The University of the State of New York

The State Education Department
State Review Officer
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No. 13-143

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, Cynthia Sheps, Esq., of counsel

Law Offices of Neal H. Rosenberg, attorneys for respondents, Jenna L. Pantel, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the Churchill School (Churchill) for the 2012-13 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

On March 21, 2012, the CSE convened to conduct the student's annual review and to develop his IEP for the 2012-13 school year (Dist. Ex. 3 at pp. 1, 16).[1] As a student with a learning disability, the March 2012 CSE recommended integrated co-teaching (ICT) services in a regular education setting for English language arts (ELA), mathematics, and social studies; special education teacher support services (SETSS) in a separate location for ELA and mathematics; and

[1] On February 6, 2012, the parents signed an enrollment contract with Churchill for the student's attendance during the 2012-13 school year, and paid a nonrefundable registration fee (see Parent Exs. F at pp. 1-2; G). The Commissioner of Education has approved Churchill as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7].

the following related services: two 30-minute sessions per week of individual occupational therapy (OT) and one 30-minute session per week of individual counseling (id. at pp. 1, 12-13).[2] In addition, the March 2012 CSE recommended a community school setting, and additional modifications within the classroom environment to address the student's academic, social/emotional, and physical management needs (id. at pp. 1-2, 16).[3]

By final notice of recommendation (FNR) dated March 21, 2012, the district summarized the special education and related services recommended by the March 2012 CSE, and identified the particular public school site to which the district assigned the student to attend for 2012-13 (see Dist. Ex. 4).

In an undated letter, the parents informed the district that upon review of the March 2012 IEP received "more than a month" after the March 2012 CSE meeting, they continued to disagree with the recommendations (Parent Ex. A at p. 2).[4] The parents expressed concerns about the appropriateness of the recommended ICT services, and the program's ability to meet the student's academic needs within the classroom, as opposed to requiring "pull-outs" for additional academic support through the recommended SETSS services (id.). The parents indicated that the March 2012 IEP provided an "overly positive assessment" of the student's ability to function within the classroom and that they believed the March 2012 IEP focused on "defending" the CSE's "decision to place [the student] in the integrated program" (id.). The parents also indicated that the March 2012 IEP did not provide sufficient information about the student's learning disability, and did not adequately reflect updated evaluative information about the student (id. at pp. 2-3). Due to the student's needs, the parents noted that he required a "small learning environment" to address his "constellation of difficulties" (id. at p. 3). The parents further noted that the student had been accepted at Churchill, and they requested that the CSE consider Churchill as an appropriate placement for the student (id.). Finally, the parents indicated their willingness to further discuss the recommendations, and advised that although the student would remain in the current "ICT program" for the remainder of the school year, they "must reserve a space at Churchill in case the recommendations remain[ed] inappropriate" (id.).

In a letter dated August 9, 2012, the parents informed the district that due to the student's continued difficulties, it became "clear" that the recommendations in the March 2012 IEP were

[2] State regulations define ICT services within the "Continuum of services" as the "provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving [ICT] services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an "[ICT] class shall minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]). In April 2008, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued a guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities" (see http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

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

[4] It appears that the parents transmitted the undated letter to the district via facsimile on May 2, 2012 (see Parent Ex. A at pp. 1-4).

not appropriate (Parent Ex. B p. 2).[5] The parents reiterated many of the same concerns expressed in their previous letter to the district, and further expressed concerns about the student's increased social/emotional difficulties and anxiety during the school year (id. at pp. 2-3). The parents, again, requested that the CSE consider Churchill as an appropriate placement for the student for the 2012-13 school year, and requested a "new meeting with the [CSE] team to again discuss this" (id. at pp. 3-4). Finally, the parents notified the district of their "plan" to place the student at Churchill, and to seek funding for the student's placement at Churchill until the district provided an acceptable recommendation (id. at p. 4).

