The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 14-100

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

Law Offices of Neal Howard Rosenberg, attorneys for respondent, Karen Newman, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Stephen Gaynor School (Stephen Gaynor) for the 2013-14 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

With regard to the student's educational history, the hearing record indicates that the student received early intervention and CPSE services before attending a general education classroom from kindergarten through second grade (Tr. pp. 110-13). Based upon teacher and parental concerns with the student's academic progress, the student received integrated co-teaching (ICT) services within a general education classroom for third and fourth grade (Tr. pp. 114-15). The hearing record reflects that, since at least the end of first grade, the student received related services including occupational therapy (OT), physical therapy (PT), and speech-language therapy

(Tr. p. 114-15; see Dist. Ex. 5 at p. 3). The hearing record further reflects that, when the district recommended placement in a general education setting with ICT services for the 2012-13 school year, the parent unilaterally enrolled the student at Stephen Gaynor (Tr. pp. 9-10, 117-18).[1] On February 28, 2013 the parents signed an enrollment contract with Stephen Gaynor for the student's attendance during the 2013-14 school year (see Parent Ex. F at pp. 3-4).

On June 18, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the student's 2013-14 school year (see Dist. Ex. 8 at pp. 1, 16). Attendees at the June 2013 CSE meeting included a district school psychologist (who also served as the district representative), a district special education teacher, the parent, and the student's then-current teacher from Stephen Gaynor (id. at p. 18; see Tr. pp. 17-18). Finding the student eligible for special education services as a student with a learning disability, the June 2013 CSE recommended a 12:1 special class placement in a community school (Dist. Ex. 8 at pp. 1, 12-13, 15).[2] In addition, the June 2013 CSE recommended related services of three 40-minute session per week of individual speech-language therapy (id. at p. 13).

By final notice of recommendation (FNR) dated August 14, 2013, the district summarized the 12:1 special class and speech-language therapy recommended in the June 2013 IEP and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (see Dist. Ex. 7).

By letter dated August 21, 2013, the parents notified the district of their concerns with the size of the classroom ratio identified in the June 2013 IEP (Parent Ex. B at p. 1). The parent indicated that the student would not receive "enough individualized attention" in a 12:1 classroom as she required "a small class in a small full[-]time special education school" (id.). Therefore, based upon this concern, the parents rejected the June 2013 IEP and indicated that they would place the student at Stephen Gaynor for the 2013-14 school year (id.). The parent further indicated that she was "unable to visit" the assigned public school classroom because the school was not open, but would schedule a visit "[u]pon the opening of [the] school" (id.).

After visiting the assigned public school site, by letter dated September 20, 2013, the parent alleged that it would be inappropriate for the student (Parent Ex. C at pp. 1-2). First, the parent argued that the 12 student class would be too large for the student, as it did not "br[eak] up into smaller groups" and would not provide the student with the "individualized attention" she required (id. at p. 1). The parent also contended that the student would be enrolled in elective classes with regular education students and that this was inappropriate for the student (id.). According to the parent, the student had self-esteem issues related to comparing herself to regular education peers (id.). The parent further argued that the classroom instruction level was inappropriate for the student and that the teacher would not employ specific instructional strategies and methodologies the student required (id.). Additionally, the parent averred that the student required a teacher who could keep the student "engaged[,] . . . focused[,] and re-direct[ed]", and that her observations led

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

[2] The student's eligibility for special education programs and 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])

her to believe that the classroom teacher would not do so (id.). Therefore, the parent reiterated her rejection of the June 2013 IEP and indicated that she would "seek reimbursement" for the costs of the student's education at Stephen Gaynor during the 2013-14 school year (id. at p. 2).[3]

A. Due Process Complaint Notice

In a due process complaint notice dated January 21, 2014, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Dist. Ex. 1 at p. 1). Specifically, the parent alleged that the June 2013 CSE was improperly constituted and that the June 2013 IEP contained "insufficient goals and objectives" (id.). Additionally, the parents asserted that the June 2013 CSE "failed to appropriately consider [a January 2012] neuropsychological report which stated that th[e] student require[d] a small class in a small full time special education school" (id.). The parents also contended that a 12:1 special class in a community school was inappropriate for the student (id. at pp. 1-2).

With respect to the assigned public school site, the parents asserted that, based on their observations during a visit, the environment was "too large," particularly because the "12:1 class d[id] not break down into smaller groups" and there was only "one special education teacher for 12 students" (Dist. Ex. 1 at p. 1). Further, the parents asserted that the recommendation that the student attend "electives and lunch" in a regular education environment would exacerbate the student's self-esteem difficulties (id.). The parents also indicated that the teacher in the proposed classroom taught at "too high a level for [the student] for reading and math" (id.).

As relief, the parents requested that the IHO order the district to reimburse them for the costs of the student's tuition at Stephen Gaynor for the 2013-14 school year and provide transportation to the school (Dist. Ex. 1 at p. 2). The parent also requested the costs of the student's tuition pursuant to pendency to the extent applicable (id.).

B. Impartial Hearing Officer Decision

On May 30, 2014, an impartial hearing convened in this matter (Tr. pp. 1-144). By decision dated June 4, 2014, the IHO found that the district failed to offer the student a FAPE for the 2013-14 school year, that Stephen Gaynor was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for relief (IHO Decision at pp. 2-3, 34-36).

