The University of the State of New York

The State Education Department
State Review Officer
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No. 13-080

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, Lisa R. Khandhar, Esq., of counsel

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the interim and final decisions of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to, among other things, reimburse them for the student's tuition costs at the Stephen Gaynor School (Stephen Gaynor) and transportation thereto for the 2012-13 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The district initially evaluated the student for eligibility for special education and related services while she was in the first grade and she began receiving special education services the following school year (Tr. pp. 298-300). However, during the student's first grade year, the student received private tutoring from a "language specialist" (id.). During her second grade year, the student began receiving special education teacher support services (SETSS), which continued through the 2011-12 (fifth grade) school year (Tr. pp. 110, 300). During the 2011-12 school year, the student was enrolled in the general education environment and received five periods per week

of SETSS; the parents also obtained additional private tutoring to address the student's reading, writing, and language needs (Dist. Exs. 4; 12).

On June 19, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Dist. Ex. 3 at p. 1, 9).[1] Finding that the student remained eligible for special education and related services as a student with a learning disability, the June 2012 CSE recommended in the resultant IEP placement of the student in the general education environment within a community school and a reduction to three periods per week of SETSS to be delivered in a separate location (id. at pp. 5, 9).[2] The June 2012 IEP also afforded the student testing accommodations consisting of extended time, tests to be delivered in a separate location, and questions to be read aloud, except when reading was being testing (id. at p. 7). Additionally, the proposed June 2012 IEP contained two annual goals that pertained to writing and reading (id. at p. 5). The June 2012 IEP did not contain a provision for specialized transportation for the student (id. at p. 9).

By final notice of recommendation (FNR) to the parents dated June 19, 2012, the district summarized the special education and related services recommended in the June 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 5 at p. 1).

In a letter to the district school psychologist (school psychologist) dated June 20, 2012, the parents acknowledged receipt of the June 2012 FNR (Dist. Ex. 13 at p. 1). They further indicated that they "strongly disagree[d] with the program recommendation" (id.). The parents maintained that the June 2012 CSE's recommendation to place the student in a general education classroom with the provision of SETSS was not sufficient to address the student's learning disability (id.). Moreover, they explained that the student required "a small, structured, nurturing, special education school setting which would be to offer her a small class size, individualized attention and age appropriate curriculum" (id.). In addition, the parents referred to documentation they had provided to the June 2012 CSE that described the student's learning difficulties and recommended a particular level of special education services that the student required in order to progress (id.). In view of the foregoing, the parents advised the district that they planned to enroll the student in Stephen Gaynor for the 2012-13 school year and requested an award of tuition reimbursement to be provided at public expense (id.). In addition, the parents indicated that they planned to request that the district arrange for "special education transportation" for the student to and from Stephen Gaynor (id.).

By letter to the district dated August 16, 2012, the parents advised that the student would attend Stephen Gaynor for the 2012-13 school year and that they planned to seek an award of

[1] On February 29, 2012, the parents executed an enrollment contract with Stephen Gaynor for the student's attendance for the 2012-13 school year (Parent Ex. F). The Commissioner of Education has not approved Stephen Gaynor as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (Tr. p. 23; 34 CFR 300.8[10]; 8 NYCRR 200.1[zz][6]).

tuition reimbursement (Parent Ex. E at p. 8). In addition, they requested that the district immediately make busing arrangements for the student to Stephen Gaynor (id.).

A. Due Process Complaint Notice

The parents requested an impartial hearing by due process complaint notice dated September 28, 2012, in which they alleged that the district denied the student a free appropriate public education (FAPE) for the 2012-13 school year (Parent Ex. A at p. 2). Regarding their FAPE claims for the 2012-13 school year, the parents contended the district ignored their concerns surrounding the June 2012 IEP, thereby depriving them of an opportunity to meaningfully participate in the development of the student's IEP (id.). They further alleged that the June 2012 CSE failed to consider the results of private evaluations in developing the June 2012 IEP, and that the June 2012 CSE failed to obtain adequate and appropriate evaluative data in order to develop an understanding of the student's needs and recommend an appropriate program (id. at pp. 2-3). The parents further characterized the annual goals as vague and not measurable (id. at p. 3). In addition, the parents maintained that the June 2012 IEP did not meet all of the student's unique needs, and that the June 2012 CSE did not recommend an appropriate program for the student (id. at pp. 3-4). Furthermore, they alleged that the June 2012 IEP did not offer the student the appropriate instruction, supports, supervision or services necessary for her to make educational gains (id. at p. 4). In addition, the parents contended that the June 2012 IEP did not provide the student with enough opportunity for 1:1 instruction or attention (id.). Next, the parents asserted that the annual goals included in the June 2012 IEP were not aligned with the student's educational needs, nor were the annual goals reasonably calculated to address them (id. at p. 3). Additionally, the parents raised challenges with respect to the appropriateness of the assigned public school site, namely, that the site could not implement the June 2012 IEP (id. at pp. 4-5). The parents also alleged that the district would not functionally group the student properly within the proposed classroom, and that the assigned public school site did not offer sufficient opportunities for 1:1 instruction (id. at p. 4).

As a remedy, the parents requested, among other things, an award of reimbursement for the costs of the student's tuition at Stephen Gaynor for the 2012-13 school year, and the costs of privately-obtained evaluations (Parent Ex. A at p. 6). The parents also asserted that the June 2012 CSE did not recommend transportation "necessary for [the student] to receive a FAPE" and requested the provision of "door-to-door special education transportation/suitable transportation" to Stephen Gaynor for the 2012-13 school year (id. at pp. 3, 6).

B. Prehearing Conference and Impartial Hearing Officer Interim Decisions

On November 15, 2012, the IHO conducted a prehearing conference to discuss preliminary matters and scheduling (Tr. pp. 3-12). During the November 2012 prehearing conference, the parents stated that the student was currently receiving transportation and indicated that they would withdraw their claim at hearing but continue to seek transportation as a remedy (Tr. pp. 4-5).

