The University of the State of New York

The State Education Department
State Review Officer
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No. 13-188

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the City School District of the City of New Rochelle

Appearances:
Kehl, Katzive & Simon, LLP, attorneys for respondent, Andrea Green, 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 parent)[1] appeals from the decision of an impartial hearing officer (IHO) which denied her request to order respondent (the district) to reimburse her for her son's tuition costs at the Windward School (Windward) 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, the 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 the 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]).

[1] Although admitted to practice law, the parent appears in this matter (and appeared at the impartial hearing below) pro se (Tr. p. 66).

New York State has implemented a two-tiered system of administrative review to address disputed matters between the 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

In the 2010-11 school year, the parent resided outside of the district, where the student attended second grade in a public school (Dist. Ex. 52 at p. 1; see Tr. pp. 74, 1216).[2] While at this public school, the student was found eligible for special education as a student with a learning disability, and an IEP was developed for him (Parent Ex. A1). This IEP recommended, among other things, a program consisting of two hours of integrated co-teaching (ICT) services five times

[2] The record contains six volumes of hearing transcripts. Volumes 1 through 4 and 6 are paginated consecutively from page 1 to page 812 and from page 1057 to page 1369, volume 5 is paginated from page 1 to page 244. For ease of reference, all references will be to the consecutively paginated transcript except to the fifth volume, which will be cited (June 24, 2013 Tr. p. X).

a week, occupational therapy (OT) in a group of three once a week for 30 minutes, and individualized reading (1:1) five times a week for 30 minutes (Parent Ex. A1 at p. 1).

The parent moved into the district in August 2011 (Tr. p. 1300). The record reflects that prior to enrolling the student in school at the district, however, the parent intended to send her son to Windward in the 2011-12 school year (Tr. pp. 522, 1124). The student was apparently placed on a "wait list" at Windward (id.), and thereafter the parent enrolled the student in another private school (Tr. pp. 41-43, 305, 362, 518, 1124). According to the parent, during a telephone conversation with the district's director of special and alternative education (the director), it was explained to her that a district program would be able to address the student's needs (Dist. Ex. 30 at. p. 4). Further, after a visit to the school that the student would attend if he enrolled in the district, the parent indicated that she was "very impressed," and she enrolled the student in the district for the 2011-12 school year (Tr. pp. 41-43, 1125-29).

Upon entering the district's schools, the student's eligibility for special education as a student with a learning disability was continued, and a comparable services program was developed for him to follow on an interim basis until the district could convene a CSE (Dist. Ex. 1 at pp. 1-12; Tr. p. 68). According to the director, this program was "as close as appropriately possible" to the program the student received from the other district (Tr. p. 70). This program was memorialized in an IEP dated September 7, 2011 which, among other things, recommended one hour of ICT services on "alternate days", a 15:1 special class "transition program for 90 minutes per day,"[3] and individual OT once a week for 30 minutes (Dist. Ex. 1 at p. 9).[4] On September 13, 2011, both the parent and the student's father signed a "Parental Consent for Interim Special Education Placement" form with respect to this program (id. at p. 14).

On October 11, 2011, a CSE convened to develop an IEP for the student (Dist. Ex. 11).[5] The district continued to classify the student as having a learning disability, and the October IEP generally continued the program from the September IEP (Dist. Ex. 11 at p. 1). In addition, the October 2011 IEP added "resource room services in a 5:1 ratio" four times weekly for 45 minutes each (id.).

The record reflects that after the October 2011 CSE meeting, the parent had numerous correspondences with the district (Dist. Exs. 12; 15; 16; 52 at pp. 12-55). While some of these messages expressed concerns (see, e.g., Dist. Ex. 52 at pp. 15-16, 30, 33, 40), a number were positive with respect to her son's academics. In an e-mail message to the assistant director, for example, the parent indicated that she felt that the district was "wonderful," and expressed

[3] According to testimony in the record, the "transition program" is a class where "intensive instruction in a smaller group" is provided in language arts, writing, and other skills (Tr. pp. 88-89).

[4] The "Student Information Summary" page included with the September 2011 IEP also indicated that the student received individualized reading from his prior school district during summer 2011 before he enrolled in the district (Dist. Ex. 1 at p. 2; see Tr. p. 71).

[5] The IEP submitted into evidence at the impartial hearing and received by the Office of State Review is incomplete; pages "8 of 12" and "9 of 12," presumably containing the remainder of the student's annual goals and the recommended special education programs and services, were not included. However, because the recommended services were detailed on the summary attached to the IEP submitted into evidence, the hearing record sufficiently demonstrates the program offered to the student.

confidence that the district would "bridge the gap" for her son (id. at p. 13). In addition, the parent indicated that she was "glad" that her son was "becoming a reader" due to the district's help (id. at p. 46), and she expressed happiness with the progress that her son was making (id. at p. 50). In December 2011, the parent requested that the CSE reconvene (id. at 55). In particular, it appears that while the parent indicated that she believed that the student exhibited progress, she believed that he continued to demonstrate difficulties and did not appear "to be closing academic gaps at a rapid pace" (Dist. Ex. 24 at p. 2).

On January 13, 2012 the CSE reconvened (Dist. Ex. 24). Updated evaluative information regarding the student was considered by the January CSE, including a "screening report" from Windward that had been provided by the parent, as well as concerns raised by the parent about the student's self-esteem (Dist. Exs. 24 at pp. 2-3, 6; 27; 34; 52 at p. 63).[6] As a result, the January 2012 CSE determined that the student's then-current academic program was meeting his needs (Dist. Ex. 27 at p. 1). However, due to the concerns expressed by the parent, the CSE added counseling and a social/emotional goal to the student's IEP (Dist. Ex. 24 at p. 1; see Tr. pp. 129-30, 132).[7] In addition, the record reflects that there were discussions between the parent and school personnel about providing additional support to the student, including an additional two hours a week of support for language arts, handwriting and math, as well as "modifications" to the student's resource room services (Tr. p. 136; Dist. Ex. 52 at pp. 83-86).[8]

Subsequent to the January 2012 CSE meeting, the parent continued to have concerns about her son's academic program and progress. It appears that much of the parent's concern was related to the results of testing done by Windward the previous December, which the parent described as "very, very poor" (Dist. Ex. 52 at p. 72; see also Tr. pp. 1262, 1275-77; Dist. Ex. 52 at pp. 64-65). The parent requested that the district administer specific assessments to the student and that the district provide the student with speech-language therapy as a related service (Dist. Ex. 52 at pp. 66, 77, 89). The district also agreed to conduct both tests requested by the parent, and to provide the student with speech-language therapy (Dist. Ex. 38).[9] However, the parent thereafter withdrew her consent for the district to conduct the requested assessments (Tr. pp. 187, 402).