Initially, the IHO found that the June 2013 CSE process "was defective because the district representative lacked a comprehensive understanding of available middle school programs . . . ." (IHO Decision at p. 2). Next, the IHO found that the district "lacked an adequate understanding of the disjunction between the [student's] performance on measures of her ability/intellect and measures of her performance/achievement" (id. at p. 3). The IHO further determined that the June 2013 IEP "lack[ed] [a] precise description of the placement characteristics essential to this

[3] The parents' August 2013 and September 2013 letters were both transmitted by facsimile, and it appears that the facsimile confirmation pages were switched when the exhibits were entered into evidence at the impartial hearing (compare Parent Ex. B at pp. 1, 2 [August 2012 letter with September 2013 facsimile confirmation date], with Parent Ex. C at pp. 1, 3 [September 2012 letter with August 2013 facsimile confirmation date])

[student's] needs" (id. at p. 2). In addition, the IHO found that the recommended 12:1 special class was "insufficiently teacher-intensive to be appropriate" for the student (id.; see id. at pp. 34-35). The IHO found that an appropriate program did not exist in the district "because more adult-rich settings" offered more attention to behavioral needs of students, rather than academic needs (id. at pp. 2-3; see id. at pp. 34-35).

With respect to the assigned public school site, the IHO indicated that because "[n]o district witness testified about the program, . . . the [parents'] observations . . . must be taken as true" (IHO Decision at p. 2). With respect to the parents' observations, the IHO indicated that these observations "stood in sharp contrast [to] the program described by the district's witness as the one she imagined the IEP would deliver" (id. at p. 35). Specifically, the IHO indicated that the parents observed "a single teacher self-contained class", rather than the "departmentalized " program the district witness testified about, particularly in that the proposed classroom included "several periods a day of mainstream instruction, as opposed to the IEP's mandate that all minor and special classes also be in a 12:1 ratio" (id.). Moreover, the IHO found that the assigned public school site was inappropriate for the student, as it was too large to meet her social/emotional needs (id.). In this regard, the IHO also found that the including the "significant amount" of access to typically developing peers and a lack of "support for transitions between classes and periods" further rendered the assigned public school inappropriate for the student (id.).

Turning to the unilateral placement, the IHO found that parents met their burden to show that Stephen Gaynor offered a "general approach . . . individually tailored to address [the student's] specific needs" (IHO Decision at p. 3; see id. at p. 35). The IHO also noted testimony that the student was making progress (id. at p. 3). Finally, the IHO noted "that the equities favor district responsibility for" the costs of the student's tuition at Stephen Gaynor (id. at p. 35).

Accordingly, the IHO ordered the district to reimburse the parents for any amount paid toward for the student's tuition at Stephen Gaynor for the 2013-14 school and to pay directly to the school any outstanding balance (IHO Decision at pp. 3, 35-36).

IV. Appeal for State-Level Review

The district appeals seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2013-14 school year and that equitable considerations weighed in favor of the parents' request for relief. Initially, the district argues that the IHO's decision failed to conform to State regulations and standard legal practice, in that it failed to include citations to applicable law and testimony and failed to provide a specific legal basis for the decision. Further, the district argues that "none of the issues that the IHO rule[d] upon were properly raised" in the parents' due process complaint notice because the parents' allegations contained therein were "overbroad and vague."

As to the IHO's specific findings, the district asserts that the IHO erred in finding that the district representative was not qualified, noting, on the contrary, evidence regarding the district representative's experience and familiarity with the continuum of special education programs available to the student. The district asserts that, while not addressed by the IHO, should composition of the June 2013 CSE be addressed, the evidence showed that the required members

attended and that a regular education teacher was not a required member of the CSE or, in the alternative, that the absence of a regular education teacher did not result in a denial of a FAPE.

With respect to the IHO's finding that the district did not understand the student's intellectual capacity versus her performance in school and on standardized tests, the district argues that testimony elicited at the impartial hearing reveals otherwise. Next, the district argues that the IHO's finding that the June 2013 IEP did not sufficiently describe the placement characteristics essential to the student's needs was "at best unclear" and cites the various strategies included in the IEP to address the student's management needs, as well as the recommended testing accommodations, and the description of the student's present levels of performance, which the district asserts was consistent with information regarding the student obtained from Stephen Gaynor. Although not addressed by the IHO, the district argues that the June 2013 IEP included measurable annual goals that addressed the student's needs arising from her disability, including her needs relating to speech-language, reading, writing, time management, mathematics, and note-taking. Further, as to the parents' allegation in their due process complaint notice that the June 2013 CSE did not consider a nueropsychological evaluation report, the district argues that the CSE used the report to describe the student's cognitive and verbal skills and that the recommendations in the IEP did, in fact, align with the recommendations in the evaluation report.

As to the 12:1 special class, the district alleges that, contrary to the IHO's finding, the placement constituted the least restrictive environment (LRE) for the student and cites testimony indicating that a 12:1+1 special class would have been inappropriate for the student because this configuration was more appropriate for students who exhibited interfering behaviors. The district also argues that, contrary to the IHO's finding that the student required a more teacher intensive setting, the hearing record indicated that the "main utility that a second teacher served for [the student] was to help her with organization, rather than instruction" and that the June 2013 IEP included ample supports to address the student's attention and focus needs.

The district further asserts that the IHO erred in his decision regarding the ability of the assigned public school site to implement the June 2013 IEP in that such considerations were speculative since the student never attended the assigned public school site. In any event, the district asserts that the parents' allegations in their due process complaint notice did not target the assigned school's ability to implement the IEP and, even if true, did not conflict with the recommendations in the June 2013 IEP. Further, to the extent that the parents raised the issue of the level of instruction in the proposed classroom, the district asserts that the June 2013 IEP identified the student's instructional levels and recommended supports to address the student's need for redirection to focus.

With respect to equitable considerations, the district asserts that the IHO's decision was conclusory and that the statement that neither party carried the burden of proof with regard to equitable considerations was "clear error."