On December 18, 2012, the parties proceeded to an impartial hearing (Tr. pp. 17-176).[3] On January 22, 2013, the IHO issued an interim order with respect to the parents' request for

[3] The impartial hearing concluded on March 6, 2013, after four nonconsecutive days of proceedings (Tr. pp. 17-566).

transportation, in which she directed the district to provide the student "with transportation to and from" Stephen Gaynor, to begin no later than February 1, 2013 (IHO Ex. V at p. 6). Specifically, the IHO concluded that she had the authority to issue an interim order on transportation in the nature of a preliminary injunction in this matter and determined that the parents would be irreparably harmed if an interim order was not issued, that they were likely to succeed on the merits of their transportation claim, and that a balancing of the hardships and equities weighed in their favor (id. at pp. 4-5).

On February 12, 2013, the parents advised the IHO that the student had not been receiving transportation pursuant to the January 22, 2013 interim order (Tr. p. 330; IHO Ex. IX at p. 2), and on February 13, 2013, the IHO issued a "supplemental interim order" in which she directed the district to provide the student "with transportation to and from" Stephen Gaynor, to begin no later than February 15, 2013 (IHO Ex. IX at p. 3). After being informed on a subsequent hearing date that neither interim order had been implemented (Tr. pp. 364-66), on February 27, 2013, the IHO issued an "amended supplemental interim order" in which she directed the district to provide the student with "door-to-door, limited travel time (not to exceed 45 minutes) special education transportation, by bus, to and from" the student's home and Stephen Gaynor, to begin no later than March 1, 2013, until such time as she issued her final decision (IHO Ex. X at p. 4).

C. Impartial Hearing Officer Final Decision

On April 9, 2013, the IHO rendered a decision on the merits, in which she concluded that the district denied the student a FAPE for the 2012-13 school year, that Stephen Gaynor was an appropriate unilateral placement, equitable considerations favored the parents' claim for relief, that the student was entitled to limited travel time, door-to-door special education bus transportation, and that the parents were entitled to an award of tuition reimbursement for the costs of the student's attendance at Stephen Gaynor for the 2012-13 school year (IHO Decision at pp. 9-19).

The IHO initially considered the parties' claims based on the evaluative information upon which the June 2012 CSE relied on to create the IEP (IHO Decision at pp. 5-8). The IHO determined that the privately obtained psychoeducational evaluations revealed that the student made minimal, if any, progress during the school year in her areas of need, and that the delays with which the student presented were consistent with those that the school psychologist had identified when she examined the student in October 2010 (id. at p. 6). However, the IHO noted the district school psychologist disregarded the private evaluations because they conflicted with the report from the student's regular education teacher (id.).[4] Despite the school psychologist's testimony, while the IHO found that the regular education teacher's report did not conflict with the information presented in the private evaluative reports, the IHO characterized the information contained in the

[4] The IHO gave little weight to the district school psychologist's testimony and opinions (both in terms of the credibility and reliability of her testimony) (IHO Decision at p. 7). In contrast, the IHO described the testimony of the witnesses for the parents as "much more specific and detailed," and found that it was supported by objective and comprehensive assessments and evaluations (id. at p. 8). Ultimately, the IHO found the testimony of the witnesses for the parents to be more credible and reliable than the testimony offered by the witnesses for the district (id. at pp. 8, 10). An SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W., 869 F. Supp. 2d 320, 329-30 [E.D.N.Y. 2012]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]).

teacher report as "subjective" (id.). Ultimately, the IHO concluded that the June 2012 CSE's sole reliance on a "subjective and limited teacher report and general statements about the student's performance in the general education class were not sufficient" (id.).

In addition, the IHO determined that the June 2012 CSE's recommendation for placement of the student in the general education environment combined with the provision of three periods of SETSS per week was not reasonably calculated to enable the student to make meaningful educational progress because the student did not make meaningful progress in the general education setting with five sessions of SETSS per week (IHO Decision at p. 8). Moreover, the IHO found that in a general education setting with five periods of SETSS per week, the student was unable to make progress and keep pace with her peers (id.). The IHO concluded that continuing the student's placement in an "inappropriate general education setting with reduced SETSS support" would not have allowed the student to meet the increased academic demands of middle school or make meaningful educational gains during the 2012-13 school year (id.).

Next, the IHO rendered findings with respect to the parents' claims with respect to the two annual goals contained in the June 2012 IEP, which related to a systematic writing program and a multisensory reading program (IHO Decision at p. 8). She described the annual goals as "limited and insufficient to address the student's special education needs," based on the student's diagnosis of dyslexia, difficulty with expressive language, and evaluative information indicating delays in multiple areas, the IHO ultimately concluded that the two IEP annual goals did not sufficiently address the student's identified areas of need (id. at p. 9).

Under the circumstances, the IHO concluded that the June 2012 IEP was not appropriate to meet the student's needs (IHO Decision at p. 9). Given her conclusion that the June 2012 IEP did not provide the student with a FAPE, the IHO found that it was unnecessary for her to render findings regarding the appropriateness of the assigned public school site to meet the student's needs (id.).

Turning next to the appropriateness of the unilateral placement, the IHO concluded that the evidence "overwhelmingly support[ed]" the parents' claim that Stephen Gaynor was reasonably calculated to enable the student to receive educational benefits and make meaningful educational progress (IHO Decision at p. 10). Specifically, the IHO found that Stephen Gaynor afforded the student small group and individualized instruction, and that the educational program that she received there specifically targeted the student's deficits (id.).

Lastly, with regard to a weighing of the equities, the IHO did not find evidence to preclude or diminish an award of relief in this instance (IHO Decision at pp. 10-11). Specifically, the IHO determined that the hearing record did not indicate that the parents interfered with the CSE process (id. at p. 11). Furthermore, the IHO rejected the district's claims that the parents' intention to pursue a private placement barred recovery (id.).