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[6] I note that the parent also explained to the CSE that that she applied to Windward for the student for September 2012 but Windward did not accept the student at this time (Dist. Ex. 24 at p. 2). The parent also informed the CSE based upon a Windward recommendation a tutor from Windward would provide tutoring for the student (id.).

[7] The parent ultimately declined the recommended counseling services (Tr. pp. 321, 394, 1191-92, 1340, 1354-55; Dist. Ex. 24 at p. 2).

[8] The nature of the resource room "modifications" that were discussed is not entirely clear. The parent contends that the district was going to change the grouping of her son's resource room to include both second and third grade students (see, e.g., July 12 Tr. p. 1345. See also Dist. Ex. 52 at pp. 72, 89). The district's assistant director, however, testified that while she recalled discussing "some additional support that was not IEP driven," she did not recall "specifics in terms of groups or changes in groups or anything to that effect" (May 13 Tr. pp. 296-297). However, I note that documents in the record suggest that some type of "group" - with at least "two other students" - was contemplated (See Dist. Ex. 52 at p. 84).

[9] This was done pursuant to a resolution agreement signed by the parent on April 18, 2012 (Dist. Ex. 38). This resolution agreement was the product of a resolution session held on March 29, 2012 (Dist. Ex. 31) in response to one of the due process complaint notices filed by the parent (Dist. Ex. 30). The content of this due process complaint notice is discussed below.

On May 3, 2012, the CSE convened to conduct the student's annual review and to develop his IEP for the 2012-13 school year (Dist. Ex. 42 at pp. 1-2). The minutes of the CSE meeting indicated that the May 2012 CSE began to develop the student's IEP and determined that additional assessments were required (id. at pp. 31-33). Specifically, the parent requested an "auditory processing/phonological processing evaluation," a "comprehensive visual perceptual" evaluation, a psychological evaluation, and a neuropsychological evaluation (Dist. Ex. 42 at pp. 3-4, 29-30). The record also reflects that with the exception of the auditory processing evaluation, the parent wanted these evaluations to be conducted by independent evaluators proposed by her (id.). While the district did not agree to have testing done by the independent evaluators proposed by the parent, it did agree to arrange for testing (Tr. pp. 381-83; Dist. Ex. 42 at p. 25). Accordingly, the CSE determined to reconvene to review the updated evaluative information and finalize the IEP for the 2012-13 school year (Tr. pp. 392-93). The record reflects that both a central auditory processing (CAP) evaluation and a psychological/neuropsychological evaluation were scheduled for the student (Dist. Ex. 43 at p. 2). However, the parent declined the latter because of "questions about the credentials of the evaluator" (Dist. Ex. 46 at p. 23; see Tr. pp. 382-83; Dist. Ex. 43 at p. 3).

On July 20, 2012, the CSE reconvened to continue the student's annual review and to continue developing his IEP for the 2012-13 school year (Dist. Ex. 46). The July 2012 CSE considered several evaluative documents, including several reports not available to the May 2012 CSE (Dist. Exs. 20-22; 34; 41; 43; 45; 46 at p. 3). Finding the student remained eligible for special education and related services as a student with a learning disability, the July 2012 CSE developed an IEP that recommended continuing ICT services for 60 minutes on alternate days (Dist. Ex. 46 at pp. 1, 11).[10] In addition, the July IEP also recommended continuing four 45-minute sessions per week of resource room in a group of five and 90 minutes per day of a 15:1 special class (id.). The July IEP also continued to recommend one 30-minute session per week of counseling in a small group (though as noted above the parent had previously declined this service), and it added four 30-minute sessions monthly for two months of speech-language therapy in a small group (id.). To address the student's academic and physical needs, the July IEP recommends accommodations and supports, including graphic organizers during writing assignments, multisensory instruction when teaching new concepts and handwriting, breaking down math concepts, use of manipulatives to reinforce math concepts, small group instruction in reading, writing, and math, reading of written information to the student together with visual supports, heavy work prior to fine motor tasks, a spacing helper, an alphabet strip for letter formation, the use of larger font sizes, and double lined paper to assist with correct letter sizes (id. at pp. 7-8, 11-12).

The district provided a prior written notice to the parent dated July 20, 2012, which described the information that the CSE relied upon, its rationale related to the matters considered by the July 2012 CSE for the 2012-13 school year (Dist. Ex. 46 at pp. 23-25). The parent unilaterally placed her son at Windward for the 2012-13 school year (Parent Exs. H-J).[11]

[10] 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]).

[11] The Commissioner of Education has not approved Windward as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

A. Due Process Complaint Notices[12]

By due process complaint notice dated February 29, 2012 the parent requested an impartial hearing. This notice, alleged among other things that (1) the district failed to follow the student's IEP from his "prior school," (2) the student's resource room program did not provide necessary instruction in math and provided reading instruction on a level higher than the student's current levels of performance, and (3) the student required a tutor in reading (Dist. Ex. 30 at p. 4). For relief, the 2012 due process complaint requested additional testing, "support for expressive language deficit," and reimbursement for tutoring that the parent had paid for (Dist. Ex. 30 at p. 2). By agreement dated April 18, 2012, the parent also agreed that the "scope of the hearing with respect to the 2011-2012 school year will be limited to [her] claim for reimbursement for the cost of a the parentally arranged private tutor for [the s]tudent" (Dist. Ex. 38 at p. 4).

On February 5, 2013, the parent filed a second due process complaint notice, alleging that (1) the district "did not implement the IEP that it had on file," (2) the student did not receive 1:1 reading instruction in the district school, (3) the student did not receive adequate "math support"[13], (4) the student's IEP was not followed by his teachers in that his assignments were not modified, (5) the student was "bullied" by teachers, aides, and other students, and that the district failed to respond appropriately thereto, and (6) the parent's requests for additional support for the student were ignored by the district (Dist. Ex. 48 at pp. 3-4). As relief the parent again sought reimbursement for the tutors that she had hired, and she also requested that district pay for the costs of the student's attendance at Windward (id. at p. 2).