In an answer, the parents respond to the district's petition by admitting or denying the allegations raised therein and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2013-14 school year, that Stephen Gaynor was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for relief. With respect to the June 2013 CSE meeting, the parents contend that the June 2013 CSE

did not give due weight to the June 2012 neuropsychological evaluation's recommendation that the student attend a small class within a small special education school. As to the June 2013 IEP, the parent avers that it does not contain annual goals that address the student's memory, attention, and social/emotional needs. Additionally, the parent alleges that the IEP's goals were developed after the CSE meeting. The parent also argues for the first time on appeal that the June 2013 IEP is invalid because several portions were blank and, further, that it does not prescribe counseling to meet the student's social/emotional needs. Finally, the parent argues that the IEP's 12:1 placement recommendation did not offer the student sufficient support to meet her needs.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-83, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that

Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters; Sufficiency of IHO Decision

First, the district objects to the IHO's failure to include citations to the hearing record in his decision. State regulations provide that an IHO's decision "shall set forth the reasons and the factual basis for [its] determination" and "shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). According to a footnote in the IHO's decision, the decision does not reference the hearing transcript because a final transcript was unavailable at the time he wrote the decision (IHO Decision at p. 34, n.11). Presumably the IHO elected to issue his decision in a timely manner rather than await the arrival of the hearing transcript.[4] Although this may have been permissible under the circumstances of this case, it appears the IHO also failed to reference any of the exhibits entered into evidence at the impartial hearing, which would have been available at the time he drafted the decision. Nevertheless, the IHO's decision, particularly its discussion of the student and her needs, is consistent with the evidence in the hearing record (see id. at pp. 34-35). Thus, although the IHO erred in failing to reference the evidence in the hearing record, there was no harm to the parties under the circumstances of this case.

Next, the district argues that the IHO's decision was legally insufficient insofar as it failed to address many of the issues identified in the parents' due process complaint notice. An IHO is required to issue detailed findings on the discrete issues identified in a party's due process complaint notice, a process that entails detailed factual and legal analysis (34 CFR 300.511[c][1][iv] [an IHO "[m]ust possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice"]; see generally 20 U.S.C. § 1415[f][3][E]; 8 NYCRR 200.5[j][4]). Here, the IHO failed to address issues that were raised in the parents' due process complaint notice including the composition of the June 2013 CSE, the sufficiency of the June 2013 IEP's annual goals, and the extent to which the CSE considered a January 2012 neuropsychological report (see Dist. Ex. 1 at p. 1). Although courts have recently indicated that an SRO may remand to an IHO when the IHO has not made determinations on issues raised in the

[4] It is impossible to determine the applicable timelines based on the evidence in the hearing record. While the IHO may have granted one or more specific extensions of time (see 8 NYCRR 200.5[j][5][i]), the hearing record does not contain, as required by State regulations, a written response to any such request (8 NYCRR 200.5[j][5][iv]). Moreover, the hearing record is silent as to if and when a resolution session occurred; therefore, it is impossible to tell whether the decision would have been due 45 days from the date that the district received the parents' original due process complaint notice, dated January 21, 2014 (see Dist. Ex. 1 at p. 1).

due process complaint notice (see T.L. v. New York City Dep't of Educ., 938 F. Supp. 2d 417, 437 [E.D.N.Y. 2013]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 591 [S.D.N.Y. 2013]), the hearing record in this proceeding is sufficient for a determination on these issues and I will address them herein. This disposition, however, is not intended to endorse the IHO's selective disposition of the parents' claims.

Finally, the district contends that the IHO exceeded the scope of the impartial hearing by issuing findings on claims not raised in the parents' due process complaint notice. Specifically, the district objects to portions of the IHO's decision indicating that the district did not understand the disparity between the student's intellectual capacity and her academic performance and that the June 2013 IEP did not sufficiently describe characteristics of the "placement" essential to the student's needs (IHO Decision at pp. 2, 3). Although the IHO characterized these determinations as "findings," it appears that these statements merely support the IHO's ultimate finding that the district failed to meet its burden to demonstrate that a 12:1 special class placement offered the student a FAPE. Thus, because these statements did not constitute independent bases upon which the IHO concluded that the district failed to offer the student a FAPE for the 2013-14 school year, the IHO did not exceed his jurisdiction in this respect.

B. Scope of Review

On appeal, the parent contends that the June 2013 IEP is invalid because several portions of it are blank and it did not prescribe counseling services to meet the student's social/emotional needs. With respect to these claims, raised for the first time on appeal, 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 J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 Fed. App'x 65 [2d Cir. 2014]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]). The parent's due process complaint notice cannot reasonably be read to include either of these claims (see Dist. Ex. 1). Further, a review of the hearing record shows that the district did not agree to an expansion of the scope of the impartial hearing to include these issues, nor did the parent attempt to amend the due process complaint notice to include these issues. Therefore, these allegations are outside the scope of my review and will not be considered.

Moreover, a review of the hearing record reveals that the IHO exceeded his jurisdiction by issuing a sua sponte finding that the district representative "lacked a comprehensive understanding of available middle school programs" within the district (IHO Decision at p. 2). 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 Student with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708, 713 [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 those issues (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]). For those reasons, this finding is hereby annulled.[5]

C. June 2013 IEP

On appeal, the district argues that the IHO erred by finding that the June 2013 IEP's recommendation of a 12:1 special class would not have provided the student with a FAPE. A review of the hearing record supports the IHO's conclusion that a 12:1 special class placement was inappropriate to meet the student's needs.

In order to assess the June 2013 CSE's placement recommendation, it is first necessary to review the evaluative material considered by the CSE and how that evaluative data was used to describe the student's needs in the June 2013 IEP. To be clear, however, neither the evaluative procedures employed by the district nor the accuracy of the present levels of performance in the June 2013 IEP are challenged issues and they may not be relied upon as a basis for finding a denial of a FAPE.[6] The June 2013 CSE considered a January 2012 neuropsychological evaluation report, a 2012-13 mid-year report card from Stephen Gaynor, a 2012-13 mid-year speech and language remediation report from Stephen Gaynor, and an April 2013 speech and language evaluation report (Dist. Exs. 3-6; see Tr. p. 18).