In addition, the IHO gave an extensive discussion regarding the district's failure to comply with the interim orders that she had previously issued (IHO Decision at pp. 13-18). Although the IHO found that the district "knowingly and intentionally failed to implement the interim order and supplemental interim order," the IHO also acknowledged that she lacked the authority to hold the district in contempt of court or to impose sanctions for want of compliance (IHO Decision at p. 15). In any event, the IHO concluded that the district's failure to implement the interim order and

supplemental interim order constituted a violation of the parents' and student's due process rights under the IDEA (id. at p. 17).[5]

As a remedy, the IHO directed the district reimburse the parents for the cost of the student's tuition at Stephen Gaynor for the 2012-13 school year, in addition to related costs (IHO Decision at pp. 11-12, 18).[6] Additionally, having determined that the student "must attend Stephen Gaynor" in order to receive a FAPE, and that student required transportation in order to attend Stephen Gaynor, the IHO directed the district to provide the student with limited travel time, door-to-door special education bus transportation to and from Stephen Gaynor for the 2012-13 school year (id. at pp. 12, 18). The IHO further indicated that the district must reimburse the parents for any costs incurred while they transported the student to and from Stephen Gaynor (id. at p. 12). In addition, the IHO directed the district to amend the student's IEP to reflect the provision of limited travel time, door-to-door special education bus transportation (id. at p. 19). Lastly, the IHO denied the parents' request for reimbursement for costs of privately-obtained independent educational evaluations (IEEs), having found that the parents obtained the IEEs without first having requested evaluations from the district (IHO Decision at p. 13).[7]

IV. Appeal for State-Level Review

The district appeals each of the IHO's interim orders, as well as the IHO's final decision on the merits, and requests that the undersigned find that the district's witnesses gave credible testimony, the district offered the student a FAPE for the 2012-13 school year, Stephen Gaynor was not an appropriate unilateral placement, equitable considerations do not support the parents' request for relief, the student was not entitled to transportation during the course of the proceedings, and the student was not entitled to door-to-door, limited travel time special education transportation.

As preliminary matters, the district maintains that the IHO decision lacked citations to applicable law and the hearing record, and that she failed to provide a legal basis for her decision, in violation of State regulation. In addition, the district claims that the IHO's conduct at the impartial hearing was biased and improper, which alone constitutes an independent basis to annul her decision. In addition, the district argues that the IHO's findings with respect to the weight she afforded to the witnesses' testimony were unfounded and not entitled to deference. Similarly, the district maintains that the IHO's findings with respect to witness credibility are also not entitled to deference.

With respect to its contention that it offered the student a FAPE for the 2012-13 school year, the district maintains, in part, that the June 2012 CSE reviewed sufficient evaluative material in formulating the IEP, and considered the input of individuals who were familiar with the student's needs. Moreover, the district submits that it did not disregard the privately-obtained evaluations;

[5] The IHO noted that the amended order was ultimately implemented (IHO Decision at p. 17).

[6] The district does not appeal from the IHO's finding that the related costs "were a necessary component" of the student's enrollment at Stephen Gaynor or her award thereof, making the award final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[7] As neither party appeals from the IHO's determination to deny the parents' request for reimbursement for the cost of the IEEs, that decision is final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

rather, a review of the June 2012 IEP reflects their results. In addition, the district notes that while the June 2012 CSE considered the results of the private evaluations in developing the June 2012 IEP, the June 2012 CSE was not required to engage in a substantive discussion about the private evaluations. Regarding the recommendation for placement in the general education environment with three periods per week of SETSS, the district asserts this placement constituted the student's least restrictive environment (LRE) and was designed to enable the student to receive educational benefits. The district further maintains that the recommendation to place the student in the general education environment combined with the provision of three periods of SETSS per week was appropriate based on the student's strong academic performance in all subject areas and continued weakness in decoding and encoding. Next, the district claims that the annual goals were appropriate and addressed the student's needs. Lastly, the district maintains that the parents' claims surrounding the appropriateness of the assigned public school site were speculative in nature, and should not be relied on as grounds for establishing a denial of a FAPE. In any event, the district submits that the hearing record does not support the parents' allegations with respect to the appropriateness of the assigned public school site and that the assigned public school site could have implemented the June 2012 IEP.

Next, the district alleges that Stephen Gaynor did not constitute an appropriate unilateral placement for the student. Specifically, the district contends that Stephen Gaynor was an overly restrictive setting, because it did not afford the student access to typically developing peers. Moreover, the district notes that prior to her enrollment in Stephen Gaynor, the student had previously been enrolled in general education classes, and had positive interactions with typically developing peers.

The district also maintains that equitable concerns do not favor the parents' request for relief in this instance. Specifically, the district alleges that the parents never seriously considering enrolling the student in a public school, given that they executed an enrollment contract with Stephen Gaynor months prior to the June 2012 CSE meeting.

The district also argues that the IHO improperly directed it to provide the student with transportation. Specifically, the district contends that the IHO erred in awarding interim relief in the form of transportation to and from Stephen Gaynor during the pendency of the proceedings, simply because the parents wanted the service. Moreover, the district submits that the student was not otherwise entitled to bus transportation.

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's conclusions that the district failed to offer the student a FAPE for the 2012-13 school year, that Stephen Gaynor was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' requested relief. In addition, the parents submit that the IHO's decision was written in conformity with State regulations. Furthermore, the parents claim that there is no evidence in the hearing record that the IHO demonstrated bias. With respect to the transportation awarded the student by the IHO, the parents assert that the student was entitled to suitable transportation.

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 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. Preliminary Matters

1. IHO Decision—Citations to the Hearing Record

Initially, a review of the decision reveals that while the IHO decision contains few specific cites to reference the transcript or exhibits; however, in this particular instance the district's claim that the IHO's failure to cite to the hearing record or legal authority, while a valid criticism, does not warrant reversal of the IHO's decision. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity. State regulations further require that an IHO "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable law are the norm in "appropriate standard legal practice," and should be included in any IHO decision. The failure to cite with specificity facts in the hearing record and law on which the decision is based is not helpful to the parties in understanding the decision and deciding if a basis exists on which to appeal. The IHO is reminded in the future to comply with State regulations, cite to relevant facts in the hearing record with specificity, and provide a reasoned analysis of those facts that reference applicable law in support of her conclusions.