The record reflects that on March 20, 2013, a resolution session was held regarding the February 2013 complaint (Dist. Ex. 51 at p. 2). By agreement dated April 16, 2013, the district agreed to reimburse the parent for tutoring services and to schedule updated evaluations and reconvene to develop an IEP for September 2013 (id.). The parent agreed to withdraw her claim for tutoring reimbursement for the 2011-12 school year (id. at p. 3). The only outstanding request for relief in this matter, therefore, was reimbursement for the costs of Windward tuition for the 2012-13 school year.

B. Impartial Hearing Officer Decision

On May 9, 2013, an impartial hearing was convened and, following six non-consecutive days of testimony, concluded on July 12, 2013 (Tr. pp. 1-1369; June 24, 2013 Tr. pp. 1-244). In a decision dated August 29, 2013, the IHO found, among other things, that the student's resource room group for the 2011-12 school year was appropriate, that thee parent and district agreed regarding the student's need for a small group reading program, and that the student had made

[12] As discussed below, there are two Due Process Complaint Notices in the record (Dist. Exs. 30; 48). Since issues from the first and second notices overlap, and further since it appears that the parent intended to base her claim for tuition reimbursement on the allegations in both of these notices, I will consider both of these notices as a part of this proceeding.

[13] The parent also alleges that her son did not get "science and social studies support" either, but these allegations are not raised in her petition and need not be addressed.

progress in both reading and math in the 2011-12 school year (id. at pp. 15-17).[14] In addition, and with respect to the parent's "bullying" claims, the IHO found that every bullying claim raised by the parent was "investigated and taken seriously," and that "procedures were put in place to minimize the chance of further confrontations with [the] student" (id. at p. 18). Accordingly, the IHO concluded that "there is nothing that occurred during the 2011-12 school year . . . that would allow the parents to unilaterally place [the student] in a private school with the expectation of tuition reimbursement for the 2012-13 school year" (id. at p. 19).

With respect to the July 2012 IEP, the IHO noted that the IEP contained twenty-five annual goals, including one math goal, new goals—and new "criteria" to existing goals—were added, the IEP recommended testing accommodations and program modifications, the IEP included speech-language therapy as requested by the parent , and "classroom accommodations" were added (IHO Decision at pp. 20-21). The IHO concluded that student made progress during the 2011-12 school year and no reason to believe that the student would not continue to make progress (id. at pp. 21-23).[15]

In addition, the IHO also found that the parent did not prevail in her argument that Windward was appropriate for the student. In this regard, the IHO noted that the parent presented no testimony from any Windward administrators or teachers regarding the student's "education profile, his needs, or the specific program of educational services provided to him at [Windward]" (IHO Decision at p. 26). The IHO also found that there were "no details about the curriculum or levels of material utilized with [the student]" in the record, and she noted that the parent presented "limited information" regarding the student's progress at Windward (id. at pp. 25-26). In addition, the IHO expressed concern about the restrictiveness of Windward as a placement for the student, and held that there was "no evidence to support or justify putting [the student] in a school that does not afford him mainstream opportunities" (id. at pp. 24-25). The IHO expressed concern that Windward did not offer "speech therapy" on site, which she noted was a service the parent had requested that the district provide (id. at p. 26). Accordingly, the IHO found that the parent did not establish that Windward was an appropriate placement for the student (id. at pp. 24-27).

Finally, the IHO concluded that equitable considerations did not support an award of tuition reimbursement (IHO Decision at p. 30). In this regard, the IHO found, among other things, that the record demonstrated that the student's family was "always interested in Windward," that they decided to send the student to Windward (and that they paid the full cost of the student's tuition) prior to any CSE meeting for the 2012-13 school year, that the parent "really lost interest in having any meaningful relationship with the [d]istrict," and "that there was nothing that the CSE could have offered that would have resulted in [the parent] considering [placing the student in the district

[14] The IHO made other findings, as well. However, many of these findings do not relate to issues raised in the parent's due process complaint notices. In addition, the IHO made findings with respect to the parent's claims regarding the implementation of the student's IEP from his previous district. As discussed below, however, while these latter claims were raised by the parent in her due process complaints, they were not reasonably related to whether the district offered the student a FAPE for the 2012-13 school year.

[15] The IHO also made a number of additional findings with respect to the July 2012 IEP on claims not raised in the due process complaint notices, including that extended school year services (ESY) were not necessary, the lack of a functional behavioral assessment (FBA) and behavioral intervention plan (BIP), and the fact that one of the student's teachers for the 2012-13 school year would be someone who previously tutored the student "without success" (IHO Decision at pp. 22-23).

public schools]" (id. at pp. 28-29). In addition, the IHO found that the parent did not provide timely notice of her intention to place the student at Windward for the 2012-13 school year at public expense (id. at p. 29). Accordingly, the IHO found that equitable considerations "would have resulted in [a] drastic reduction of any award in tuition reimbursement" (id. at p. 30).

IV. Appeal for State-Level Review

In an undated petition, the parent appeals the IHO's determination.[16] While explicitly noting that it is the "2012-13 school year which is the subject of this hearing," the petition raises numerous and scattered allegations. Among the parent's main contentions are that the July 2012 IEP is inadequate to meet the student's needs in reading and math, that the July 2012 IEP "duplicated" the 2011-12 IEPs under which he made no progress, and that the district failed to implement the student's previous IEPs. With respect to the July 2012 IEP (and the 2012-13 school year) itself, the parent makes allegations including that: the IEP lacked "supports for school personnel"; the IEP lacked 1:1 reading instruction and OT; counseling and speech-language therapy were added to the IEP "without any screening by the specialists"; the IEP did not update the student's present levels of performance; the annual goals were not modified and were copied from a prior IEP; the student would be taught by a teacher who the parent felt he would not benefit from; the IEP did not offer 12-month services; agreed upon modifications to the resource room services were not implemented; the student was not provided support for his math needs; the district did not address the fact that the student was bullied; and that the student requires two hours per day of ICT services and 3:1 OT in a separate location.

In addition, the parent makes a number of specific claims on appeal throughout her petition that were not raised in her due process complaint notices or are no longer live, including that: the district failed to implement the student's IEP from his prior school district; accommodations and related services from the 2011-12 school year IEPs were not implemented; the student did not receive appropriate reading instruction during the 2011-12 school year; district personnel were not appropriately trained; the district "predetermined" the program it offered; the resource room offered to the student in the 2011-12 school year was inappropriate; the student made little academic progress and regressed socially during the 2011-12 school year; the district did not provide services mandated by prior IEPs from another district; the parent was denied procedural safeguards and input into changes that were made to IEPs; and the district violated the IDEA's parental participation requirements.