The January 2012 neuropsychological evaluation assessed the student's behavior, social/emotional functioning, and general intelligence as well as her abilities in the areas of academics, memory, executive functioning, attention and concentration, language, motor function, and spatial/perceptual skills (Dist. Ex. 5 at pp. 5-12). With respect to the student's behavior, the evaluator observed that the student exhibited "difficulty with receptive language skills", was "anxious about her performance" on testing, and demonstrated "difficulty standing still . . . [and] [a]t times . . . attending to [testing] material" (id. at p. 5). Administration of the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV) yielded the following standardized scores: verbal comprehension index 110 (high average), perceptual reasoning 90 (average), working memory 94 (average), and processing speed index 85 (low average) and a full scale IQ of 95 (average) (id. at pp. 5, 13). The evaluator deemed the 25 point discrepancy between the student's verbal comprehension index and her processing speed index to be significant (id.).

Administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) yielded 18 subtest scores within the average range, and five subtest scores—letter word identification, calculation, math fluency, sound awareness, and punctuation and capitals—in the low average range (Dist. Ex. 5 at p. 14). A theme throughout the narrative in the evaluator's report was the

[5] To the extent this finding could be construed as a challenge to the composition of the June 2013 CSE, the hearing record reveals that the CSE was properly composed and the parents do not contend otherwise on appeal (Dist. Ex. 8 at p. 18; see Tr. pp. 17-18).

[6] The parents only challenged the CSE's conclusions drawn from the evaluative information, not that the evaluations themselves were improperly conducted or lacked sufficient information about the student.

student's "longstanding difficulty with receptive and expressive language skills" (Dist. Ex. 5 at p. 6, see also pp. 5-7, 9, 13-16). The evaluator indicated that the student's deficits in these areas hindered her ability to understand and answer the questions posed by the evaluator during, for example, the verbal comprehension index portion of the WISC-IV and the word samples tasks of the WJ-III ACH (see id. at pp. 5, 7). According to the evaluator, "questions and directions frequently had to be repeated and clarified in order for her to understand them" (id. at p. 9). Moreover, the student "often mishear[d] words and numbers" and "exhibit[ed] significant difficulty with auditory discrimination of similar sounding words" (id.) Administration of expressive language tests as part of the NEPSY-II produced scores in the borderline range (id.).

The evaluator reported that the student also presented with delays in the areas of executive functioning, attention, and concentration (Dist. Ex. 5 at p. 8). The student's performance on the Trail Making Test revealed "severely impaired" scores pertaining to the student's attention and executive functioning (id.). Further, the student's scores on the Wisconsin Card Sorting Test – a test that "assess[ed] the [student's] capacity to inform, maintain, and shift cognitive strategies in response to environmental feedback" – fell in the low average range (id.). Administration of the continuous performance test revealed "erratic" responses "indicative of poor attention capacity" as well as "impulsivity and limitations in vigilance" (id.). The parents confirmed the accuracy of these testing results to the evaluator, indicating that the student could easily "lose focus and miss out on important parts of what ha[d] been said" (id.). Additionally, the parents indicated that the student exhibited difficulty "getting started" when presented with several tasks at one time, and "move[d] around and talk[ed] frequently" (id. at p. 9). Based upon these testing results as well as the parents' observations, the evaluator concluded that the student met the criteria for a diagnosis of an attention deficit disorder (ADHD), inattentive type (id.).

The January 2012 evaluation also assessed the student's motor, visual/spatial, perceptual, and constructional skills (see Dist. Ex. 5 at p. 9). Upon administration of the Purdue Pegboard Test, the evaluator found the student's motor skills "mildly impaired" when using each hand independently, and "severely impaired" when both hands were utilized (id.). The evaluator additionally noted "difficulty" with visual/motor and visual/spatial skills, with the student exhibiting relative strength in visual/perceptual skills (id.). Considering the student's abilities and needs, the evaluator recommended, among other things, that the student receive "much 1:1 teacher intervention to help her . . . process [ ] information" as well as placement in a "full-time, small special education school setting in a small classroom with a low student to teacher ratio" (id. at p. 12).

A January 2013 mid-year report card from Stephen Gaynor identified the student's current areas of study as well as the student's areas of strength and areas that were in need of support (Dist. Ex. 3 at pp. 1-13). The student's teachers noted that the student was creative, hard-working, and socially well-adjusted (id. at pp. 1, 7, 8, 10-13). The report card also noted that the student exhibited difficulty sustaining attention, following directions, organizing her thoughts, and that a goal was for her to independently employ "tools and strategies [to] promote her learning" (id. at p 1; see generally id. at p. 1-13). With regard to the student's social/emotional functioning, the report card indicated that the student, among other things, "[a]djusted very well to [her] new school [ ] environment," was "[p]assionate and empathetic toward peers," and "respectful of adults" (id. at p. 13). The report card also noted that the student participated in a "social group to facilitate positive peer interaction" (id.). With respect to the student's homework, the report card indicated

that the student "benefit[ted] from 1:1 support to remain organized and ensure understanding" (id. at p. 12).

The June 2013 CSE also reviewed a 2012-13 mid-year speech and language remediation report completed by a speech-language pathologist who provided services to the student at Stephen Gaynor (Dist. Ex. 4 at pp. 1-3). This report indicated that the student received a weekly individual/dyad session as well as a classroom collaborative session (id. at p. 1). Regarding the student's receptive language abilities, the report indicated that the student exhibited "difficulty maintaining focus during large classroom lessons" and was "often distracted by items in or around her desk" (id.). The student was also "sensitive to noises" which "ma[de] it difficult for her to concentrate at times" (id.). The speech pathologist observed that the student worked "[b]etter in small groups" (id.). Additionally, the speech pathologist noted that the student's memory improved when she possessed a "tangible experience with which to connect to [presented] material" (id.). Regarding the student's comprehension abilities, the speech language pathologist noted that the student did not yet utilize new vocabulary in oral or written assignments (id.). She additionally noted that visualizations and exposure to synonyms aided the student in understanding new words (id.). Further, the student "frequently ask[ed] questions throughout [the] lesson[s]" and was working on note-taking strategies at the time of the report (id. at p. 2).