2. IHO Bias

Turning to the district's assertions regarding the IHO's conduct during the impartial hearing, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090) and render his or her decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealing with litigants and others with whom the IHO interacts in an official capacity, and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021). An IHO may not be an employee of the district that is involved in the education or care of the child; may not have any personal or professional interest that conflicts with the IHO's objectivity; must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations; and must possess the knowledge and

ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).[8]

In this case, based on a review of the hearing record and contrary to the district's contention, the hearing record does not ultimately support a finding that the IHO acted with bias or abused her discretion in the conduct of the hearing. An independent review of the hearing record demonstrates that while the IHO may have taken a sharp tone with counsel for the district in an attempt to maintain control over the proceedings, the district was ultimately provided the opportunity to be heard at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see, e.g., Tr. pp. 417-22, 429-34, 438-440, 499-503, 517-21, 534-35, 542-64; IHO Ex. IV; see generally 20 U.S.C. § 1415[g]; Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]). A review of the hearing record further shows that the IHO attempted to assist the district representative at the first two impartial hearing dates, who was not an attorney, by restating questions, explaining the hearing process, and providing information on the proper phrasing of questions (see, e.g., Tr. pp. 34-35, 70-75; 8 NYCRR 200.5[j][3][vii]). Additionally, the IHO sustained objections raised by the district (Tr. pp. 119-20, 428-29, 486). The IHO also acted within the scope of her authority when she asked a series of questions of the parent in order to more fully develop the hearing record on the issues that were presented to her to resolve (Tr. pp. 160-61; 8 NYCRR 200.5[j][3][vii]). Accordingly, the hearing record does not support the district's claim that the IHO acted with bias.

B. Adequacy of the June 2012 IEP

1. Evaluative Information and SETSS Recommendation

Turning next to a review of the June 2012 IEP, contrary to the district's contention that the June 2012 CSE's determination to place the student in the general education environment combined with three periods of SETSS per week was based on reports of the student's strong classroom performance, as more fully described below, the evaluative data before the June 2012 CSE does not support a finding that the June 2012 CSE's program recommendation was reasonably calculated to enable the student to receive educational benefits.

The IDEA requires a district to conduct an evaluation of students receiving special education or related services at least once every three years unless the parents and the district agree otherwise (see 20 U.S.C. § 1414[a][2][B]). In developing an IEP, a CSE is directed to "review existing evaluation data on the child, including—(i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom based observations; and (iii) observations by teachers and related services providers" (id. § 1414[c][1][A]). Further, in developing the recommendations for a student's IEP, the CSE must

[8] Recent amendments to State regulations concerning the conduct of special education impartial due process hearings have been enacted effective February 14, 2014 (see 8 NYCRR 200.1, 200.5, 200.16). The Office of Special Education has issued two guidance documents which describe the amendments and provide guidance on their implementation (see "New Requirements Related to Special Education Impartial Due Process Hearings: Amendment to Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education," Office of Special Educ. Mem. [Feb. 2014], available at http://www.p12.nysed.gov/specialed/publications/IHOregsadoption213.pdf; "Summary and Guidance on Regulations relating to Special Education Impartial Hearings," Office of Special Educ. Mem. [Feb. 2014], available at http://www.p12.nysed.gov/specialed/publications/IHguidance-Feb2014.pdf).

consider the results of the "initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental[,] and functional needs of the student, including, as appropriate, the results of the student's performance on any general State or district-wide assessments; and any special considerations" in federal and State regulations (20 U.S.C. § 1414[d][3][A], [B]; 34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]; see also T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *18 [S.D.N.Y. Sept. 16, 2013]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *9 [S.D.N.Y. Sept. 29, 2012]).

The CSE must also consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]; accord Application of a Student with a Disability, Appeal No. 12-108). Moreover, the IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [E.D.N.Y. Aug. 5, 2013]; see T.G., 2013 WL 5178300, at *18).

The hearing record shows that the June 2012 CSE considered two private psychoeducational evaluations dated October 2011 and May 2012 and a May 2012 teacher report from the student's then-current regular education teacher, in addition to input from the student's then-current teachers and the parents (Tr. pp. 38-39; Dist. Exs. 3 at pp. 1-2, 12; 4; Parent Exs. C; D).[9, 10] Briefly, the hearing record reflects that the student exhibits deficits in reading comprehension, decoding, encoding, spelling and math calculation (Tr. pp. 46-47; 198-99; 207; Dist. Ex. 3 at pp. 1-2; Parent Exs. C at pp. 5-7; D at pp. 2-3). The student also has received a diagnosis of dyslexia (Parent Ex. C at p. 1).

As discussed in greater detail below, a comparison of the standard scores from the October 2011 and May 2012 evaluations indicated that while the student maintained statistically similar scores academically during the 2011-12 school year, she did not make meaningful progress in her primary areas of deficit, despite receiving five periods of SETSS per week as well as private tutoring twice per week (Tr. p. 206; Dist. Ex. 12; Parent Ex. D at p. 1; compare Parent Ex. C at p. 10, with Parent Ex. D at p. 5).

According to the October 2011 private psychoeducational evaluation, the student demonstrated intellectual potential in the high average to superior range (Parent Ex. C at p. 2). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) revealed that in contrast to the student's superior rating on the verbal comprehension scale (superior

[9] In their June 20, 2012 correspondence, the parents indicated that they provided the district with a copy of a June 2012 letter from the student's private tutor (Parent Ex. E at p. 7).

[10] A school psychologist, an additional parent member, and a parent advocate also participated in the June 2012 CSE (Dist. Ex. 3 at p. 12).

range), the student demonstrated areas of weaknesses in the perceptual reasoning scale (average range), working memory scale (average range) and processing speed scale (average range) (id. at pp. 3-4). The private evaluator further found that the student exhibited difficulty with word retrieval and that the student responded with awkward expression (id. at pp. 2-3). In addition, the private evaluator noted that the student exhibited difficulties seeing spatial relationships; with visual discrimination and visual processing; and withholding and working with information in her head (id. at pp. 3-4). However, the private evaluator also reported that when the information was meaningful, the student's rote auditory memory was good, and the student could hold onto information to be recalled for at least 30 minutes (id. at p. 5). The student also demonstrated good memory and processing skills when the student could see the information while she was listening (id.). In addition, the private evaluator found that on the Understanding Directions test, the student followed verbal directions by pointing to items in pictures and achieved scores in the average range; however, the student demonstrated difficulty when the instructions were presented sequentially (id.). Furthermore, the private evaluator found that the student's expressive language skills were "not in keeping with" the student's intelligence, and noted that the student exhibited difficulty retrieving specific words and labels (id.). According to the private evaluator, the student was sometimes able to identify the use of an object, but could not give its name (id.). Under the circumstances, the private evaluator opined that the student presented with difficulty holding onto and retrieving information when it was merely a label and not meaningful, a factor which contributed to difficulty with decoding words (id.).