A. Due Process Complaint Notice

By due process complaint notice dated December 12, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Dist. Ex 1 at p. 1). Initially, the parents indicated that they received the March 2012 IEP one month after the CSE meeting, they wrote to the district to advise them of their concerns about the March 2012 IEP, they noted their disagreement with the recommendations in the March 2012 IEP at the CSE meeting, the student continued to struggle in the "ICT program" during the 2011-12 school year, and the student's "emotional state deteriorated" during the 2011-12 school year (id.).

With respect to the March 2012 IEP, the parents asserted that the IEP provided an "overly positive assessment" of the student's ability to function within the classroom and that they believed the March 2012 IEP focused on "defending" the CSE's "decision to place [the student] in the integrated program" (Dist. Ex. 1 at p. 1). The parents also indicated that the March 2012 IEP did not provide sufficient information about the student's learning disability, and did not adequately reflect updated evaluative information about the student (id. at pp. 1-2). In particular, the parents contended that the March 2012 IEP did not reflect information from an updated neuropsychological and educational evaluation report, and did not accurately reflect the student's "actual functioning," as reported by his teachers, or the student's difficulties in the areas of reading, spelling, and mathematics, as reported by his teachers (id. at p. 2).[6] The parents also indicated that the March 2012 IEP failed to include the student's diagnoses, and did not sufficiently detail the student's social/emotional functioning or difficulties with attention (id. at pp. 2-3). In addition, the parents noted that the March 2012 IEP failed to include information about the student's social skills and fine and graphomotor weaknesses (id. at p. 3). Next, the parents alleged that the March 2012 IEP did not include sufficient annual goals and short-term objectives to address the student's special education needs, particularly in the areas of writing, decoding, and fine and graphomotor skills, and failed to include sufficient management needs (id. at pp. 2-3).

[5] It appears that the parents transmitted the August 9, 2012 letter to the district via facsimile on August 13, 2012 (see Parent Ex. B at pp. 1-5).

[6] For ease of reference, the parents' privately obtained neuropsychological and educational evaluation—consisting of an initial evaluation in September 2011 (Parent Ex. 9 at pp. 1-17) and an updated evaluation in February 2012 (referred to as "Addendum to Neuropsychological and Educational Evaluation" on the report) (Parent Ex. 10 at pp. 1-6)—will be referred to, respectively, as the September 2011 evaluation report and the February 2012 addendum report, or collectively, as the neuropsychological evaluation report.

Next, the parents alleged that the March 2012 CSE impermissibly engaged in predetermination with respect to the recommendations for ICT services with SETSS (see Dist. Ex. 1 at p. 4). In addition, the parents asserted that the March 2012 CSE failed to consider other programs or more restrictive programs—including a State-approved nonpublic school—and failed to consider the possible negative effects of inclusion on the student (id.). The parents further asserted that the March 2012 CSE disregarded the concerns expressed about the recommended ICT services, and ignored their request for a new "IEP meeting" (id. at p. 5).

Regarding the student's unilateral placement at Churchill, the parents indicated that Churchill provided the student with appropriate supports and services (see Dist. Ex. 1 at p. 5). In addition, Churchill appropriately grouped the student academically, the student received special education all day in a small classroom from teachers trained in "multisensory instruction," and Churchill's program was tailored to the student's individual needs (id.). As relief, the parents requested reimbursement for the costs of the student's tuition at Churchill for the 2012-13 school year, and the provision of transportation and related services (id.).

B. Impartial Hearing Officer Decision

On January 10, 2013, the parties conducted a prehearing conference, and on March 21, 2013, proceeded to an impartial hearing, which concluded on June 7, 2013 after three days of proceedings (see Tr. pp. 1-304; IHO Ex. II). In a decision dated June 27, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, that Churchill was an appropriate placement, and that equitable considerations weighed in favor of the parents' request for tuition reimbursement (see IHO Decision at pp. 11-14). As a result, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at Churchill for the 2012-13 school year (id. at p. 14).