In addition, the parent challenges the IHO's findings regarding the appropriateness of Windward as a placement for the student. In this regard, the parent contends that Windward provides "teacher instruction," that the student is grouped with students of similar needs and follows a structured schedule that is structured, that Windward provided the student with 1:1 tutoring, and that the student has made progress in all areas. In addition, the parent contends that Windward teachers are trained to address the student's deficits, that educational and social issues are addressed as they arise, and that Windward provides parent education seminars. Finally, in response to the IHO's findings regarding equitable considerations, the parent argues that the district did not raise the issue of insufficient notice.

[16] State regulation requires that all pleadings set forth the allegations of the parties in numbered paragraphs (8 NYCRR 279.8[a][3]); however the petition does not contain any numbered paragraphs.

The district answers the petition and denies the parent's allegations therein. In addition, the district contends that it offered the student a free appropriate public education (FAPE) for the 2012-13 school year, that the record supports the IHO's findings that Windward was not an appropriate placement, and that equitable considerations do not support an award of tuition reimbursement because the parent did not cooperate with the CSE and at times obstructed the district's efforts to provide the student with a FAPE. The district also argues that claims not raised in the parent's due process complaint notices should not be addressed in this appeal.

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

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

A board of education may be required to reimburse the parents for their expenditures for private educational services obtained for a student by his or her the 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 the 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 the parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Review

Before addressing the merits of the parent's appeal, I must first address a procedural issue.

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415 [f][3][B]; 34 CFR 300.508 [d][3][i], 300.511[d]; 8 NYCRR 200.5 [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415 [c][2][E][i][II]; 34 CFR 300.508 [d][3][ii]; 8 NYCRR 200.5 [i][7][i][b]; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S, Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5 [j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Here, the record reflects that the parent raises a number of claims in her petition which cannot be reasonably read into her due process complaint. These include claims regarding the sufficiency of evaluations considered by 'the CSE (including the parent's claim that the district's tests and evaluations were used simply to falsify progress), claims regarding the sufficiency of the "present levels of performance" in the 2012-13 IEP, claims regarding (or related to) the sufficiency of the goals in the 2012-13 IEP, claims of predetermination, claims that the student did not make

social progress at 'the district public school, and claims that services (i.e., counseling and speech) were added to the 2012-13 IEP without sufficient evaluation. In addition, the parent raises other issues in her petition that were not raised in her due process complaint notices, including her ability to participate in the IEP development process, the lack of occupational theory (OT)[17] and extended year services (ESY) in the 2012-2103 IEP,[18] claims regarding the ratio in which OT services were provided, and issues related to the competence of district staff.[19] There is no indication in the hearing record that the district explicitly agreed to expand the scope of the impartial hearing to include any of these issues, or that the parent received permission to amend her due process complaints to include them. Accordingly, these issues are not properly before me and will not be addressed, Further, to the extent that the IHO made findings on these issues, it was improper to do so.[20]

Finally, to the extent that the parent claims that the district failed to implement the student's IEP from his previous school district and seeks relief on this basis, I find that this claim is not properly before me. The parent by the terms of her petition limits this proceeding to the 2012-13 school year and IEP and has thus waived any consideration of her claim that the district failed to comply with the student's IEP for the 2010-11 school year from the student's previous school district.[21] This is especially appropriate given that parent entered into resolution agreements in April 2012 and April 2013 through which she received all of the relief that she sought for the 2011-12 school year (Dist. Ex. 38; Dist. Ex. 51).

B. July 2012 IEP

Turning to the merits of the parent's appeal, the parent' alleges that (1) the program developed for the student by the July 2012 CSE was inappropriate because it did not address the student's reading and math needs; (2) the district's failed to implement the student's previous IEPs;[22] (3) the July 2012 IEP improperly "duplicated" the programs used during the 2011-12 school year, under which the student did not make progress 2011-12; and (4) that the student was

[17] Though not properly raised, the hearing record demonstrates that the parent requested that the district terminate the provision of OT services to the student in November 2011 (Tr. p. 698; Dist. Exs. 24 at p. 2; 52 at p. 41).

[18] Though not properly raised, the hearing record lacks any evidence that the student was eligible for 12-month services (see 8 NYCRR 200.1[aaa]; 200.6[k][1]; see 34 CFR 300.106).

[19] There are other issues raised in the petition that arguably go beyond the scope of the parent's due process complaint notices. However, many of these issues are addressed in (or encompassed by) the discussion below.

[20] However, with respect to certain issues the IHO addressed them in order to "properly address the recommended program" being challenged, an appropriate approach for the IHO to take (IHO Dec. at pp. 19-20).

[21] In any event, the IDEA only requires that a district implement an IEP developed by another district in the same state when a student transfers districts within a school year (20 U.S.C. § 1414[d][2][C][i][I]; 34 CFR 300.323[e]). The student enrolled in the district at the beginning of the 2011-12 ten-month school year, at which time he was provided with an IEP (Dist. Ex. 1).

[22] Any implementation issues related to the student's previous IEPs are outside the scope of this proceeding. However, it appears from the record that the parent may be asserting this allegation as "proof" that the district would not have implemented the student's 2012-13 IEP. It is to this limited extent that I will consider this claim.

"bullied" by staff and students at the district school and the district took no actions in response.[23] For the reasons discussed below, I find that none of these allegations supports a finding that the district denied the student a FAPE for the 2012-13 school year.

1. Reading Needs

The July 2012 CSE considered several evaluative documents including a January 2012 annual review report, a January 2012 classroom observation, a January 2012 program progress report, a March 2012 educational annual review, a May 2012 classroom observation, a May 2012 audiological evaluation, and a June 2012 report card (Dist. Exs. 20-22; 34; 41; 43; 45; 46 at p. 3). These documents collectively show that the student demonstrated difficulties with reading, including reading comprehension and decoding (Dist. Ex. 22 at pp. 1-2). Specifically, according to the January 2012 program progress summary report, the student's reading comprehension skills were at an approximate late-second grade instructional level and his decoding skills were at a mid to late-second grade instructional level when the student was in third grade (Dist. Ex. 22 at p. 1). 'Further, the hearing record shows that the student demonstrated difficulties with implementing strategies and decoding fluency (id. at p. 1). In March 2012, an administration of the WJ-III ACH to the student yielded standard scores of 95 in letter word identification, 94 in passage comprehension, 92 in spelling, and 92 in writing samples (Dist. Ex. 34 at p. 1). The evaluator noted the student performed in the average range in all tested areas (Dist. Ex. 34 at pp. 1-3).