Additionally, the private evaluator assessed the student's academic skills using the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) (Parent Ex. C at p. 2). The private evaluator described the student's performance on that assessment as variable, with the majority of the student's scores falling within the average range; however, the private evaluator explained that the scores "[we]re not at all in keeping with [the student's] intellectual potential which is far above the average range" (id. at p. 5). The private evaluator further described the student's basic reading skills as "quite weak," especially, when compared with the student's above average intellectual potential (id.). For example, the student attained scores in the low average range on the Letter Word Identification subtest, where the student was required to read real words out of context (id.). The private evaluator reported that the student sometimes guessed at a word after looking at some of the letters (id.). Although the private evaluator found that the student had learned some "basic decoding skills," the private evaluator also reported that the student confused vowel sounds and substituted, omitted, or added sounds when attempting to read nonsense words (id. at p. 6). Additionally, the private evaluator noted that the student's reading comprehension skills were "negatively impacted" by her difficulties with basic decoding and word recognition (id.).

The private evaluator also found that the student scored in the low average range on the Spelling subtest (Parent Ex. C at p. 7). Moreover, the private evaluator found that the student sometimes spelled simple words phonetically—and often omitted and added sounds—when she attempted to spell many words (id.). According to the private evaluator, some of the student's attempts "suggest[ed] incomplete visual memory" (id.). In addition, the private evaluator characterized the student's knowledge of punctuation as weak, noting that she was not consistent in her capitalization of proper nouns and that the student was unfamiliar with hyphens and colons (id.).

The private evaluator further found that, when the student was not penalized for poor spelling, she demonstrated "excellent thinking and creativity in her writing," and she achieved

scores in the upper end of the average range on both the Writing Samples test and the Writing Fluency test (Parent Ex. C at p. 6). Additionally, administration of the Test of Written Language, Fourth Edition (TOWL-4), yielded scores in the upper end of the average range with respect to spontaneous writing, and scores within the average range with respect to contextual conventions and story composition (id. at pp. 6, 9). According to the private evaluator, the student lost credit on the contextual conventions subtest due to poor spelling; however, the student earned credit due to her use of introductory phrases and compound sentences (id. at p. 6).

With regard to mathematics, the student attained overall scores within the average range; (Parent Ex. C at p. 7). The student's strong reasoning skills were evidenced by her performance on the applied problems test of the WJ-III ACH, where the student was required to solve everyday problems in math; however, the private evaluator noted that during this subtest, although she read the problems to the student as the student read them to herself, the private evaluator sometimes had to reread the problems before the student understood what was expected of her (id.). The private evaluator noted that while the student worked carefully, she seldom used paper and pencil to perform calculations (id.). Regarding the student's calculation skills, the private evaluator described them as "somewhat weak" (id.). Specifically, she reported that the student was not consistent in correctly completing multiplication examples, nor did the student attempt fractions or long division (id.).[11] On the Math Fluency subtest, the student worked relatively slowly, but did not make any mistakes (id.).

Overall, the private evaluator found that the student's intellectual potential was "considerably above the average range"; however, the student exhibited language-based learning disabilities (Parent Ex. C at p. 7). According to the private evaluator, notwithstanding the reading help that the student received in school, the student continued to exhibit poor decoding and encoding skills (id.). The private evaluator recommended that the student continue to receive "intensive, consistent structured training" in encoding and decoding outside of school on an individual basis using a particular approach, as well as placement in small classes and the use of multi-sensory techniques (id. at pp. 7-8).

In accordance with the parents' request, the same private evaluator completed an academic update in May 2012 to review the progress the student made over the course of the 2011-12 school year (Parent Ex. D at p. 1). The private evaluator reported that the student continued to display intellectual potential in the high average to superior range; however, the student's academic skills were "below age and grade level expectations and far below expectations given her superior verbal reasoning skills" (id. at p. 2). The private evaluator reported that while most of the standard scores on tests of reading, writing, and math did not differ significantly from scores the student attained in October 2011, the "gap between [the student's] intelligence and her academic skills [wa]s still pronounced" (id.). Under the circumstances, the private evaluator determined that the student made minimal or no progress over the course of the 2011-12 school year, despite the provision of SETSS and private tutoring by a "learning disabilities specialist" (id.). The private evaluator further suggested that the services that the student received over the course of the 2011-12 school year "may have prevented [the student] from losing skills, but [she] has not been able to close the gap between her intelligence and her academic achievement" (id.). Specifically, the private

[11] The private evaluator noted that it was possible that the student had not yet been taught these procedures (Parent Ex. C at p. 7).

evaluator found that the student continued to confuse vowel sounds and to omit and add sounds, when reading unfamiliar words (id.). In addition, the private evaluator reported that the student continued to misread words, which resulted in an incorrect synonym or antonym on the reading vocabulary subtest (id.). She further noted that the student's calculation skills were not progressing, that the student made careless errors, and she seemed to have difficulty holding onto basic procedures in math (id. at p. 3). In particular, the private evaluator found that the student continued to have difficulty with respect to multiplication, division and fractions (id.).

Additionally, the May 2012 academic update indicated that the student's standard scores declined on the punctuation and capitalization test (compare Parent Ex. C at pp. 7, 10, with Parent Ex. D at pp. 3, 5). Specifically, in October 2011, the student attained a standard score of 95 (37th percentile), whereas in May 2012, her standard score was 80 (9th percentile) (Parent Exs. C at pp. 7, 10; D at pp. 3, 5). The private evaluator opined that the student "seem[ed] to have forgotten some rules of punctuation and capitalization" (Parent Ex. D at p. 3). The district school psychologist conceded that this decline reflected such a large discrepancy in the student's abilities that it may require further examination "because it's such an outlying score that it could reflect some other problem" (Tr. pp. 89-90).