To support the conclusion that the district failed to offer the student a FAPE, the IHO found that the March 2012 IEP did not accurately reflect the student's "present levels of academic achievement," and failed to identify the student's difficulties with "spelling, decoding or writing mechanics" in the IEP (IHO Decision at p. 12). The IHO also determined that the March 2012 IEP did not include annual goals to address the student's decoding needs; the annual goal for writing was "too advanced for the student;" and the March 2012 IEP did not include annual goals to address the student's needs in the areas of spelling; writing mechanics, including punctuation; or decoding (id. at pp. 12-13). In addition, the IHO found that, procedurally, the March 2012 IEP was written after the March 2012 CSE meeting—without parent participation—and the parents' request to "reconvene due to [the] inaccuracy of the IEP was ignored" (id. at p. 13). Consequently, the IHO found that the "procedural inadequacies" rose to the level of a denial of a FAPE for the 2012-13 school year (id.).

Turning to the unilateral placement, the IHO found that the parents met their burden to establish that Churchill provided the student with "educational instruction specially designed to meet his unique needs" (IHO Decision at p. 13). In particular, the IHO found that the student received instruction in small classes with 12 students and 2 teachers, and "small group instruction" in reading and mathematics with other students "on his functional levels," as well as OT to address his handwriting (id.). The IHO also found that Churchill used a "multisensory reading program" to address the student's reading disorder, a "specific writing program, including the use of graphic

organizers," and that Churchill was "consistent" with a private evaluator's recommendation (id. at pp. 13-14). Finally, the IHO noted that the student made progress at Churchill in "reading, writing, math, and handwriting," and although Churchill was a "very restrictive environment," it did not "defeat" an award of tuition reimbursement (id. at p. 14).

With respect to equitable considerations, the IHO concluded that the parents participated in the March 2012 CSE meeting, shared privately obtained evaluations, communicated concerns, and otherwise cooperated with the March 2012 CSE (see IHO Decision at p. 14). Based upon these determinations, the IHO directed the district to reimburse the parents for the costs of the student's tuition at Churchill for the 2012-13 school year (id.).

IV. Appeal for State-Level Review

The district appeals, and contends that the IHO erred in finding that the district failed to offer the student a FAPE, that Churchill was an appropriate placement, and that the parents were entitled to tuition reimbursement.[7] The district asserts that, contrary to the IHO's findings, the March 2012 IEP accurately reflected the student's abilities and present levels of academic performance at the time of the March 2012 CSE meeting based upon the evaluative materials and information provided by the student's then-current teachers. The district also asserts that, contrary to the IHO's finding, the annual goals in the March 2012 IEP developed "clear, unambiguous, appropriate and measurable goals designed to address the [s]tudent's unique areas of deficits." Next, the district argues that the IHO erred in finding that procedural violations resulted in a failure to offer the student a FAPE. Finally, the district asserts that other programs were considered, the assigned school could have appropriately implemented the student's 2012-13 IEP. In addition, although not addressed by the IHO, the district contends that March 2012 IEP adequately addressed the student's social/emotional needs, including his difficulties with attention, and the March 2012 CSE considered a more restrictive placement option for the student, but determined that the ICT program with SETSS constituted an appropriate placement in the least restrictive environment (LRE). Finally, the district argues that although speculative, the assigned public school site would have appropriately implemented the student's March 2012 IEP.

With respect to the IHO's finding that Churchill was an appropriate placement, the district argues Churchill, as a school that exclusively serves students with disabilities, was too restrictive of a setting for the student. Ultimately, the district seeks findings that it offered the student a FAPE for the 2012-13 school year and that the parents did not sustain their burden to establish the appropriateness of the student's unilateral placement at Churchill.

In an answer, the parents respond to the district's allegations, and assert additional arguments to uphold the IHO's findings that the district failed to offer the student a FAPE for the 2012-13 school year and that Churchill was an appropriate placement for the student. In addition, the parents contend that LRE considerations do not preclude an award of tuition reimbursement in this case.

[7] The district does not appeal the IHO's finding that equitable considerations weighed in favor of the parents request for relief; as such, the IHO's determination is final and binding and will not be addressed in this decision (see 34 CFR § 300.514[a]; 8 NYCRR 200.5[k).

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; 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., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

VI. Discussion

A. March 2012 IEP

1. Present Levels of Performance

The district asserts that the IHO erred in finding that the March 2012 IEP did not accurately reflect the student's abilities or present levels of academic performance. The parents reject the district's assertions, arguing that the March 2012 IEP is devoid of information about the student's deficits in reading, mathematics, writing, attention, and organization. An independent review of the hearing record supports the parents' arguments; therefore, the IHO's findings that the March 2012 CSE failed to accurately describe and identify the student's deficits and present levels of performance in the March 2012 IEP will not be disturbed.

As noted above, among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

It is undisputed that at the time of the March 2012 CSE meeting, the district had copies of both the September 2011 evaluation report and the February 2012 addendum report available for review (see Tr. pp. 20-21, 55-57, 206-08; Dist. Exs. 9 at pp. 1-17; 10 at pp. 1-6). The September 2011 evaluation included the administration of a variety of both formal and informal assessments, including teacher reports (see Dist. Ex. 9 at pp. 1-2, 6, 12-17). At the time of the evaluation, the student attended second grade in a general education setting with the provision of daily SETSS at a district public school, while receiving OT and tutoring outside of school (see Tr. pp. 198-200; Dist. Ex. 9 at pp. 1-2). Based upon teacher reports, the evaluator noted that although the student contributed "strong ideas to the class," he struggled with "decoding, math reasoning, spelling and written expression," and required "prompting to complete assignments" (id. at p. 2).[8] The student's first grade teacher completed the Swanson, Nolan and Pelham Teacher and Parent Rating Scale (SNAP-IV) in June 2011 as part of the evaluator's assessment of the student's attention, concentration, and executive functioning (see id. at p. 6). The results of the SNAP-IV revealed that the student failed to give "close attention to details, often ha[d] difficulty sustaining attention, [was] frequently reluctant to engage in tasks requiring sustained mental effort, and [was] frequently easily distracted" (id.). While the parents denied concerns regarding hyperactive and impulsive behaviors, the first grade teacher reported that the student "often" left his seat in the classroom (id.).

[8] The evaluator noted that the teacher reports reflected information obtained about the student during kindergarten and first grade; the evaluator did not include information reported by the student's "current teacher" since it was not available at that time, but indicated that reports would "be obtained" (see Dist. Ex. 9 at pp. 1-2, 6).

Consistent with previous evaluation results, formal assessments administered to the student in September 2011 revealed cognitive abilities within the average range with evenly developed verbal and nonverbal skills (Dist. Ex. 9 at pp. 2-3, 8, 12).[9] The evaluator noted the student's strengths in the verbal and language domain, with strong receptive and expressive language skills (id. at p. 8). The evaluator also indicated the student's weaknesses in basic aspects of language processing, such as "rapid naming" and "phonological awareness" (id.). In addition, the student demonstrated "weaknesses" in "motor functioning, visual perception, visual motor integration, learning and memory, attention, inhibition, as well as planning and organization" (id.). The student further demonstrated "marked difficulties with persistence," "frustration tolerance," and "inconsistent" effort, which may have resulted in an underestimation of the student's true skills across some tasks (id.). However, the student's difficulties with motor skills, learning, attention, inhibition, and planning and organization were also evident on tasks where his effort appeared strong (id.). In addition, the evaluator noted that the student's symptoms of inattention, in conjunction with his behavior during the evaluation and the "marked difficulties" on tasks of attention and executive functioning, were consistent with the "behavior and cognitive pattern" in students with an attention deficit hyperactivity disorder (ADHD) (id.). However, at that time, the evaluator opined that while the student's symptoms did not reach the "diagnostic threshold for a full diagnosis," the student's symptoms were "beginning to interfere with his functioning" and should be closely monitored for a possible medical consultation (id. at pp. 8, 10). Next, the evaluator indicated that the student demonstrated delayed fine motor skills and difficulties with graphomotor control, handwriting, and motor imitation (id. at p. 8).

Academically, the evaluator noted that the student exhibited difficulties with "underlying phonological awareness and rapid naming skills," which he required for reading acquisition and development (Dist. Ex. 9 at p. 9). Consistent with these identified difficulties, the student also exhibited "weak" decoding skills, reading fluency, and accuracy (id.). The student's difficulties in these areas further affected his spelling skills—which together with his motor coordination difficulties—resulted in an "extremely effortful process" for the student in writing (id.). Based upon the assessment results, the evaluator indicated that the student required a "small and structured classroom" to address his needs, and opined that an ICT classroom would be the "ideal placement" for the student because it would provide him with "increased levels of individual learning support" (id.).

On February 14, 2012, the student returned to the same evaluator for updated testing (compare Dist. Ex. 10 at pp. 1, 6, with Dist. Ex. 9 at pp. 1, 11). At the time of the February 2012 evaluation, the student had been attending an "ICT classroom" since mid-November with the provision of five 45-minute sessions per week of SETSS for reading (see Tr. pp. 18-19, 62-63; Dist. Ex. 10 at p. 1). To allow a direct comparison of the student's progress since September 2011, the evaluator readministered certain formal assessments to the student (see Dist. Ex. 10 at pp. 2, 4). As a result, the evaluator noted the student's "increased" rapid naming skills and phonological

[9] According to the September 2011 evaluation report, the district evaluated the student in October 2010, which revealed "average cognitive skills with strong working memory, average verbal reasoning skills, as well as average nonverbal reasoning and processing speed skills" (Dist. Ex. 9 at p. 2). The results of the October 2010 evaluation also revealed that the student exhibited difficulty with "visual construction and mild weaknesses in motor speed;" "average reading and math skills, and low average written expression abilities;" and "average skills across receptive and expressive [language] domains" (id.).

awareness since the previous evaluation and that the student demonstrated "much improvement" in his mathematical computation and math reasoning skills (id. at p. 4). However, the student's reading, spelling, and written expression continued to be areas of "significant difficulty," showing "very similar difficulties in rhyming and sound matching" and "little improvement" since September 2011 (id.). According to the evaluator, the student also demonstrated "minimal gains" in sight word vocabulary, his ability to apply rules of phonics had "not changed," and his writing skills showed a "mild decline" (id.). Consequently, the evaluator indicated that while the student had shown improvement in mathematics, he continued to exhibit difficulties with "decoding, reading, spelling and writing" (id.).

In terms of the student's social/emotional and behavioral functioning, the February 2012 addendum incorporated results reported by the student's parents and his current ICT teachers, who had completed the SNAP-IV and the Behavior Assessment System for Children-2nd Edition (BASC-2) (see Dist. Ex. 10 at pp. 1, 3; see also Dist. Exs. 7-8). Based upon these reports, the evaluator indicated that the student's academic difficulties affected his self-esteem and emotional functioning (see Dist. Ex. 10 at p. 5). The evaluator further noted that the student worried about his academic performance, what other students might think of him, and that he was often teased in school (id.). Based upon the updated results, the evaluator indicated that the student required a "small and structured classroom within a specialized school setting for [students] with specific reading and writing disabilities" (id.).

At the impartial hearing, the student's second grade special education teacher from the ICT classroom (special education teacher) who participated at the March 2012 CSE meeting appeared as a witness (Tr. pp. 9-108). In testimony, she described the student as "friendly," "helpful," and a "hard worker" who, in the classroom, exhibited "weaknesses" in writing and "getting his thoughts out" (Tr. pp. 21-22). The special education teacher also testified that in mathematics, the student similarly had difficulty in "getting it down on paper" (Tr. p. 22, 57-58). With respect to organization, the student could manage his folders and he "knew where to put things," but he demonstrated difficulty with organization of written language (Tr. pp. 58-59). The special education teacher also testified that in reading, the student exhibited difficulty with decoding and fluency, but these difficulties did not interfere with his reading comprehension skills (see Tr. p. 59). Socially, she described the student as having friends in the classroom (see Tr. pp. 22-23).

In preparation for the student's March 2012 CSE meeting, the special education teacher testified that she reviewed the "document . . . handed" to her by the parents at the March 2012 CSE meeting and that all of the March 2012 CSE participants had access to the September 2011 evaluation report and the February 2012 addendum report (Tr. pp. 20-21, 55-57). Although the special education teacher did not think the neuropsychological evaluation report was "inaccurate," she also did not believe it was consistent with how the student presented on a "day-to-day basis" or that the student's "challenges" were as "severe" as what was reported (Tr. pp. 23-24, 60-61).

In developing the student's March 2012 IEP, the special education teacher testified that she considered "everything that was said from all service providers and the parents," and drafted the March 2012 IEP after the meeting (Tr. p. 24). In drafting the March 2012 IEP, the special education teacher based the information set forth in the present levels of performance upon the student's "needs" and "very specific, . . . small target goals" (Tr. pp. 24-25). With respect to drafting the academic achievement, functional performance and learning characteristics section of

the IEP, the special education teacher testified that she considered how the student "fit into the general characteristics of the classroom," and in her opinion, these sections of the March 2012 IEP accurately reflected how the student presented in spring 2012 (Tr. pp. 26-27).

As noted above, 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]). However, a review of the hearing record indicates that while the information contained in the present levels of performance in the March 2012 IEP was not inaccurate, it did not present a sufficient description of the student's strengths or the academic, developmental and functional needs of the student as required by federal and State regulations (34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In this case, it appears that the special education teacher who drafted the March 2012 IEP relied primarily upon observations of the student in the classroom and how he presented on a day-to-day basis as opposed to incorporating information about the student's needs from a variety of sources, such as the neuropsychological evaluation report (compare Tr. pp. 21-23, 57-59, and Dist. Ex. 3 at p. 1, with Dist. Exs. 7-8, and 9 at pp. 1-17, and 10 at pp. 1-6). For example, the academic achievement, functional performance, and learning characteristics include generic descriptions of the student's activities of daily living and his ability to organize his belonging and follow general classroom expectations, in addition to noting "grade level" intellectual functioning, his ability to retain information and learn "at the same rate as his peers," and his difficulty with the "reproduction of material in written form" (Dist. Ex. 3 at p. 1). Notably absent from this present levels of performance section of the March 2012 IEP is any description of the student's reading, mathematics, or writing skills—and in particular, his difficulties in phonological awareness, rapid naming skills, spelling, and written expression—or how the student's disabilities or difficulties in these specific areas affect his progress in relation to the general education curriculum (see id.). In addition, even if the special education teacher did not believe that the information in the neuropsychological evaluation report was consistent with how the student presented in the classroom, she could have noted the inconsistencies in the March 2012 IEP, similar to the manner in which the district had previously done in drafting the student's November 2010 IEP (compare Dist. Ex. 3 at p. 1, with IHO Ex. I at pp. 3-4).

In consideration of the foregoing, the hearing record supports the IHO's conclusion that the March 2012 IEP did not accurately reflect the student's "present levels of academic achievement," and failed to sufficiently identify the student's difficulties in the areas of reading, mathematics, and writing.

2. Annual Goals

Next, the district asserts that the IHO erred in finding that the annual goals in the student's March 2012 IEP were not sufficient or appropriate, and argues that the March 2012 CSE developed "clear, unambiguous, appropriate and measurable goals designed to address student's unique areas of deficits." In response, the parents generally assert that the annual goals were not sufficient. A review of the hearing record supports the parents' assertions, and therefore, the IHO's conclusion will not be disturbed.

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]).

Initially, the district's failure to accurately reflect the student's present levels of academic achievement and to sufficiently identify the student's difficulties in phonological awareness, rapid naming skills, spelling, and written expression in the March 2012 IEP corresponds to a similar failure to develop annual goals to meet the student's needs that result from the student's disability and to enable the student to be involved in and make progress in the general education curriculum with respect to these particular areas of need. In addition, a review of the hearing record indicates that a majority of the annual goals in the March 2012 IEP—such as paragraph writing, automatic memory recall of facts related to math word problems, reading comprehension of various reading genres, use of social skills strategies, and carrying out multi-step classroom activities—fail to identify the specific skills the student would be expected to learn and use in order to demonstrate achievement (see Dist. Ex. 3 at pp. 4-5, 7-9, 11). In summary, the hearing record in its entirety does not support a conclusion that the annual goals in the March 2012 IEP were designed to sufficiently address the student's needs.

B. Request for a CSE Meeting

The district argues that the IHO erred in finding that procedural violations—by drafting the March 2012 IEP after the conclusion of the March 2012 CSE meeting, without parent participation, as well as ignoring the parents' request to reconvene due to the inaccuracy of the IEP—resulted in a failure to offer the student a FAPE. The parents deny the district's allegations, and argue that the district's failure to convene a new CSE meeting to address their written concerns about the March 2012 IEP inhibited parental participation in the development of the student's IEP. A review of the hearing record supports the parents' assertions, and therefore, the IHO's determination will not be disturbed.

It is beyond cavil that the primary purpose of the IDEA is to ensure that all students with disabilities are provided with a FAPE and to protect their rights and those of their parents (20 U.S.C. § 1400[d][1][A]-[B]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). As stated by the Supreme Court, "[t]he core of the [IDEA] is the cooperative process that it establishes between parents and schools" (Schaffer v. Weast, 546 U.S. 49, 53, [2005]; see Rowley, 458 U.S. at 205-06). Furthermore, in a recent guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). However, a district's failure to comply with procedural requirements of the IDEA only constitutes a denial of a FAPE if the procedural violation deprived the student of educational benefits or significantly impeded the parents'

opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

In this case, the parents wrote two letters to the district advising of their specific concerns regarding the student's March 2012 IEP (see Parent Exs. A-B). In the first letter sent to the district in May 2012, the parents disagreed with the ICT and SETSS recommendations, and noted their particular concerns about the March 2012 IEP, including the following: the failure to adequately describe the student or his special education needs; the failure to "detail the areas of [the student's] deficit[s];" the failure to provide "any information" about the student's learning disability; the failure to record that the student had been diagnosed as having a reading disorder, a math disorder, a disorder of written expression, and a developmental coordination disorder; the failure to include the student's continued struggles in his areas of need; and the failure to include the effect of the student's academic difficulties on his social/emotional functioning (Parent Ex. A at pp. 2-3). At that time, the parents "welcome[d] the opportunity to again" discuss the recommendations with the CSE (id. at p. 3).

In a second letter, dated August 9, 2012, the parents repeated their disagreement with the ICT and SETSS recommendations and with their particular concerns about the March 2012 IEP, as set forth in the first letter sent in May 2012 (compare Parent Ex. B at pp. 2-4, with Parent Ex. A at pp. 2-3). In addition, the parents indicated that although they had explained why they did not believe the March 2012 IEP reflected the student's needs in the previous letter, "[n]o one responded to those assertions or attempted to remedy the deficiencies within the IEP" (Parent Ex. B at p. 3). The parents further noted that since their previous letter, the student's difficulties had "intensified," and the March 2012 IEP "should be updated to reflect the information" since the March 2012 CSE meeting, as well as to add information about the student's "continued difficulties" (id.). In addition, the parents indicated that the student had been accepted to attend Churchill, and as a result, the parents specifically requested a "new meeting" with the CSE to "discuss this since no one ha[d] contacted [them] to re-meet after [their] last letter detailing [their] concerns with the IEP" (id. at p. 4).

In this case, the district violated the IDEA by failing to either reconvene the CSE in response to the parents' request or responding with prior written notice in conformity with State and federal regulations (8 NYCRR 200.5[a]; see 34 CFR 300.503) stating the reasons why the district did not believe a reconvening of the CSE to be necessary (cf. Application of a Student with a Disability, Appeal No. 12-071 [finding no violation where the parents stated only that they were "willing to meet" with the CSE to discuss their concerns]).[10] By failing to convene a new CSE meeting to discuss the parents' concerns about the March 2012 IEP, the district undermined the "cooperative process" between parents and districts that the Supreme Court has held constitutes the "core of the [IDEA]" (Schaffer, 546 U.S. at 53, citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5] [stating Congress' finding that the education of students with disabilities can be improved by "strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home"]).

[10] Further interpretive guidance and the required State forms related to prior written notice (notice of recommendation) may be found at http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html .

Here, the district's failure to respond to the parents' request to convene a new CSE meeting to address the concerns raised about the March 2012 IEP—especially in light of the collective deficiencies detailed above with regard to both the present levels of performance and the annual goals in the March 2012 IEP—significantly impeded the parents' ability to participate in the decision-making process regarding the student's placement and resulted in a failure to offer the student a FAPE for the 2012-13 school year (20 U.S.C. § 1415[f][3][E][ii][II]; 34 CFR 300.513[a][2][ii]; 8 NYCRR 200.5[j][4][ii]). Moreover, there was insufficient mitigating evidence in the hearing record, such as the preparation of a prior written notice, that the district could rely upon in order to rebut the parents' claims in this case.

C. Unilateral Placement

Having determined that the district failed to offer the student a FAPE for the 2012-13 school year, the final issue to address is whether—as the district argues—the IHO erred in concluding that Churchill was an appropriate unilateral placement for the student given her additional finding that Churchill was a "very restrictive environment."

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

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

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

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

In this case, the student's third grade special education teacher at Churchill during the 2012-13 school year testified that Churchill is a State-approved nonpublic special education school serving students with disabilities from kindergarten through high school (Tr. pp. 115-22). According to her testimony, the philosophy at Churchill is to "provide academic programs for the students that have modifications that are geared toward their individual needs;" at Churchill, students can also receive related services of OT, counseling, and speech-language therapy (Tr. pp. 118-19). The Churchill special education teacher also testified that classrooms, typically, have 12 students and 2 teachers, with the opportunity for smaller groupings for reading and math based upon the students' individual needs (Tr. pp. 119, 123-24). During the 2012-13 school year, the student received instruction for reading comprehension, phonics, and mathematics in a group of five students with one teacher (Tr. p. 123). For counseling, library, and health, the student received instruction in a group of six students with one teacher, and for OT, the student received services in a group of up to six students with one therapist (see Tr. pp. 123-24; Parent Ex. H at p. 14). For writing, the student received instruction in a group of 12 students with 2 teachers (Tr. p. 129). The Churchill special education teacher testified that the student received the following modifications across the curriculum to address his needs: directions given one step at a time, use of graphic organizers, language broken down into smaller chunks, use of verbal and tactile reminders to refocus, use of visuals and manipulatives, and individual support to complete assignments (Tr. p. 128). In addition, teachers modeled expectations for the students, the student used a "class organization system" consisting of color-coded folders, and the student was exposed to consistent routines (id.). A review of the hearing record indicates that the student made progress academically and within the social/emotional area during the 2012-13 school year (see Tr. pp. 127, 156-57; Parent Ex. H at pp. 1-15). According to the Churchill special education teacher, Churchill was an appropriate placement for the student because he received individualized supports he required within a small class environment, with other socially appropriate students who had similar learning struggles (Tr. pp. 167-68).

As noted above, the sole argument for which the district asserts that Churchill was not an appropriate placement for the student is because the student population is composed entirely of students with disabilities and therefore, Churchill was too restrictive of a setting for the student.[11] Although the restrictiveness of the parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 2010 WL 1253698, at *19 [S.D.N.Y. Mar. 21, 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]), parents are not as strictly held to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]), and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (D.D-S. v. Southhold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]).

Under the circumstances of this case, the weight of the evidence shows that even if Churchill was more restrictive than the student required and may not have maximized the student's interaction with nondisabled peers, the neuropsychological evaluation report addendum included a recommendation for a small and structured classroom within a specialized school setting (Dist. Ex. 10 at p. 5), and I find that in this instance, LRE considerations do not weigh so heavily as to preclude the determination that the parent's unilateral placement of the student at Churchill for the 2012-13 school year was appropriate (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district failed to sustain its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 school year and that LRE considerations do not preclude a determination that Churchill was an appropriate unilateral placement for the student, the district's appeal must be dismissed.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 18, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER

[11] The district did not appeal the IHO's determination that Churchill was appropriate insofar as it addressed student's needs; therefore, the IHO's determination has become final and binding on the parties and no opinion will be expressed in this decision with regard to whether the parents established that Churchill met the student's unique special education needs as determined by the IHO.