Based on input from the members of the CSE during the May and July 2012 CSE meetings, as well as the evaluative information, the July 2012 CSE developed the student's present levels of performance, including a description of the student's reading needs (Dist. Exs. 42 at pp. 1-35; 46 at pp. 2-8, 24-25). The July 2012 IEP reflected that the student demonstrated steady but slow progress in reading (Dist. Ex. 46 at p. 6). The IEP indicated the student's reading comprehension skills were stronger than his decoding skills (id.). The IEP also indicated that, in September 2011, the student was reading 20 sight words but a more recent assessment indicated the student read 110 words with automaticity (id.). The IEP indicated that the student demonstrated overall improvement in blending CVC words while reading (id.). The IEP also indicated the student did not always self-correct for meaning when reading but he exhibited improvement in this area (id.).

The hearing record demonstrates that the July 2012 CSE developed 12 annual goals to address the student's reading needs (Dist. Ex. 46 at p. 9-10). The annual goals related to reading targeted several skills including decoding, sight word vocabulary, phonological processing, and grammar (Dist. Ex. 46 at pp. 9-10). The district's assistant director of special and alternative education (assistant director) testified that the July 2012 CSE developed annual goals in the areas of reading, writing, and language that addressed the student's needs based on his current functioning and progress (May 14 Tr. pp. 533-35). In addition, and to address the student's reading needs, the July 2012 CSE recommended accommodations and supports, including multisensory instruction when teaching new concepts, small group instruction in reading, and reading of written information to the student together with visual supports (Dist. Ex. 46 at pp. 7-8).

[23] The parent's due process complaint also alleged other denials of FAPE that are not raised in the petition. State regulations provide that a petition for review must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken" (8 NYCRR 279.4[a]).

The July 2012 CSE recommended an educational program that included four 45-minute sessions per week of resource room services in a group of five and 90 minutes per day of a 15:1 special class, the latter of which was denoted on the IEP as a "transition program" (Dist. Ex. 46 at p. 1). While the parent argues that, based on the student's lack of progress in his academic program for the 2011-12 school year, the July 2012 IEP was insufficient to address his reading needs, the hearing record does not support such a conclusion. Specifically, assuming for the sake of argument that the program recommendations were identical, the hearing record reflects that the student received sufficient and appropriate reading instruction in both environments.

The student's special education teacher in the transition program (the special education teacher)—who also provided the student's ICT services—for the 2011-12 school year testified that he provided the student with 90 minutes of instruction per day in the area of English language arts (ELA) (Tr. p. 557; Dist. Ex. 46 at p. 1; see Tr. pp. 532-33). The hearing record also reflects that the special education teacher addressed the student's needs related to phonological processing, sentences, and reading during the 90-minute ELA session (Tr. p. 558). In this regard, the special education teacher testified that, among other things, he used preventing academic failure (PAF), an Orton Gillingham phonics program that addressed sound/letter relationships, sight words, as well as strategies to break down words during the special class (Tr. p. 559). The special education teacher also testified that he used additional reading materials and workbooks to add "depth" to the lessons (Tr. pp. 560-61). The special education teacher also testified that he provided 10 to 15 minutes of 1:1 instruction per day to the student and assisted the student with language concepts related to math (Tr. pp. 563, 566). The transitional special education teacher further testified to implementing a drop everything and read (DEAR) program during the class where the students would read independently or to a teacher (Tr. p. 557). Additionally, the special education teacher provided support to the student within the general education setting by providing ICT services in 2011-12, which included reteaching of concepts (May 14 Tr. pp. 557-58).

The hearing record shows that the student also received reading assistance in his resource room program (Dist. Ex. 46 at p. 1).[24] According to the student's resource room special education teacher (the resource room teacher) the function of the resource room program was to teach the student the skills and concepts as indicated in his IEP and to assist the student to develop grade level academic skills (June 24, 2013 Tr. p. 100). In this regard, the resource room teacher testified that she addressed the student's academic skills related to decoding, reading comprehension, language development, organization, and vocabulary (June 24, 2013 Tr. pp. 108,111; Dist. Ex. 22 at p. 1).[25] In addition, the resource room teacher testified that she helped the student with handwriting and that both the PAF reading program and the basic writing skills program were utilized in the resource room (June 24, 2013 Tr. pp. 107, 111; Dist. Ex. 22 at p. 1). In addition, the record reflects that the resource room teacher provided the student with support to address his annual goals, as well as with supplemental instruction to assist the student to progress in the general education setting (June 24, 2013 Tr. p. 25). The resource room teacher also testified that she spoke

[24] At the time of the January 2012 program progress summary report, there were two other students in the resource room program (Dist. Ex. 22 at p. 1).

[25] In addition, the assistant director described resource room as providing the student assistance in the areas of reading, writing, math, and study skills (May 9, 2013 Tr. pp. 167-68).

with the student's special education teacher often and that she would pre-teach words to the student (June 24, 2013 Tr. pp. 108, 113).

Finally, the parent argues that the student required 1:1 reading instruction. However, as discussed above, the hearing record demonstrates that the student received a significant amount of reading instruction and support during the 2011-12 school year. Further, the hearing record reflects that student's instructional levels in reading were approximately one year below grade level, that the student demonstrated average cognitive skills with high average skills in the area of verbal comprehension, and that he also exhibited age-appropriate social skills (June 24, 2013 Tr. p. 112; see Dist. Exs. 11; 22 at pp. 1-2; 24; 43 at p. 8; 46 at pp. 4, 7). In view of the evidence above and the fact that the student made meaningful academic progress as discussed below, I find that the student did not require 1:1 reading instruction for purposes of offering a FAPE.

Based on the foregoing, a review of the entire hearing record indicates that July 2012 IEP addressed the student's needs in the area of reading.