The May 2012 academic update also included results from the Test of Visual Auditory Learning from the Woodcock-Johnson III Tests of Cognitive Abilities (WJ-III COG), which was administered to the student to assess her short- and long-term memory and learning ability (Parent Ex. D at pp. 3, 5). Results of this assessment indicated that the student had difficulty holding on to earlier, more basic information as more information was introduced (id. at p. 3). The private evaluator explained that "this problem play[ed] a large role in [the student's] learning disabilities and reflect[ed] the difficulties that she encounter[ed] in holding onto decoding and encoding procedures, punctuation rules, and calculation procedures" (id.).

Based on the results of the May 2012 academic update, the private evaluator concluded that the student was "clearly exhibiting learning disabilities across the board" (Parent Ex. D at p. 3). The May 2012 academic update suggested that the student was "unable to learn" in a general education setting, "even with intensive help both in and out of school" and the private evaluator recommended a "special education school setting" that offered small class sizes, multi-sensory teaching of basic skills, as well as repetition and practice to help the student retain the skills being taught (id. at pp. 3-4).

Consistent with the information provided in the private evaluations, during the June 2012 CSE meeting, the parents reported their concern regarding the student's ability to sustain her level of academic performance "without formal [s]pecial [e]ducation services" (Dist. Ex. 3 at p. 2). The parents reported that the student experienced difficulty completing homework assignments, resisted reading, and demonstrated anxiety with respect to her academic performance (id. at pp. 2-3). According to the June 2012 IEP, the parents requested that the student receive her special education services in a 12:1 special class placement, with the provision of related services to include speech-language therapy and counseling; however, the June 2012 CSE rejected this option, having determined that the student's "academic success [did] not require this level of service" (id. at p. 10). The June 2012 IEP further indicated that a 12:1 special class placement was intended to serve students whose academic behavioral needs required specialized instruction best accomplished in a self-contained setting, and therefore, constituted a "far too restrictive" setting for the student (id.). Moreover, the June 2012 CSE concluded that, based on the results of a

November 2010 speech-language evaluation, the student did not require the provision of speech-language therapy (id.). Further, the June 2012 CSE noted that since the November 2010 evaluation, the student had not demonstrated language weaknesses in school that would warrant further evaluation or suggest a need for intervention (id.). Lastly, the June 2012 CSE opted against the provision of counseling for the student, given her strong social/emotional performance in school (id.).

Notwithstanding the results of the October 2011 and May 2012 private psychoeducational evaluations, as well as the parents' expressed concerns, the school psychologist testified that the information gleaned from the private evaluations was not consistent with the student's abilities in the classroom (Tr. p. 42). According to the school psychologist, the student was "functioning very well" in the classroom, and had made significant improvement over the prior school year (Tr. p. 46). Additionally, the school psychologist testified that the student had met all of her special education goals and the May 2012 academic update did not reflect that progress (id.). The school psychologist added that although the student continued to present with weaknesses in spelling and decoding, her weakness "were not at the level that would require formal special education services" (Tr. p. 47). Moreover, the school psychologist indicated that the student's special and regular education teachers were confident that the support the student continued to require "could be adequately addressed in the classroom" (id.).

Similarly, a May 2012 report from the student's then-current regular education teacher revealed that despite difficulty with decoding, the student read on grade level and exhibited strong comprehension skills (Dist. Ex. 4 at p. 1). According to the student's regular education teacher, the student did well in math; however, she sometimes made calculation errors in her homework (id.). In the area of written expression, the May 2012 report indicated that the student wrote "clearly and with stamina"; however, her teacher indicated that the student needed to reread her work for sentence structure and organization (id. at p. 2). In addition, the report reflected that the student was always engaged, had many friends, and participated throughout the school day (id. at pp. 1-2). In summary, the teacher suggested that the student required minimal support, and was functioning "at or above grade level in general" (id. at p. 2).

Also consistent with the district school psychologist's testimony, the student's then-current special education teacher testified that at the time of the June 2012 CSE meeting, the student's instructional reading level was at the beginning fifth grade level (Tr. p. 111). The special education teacher also characterized the student as a good writer who would revise her work (Tr. pp. 111-12). Regarding mathematics, the special education teacher indicated that the student had a good understanding in that area and exhibited good perceptual reasoning (Tr. p. 112). While the special education teacher testified that the student presented with "relative weaknesses in writing, spelling and some weaknesses in decoding," and that the student had to work harder at spelling and writing, the special education teacher opined that it was not a significant enough deficit that it interfered with her functioning in the classroom (Tr. p. 113). The special education teacher also noted improvement with respect to the student's decoding skills, and explained that when she was unable to decode a word or a phrase, she would use context and then go back and self-correct (Tr. p. 116). Additionally, the special education teacher reported that the regular education teacher indicated that the student did not require any modifications in the classroom (Tr. pp. 112-13). The special education teacher further opined that although the student needed specific instruction in certain areas, as well as practice in those areas, she did not require more than the recommended three

periods per week of SETSS because she "did not need somebody to come into the classroom and support her in terms of understanding the content or applying her knowledge" (Tr. pp. 116-17).

A review of the hearing record indicates that although the June 2012 CSE had available to it sufficient evaluative material to develop the student's IEP, in this particular instance the hearing record is sparsely developed with respect to the June 2012 CSE's viewpoint regarding the objective information and does not provide any basis upon which the June 2012 CSE could reasonably reduce the frequency of SETSS from five to three times per week for the 2012-13 school year.[12] Specifically, absent from the hearing record are any June 2012 CSE meeting minutes, progress reports or report cards from the 2011-12 school year, or any prior written notice provided to the parents detailing the basis for and explanation of the reason for the recommended reduction in services.[13] Accordingly, based on an independent review of the evaluative information available to the June 2012 CSE, the hearing record does not support a finding that the recommendation to reduce the frequency of the student's SETSS sessions from five periods per week to three was reasonably calculated to confer educational benefits on the student and provide her with a FAPE for the 2011-12 school year.

2. Annual Goals

Next, with respect to the appropriateness of the June 2012 IEP's annual goals, as more fully described below, a review of the hearing record supports the IHO's finding that the annual goals were limited and insufficient, and did not sufficiently address the student's "identified deficit areas" (IHO Decision at p. 8).