Turning to the student's ability to follow directions, the speech-language pathologist reported that the student "follow[ed] routine directions with ease" but that her ability to do so broke down "as directions bec[a]me longer and more complex" (Dist. Ex. 4 at p. 2). The speech-language pathologist noted that repetition and breaking down instructions into smaller components assisted the student in this regard (id.). As for the student's higher level language skills, the speech pathologist reported that the student was a "concrete thinker" and that abstract information was difficult for the student to process (id.). Additionally, though the student "always ma[de] a concerted effort to make connections . . . to the outside world," these connections were "sometimes . . . not logical" (id.). As for the student's expressive language abilities, the speech pathologist found the student to be "very verbal and very comfortable expressing herself in a variety of settings" (id.). The student exhibited "challenges with retrieval" and, with assistance, was "beginning to use description as a strategy for word finding" (id.).

An April 2013 speech-language evaluation conducted by a speech-language pathologist from a private testing company at the district's behest assessed the student's abilities through formal testing, observation, and parental input (Dist. Ex. 6 at pp. 1-5; see Tr. p. 31). Overall, the evaluator found the student's language skills to be in the average range, except for the student's receptive language skills, which were below average (id. at pp. 2-3, 5). Administration of the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-IV) yielded the following core and index scores: core language 96 (average), expressive language index 110 (average), language content index 100 (average), language memory index 94 (average), and receptive language index 79 (below average) (id. at p. 2). The evaluator further observed that the student's hearing, fluency, voice, and articulation skills were all within normal parameters (id. at pp. 4, 5). The evaluator also noted the parents' observations that the student was a "highly verbal child with many ideas . . . [and] strong verbal language skills" who exhibited difficulties in "receptive language, reading, writing, and spelling" (id. at p. 1).

Turning to how the evaluative data was reflected in the student's present levels of performance in the June 2013 IEP, consistent with the January 2012 neuropsychological assessment report, the June 2013 IEP indicated that the student's overall cognitive skills were in the average range, with her verbal comprehension skills in the high average range and described as "significantly stronger" than her perceptual reasoning and processing speed skills (compare Dist. Ex. 5 at pp. 5, 13, with Dist. Ex. 8 at p. 1). [7] The IEP also reflected the neuropsychological assessment findings that the student's academic test scores ranged from low average to average (compare Dist. Ex. 5 at p. 14, with Dist. Ex. 8 at p. 1). Results from an April 2013 administration of the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) were also incorporated into the IEP, indicating that the student's core language score was in the average range, as was her expressive language index, language content index, and language memory index scores (compare Dist. Ex. 6 at pp. 1-3, with Dist. Ex. 8 at p. 1). Reflected in the IEP were the results of the April 2013 speech-language evaluation report, noting that the student's receptive language index score was in the low average range (compare Dist. Ex. 6 at p. 2, with Dist. Ex. 8 at p. 1). The June 2013 IEP present levels of performance also incorporated narrative information from the April 2013 speech-language evaluation report, which described the student's difficulty with receptive language tasks, strong expressive language skills, and inconsistent response time (compare Dist. Ex. 6 at pp. 3-4, with Dist. Ex. 8 at pp. 1-3).

The school psychologist who also served as the district representative at the June 2013 CSE meeting testified that in addition to the information provided by the January 2012 neuropsychological assessment, the April 2013 speech-language evaluation, and the Stephen Gaynor mid-year speech-language remediation reports, the CSE members also discussed the student's needs, the results of which were reflected in the IEP (Tr. pp. 17-18, 20-23). The June 2013 IEP present levels of performance also included information from the mid-year Stephen Gaynor report card and input from the student's then-current teacher about the student's academic strengths and needs (Tr. pp. 17-18; Dist. Ex. 8 at pp. 2-3; see Dist. Ex. 3 at pp. 1-5, 7, 11-12). Based on discussion with the student's teacher, the CSE approximated that the student's reading, mathematics, and writing skills were at a third grade level (Tr. pp. 22-23; Dist. Ex. 8 at p. 16).

The June 2013 IEP reflected Stephen Gaynor reports that the student had adjusted well to her new school, was a loyal and kind friend, was respectful of adults and comfortable interacting with them, was able to work cooperatively in a group as well as with a partner, was comfortable speaking her mind and sharing personal experiences, was "passionate and empathetic," was able to successfully navigate social situations with minimal support, and participated in a social skills group to facilitate positive interactions (compare Dist. Ex. 3 at p. 13, with Dist. Ex. 8 at pp. 2-3).

[7] Contrary to the parents' assertion, the evidence in the hearing record reveals that the June 2013 CSE considered the January 2012 neuropsychological evaluation (Tr. pp. 18, 23-24, 35; Dist. Ex. 8 at p. 1). A CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (see, e.g., T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]). Here, it is clear that the June 2013 CSE considered the January 2012 neuropsychological evaluation report and incorporated its testing results into the IEP (see Dist. Ex. 8 at p. 1).

The IEP also indicated that the student exhibited strong interpersonal skills, and parent report that the student had made good friends (Dist. Ex. 8 at pp. 2-3).

The IEP further described the student as "an enthusiastic learner with a positive attitude and openness for learning," who "pushed herself to incorporate new skills, strategies and knowledge" (Dist. Ex. 8 at p. 3). According to the IEP the student wanted to succeed, was positive about herself, and indicated that her ability to manage transitions had improved (Dist. Ex. 8 at pp. 2-3). The student's teacher reported and the IEP reflected that the student "knows herself pretty well and can indicate when she needs support," adding that she was a "hard worker and perseveres through any challenge" (Dist. Ex. 8 at p. 3).