2. Math Needs

Evaluative information before the July 20 CSE indicated that the student demonstrated average to above average math skills (see Dist. Ex. 34 at p. 1). Specifically, the January 9, 2012 WJ-III ACH results indicated that the student performed within the average range on both math subtests, including calculation and applied problems (Dist. Ex. 20 at pp. 1-2). The student's performance was in the average range in math computations and high average range in math reasoning, math achievement, and math knowledge (Dist. Ex. 34 at p. 2). In addition, the student solved single and multi-digit addition and subtraction problems (Dist. Ex. 20 at p. 2). In March 2012, an administration of the WJ-III ACH to the student yielded standard scores of 108 (average) in calculation and 112 (high average) in applied problems (Dist. Ex. 34 at pp. 1-3). The student performed within the average range in the area of math computations but exhibited difficulty with multiplication (Dist. Ex. 42 at pp. 14-15). Specifically, the student solved single and multi-digit subtraction problems and solved two multiplication problems but did not solve any problems involving division or fractions (id. at p. 15). In addition, the special education teacher reported that the student's skills in math calculations and applied problems were areas of strength and that the student demonstrated significant progress during the 2011-12 school year (Dist. Ex. 34 at p. 3). The July 20, 2012 prior written notice indicated that the student achieved a level three on the math state assessment (Dist. Ex. 46 at p. 24).[26]

Although the standardized assessments considered by the July 2012 CSE reflected that the student demonstrated average to above average math skills, and although one of the student's teachers testified that he was a "brilliant" math student (June 24, 2013 Tr. p. 232), the parent believed the student demonstrated difficulties in math (Tr. p. 46; Dist. Ex. 34 at pp. 1-3). In addition, while the July 2012 IEP present levels of academic performance indicated overall average to high average skills in math, the IEP nonetheless reflected that the student needed to improve his math computation skills and math problem solving skills (Dist. Ex. 46 at pp. 3-4, 7). Accordingly, the July 2012 CSE developed four annual goals in the area of math, targeting skills including automaticity for math facts in the areas of addition, subtraction, and multiplication, and

[26] Students performing at Level three on New York State assessments are deemed to be "proficient" in that subject (see 8 NYCRR 100.2[p][1][v][c]).

a goal for division skills (id. at pp. 10-11, 24). The assistant director testified that the July 2012 CSE developed annual goals related to math that addressed the student's needs based on his current functioning and progress (Tr. pp. 533-35).2012-13 Additionally, to further support the student's needs relating to math, the July 2012 IEP recommended a number of accommodations and supports, including multisensory instruction when teaching new concepts, breaking down math concepts, manipulatives to reinforce math concepts, and small group instruction in math (id. at pp. 7-8).

In addition, the hearing record reflects that the academic program offered to the student in the 2011-12 school year provided him with sufficient instruction and support in math such that he made progress. As an initial matter, the student received math instruction within the general education setting during the 2011-12 school year (Tr. p. 555; June 24, 2013 Tr. pp. 138, 140). I also note that for purposes of math, the district placed students in groups based on their individual needs (June 24, 2013 Tr. p. 148). According to testimony, the math class in which the student was initially placed by the district was for students who were performing "two steps below grade level in math," and that the student performed "towards the higher end" of the group (June 24, 2013 Tr. pp. 148-49).

The record reflects that in addition to being grouped by need in a general education class for math, the student was provided with special education services as well. For example, the assistant director testified that the special education teacher and regular education teacher would provide ICT services together for 60-minutes per day on alternate days in the areas that included math (May 9 Tr. pp. 169-71). In addition, to address the student's difficulties with the language of math, the special education teacher testified that he assisted the student in breaking down the vocabulary related to math to increase the student's comprehension of the math problems (Tr. p. 566). In addition, the July 2012 CSE recommended 90-minutes per week of resource room services to allow sufficient time to address all of the student's academic needs (Tr. pp. 167-68). The resource room teacher testified that she addressed, among other things, the student's math goals (June 24, 2013 Tr. p. 25).[27]

Based on the above, the July 2012 IEP provided sufficient support to address the student's needs in the area of math.

[27] The parent appears to place great weight on a report card from June 2012 indicating that the student's performance rating decreased in some math content areas during the course of the year (Tr. pp. 1160-61; Dist. Ex. 45 at p. 4). However, this does not necessarily reflect an overall decrease in ability. This is especially true where, as here, there is a significant amount of evidence in the hearing record that suggests the contrary. In addition, the student was "moved up" to a higher level class in math in the middle of the school year, and the extent to which this may have affected the student's performance evaluation cannot be ascertained from this record (June 24, 2013 Tr. pp. 148-51). Accordingly, the report card's indication that the student was making less progress than he had previously in some content areas does not lead me to the conclusion that the district fail to offer the student an appropriate program (Walczak, 142 F.3d at 130 [the IDEA "does not itself articulate any specific level of educational benefits that must be provided through an IEP"]).

3. Progress during the 2011-12 School Year

As noted above, the parent also argues that because the student did not make progress during the 2011-12 school year, the July 2012 IEP—which offered a substantially similar program—was not appropriate to meet the student's needs. I disagree.

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2013 WL 3155869, at *2 [2d Cir. June 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Dec. 2010] , at p. 18, available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Bd. of Educ., 2007 WL 2681207, at *3 [C.D. Ill. Aug. 10, 2007]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

As an initial matter, there are differences between the program recommendations found in the IEPs developed for the student for the 2011-12 school year as compared to the July 2012 IEP at issue in this matter. The July 2012 IEP contained updated annual goals based on the student's academic needs, the addition of speech-language therapy, and an additional accommodation to address the student's fine motor needs (see Dist. Exs. 11 at p. 8; 24 at pp. 7, 11 46 at pp. 8, 12). Even assuming that the July 2012 IEP is sufficiently similar to the student's IEPs from the 2011-12 school year for the student's progress under the prior IEPs to be relevant to the sufficiency of the July 2012 IEP, the hearing record demonstrates that the student made significant academic progress during the 2011-12 school year.

Comparing the student's performance in reading over time, for example, the evidence in the hearing record indicates that the student's overall reading skills improved from below average/low average reading skills to average reading skills (see Dist. Ex. 34 at p. 1). Specifically, the student showed modest increases in standard scores in all areas of reading.