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

[12] While the nether the IDEA nor State law require that substantive discussion of privately obtained evaluative material be conducted in any particular manner—the details are left to the collaborative process in which both parties must bring their particular areas of concern to the table—privately obtained evaluations must nevertheless must be considered by the CSE in the development of the IEP. Certainly the CSE should be prepared to discuss a private evaluation if a parent raises it for discussion at the CSE meeting.

[13] In addition, although the parents do not assert a claim on this basis, the hearing record does not include a copy of prior written notice from the district or evidence that such notice had been sent, and I remind the district of its obligation to provide prior written notice consistent with State and federal regulations on the form prescribed for that purpose by the Commissioner (34 CFR 300.503; 8 NYCRR 200.5[a]; see also http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html). In this instance, inclusion of prior written notice from the district would have clarified this issue, as the district was required to provide written notice to the parents describing "each evaluation procedure, assessment, record, or report the [district] used as a basis for the proposed or refused action," as well as "[a]n explanation of why the [district] propose[d]" to reduce the frequency of SETSS received by the student (34 CFR 300.503[b][2], [3]; 8 NYCRR 200.5[a][3][ii], [iv]).

In this instance, neither party disputes the accuracy of the student's academic achievement, functional performance, and learning characteristics as depicted in the June 2012 IEP. According to the June 2012 IEP, the student's school performance indicated that she was at or above grade level in all subjects except spelling and that she exhibited weaknesses in decoding (Dist. Ex. 3 at p. 2). It further reflected that the student's instructional and functional levels for reading and math were both at the fifth grade level (id. at p. 9). The June 2012 IEP reflected that that the student did not require modifications in the classroom in order to successfully comprehend lessons and complete assignments, and she struggled with reading only when she chose books "beyond her capacity," which caused the student to become frustrated and concerned about her capabilities (id. at p. 2). In any event, the June 2012 IEP characterized the student as "an enthusiastic reader," who was eager to participate (id.). While the June 2012 IEP reflected that the student's decoding weaknesses were "more pronounced" when words were presented in isolation, it further noted that the student could apply learned strategies such as using contextual cues to read efficiently (id.). Academic and management needs contained in the June 2012 IEP indicated that the student continued to need help in spelling and decoding with accuracy (id. at pp. 2-3).

The June 2012 IEP contained two annual goals developed to improve the student's skills in writing and in decoding and encoding (Dist. Ex. 3 at p. 5). Specifically, the first annual goal was designed to improve the student's use of appropriate pre-writing strategies to organize her ideas and then to write a five-paragraph expository essay using complex, grammatically correct sentences (id.). However, the June 2012 IEP did not designate writing as an area of need (id. at p. 2). Furthermore, the October 2011 psychoeducational evaluation indicated that, with the exception of spelling, the student demonstrated excellent thinking and creativity in her writing, and she earned scores at the high end of the average range on both writing subtests (Tr. pp. 38-39; Parent Ex. C at p. 6).

The second annual goal was developed to improve the student's ability to decode and encode words using knowledge of syllable types, root words, derivatives, prefixes and suffixes within a multi-sensory reading program (Dist. Ex. 3 at p. 5). Although this annual goal was appropriate to address the student's decoding deficits, the June 2012 IEP lacked any annual goals to address the student's spelling deficits, an identified area of need (id. at pp. 2-3, 10).

As the student's spelling and decoding deficits were known to the CSE at the time of the June 2012 CSE meeting, it was improper for the district to fail to address them appropriately within the body of the IEP. Although the failure to address every one of a student's needs by way of an annual goal will not ordinarily constitute a denial of a FAPE (J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]), under the circumstances of this case, the June 2012 IEP failed to provide appropriate annual goals based on the student's needs and did not otherwise provide appropriate special education supports and services to meet the student's academic needs and therefore denied her a FAPE (20 U.S.C. § 1414 [d][1][A]; 34 CFR 300.320 [a]; 8 NYCRR 200.4 [d][2]; see Application of the Dep't of Educ., Appeal No. 12-135).

3. Assigned Public School Site

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., 2014 WL 53264 [2d Cir. Jan. 8, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; 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"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I continue to find it necessary to depart from those cases. Since a number of these prospective implementation cases were decided in the district courts, 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 [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 [rejecting as improper the parents' claims related to how the proposed IEP would have been implemented]). 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]

As explained most recently, "[i]t would be inconsistent with R.E. to require the [district] to proffer evidence regarding the actual classroom [the student] would have attended, where it had become clear that [the student] would attend private school and not be educated under the IEP" (M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]). Instead, "[t]he Second Circuit has been clear . . . that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"']). When the Second Circuit spoke most 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., 2014 WL 53264, at *6, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, I find that the parents cannot prevail on their claims that the district would have failed to implement the June 2012 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's June 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 program recommended by the June 2012 CSE and instead chose to enroll the student in a nonpublic school of their choosing prior to the beginning of the student's 2012-13 school year (see Parent Ex. E at pp. 8, 11). 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, it would be inequitable to allow the parents 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 "[t]he

[14] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular 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. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [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.

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 at the particular public school site to which to student was assigned by the district or 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 parents cannot prevail on their claims that the assigned public school site would not have properly implemented the June 2012 IEP.

C. Appropriateness of Stephen Gaynor

Having concluded that the district failed to provide the student with a FAPE for the 2012-13 school year, I must next consider whether Stephen Gaynor 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 offer 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 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7). 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., 231 F.3d at 104). "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]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA,

> parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65; see also C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826,835-36 [2d Cir. 2014]).

The district challenges the appropriateness of Stephen Gaynor solely to the extent that the student does not receive any opportunity for interaction with typically developing peers, rather than challenging whether it provides services specially designed to meet the student's unique needs. In any event, while the restrictiveness of a unilateral parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement, parents are not held as strictly to the standard of placement in the LRE as school districts (C.L. v. Scarsdale, 744 F.3d at 836-37; Frank G., 459 F.3d at 364; Rafferty, 315 F.3d at 26-27; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]; Schreiber v. East Ramapo Cent. Sch. Dist., 700 F.Supp.2d 529, 552 [S.D.N.Y. 2010]; W.S., 454 F. Supp. 2d at 138; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]). Here, while Stephen Gaynor might not have maximized the student's interaction with nondisabled peers, in this instance, it does not weigh so heavily as to preclude the determination on its own that the parents' unilateral placement of the student at Stephen Gaynor for the 2012-13 school year was appropriate (see C.L. v. Scarsdale, 744 F.3d at 830, 836-37; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65). As the district raises no arguments challenging the IHO's decision regarding the appropriateness of the unilateral placement other than that it is not the student's LRE, I express no opinion with regard to whether Stephen Gaynor was otherwise an appropriate placement but note that the hearing record offers scant objective evidence to support the parents' assertions that Stephen Gaynor provided the student with instruction specially designed to meet his unique needs or the degree to which it addressed his various needs (see L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 489-92 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 38 [S.D.N.Y. 2012], aff'd, 744 F.3d 826).

D. Equitable Considerations

With regard to whether equitable considerations support the parents' request for relief, the district argues that the parents' intention to enroll the student in a nonpublic school, regardless of the program and placement offered by the district, weighs against granting their request for tuition reimbursement. Although the district argues that several district courts have looked to whether parents intended to accept a public school placement when fashioning awards, the Second Circuit has recently opined upon this issue, holding that where parents cooperate with the district "in its efforts to meet its obligations under the IDEA . . . their pursuit of a private placement [is] not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L. v. Scarsdale, 744 F.3d at 840). Accordingly, the district's challenge to the IHO's decision in this regard is rejected.

E. Transportation

Turning finally to the parties' contentions surrounding the IHO's interim and final orders directing the district to provide the student with door-to-door, limited travel time, special education transportation to and from the student's home to Stephen Gaynor, and directing the CSE to amend the student's IEP to include a provision for special education transportation, the hearing record reflects that the parents conceded during the prehearing conference that the student did not require specialized transportation due to her individualized needs (Tr. p. 28; see Dist. Ex. 3 at p. 9). Accordingly, there is no basis for the provision of specialized transportation on the student's IEP, and the IHO's award of reimbursement for transportation costs, and her direction to the district to provide the student with special transportation services going forward and for the CSE to include special transportation on the student's IEP, must be reversed. Even if the student required specialized transportation, such a matter is more properly entertained in the first instance by the CSE and such a need should be reassessed on an annual basis.

Moreover, with regard to any right that the student may have had to standard transportation, I note that the evidence shows that at the beginning of the school year, the district offered to provide the student with public transportation at district expense; however, the parents refused (Tr. pp. 446, 479-82).[15] In any event, it appears that the IHO's "amended supplemental interim order" directing the district to provide the student with bus transportation was eventually implemented and that the issue regarding the student's transportation during the 2012-13 school year is no longer in dispute (IHO Decision at p. 17; Tr. pp. 511-12, 530-31, 554).[16] Because the parents conceded that the student is not entitled to specialized transportation pursuant to the IDEA or State law, and refused, at least at first, the district's attempt to otherwise provide transportation to the student, the

[15] The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Transportation as a related service can include travel to and from school and between schools; travel in and around school buildings; and specialized equipment such as special or adapted buses, lifts, and ramps (34 CFR 300.34[c][16]). Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education (Application of a Child with a Disability, Appeal No. 03-053). The nature of the specialized transportation required for a particular student depends upon the student's unique needs, and it must be provided in the LRE (34 CFR 300.107; 300.305). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, the district must ensure that the student receives the necessary transportation at public expense (Transportation, 71 Fed. Reg. 46,576 [Aug. 14, 2006]; see 8 NYCRR 200.1[ww]). The hearing record does not indicate why the parents refused to accept public transportation for the student.

[16] Furthermore, the hearing record provides no evidentiary support for requiring the district to provide the student with door-to-door, limited (45-minute) travel time special transportation, especially in light of the fact that the even the student's father testified that the drive from the student's house to Stephen Gaynor took a minimum of half an hour each way during the relevant time periods under the "[b]est case scenario," and could take as long as one hour and fifteen minutes during times of heavy traffic (Tr. pp. 156-60). The IHO's concern that the student would be "just tacked on at the end of a route" lasting several hours notwithstanding (Tr. p. 558), it would be unreasonable to require the district to provide a bus for this student's private use, so as to ensure a travel time that fit within the strictures of the IHO's order, when the hearing record does not indicate that the student had any special need for limited travel time or that the student could not receive a FAPE without being provided limited travel time special transportation to her unilateral nonpublic school placement.

parties' remaining arguments regarding the IHO's authority to enter interim injunctive relief need do not warrant extended discussion (but see Application of the Bd. of Educ., Appeal No. 13-152; Application of the Dep't of Educ., Appeal No. 11-104; Application of the Dep't of Educ., Appeal No. 11-004).[17] However, to the extent the district otherwise has a statutory obligation to provide the student with transportation services to her private school placement, this decision should not be construed to relieve the district of such obligation (see, e.g., Educ. Law § 3635).

VII. Conclusion

In summary, the IHO's decision awarding tuition reimbursement is largely affirmed, excepting those portions relating to the district's obligation to provide the student with transportation services. I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated April 9, 2013 is modified, by reversing hose portions which ordered the district to provide the student with and amend her IEP to reflect door-to-door, limited travel time special transportation to and from Stephen Gaynor, and directed the district to reimburse the parents for their expenses incurred transporting the student to and from Stephen Gaynor during the 2012-13 school year; and

IT IS FURTHER ORDERED that the IHO's interim decisions, dated January 22, 2013, February 13, 2013, and February 27, 2013, are vacated.

Dated: **Albany, New York**
April 22, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[17] Furthermore, the IDEA explicitly provides that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child" (20 U.S.C. § 1415[j]). Then-current educational placement will "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]) and, as noted above, special transportation is classified as a related service by federal law and as special education by State law (Educ. Law §§ 4401[1]; 4402[4][a]; 34 CFR 300.34[c][16]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Accordingly, it is unclear by what authority the IHO could order a change in the student's placement during the pendency of the proceedings, other than by way of an interim determination with regard to the student's stay-put placement. While the matter was pending, the IHO should have examined this matter under the automatic injunction envisioned under the IDEA rather than a new form of preliminary injunctive relief of her own making (see Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]).