Regarding the student's attention skills, the IEP reflected that "all reports noted it was difficult for the student to maintain her focus and attention" (Dist. Ex. 8 at p. 3). The IEP also indicated that in May 2013 the student began "taking medication for her ADHD and some improvement in focus is noted" and was now "inconsistent" (Dist. Ex. 8 at pp. 2-3). The June 2013 IEP reflected that the student fidgeted with her pencil which affected her ability to follow directions, and at times she did not appear to be engaged (Dist. Ex. 8 at pp. 2-3).[8]

1. Annual Goals

Turning to the first disputed issue with regard to the content of the June 2013 IEP, after ascertaining the student's present levels of performance, the CSE recommended annual goals based upon these levels (Tr. pp. 19-22; Dist. Ex. 8 at pp. 5-12). On appeal, the parents allege that these goals do not address the student's social/emotional, memory, and attention deficits. First, with respect to the student's social/emotional needs, the evidence in the hearing record indicates that at the time of the January 2012 neuropsychological evaluation, the student's self-esteem challenges stemmed from her perceived inability to "do [ ] academic work at the same level as her peers" (Dist. Ex. 5 at pp. 4-5; Tr. p. 40). However, at the time of the June 2013 CSE meeting, current information available to the CSE about the student's school performance that was reflected in the IEP did not indicate that the student exhibited social/emotional needs to the extent that annual goals in this area were required for a FAPE (Dist. Exs. 3; 8 at pp. 2-3). The June 2013 IEP described the student as "an enthusiastic leaner with a positive attitude and openness for learning" and further reflected the parents' observation that the student was "very self aware and positive about herself" (Dist. Ex. 8 at p. 3). The IEP also indicated that the student was comfortable asking for help, that she was aware of how to use strategies and used them independently, and that she "perservere[d] through any challenge" (id.).

The parents are correct that the June 2013 IEP does not include annual goals specifically targeting the student's memory and attention difficulties; however, a review of the IEP as a whole shows that the recommended management needs and facets of the annual goals provided methods to assist her in making educational progress in light of these deficits (see Dist. Ex. 8 at pp. 4-12). As for the student's memory needs, the 2012-13 mid-year speech and language update completed by the student's speech-language pathologist at Stephen Gaynor indicated that the student's "memory improve[d] when she ha[d] a tangible experience with which to connect to [presented]

[8] The June 2013 IEP also described the student's physical development, including recent foot surgery and parent report that the student exhibited low muscle tone (Dist. Ex. 8 at p. 3).

material" (Dist. Ex. 4 at p. 1). The speech and language update also recommended multisensory instruction to help the student retain information (id.). Many of the June 2013 IEP's annual goals incorporated similar strategies to bolster the student's memory abilities (see Dist. Ex. 8 at pp. 6-8, 10-12).[9] Further, as described above, the IEP recommended resources to address the student's needs identified in the present levels of performance—including memory and attention needs—by recommending strategies to address her management needs, which were similar to those used at Steven Gaynor, such as breaking down multistep directions into smaller parts, presenting directions in more than one modality, repeating information, and providing visual cues, modeling, prompting, and multi-modal instruction (Dist. Exs. 3 at pp. 2, 4-7; 8 at p. 4).[10] Consequently, the district did not deny the student a FAPE by failing to address the student's needs in the areas of social/emotional, memory, and attention.

2. 12:1 Special Class Placement

After developing the student's present levels of performance and annual goals to address these areas of need, the June 2013 CSE recommended placement in a 12:1 special classroom in a community school (Dist. Ex. 8 at pp. 12-13, 15). The June 2013 IEP reflects that the CSE also considered ICT services within a general education environment, but rejected this placement because it "could not meet [the student's] needs at the time" (id. at p. 17).[11]

On appeal, the parent argues that the June 2013 CSE's 12:1 classroom recommendation was inappropriate because it did not address the student's need for individual attention.

The school psychologist testified that the June 2013 CSE considered placing the student in a classroom providing ICT services, but that based upon discussion at the meeting, determined that the student would "greatly benefit from having a smaller class" and a "more restrictive" setting (Tr. p. 25; see Dist. Ex. 8 at p. 17). According to the school psychologist, the CSE determined that an ICT classroom would be "just too large" and distracting for the student (Tr. p. 43). The CSE ultimately recommended placement in a 12:1 special class for 35 periods per week, which was "a

[9] In this regard, I note that administration of the WISC-IV during the January 2012 neuropsychological evaluation yielded a working memory score in the average range (Dist. Ex. 5 at p. 13).

[10] The parents' allegation that the student was denied a FAPE because the student's goals were improperly developed after the June 2013 CSE meeting is not persuasive. It appears, based upon the district representative's testimony, that the substance of the goals was discussed at the June 2013 CSE meeting (Tr. p. 19). The final language of the goals appears to have been drafted afterward (Tr. p. 19). This does not support a finding that the student was denied a FAPE because "there is no requirement in the IDEA or case law that the IEP's statement of goals be typed up at the CSE meeting itself, or that parents or teachers have the opportunity to actually draft the goals by hand or on the computer themselves, or that the goals be seen on paper by any of the CSE members at the meeting'" (E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *8 [S.D.N.Y Sept. 29, 2012], quoting S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *11 [S.D.N.Y. Nov. 9, 2011]).

[11] State regulations define ICT 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 integrated co-teaching 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]).

full day of instruction" according to the school psychologist, and also recommended three individual 40-minute sessions of speech-language therapy per week to address the student's language needs (Tr. p. 24; Dist. Ex. 8 at pp. 12-13). In recommending the 12:1 special class placement, the school psychologist indicated that the CSE took into consideration the recommendations of both the student's teacher from Stephen Gaynor, and the evaluator who conducted the neuropsychological assessment that a "small class" would be beneficial for the student (Tr. p. 43).

According to State regulation, a 12:1 special class placement derives from the provision which states that "[t]he maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting shall not exceed 15 students, or 12 students in a State-operated or State-supported school" (8 NYCRR 200.6[h][4][i]). With regard to increasing adult support beyond a 12:1 special class setting, State regulation further provides that a 12:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). In turn, "management needs" are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's "management needs" shall be determined by factors which related to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (see 8 NYCRR 200.1[ww][3][i][a]-[d]). According to the school psychologist, students in district 12:1+1 special class placements require an additional adult in the classroom to assist the teacher in regulating behaviors that interfered with the learning of others (Tr. pp. 44-45). However, according to the school psychologist, the student did not exhibit the need for an additional adult in the classroom due to a "behavioral issue;" rather, she required a smaller setting for instruction (Tr. p. 45). Additionally, the school psychologist testified that students typically placed in 12:1+1 special classes had different needs that were not compatible with the student's needs, including that they functioned "much lower" than the student cognitively (Tr. pp. 65; see Tr. p. 59). Although it did not appear from the school psychologist's testimony that she was aware which public school the student was ultimately assigned to attend for the 2013-14 school year, the school psychologist further testified that students in 12:1 special classes intellectually and socially "fit [the student's] profile" and the 12:1 special class was a program providing a "significantly homogeneous[]" group of students similar to the student both in terms of academic levels and management needs, which was more appropriate for her than a 12:1+1 special class setting (Tr. pp. 61-62; see Tr. pp. 55-56). The school psychologist testified that the student's Stephen Gaynor teacher was an "active participant" during the meeting, and based upon what the teacher explained the student was able to do and her cognitive functioning, a 12:1 special class setting would be more beneficial than placement in a 12:1+1 special class (Tr. pp. 28, 44).

The school psychologist testified she was aware that the student's classroom at Stephen Gaynor "was no more than 12 students" with at least one head teacher and either an assistant or assistant teacher (Tr. pp. 32-34, 55). When asked at the impartial hearing whether the CSE considered a more supportive classroom ratio, the school psychologist indicated that it did not consider a classroom containing additional supplementary school personnel because such a configuration was for students who "need[ed] an additional person in the room to regulate [his or]

her behaviors" (Tr. p. 45; see Tr. pp. 44-46).[12] The school psychologist further testified that the district did not have a "small" classroom, which according to the counsel for the parents, was defined as a classroom containing "two teachers" (Tr. p. 46).[13]

With regard to documentary information relevant to the level of intensity of the student's management needs and whether they interfered with instruction, the January 2013 Stephen Gaynor mid-year report indicated the student needed supports in the classroom to follow multi-step directions, stay on task, organize and keep track of her materials, maintain the pace of written work, and use an outline (Dist. Ex. 3 at pp. 2-6). The mid-year report further concluded that the student benefited from having directions repeated and/or clarified, breaking up unfamiliar multisyllabic words, and the presentation of prompts and modeling (id.).[14]

There was also a new factor present in the June 2013 CSE's calculus, which even Stephen Gaynor personnel had only brief experience with; namely, that the June 2013 IEP indicated that in May 2013 the student "began taking medication for her ADHD and some improvement in focus is noted" (Dist. Ex. 8 at p. 2).

Upon a careful review of the hearing record. the evidence shows that as detailed above, the older evaluative information before the June 2013 CSE indicated that the student had substantial difficulty focusing in the classroom and maintaining attention, yet it also indicates that in most achievement areas the student was nevertheless performing in the average range with a smaller subset of weakness areas in the low average range. More recent reports on the student, which did not repeat the same testing, indicated that the student had made progress in the area of attending after moving from a general education environment with ICT services to a special class setting with 12 students and two adults. Thereafter medication was introduced shortly before the CSE meeting which reportedly was responsible for a positive effect on the student's ability to attend in a classroom. On the other hand, the IEP does not reflect the Stephen Gaynor speech-language pathologist's report that the student performed better in small groups, or the neuropsychologist's recommendation that the student receive "much 1:1 teacher intervention" (Dist. Exs. 4 at p. 1; 5 at p. 12). Other factors that are unhelpful to the district's case is that there was no prior written notice

[12] At the impartial hearing, the school psychologist who served on the June 2013 CSE testified that additional classroom support was not appropriate for the student because she did not present with "behavioral issues" (Tr. p. 45; see Tr. pp. 44-45). State regulations provide that a student's management needs, and not his or her behaviors, provide the basis upon which districts may determine the maximum classroom size for students with disabilities (see 8 NYCRR 200.6[h][4]; see especially 200.6[h][4][[i] ["The maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students . . ."]). Although the school psychologist interpreted the term management needs too narrowly during her testimony by limiting her definition to only "behavior" difficulties, neither party contends that the student presented with behavioral problems that were interfering with the instructional process.

[13] The evaluator who conducted the January 2012 neuropsychological assessment recommended that the student be placed in a "full-time, small special education school setting in a small classroom with a low student to teacher ratio, with similarly functioning peers who have language problems" (Dist. Ex. 5 at p. 17). Often what is considered "small" or "limited" in terms of class size is very much in the eye of the beholder who opts to use such imprecise and sometimes controversial terms.

[14] Many of these strategies were touched upon in the management needs section of the IEP (Dist. Ex. 8 at p. 4)

offered into evidence which explained which information the district relied on to conclude that the additional adult desired by the parent was not necessary (see 34 CFR 300.503; 8 NYCRR 200.5[a]; see also Letter to Chandler, 112 LRP 27623 [OSEP 2012).[15] For example, a classroom observation of the student at Stephen Gaynor that described the student's skills in attending in a special class setting, although not required by regulation, might have been helpful to the district in documenting the level of adult support necessary. Conversely, the district psychologist's reasoning that "two adults" was a more restrictive special class was certainly not a persuasive rationale, as restrictiveness relates to the student's level of access to nondisabled peers, not the number of adults in a classroom (Tr. p. 42). The district did not attempt to quantify during the hearing the level of benefit that two adults would provide versus one adult in the special class setting, nor did it explain the weight that the CSE attributed to the student's medication changes.

In view of the forgoing, while it may have been in theory possible for the district to offer other evidence to satisfy its burden of proof at the impartial hearing, it did not in fact offer sufficient evidence to support the a finding that the IHO erred in concluding that a 12:1 special class placement was insufficiently supportive and I decline of overturn this conclusion.[16] Accordingly, the district does not prevail on the issue of educational placement as set forth on the student's June 2013 IEP.

D. Assigned Public School Site

Finally, the district asserts that the IHO's determination that the assigned public school site could not implement the June 2013 IEP was speculative since the student never attended the public school. As such, the district further argues that it was not required to demonstrate the ability of the assigned public school site to implement the IEP. Moreover, the district argues that the parents' allegations in their due process complaint notice related to their observations during their visit, which did not conflict with the recommendations in the June 2013 IEP. The parents aver that the IHO's findings in this respect were proper.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent

[15] The lack of a prior written notice in this record is not itself a basis for a denial of a FAPE as it was not challenged in this proceeding, but where the district bears the burden of proof on the sufficiency of the IEP, that task at the impartial hearing becomes more difficult in the absence of this document completed in a manner that meets the requirement of the IDEA.

[16] I do not adopt the IHO's finding that the student's learning needs are "labor intensive" as no one reasonably quantified the amount of time an adult needed to spend with the student on particular tasks. Additionally I do not agree that information from the parent's site visit formed a basis for concluding that the IEP, which was created prior to that visit, was inadequate.

pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2013]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[17] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on claims regarding implementation of the June 2013 IEP because a retrospective analysis of how the district would have implemented the student's June 2013 IEP at the assigned public school site is not an appropriate inquiry under

[17] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2013]). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the June 2013 IEP (see Parent Ex. B). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow a parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on claims that the assigned public school site would not have properly implemented the June 2013 IEP and the IHO's findings on this issue must be annulled.[18]

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation; that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P.

[18] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M, 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M., 2012 WL 4571794, at *11).

v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

E. Equitable Considerations

Finally, the district appeals the IHO's determination that no equitable factors served to diminish or preclude the parents' sought award of tuition reimbursement insofar as the IHO's decision provided no analysis on this issue. While I agree with the district that this portion of the IHO's analysis was lacking, an independent review of the hearing record nevertheless supports the IHO's conclusion.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; E.M. v. New York City Dep't of Educ., 2014 WL 3377162, at *16 [July 11, 2014]; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]. The IDEA provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner; fail to make their child available for evaluation by the district; fail to provide appropriate notice of the student's removal from the public school system; or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see 34 CFR 300.148[d][1]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] ["Important to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The Second Circuit has also indicated that among the equitable considerations that a court or administrative officer may review are:

> [W]hether [the parent's] unilateral withdrawal of her child from the public school was justified . . . whether the amount of private-school tuition was reasonable, whether [the parent] should have availed herself of need-based scholarships or other financial aid from the private school, . . . whether there was any fraud or collusion in generating (or inflating) the tuition to be charged to the [district], or whether the

> arrangement with the [private] school was fraudulent or collusive in any other respect.

(E.M., 2014 WL 3377162, at *16).

Here, the parents cooperated with the district through the CSE process. Specifically, the parents attended and participated in the June 2013 CSE meeting (Dist. Ex. 8 at p. 18; Tr. p. 118). Moreover, it appears from the hearing record that the parents expressed their disagreement with the IEP ten business days prior to the student's removal from the public school system (Parent Ex. B at p. 1).[19] And although the evidence in the hearing record shows that the parents signed an enrollment contract with Stephen Gaynor in February 2013 for the student's attendance during the 2013-14 school year and provided a deposit in order to reserve a spot for the student (Parent Exs. F at pp. 1, 3; J at p. 1), it appears that the parents acted reasonably under the circumstances of this case (see, e.g., C.L., 744 F.3d at 840; A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *9-*10 [S.D.N.Y. Sept. 23, 2013]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *28-*30 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], aff'd sub nom, R.E., 694 F.3d 167; C.L. v. New York City Dep't of Educ., 2013 WL 93361, at *9 [S.D.N.Y. Jan. 3, 2013], aff'd, 2014 WL 278405 [2d Cir. Jan. 27, 2014], as amended [Feb. 3, 2014]). There are no other facts or circumstances justifying a reduction in an award of tuition reimbursement; therefore, the IHO did not err in concluding that the parents should receive a full award of tuition reimbursement for the 2013-14 school year.

VII. Conclusion

The hearing record supports the parents' position that a 12:1 classroom placement was not reasonably calculated to provide the student with a FAPE for the 2013-14 school year. Moreover, no equitable considerations serve to diminish or preclude an award of tuition reimbursement to the parent. Accordingly, I conclude that the parents are entitled to an award of tuition reimbursement for the 2013-14 school year and affirm the IHO's decision in this respect.

[19] Courts within the Second Circuit have held that the IDEA's ten business day notice requirement applies to students who were enrolled in a private school at public expense at the time of the relevant IEP meeting (Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *10 [S.D.N.Y. Mar. 18, 2010]; S.W. v. New York City Dep't of Educ., 646 F.Supp.2d 346, 362–363 [S.D.N.Y.2009]). Although neither the IDEA nor its implementing regulations are clear on this issue, it appears that a complete award of tuition reimbursement under such circumstances would only be appropriate if parental notice is provided ten business days prior to the date that the disputed IEP would be implemented. This is in keeping with the fundamental purpose of the notice provision, which is to "giv[e] the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]).

I have considered the parties' remaining contentions and find them without merit (M.C., 226 F.3d at 66; Walczak, 142 F.3d at 134; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 10, 2014

_____
JUSTYN P. BATES
STATE REVIEW OFFICER