Further, the assistant director testified that district personnel monitored the student using "AIMS-Web," an assessment used to monitor student progress on a regular basis in the area of reading (Tr. pp. 113-114). With respect to the student, the AIMS-Web assessments showed that

he progressed in the area of reading during the 2011-12 school year (Dist. Ex. 34 at pp. 4-6). Specifically, these assessments showed that the student's performance was well below average during the fall and winter of the 2011-12 school year and that he advanced to below average in spring 2012 (id.). Further, in a March 2012 annual review report, the special education teacher described the student's AIMS-Web results in detail (id. at p. 2). Specifically, the special education teacher indicated that, according to the results of the AIMS-Web, the student read 17 correct words per minute on a third grade level in fall 2011 and 30 words per minute in winter, which was an increase of 21 words per minute (id.). In addition, the record reflects the student continued to demonstrate progress as indicated by his spring benchmark of reading 71 words per minute (id.). In February 20, 2012, based on the student's progress, the district modified, his grade level for progress monitoring purposes, from second to third grade (id.). In addition, the transitional special education teacher indicated that "sustained progress [wa]s noted at the third grade level" for the student (id.).

Moreover, the student's special education teacher testified that the student exhibited progress in reading during the 2011-12 school year (Tr. pp. 568, 573, 578- 580). In particular, the special education teacher noted that when the student entered third grade, his reading skills were at a late-kindergarten to low first grade level and, by late November and early December, the student's reading levels were comparable to those of his classmates (Tr. pp. 562-63). Further, in a report dated January 12, 2012, the student's resource room teacher indicated that she too was seeing progress in reading (Dist. Ex. 22 at p. 2). In fact, the hearing record reflects that this sentiment was shared by the student's teachers at the May 2012 CSE meeting, at which the student's special education teacher indicated the student had improved in the area of reading comprehension and his resource room teacher indicated that, although the student continued to demonstrate difficulty in the area of decoding, he did exhibit improvement (Dist. Ex. 42 at pp. 14, 18-19). Further, the student's regular education teacher indicated that by the end of the year, the student's confidence had improved, and he was volunteering to read (June 24, 2013 Tr. at p. 163; Dist. Ex. 42 at p. 22).

Moreover, despite some evidence in the hearing record that the student struggled in math (see, e.g., Tr. pp. 1148, 1154, 1160-61, 1164), the record as a whole indicates that the student maintained his average math abilities.[28] For example, the October 2011 WIAT-III results indicated the student achieved standard scores of 93 (average) in numerical operations and 104 (average) in math problem solving (Dist. Ex. 34 at p. 1). While these scores generally indicate an average skill level in math, a March 2012 administration of the WJ-III ACH similarly indicated the student maintained or improved upon his average skills, achieving standard scores of 108 (average) in calculations and 112 (high average) in applied problems on this assessment (see Dist. Ex. 34 at p. 1).

[28] The parent appears to place great weight on a report card from June 2012 indicating that the student's performance rating decreased in some math content areas during the course of the year (Tr. pp. 1160-61; Dist. Ex. 45 at p. 4). However, this does not necessarily reflect an overall decrease in ability. This is especially true where, as here, there is a significant amount of evidence in the hearing record that suggests the contrary. In addition, the student was "moved up" to a higher level class in math in the middle of the school year, and the extent to which this may have affected the student's performance evaluation cannot be ascertained from this record (June 24, 2013 Tr. pp. 148-51). Accordingly, the report card's indication that the student was making less progress than he had previously in some content areas does not lead me to the conclusion that the district fail to offer the student an appropriate program (Walczak, 142 F.3d at 130 [the IDEA "does not itself articulate any specific level of educational benefits that must be provided through an IEP"]).

In addition, the hearing record reflects that the student generally did well in math during the 2011-12 school year. According to the student's regular education teacher, the student demonstrated excellent progress during the 2011-12 school year (June 24, 2013 Tr. p. 165). In fact, the student's regular education teacher testified that the student was only in his math class for a short period because the student was ready to move to the next highest math group (June 24, 2013 Tr. p. 148).[29] The regular education teacher testified the student's 2.4 grade level performance on an assessment of his math skills supported the decision to move him to a higher math group (June 24, 2013 Tr. pp. 157-59; Dist. Ex. 18 at p. 1). Additionally, the regular education teacher testified that the district placed the student in the next highest math group because it was the student's strongest skill (June 24, 2013 Tr. pp. 149-51). In addition, the hearing record indicates that the student scored at level three on the New York State assessment in math (June 24, 2013 Tr. pp. 151-152; Dist. Ex. 46 at p. 24).

In light of the above, the hearing record indicates that the student made progress during the 2011-12 school year, modeling the July 2012 IEP after the prior IEP in this instance was reasonably calculated to enable the student to continue making progress in the district public schools (see H.C., 2013 WL 3155869, at *2; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]).[30]

C. Bullying

Finally, the parent alleges that the public school was inappropriate for the student based on her claims that the student was "bullied" by staff and students at the public school during the 2011-12 school year, and that the district failed to address the problem. Since the parent does not clearly identify the incidents about which she is complaining, the exact scope of this allegation is not entirely clear. However, it appears from a review of the hearing record that the parent's allegations relate to the following: (a) an incident involving a lunch aide in October 2011; (b) an incident involving an altercation with a student during a school field trip in November 2011 ; (c) problems that the student was having with a different student in early- to mid-November 2011; (d) a playground incident (described by the parent as a "single transgression") in mid-November 2011 involving yet another student during which the student's face was scratched; (e) problems with the student's third-grade regular education teacher, the school librarian, and the student's art teacher; (f) problems with a group of students after school in April/May 2012 ; (g) an incident in which a teaching assistant allegedly "grabbed" the student; and (h) various other incidents involving aides or monitors later in the school year (Tr. pp. 715-718, 722-24, 1240-43, 1258; Dist. Ex. 52 at pp. 16, 30, 33, 40, 60, 95, 113-116, 118; Parent Ex. A).

[29] There is testimony in the hearing record suggesting that the student was moved to a different math class because of alleged problems he was having with his math teacher (see, e.g., Tr. pp. 1241, 1270, 1335-36). However, the student's math teacher (who was also his regular education teacher) testified that the student tested out of his math class (June 24, 2013 Tr. p. 148), and there is documentary evidence in the record supporting this testimony (see Dist. Ex. 52 at p. 51).

[30] As an aside, I note that in an apparent attempt to explain the student's progress, the parent contends that the student copied from other students. However, while there is testimony from the student's maternal grandmother that the student told her he copied from other people at times (Tr. pp. 1163, 1219), there is insufficient evidence in the hearing record to support a finding that all of the student's progress could be attributed to copying from other students.

As an initial matter, the hearing record reveals that many of the above-described incidents could not fairly be described as "bullying." For example, the record reflects that parent's October 2011 complaint against the district's lunch aide was initially withdrawn by the parent herself because she felt that "bullying" was "not accurate" and "too strong a descriptor" for the incident (Dist. Ex. 12). In addition, the incident involving the alleged "grabbing" by a teaching assistant appears to actually have been an attempt by the assistant to help the student up after he threw himself on the floor, and the parent's claims against district aides or monitors relating to the end of the school year appear to have been related to incidents in which the student allegedly used foul language or yelled out inappropriately (Tr. pp. 722-24; Dist. Ex. 52 at p. 118). There is also no indication in the hearing record that the above-described incidents were anything more than isolated incidents. In fact, most appear to have been one-time occurrences, including many of those involving school personnel.

In addition, the principal of the district public school testified that he thoroughly investigated and addressed any incident that was brought to his attention by the parent (Tr. pp. 710-711). In particular, the record reflects that the principal responded to the parent's concerns with respect to the student's general education teacher, the school's art teacher, librarian, and lunch monitors, and the "grabbing" of the student by the teaching assistant (Tr. pp. 706, 710-13, 720, 723). In addition, the record reflects that principal investigated and was involved in resolving the issues the student experienced in November 2011 during lunch, after school, and on the playground (Tr. pp. 725-733). With respect to these latter incidents, the record reflects that the district went so far as to have the student "shadowed in the cafeteria and on the playground," and there is no indication in the record that the student had any subsequent problems with the students alleged to have bullied him (Dist. Ex. 52 at p. 40). In fact, the record reflects that the student's father met with the principal regarding these matters in November 2011, at which time the issues appeared to be resolved (Dist. Ex. 52 at p. 42). In addition, and with respect to the parent's concerns regarding the group of students who bothered the student after school in April or May 2012, the record reflects that that this matter was investigated by the principal and that a security guard was assigned to watch the student during after school hours (Tr. p. 716; Dist. Ex. 52 at p. 115). In addition, the hearing record reflects that the principal spoke with the children involved in these incidents and the hearing record does not indicate that any additional incidents thereafter occurred (Dist. Ex. 52 at p. 115). Accordingly, the hearing record supports a finding that the district took the parent's concerns seriously and took reasonably actions in response.

Moreover, assuming for the sake of argument that the student was bullied in this case to the extent described by the parent, there is no indication from the hearing record that the bullying resulted in the denial of a FAPE or that the student did not receive meaningful educational benefit (see Dear Colleague Letter, 61 IDELR 263 [OSEP Aug. 20, 2013] [noting that districts have an obligation to ensure that students who are targeted by bullying behavior continue to receive FAPE pursuant to their IEPs]; Dear Colleague Letter, 55 IDELR 174 [OSEP OCR 2010]; see also Smith v. Guilford Bd. of Educ., 2007 WL 1725512, at *4-*5 [2d Cir. June 14, 2007] [indicating that bullying might, under some circumstances, implicate IDEA considerations]). There is also no indication from the hearing record that any of the alleged bullying resulted in the district's failure to implement substantial or significant provisions of the IEP or that the student was denied educational benefits or failed to make academic progress under the July 2012 IEP. Accordingly, while I sympathize with the parent's concerns, the hearing record does not support a conclusion that the district did not take the parent's concerns seriously, or that it failed to act appropriately or reasonably in each instance. Further, while the above-described incidents were undoubtedly

upsetting for the student, the hearing record does not indicate that any of the incidents led to a deprivation of educational benefit. To the contrary, and as discussed above, the record reflects that the student made academic progress during the 2011-12 school year. Accordingly, the hearing record in this matter does not support a finding that the student was denied a FAPE as a result of these incidents. If the parent continues to have concerns going forward that the student is being bullied and that the bullying is resulting in the denial of a FAPE to the student, she can request that the CSE reconvene. Should the CSE then determine that additional services are not warranted to address the parent's concerns, it must provide her with prior written notice on the form prescribed by the Commissioner that, among other things, provides an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[b][1]-[2]; see 8 NYCRR 200.1[oo]; 200.5[a]).

D. Appropriateness of Windward

While the parent's appeal must be dismissed for the reasons discussed above, I now turn to the IHO's findings with respect to the appropriateness of Windward to meet the student's needs.

It is well settled that a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 14; 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, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see 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; 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]; Educ. Law § 4401[1]; 34 CFR 300.39[a][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 M.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; Frank G., 459 F.3d at 364-65).

Here, the hearing record lacks sufficient information about Windward to make a finding regarding whether it sufficiently met the student's special education needs. As noted by the IHO, neither a Windward teacher nor administrator testified regarding the student's educational needs or the program offered by the school. Rather, in support of the "appropriateness" of Windward as a placement for the student, the parent relied on general information about the school, including its mission statement, information about the programs it offered, and how its teachers were trained (see Parent Exs. N; O). In addition, the parent relied upon the fact that both she and the student's maternal grandmother (a retired special education teacher) liked the school, and believed that the student was doing well there. However, other than a general class schedule (Parent Ex. L), lacking from the hearing record is any detailed information regarding the classes the student was taking, the curriculum utilized in those classes, or information regarding how the student's individual needs were being met at Windward. Further, aside from three notebooks containing written expression material (but which lacked a specific explanation regarding the context of the material) and general statements made by the parent and her mother, the hearing record lacks any detailed information regarding the student's performance while at Windward (see Parent Exs. M-1; M-2; M-3). Accordingly, the IHO correctly held that the hearing record lacks sufficient information to establish that Windward provided the student with specially designed instruction designed to address his unique needs, and so does not support a finding that Windward was an appropriate placement for the student for the 2012-13 school year.

VII. Conclusion

The record supports the IHO's determinations that the district offered the student a FAPE for the 2012-13 school year and that the parent failed to establish that Windward was an appropriate placement for the student. Thus, the necessary inquiry is at an end and whether or not equitable considerations support an award of tuition reimbursement need not be addressed (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; A.D. v. New York City Dep't of

Educ., 2013 WL 1155570, at *14 [S.D.N.Y. Mar. 19, 2013]). In light of this, it is not necessary to address the additional findings made by the IHO' or the parties' remaining contentions.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
November 22, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER