The University of the State of New York

The State Education Department
State Review Officer
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No. 15-048

Application of the BOARD OF EDUCATION OF THE CLARKSTOWN CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Jaspan Schlesinger, LLP, attorneys for petitioner, Carol A. Melnick, Esq., of counsel

Gina DeCrescenzo, PC, attorneys for respondents, Gina M. DeCrescenzo, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the Hawk Meadow School (Hawk Meadow) for the 2012-13 school year. The parents cross-appeal from that portion of the IHO's decision which denied their request to be reimbursed for the costs of the student's tuition at Hawk Meadow for the 2011-12 and 2013-14 school years. The appeal must be dismissed. The cross-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

The student attended a general education program within a district elementary school through the 2011-12 school year (Tr. pp. 272, 408; see Dist. Exs. 13 at p. 2; 25 at pp. 1-2). On May 11, 2012, the parents requested that the district conduct a psychoeducational evaluation of the student, in light of concerns about his progress and despite the student's receipt of building-level services (Dist. Ex. 7; see Dist. Ex. 25 at p. 8). In a letter dated June 4, 2012, the parents informed the district that they reserved the right to place the student in a private school at district expense, and rejected "the program … as inappropriate" (Dist. Ex. 9). They further advised that they planned to request transportation for the student for summer 2012 and the 2012-13 school year (id.).

On June 19, 2012, the CSE convened to conduct an initial eligibility determination for the student for special education services and to develop an IEP for the remainder of the 2011-12

school year (see Dist. Ex. 3 at pp. 1). Finding the student eligible for special education and related services as a student with a learning disability, the June 2012 CSE developed an IEP with annual goals and recommended that the student be placed in a 15:1 special class for instruction in language arts, one 30-minute session per day of resource room services in a small group, one 30-minute session per week of indirect consultant teacher services, and one 30-minute session per week of counseling in a small group (id. at pp. 1, 6-8).[1]

In summer 2012, the parents followed through on their intentions referenced in their June 4, 2012 letter and enrolled the student at Hawk Meadow for the summer program (see Parent Ex. HH; Tr. pp. 865, 871).[2]

In a letter dated August 20, 2012, the parents informed the district that they "carefully considered the school district's "placement offer" for [the student]" and determined that it was not appropriate for him (Dist. Ex. 15). According to the parents, the "placement offer" did not meet the student's unique educational needs; therefore, the parents notified the district of their intentions to enroll the student at Hawk Meadow for the 2012-13 school year and to request reimbursement for the costs of the student's tuition (id.). The parents also requested that the district provide the student with transportation to Hawk Meadow for the 2012-13 school year if the district failed to offer the student a more appropriate placement within ten days (id.).

In a September 12, 2012 e-mail to the district, the parents attached a written consent for the initial provision of special education services for the student (Dist. Ex. 19; see Dist. Ex. 18). Although the parents checked the box indicating their consent for the initial provision of special education services, they further indicated that while they consented to classification, they did "not agree with the appropriateness of the committee's recommendations as discussed with the team many times" (Dist. Ex. 18). In addition, the parents requested that the district postpone the upcoming CSE meeting, scheduled to take place on September 14, 2012 (see Dist. Ex. 19).

In a September 13, 2012 letter to the parents, the district confirmed receipt of the consent form for the initial provision of special education services (see Dist. Ex. 20 at p. 1). Additionally, the district agreed to reschedule the CSE meeting (id.). The district also confirmed that the parents agreed to provide the following documentation: consent forms for the release of information from Hawk Meadow regarding the student, a release of information from Hawk Meadow defining the nature of its program, and a release of information to provide to the public district where Hawk Meadow was located (district of location), under parentally placed procedures, informing it of placement of the student at Hawk Meadow (id. at pp. 1-2).

The student continued attending Hawk Meadow for the 2012-13 school year (Tr. p. 875).

On September 28, 2012, the CSE convened to conduct a "Revision of IEP" meeting (Dist. Ex. 4 at p. 1). The district essentially continued the program and services as developed for the

[1] 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][6]; 8 NYCRR 200.1[zz][6]).

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

student in the June 2012 IEP; however, it updated the student's IEP to reflect a status of "parentally placed outside of district" (id. at p. 2; see Tr. pp. 358-59).

On October 16, 2012, the parents executed a tuition contract with Hawk Meadow for the student's attendance during the 2012-13 school year (Parent Ex. DD).

On June 19, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (see Dist. Ex. 5 at p. 1). Finding that the student remained eligible for special education and related services as a student with a learning disability, the June 2013 CSE continued the student's annual goals and again recommended a 15:1 special class placement for instruction in language arts, in addition to one 30-minute session per week of indirect consultant teacher services, one 30-minute session per day of resource room services, and one 30-minute session per week of counseling in a small group (id. at pp. 1, 5-7).

In summer 2013, the student attended Hawk Meadow's summer program (Tr. pp. 905-06).

In a letter date-stamped August 26, 2013, the parents advised the district that they planned to remove him, and place him in a nonpublic school for the 2013-14 school, as a result of its failure to offer the student a free appropriate public education (FAPE) (see Dist. Ex. 29). The parents further informed the district that they planned to request "reimbursement for all costs associated with the private placement" (id.).

On September 16, 2013, the parents executed an enrollment agreement with Hawk Meadow for the student's attendance for the 2013-14 school year (Parent Ex. X). The student attended Hawk Meadow for the 2013-14 school year (see Tr. p. 905; see also Parent Ex. U).

A. Due Process Complaint Notice

By due process complaint notice dated September 27, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12, 2012-13, and 2013-14 school years (see Dist. Ex. 1 at pp. 4-5). More specifically, the parents alleged that the district violated its child find obligation for the 2011-12 school year (id. at p. 4). With respect to the 2012-13 school year, the parents alleged that the June 2012 CSE did not develop annual goals and objectives for the student (id. at pp. 4-5). The parents further alleged that the district did not test the student in all areas of his suspected disability (id. at p. 5). Next, the parents asserted that the district failed to address the student's academic, physical, social and emotional needs or use an appropriate scientifically-based methodology to address the student's cognitive and academic deficits (id. at p. 4). The parents also contended that the district failed to offer the student appropriate related services or 12-month school year services (id. at p. 5). Lastly, the parents argued that the district failed to provide the student with special transportation necessary to receive a FAPE (id.).

Regarding the 2013-14 school year, the parents alleged that the district failed to timely offer the student a program (Dist. Ex. 1 at p. 5). The parents further alleged that the June 2013 CSE did not test the student in all areas of his suspected disability (id. at p. 5). Next, the parents asserted that the June 2013 CSE failed to develop a program for the student that addressed his academic, physical, social and emotional needs, or a program that used an appropriate scientifically-based methodology to address the student's cognitive and academic deficits (id. at p. 4). The parents also alleged that the June 2013 CSE failed to offer the student appropriate related

services, and 12-month school year services (id. at p. 5). Lastly, the parents argued that the district failed to provide the student with the transportation necessary to receive a FAPE (id.).

As a remedy, the parents requested an award of compensatory education to remedy the district's failure to offer the student a FAPE for the 2010-11 and 2011-12 school years (Dist. Ex. 1 at p. 7). The parents also requested reimbursement for the costs of the student's tuition at Hawk Meadow for the 2012-13, 2013-14 and 2014-15 school years, inclusive of 12-month school year services (id.).

B. Impartial Hearing Officer Decision

On December 13, 2013, an impartial hearing convened and concluded on July 23, 2014 after 10 days of proceedings (Tr. pp. 1-1599). In a decision dated March 25, 2015, the IHO determined that the district met its child find obligation during the 2011-12 school year, that the district offered the student a FAPE for the 2011-12 and 2013-14 school years, and that the student was not entitled to 12-month school year services; however, she also found that the district failed to offer the student a FAPE for the 2012-13 school year, that Hawk Meadow was an appropriate unilateral placement, and that equitable considerations supported the parents' request for relief (see IHO Decision at pp. 27, 29-37).[3]

Specifically with regard to the parents' child find claim, the IHO determined that, during the 2010-11 school year, as soon as the district was aware of the student's struggles, it promptly determined that he needed academic intervention which was provided three times per week (see IHO Decision at p. 28). The IHO found that the evidence in the hearing record showed that the student progressed, and that when the 2011-12 school year began, and the student continued to struggle, the district promptly provided him with Response to Intervention (RtI) services (id.). Ultimately, the IHO found that the student progressed as a result of the RtI services, and therefore, a referral to the CSE was unnecessary (id. at p. 29). Moreover, the IHO found that when the parents requested a CSE referral for the student, the district "promptly acted and initiated the process" (id.). As a result, the IHO rejected the parents' claim of a child find violation (id.).

Next, the IHO concluded that the June 2012 IEP was appropriate and that the district offered the student a FAPE for the 2011-12 school year (see IHO Decision at pp. 29-32). More specifically, the IHO concluded that the district afforded the parents a "full and meaningful opportunity to participate in [the student's] IEP development for the" 2011-12 school year (id. at p. 31). The IHO further determined that the June 2012 CSE had sufficient evaluative material on which to base the IEP, and that the lack of an OT evaluation did not result in a finding that the district failed to offer the student a FAPE for the 2012-13 school year (see id. at p. 30). She also concluded that the June 2012 CSE appropriately determined that the student did not require speech-language therapy in order to receive a FAPE, given there was no information before the CSE that showed he exhibited such a need (see id.). Next, the IHO rejected the parents' claims that the district was required to specify an educational methodology on the June 2012 IEP (see id. at pp. 31-32). Additionally, the IHO found that the June 2012 IEP contained annual goals that were appropriate and aligned with the student's areas of need (id. at p. 32). She further determined

[3] The IHO decision included in the hearing record is unpaginated. To avoid confusion, page references in this decision rely on the same pagination referenced in the petition for review, which excludes pages such as the IHO's transmittal letter, cover sheets and appearances section.

that the June 2012 CSE created an appropriate program recommendation for the student, with appropriate related services (id.). Lastly, the IHO concluded that the hearing record did not contain sufficient evidence to demonstrate that student required ESY services for summer 2012 (id. at p. 34).

However, the IHO determined that the district did not offer the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 32-33). More specifically, she concluded that the district did not meet its obligation to have an IEP in place for the student at the beginning of the school year because the June 2012 IEP expired by its own terms and a new IEP was not drafted until September 28, 2012 (id. at p. 32). She proceeded to find that Hawk Meadow constituted an appropriate unilateral private placement for the student for the 2012-13 school year, and that equitable considerations weighed in favor of the parents' requested relief (id. at pp. 34-37).

Finally, with regard to the 2013-14 school year, the IHO determined that the district had an IEP in place for the student in a timely manner (IHO Decision at p. 33). Furthermore, the IHO found that through no fault of the district, the CSE did not have updated evaluative information on the student; however, the June 2013 CSE's recommendation was appropriate based on the information before it (id.). In addition, she concluded that there was insufficient evidence in the hearing record to demonstrate that the student required 12-month school year services (id. at p. 34).

IV. Appeal for State-Level Review

The district appeals and alleges that the IHO erred in finding that it did not offer the student a FAPE for the 2012-13 school year, that Hawk Meadow was an appropriate unilateral placement and that equitable considerations supported the parents' request for relief. More specifically, the district alleges that it had no obligation to develop an IEP for the student, because the parents did not provide consent to the initial provision of special education and related services. In any event, the district maintains that the September 2012 IEP appropriately addressed the student's special education needs. Next, the district asserts that there is no evidence in the hearing record to establish that Hawk Meadow was an appropriate unilateral placement. Lastly, the district alleges that equitable considerations do not support the parents' request for relief in this instance, given that the parents failed to timely provide notice of the student's removal from the public school and that they failed to cooperate with the CSE process.

The parents cross-appeal those portions of the IHO's decision that found that the district satisfied its child find obligation, and that the district offered the student a FAPE for the 2011-12 and 2013-14 school years. The parents also allege that the IHO erred in failing to determine their claims related to Section 504 of the Rehabilitation Act of 1973 (section 504).[4] As relief, the parents

[4] State Education Law makes no provision for State-level administrative review by an SRO of IHO decisions with regard to section 504 (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parents' claims regarding section 504 or the IHO's findings, or lack thereof (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). Here, even if the IHO reviewed the parents' section 504 claims, an SRO would not have jurisdiction to review those determinations.

request an award of additional services to remedy the district's failure to offer the student a FAPE for the 2011-12 school year, in addition to an award of reimbursement of the costs of the student's tuition at Hawk Meadow for the 2012-13, the 2013-14 and 2014-15 school years, and summer 2012 as well as summer 2013, including the costs of the student's transportation.[5]

In a reply to the cross-appeal, the district responds to the parents' contentions and generally denies all of the parents' allegations.

V. Applicable Standards

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

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

[5] To the extent that the parents request an award of monetary damages or reimbursement of lost wages as a result of the district's alleged failure to provide the student with transportation services during the 2013-14 school year such relief is a form of compensatory damages which are not available in the administrative forum under the IDEA (see Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Board of Educ. of Newburgh Enlarged City School Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see R.B. v. Bd. of Educ., 99 F.Supp.2d 411, 418 [S.D.N.Y. 2000]).

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. 2011-12 School Year -- Child Find

Turning first to the parent's cross-appeal challenging the IHO finding that a referral to the CSE during the 2011-12 school year was unnecessary, the IHO concluded that the student progressed as a result of the RtI services the district provided to him and that the district met its child find obligations during the 2011-12 school year, by providing the student with RtI services, which allowed him to progress in math and reading (IHO Decision at pp. 28-29). Additionally, the district asserts that, upon the parent's request, it timely referred the student to the CSE. As explained more fully below, the evidence in the hearing record supports the IHO's conclusion that during the 2011-12 school year, the district had no reason to suspect that the student was a child with a disability, and that it complied with its child find obligations to the student.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 C.F.R. 300.111; 8 NYCRR 200.2[a][7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 C.F.R. 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518

[D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz, 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate the student (A.P., 572 F. Supp. 2d at 225, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]). see also 8 NYCRR 100.2[ii]).

In addition, a referral may be made by a student's parent or person in parental relationship (34 CFR 300.301[b]; 8 NYCRR 200.4[a][1][i]; see also 8 NYCRR 200.1[ii][1]-[4]). State regulations do not prescribe the form that a referral by a parent must take, but do require that it be in writing (8 NYCRR 200.4[a]; Application of a Child Suspected of Having a Disability, Appeal No. 05-069; Application of a Child Suspected of Having a Disability, Appeal No. 99-69). Once a building administrator or employee of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]–[a][5]; see also 34 CFR 300.300[a]). State regulations also provide that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate), to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, AIS, and any other services designed to address the learning needs of the student (8 NYCRR 200.4[a][9]). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (8 NYCRR 200.4[a][9][iii][a]-[b]). Upon receiving the parent's consent to conduct an initial evaluation of the student, the district must complete that evaluation within 60 days (see 20 U.S.C. § 1414[a][1][C][i][I]; 34 CFR 300.301[c][1][i]-[ii]; 8 NYCRR 200.4[b][1]).

Initially, with regard to the appropriateness of the academic interventions provided to the student during the 2011-12 school year, the IDEA provides for impartial hearings and State-level reviews in matters relating to the identification, evaluation or educational placement of students, or the provision of a FAPE (20 U.S.C. § 1415[b][6][A]; 34 CFR 300.507[a][1]; 8 NYCRR 200.5[i][1], [j][1]). In this case, while the district's use of RtI or other academic intervention is relevant to an examination of whether the district improperly failed to identify the student as a student with a disability under the IDEA, the district's compliance with 8 NYCRR 100.2(ii) and the skill with which the particular pre-referral academic interventions in the RtI program were delivered is not a matter subject to the jurisdiction of an IHO or SRO.

Here, a review of the evidence in the hearing record supports the IHO's finding that "as soon as [the student's] teachers were aware of his struggles," the district promptly determined that the student was in need of academic interventions (IHO Decision at p. 28). In October 2010, the student's kindergarten teacher had concerns about the student because he did not know many of his letters and sounds and he had few sight words (Tr. p. 697). Consequently, the district special education teacher provided the student with RtI services for the 2010-11 and 2011-12 school years (Tr. p. 643). During the 2010-11 school year, the special education teacher went into the classroom, worked with the student on an individual basis, for 20-30 minutes, two to three times per week on reading instruction, and in a small group during the other two days of the week, and she also worked on areas where the classroom teacher felt the students needed improvement (see Tr. pp. 644, 693-94). Based on input from the student's reading and regular education teachers, and assessment results, the special education teacher provided the student with instruction in letter identification, letter sounds, word formation, sight words and creating small sentences (Tr. p. 645). According to the district special education teacher, based on the results of her own and standard assessments, the student progressed during the 2010-11 school year, and at the end of the school year, he had learned enough to be ready to begin first grade (Tr. pp. 646-47; 698). Additionally, the district special education teacher testified that she kept in contact with the student's mother during the 2010-11 school year, and at no time did the parents express any dissatisfaction with the nature of the instruction that she provided to the student; rather, the district principal testified that the parents "loved" the special education teacher (Tr. p. 646; see also Tr. pp. 197, 420, 453).

At the beginning of the 2011-12 school year, based on the student's classroom teacher's concerns that his reading skills remained weak, he knew very few sight words, and exhibited difficulty in the classroom, namely with respect to organization, following directions, and staying on task, the "IST team" determined that the student should continue to receive RtI services (Tr. pp. 699-700).[6] According to the special education teacher, in October 2011, the IST team met and asked the parents if they wished for him to be pulled out as part of the special 9:1+2 class, to which they agreed (Tr. pp. 700-01).[7] She further testified that the student was pulled out for English language arts (ELA) every day for 45 minutes, during which time he received approximately 20 minutes of individual instruction in reading (Tr. pp. 703-04).[8] The special education teacher also pulled the student out of his classroom for 45 minutes of mathematics instruction on a daily basis, during which time he received small group instruction, in addition to approximately 15 minutes of individual instruction (Tr. pp. 706-08). In addition, the special education teacher testified that every other day, she pushed into the student's science and social studies classes (Tr. pp. 708-09).

According to the evidence in the hearing record, during the 2011-12 school year, based on Fountas and Pinnell assessments, the student progressed from a level A to a level G, which the

[6] The special education teacher could not recall for what the acronym IST stands; however, she testified that the elementary school's IST team was comprised of a regular and special education teacher, a speech-language pathologist, school psychologist, a principal, and sometimes, but not in the student's case, a school nurse (Tr. pp. 650, 696-97). She explained that the IST team convened every six weeks, if not sooner, where a student was not improving (Tr. pp. 649-50).

[7] The special education teacher explained that her class was comprised of nine students and two teaching assistants (Tr. p. 702).

[8] According to the district principal, the student received tier 3 interventions, because he completed "intensive" work with the special education teacher on a daily basis (Tr. pp. 457-58).

school psychologist described as "extremely commendable progress" (Tr. pp. 416, 431, 499, 714).[9] In addition, the special education teacher described the student's progress in the area of sight words as "enormous," and she further testified that he was decoding, and writing sentences, as well as writing words phonetically, if he could not spell them (Tr. p. 717).

Additionally, notwithstanding testimony from the student's tutor that "he was not happy at all about his experiences" in the district elementary school during the 2011-12 school year, the evidence in the hearing record weighs against a finding that the student's social/emotional needs should have triggered the district's child find obligation (Tr. p. 1026; see Tr. pp. 1075-77).[10] On the contrary, despite reports from the parents that the student was unhappy coming to school, according to the district school psychologist, teachers reported to her that they did not have any concerns regarding the student, and they described him as "creative," and "happy" (Tr. pp. 492, 567). She further testified that once the student was engaged, he was happy and enjoyed school (Tr. pp. 492-93). Similarly, the principal testified that despite parent reports that the student "was unhappy," she did not see an "unhappy child in school;" rather, when he was in school, the student was happy (Tr. pp. 444-45). Additionally, the special education teacher testified that she never saw that the student was unhappy in her classroom (Tr. p. 690). According to the special education teacher, "[the student] would come in, he was fine, got right to work, did what he had to do" (id.). In any event, the school psychologist testified that the district offered the student "counseling at building level;" however, the parents preferred to obtain private counseling for the student, because they did not want him pulled out of his class for counseling (Tr. p. 526).

Based on the foregoing, given the student's documented progress during the time he received academic interventions through the RtI services, and the lack of evidence to support the parents' claims that he exhibited social/emotional concerns, the evidence in the hearing record weighs against a finding that the district had a reason to suspect that the student was in need of special education services during the 2011-12 school year. Although I am mindful of the parent's concerns related to the student's placement in a special class as part of the aforesaid RtI services, considerable evidence exists in the hearing record to support a finding that the student continued to make adequate progress while utilizing the RtI services provided and his current needs and level of progress were regularly monitored prior to his referral to the CSE. Accordingly, although it may remain an open question as to whether the district complied with evolving best practices concerning the use of RtI, the record evidence compels a finding that the district did not violate its child find obligations under the circumstances of this case.

Moreover, the evidence in the hearing record supports the IHO's conclusion that the district promptly acted and initiated the process when the parents requested a referral to the CSE (IHO Decision at p. 29). Specifically, the evidence in the hearing record shows that on May 11, 2012, the parents requested that the district conduct a psychoeducational evaluation of the student, in light of their concerns regarding his progress, despite the receipt of building-level services (Dist. Ex. 7; see Dist. Ex. 25 at p. 8). On May 21, 2012, they consented to a district evaluation of the

[9] According to the special education teacher, Fountas and Pinnell assessments designate Level A as a "very beginning kindergarten level," whereas Level G is "solidly first grade" (Tr. p. 714).

[10] During the 2011-12 school year, the student had 27 unexcused absences, and was tardy 35 days of the school year (Dist. Ex. 43). According to the school psychologist, the student's lateness and absences hindered the district's ability "to get forward with [the student]" (Tr. p. 492). The principal testified that the student's absences concerned her, and she sent letters to the parents offering support and assistance (Tr. p. 445).

student to determine his eligibility for special education services (Dist. Ex. 8). Additionally, the evidence in the hearing record shows that it timely conducted its evaluations of the student within 60 days of consent (see Dist. Exs. 12; 13; see also 8 NYCRR 200.4[b][1], [7]). Accordingly, the evidence in the hearing record supports the IHO's conclusion that "no child find violation occurred" (IHO Decision at p. 29).

B. 2011-12 School Year--June 2012 CSE Process

Turning next to the parties' dispute related to the June 2012 IEP, the parents allege that the IHO erred by determining that the district did not significantly impede the parents' participation in the June 2012 CSE meeting. As explained more fully below, a review of the evidence in the hearing record leads to the conclusion the parents do not prevail in their claim that the district failed to offer the student a student a FAPE for the final three days of the school year.

There is no evidence in the hearing record to suggest that the June 2012 CSE significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student. Rather, the district special education teacher testified that the parents voiced their concerns about the IEP during the June 2012 meeting (see Tr. pp. 688-89). Moreover, June 2012 CSE meeting minutes indicated that although the June 2012 CSE believed that a "Special Class for language arts and math [wa]s the most appropriate placement for the student," the parents "h[ad] reservation about this particular program model based on his experiences as a non-classified student" (Dist. Ex. 4 at p. 2). The June 2012 CSE meeting minutes further revealed that the "parent[s] [were] given the opportunity to provide input" (id. at p. 3). To the extent the parents complain that the student's program during the entirety of 2011-12 was inappropriate because they had no official input into the particulars of that program, I note that the June 2012 IEP was only in place for the final three days of the school year and, prior to the June 2012 CSE meeting, the student was unclassified. Moreover, according to the executive director, the June 2012 CSE designated the student as "Classified No Services," because there "was no school on those days, it's basically students going in for receiving their report card" (Tr. p. 90) [11] Under the circumstances, the evidence in the hearing record does not support a finding that the district failed to offer the student a FAPE for the period of June 19, 2012 through June 22, 2012.[12]

C. 2012-13 School Year--September 2012 CSE Process

Next, the district alleges that the IHO erred in finding that it did not offer the student a FAPE for the 2012-13 school year, because the parents failed to consent for the provision of special education; however, as explained more fully below, the evidence in the hearing record supports the IHO's finding that the district did not comply with its obligation to have an IEP in effect for

[11] The hearing record contains a consent form signed by the student's mother on June 22, 2012; however, there is no evidence in the hearing record to establish when or if at all the district received this form (Parent Ex. K). The parent initially testified that she brought it in to the district office, but could not recall the exact date that she submitted it, or to whom she gave the form, then she later testified that she may have mailed it, but she was not sure (Tr. pp. 1220-22, 1224).

[12] The parents do not raise any claims pertaining to the implementation of the June 2012 IEP (see generally Dist. Ex. 1). In any event, in this particular instance, the parents would not prevail on a claim that the district failed to implement the June 2012 IEP, given that there is no evidence in the hearing record to establish that the district failed to implement substantial or significant provisions of the IEP during the three-day duration of the IEP (Dist. Ex. 3 at p. 1; see D.D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]).

the student at the beginning of the school year, and therefore, it did not offer the student a FAPE for the 2012-13 school year.

The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6). There is no legal authority requiring districts to produce an IEP at the time that the parents demand; districts must only ensure that a student's IEP is in effect at the beginning of each school year and that the parents are provided with a copy (34 CFR 300.322[f], 300.323[a]; 8 NYCRR 200.4[e][1][ii]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 586 [S.D.N.Y. 2013]; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).

Here, the CSE chairperson testified that the CSE did not conduct an annual review for the student for the 2012-13 school year (see Tr. p. 366). He testified that because the parents did not agree with the recommendations made in June 2012, "there was no reason to plan for the following school year, since there was no agreement that [they] felt it was appropriate at that time" (see id.). The CSE chairperson admitted that the district could have reconvened during summer 2012 to try to find the right program for the student; however, by that time, the parents had already unilaterally placed the student (see Tr. pp. 379-80). Although the CSE convened in September 2012, the evidence in the hearing record reveals that the CSE did not meet for the purposes of conducting an annual review; rather, it was a "Revision of IEP" meeting, and it took place subsequent to the commencement of the 2012-13 school year (Dist. Ex. 4 at pp. 1-4). The evidence in the hearing record further establishes that the September 2012 CSE did not discuss program recommendations for the student or evaluative material; rather, the CSE convened solely to discuss the provision of transportation for the student (see Tr. pp. 421-22, 489, 1129). Based on the evidence in the hearing record, the evidence supports a finding that the district did not have an IEP in place for the student at the beginning of the school year and therefore, did not offer the student a FAPE for the 2012-13 school year.

D. Appropriateness of Hawk Meadow

Having determined that the district failed to offer the student a FAPE for the 2012-13 school year, the next issue to determine is whether Hawk Meadow was an appropriate unilateral placement. The district argues that the hearing record does not contain evidence that Hawk Meadow provided the student with instruction specially designed to meet his unique needs. A review of the evidence in the hearing record refutes the district's allegation, and supports the IHO's finding that Hawk Meadow was an appropriate unilateral placement for the 2012-13 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016;

Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

1. The Student's Needs

In this instance, although the student's needs are not directly in dispute, a discussion thereof provides context for the discussion of the disputed issue to be resolved—namely, whether the student's unilateral placement at Hawk Meadow was appropriate for the 2012-13 school year.

In this case, according to the June 2012 psychoeducational report, the student willingly entered the testing room, responded to the questions presented to him in a polite manner, and that the student appeared to put forth his best effort (Dist. Ex. 13 at p. 3).[13] The June 2012 psychoeducational report included test results from privately obtained cognitive testing conducted in May 2012 (Dist. Ex. 12 at pp. 2-3).[14] The report indicated that an administration of the Wechsler Intelligence Scale for Children — Fourth Edition (WISC-IV) yielded a full scale IQ of 97 which fell in the average range of general cognitive ability (id. at p. 3). Due to a "wide discrepancy between composite scores," the school psychologist analyzed the student's individual areas of cognitive functioning (id. at p. 6). The school psychologist reported that the student's fluid reasoning, nonverbal problem solving ability, as well as his inductive reasoning abilities were significantly above average (id.). She further reported that the student exhibited average abilities in verbal reasoning, vocabulary, and in his ability to abstract meaningful concepts and relationships (id.). In addition, the June 2012 psychoeducational report indicated that the student's immediate auditory memory was in the low average range, while his scanning speed was significantly below average (id.).

With respect to academic functioning, an administration of the Woodcock-Johnson III Tests of Achievement (WJIII ACH) to the student revealed that he performed in the average range for skills measured by the broad math cluster, oral language cluster, and broad written language cluster (Dist. Ex. 13 at p. 4). With respect to the broad math cluster, the student performed in the average range on tasks that required the ability to mathematically calculate, recognize a procedure for solving problems amidst extraneous information, and solve a large number of simple math problems quickly (Dist. Ex. 12 at p. 4). Within the oral language cluster, the report indicated that the student achieved a score in the average range on tasks that required him to listen to stories read aloud and attempt to repeat as many details as possible; recall stories with a time delay; and point to a series of objects in pictures after listening to a set of increasingly difficult instructions (id.). With respect to the broad written language cluster, the report noted that the student's score fell in the average range on tasks such as spelling words that were read aloud to him and constructing sentences according to directions given; however, the student's writing automaticity score was in the low average range (id. at pp. 4-5). According to the June 2012 psychoeducational report, the student's broad reading cluster standard score fell within the low average range (id. at p. 5). The June 2012 psychoeducational report further noted that although the student achieved scores in the average range on subtests measuring passage comprehension and letter-word identification skills, his performance on the broad reading cluster subtest fell below his then-current grade level (id.).

In order to assess the student's social/emotional functioning, the student completed several open-ended sentence strings (Dist. Ex. 13 at p. 5). As a result, the evaluator concluded that the student's responses seemed to "express typical functioning for a child his age" (id.). The school psychologist further reported that she administered several projective drawings to the student that also indicated typical levels of emotional functioning (id.). Additionally, the school psychologist described the student's interactions with her as age appropriate, and she further reported that the

[13] The June 2012 psychoeducational report included information obtained from a June 2012 social history (see Parent Ex. O).

[14] Although the parents provided the district school psychologist with scores obtained as a result of a May 2012 neuropsychological evaluation of the student in order to complete the June 2012 psychoeducational report, the June 2012 CSE did not have the May 2012 neuropsychological evaluation report for consideration at the time of the June 2012CSE meeting (see Tr. p. 355).

student successfully maintained attention and cooperation during testing sessions (id. at p. 4). However, inconsistent with the school psychologist's description of the student's social/emotional functioning, the June 2012 evaluation included the parents' report that the student's attitude toward school was "very concerning" and that he cried constantly about having to go to school and did not like being placed within the special class (id. at p. 2). The June 2012 psychoeducational report also included the parents' concerns that the student was more sad than usual and that homework was a "major struggle" (id.).

According to the June 2012 psychoeducational report, the student's special education teacher characterized the student as "extremely creative and artistic" (Dist. Ex. 13 at p. 5). The report further noted that his teacher believed that the student shared very insightful comments during class read-alouds, and she further described him as an active participant in classroom discussions (id.). Additionally, the teacher reported that the student engaged in appropriate social interactions and was a "hard worker" (id.). According to the June 2012 psychoeducational report, she also noted that the student was "below grade level in language arts and math," (id.). The June 2012 evaluation included a report from the teacher that the student tried to write phonetically, and exhibited "many reversals in his writing" (id.). Further, the teacher reported that the student had difficulty following directions, required repetition of concepts, and individual or small group instruction to learn (id. at pp. 5-6).

To address the student's needs identified as a result of the June 2012 psychological evaluation, the school psychologist made the following recommendations: sharing information from the report with the CSE to assist in developing the student's educational plan; the student should attempt to go for extra help sessions to take advantage of resources within the school; and the student should practice reading at home to reinforce literacy skills and what had been learned in school (Dist. Ex. 12 at pp. 6-7).

The hearing record also includes a June 2012 speech-language evaluation report, in which the evaluator administered the Clinical Evaluation of Language Fundamentals—Fourth Edition (CELF-4) and the Comprehensive Assessment of Spoken Language (CASL) to the student (Dist. Ex. 12 at p. 2). According to the June 2012 speech-language evaluation report, the student's speech-language skills fell within the average range (id. at p. 3). The evaluator found that the student's comprehension and use of language structure were well above expected levels (id.). Additionally, the evaluator reported that the student exhibited appropriate pragmatic language skills, and could converse easily with adults and peers (id.). She further noted that the student used his language to question and explain (id.). However, the student demonstrated skills in the low average range on tasks measuring concepts and following directions, recalling sentences, and expressive word classes (id.). To address the student's speech-language needs, the evaluator noted that the student benefitted from the following classroom strategies: inference-building activities, working with relationships between words, presenting information through as many sensory channels as possible, refocusing, redirecting, paraphrasing, and frequent checking for comprehension (id. at pp. 2, 4).

The hearing record also includes a June 2012 classroom observation in which the evaluator observed the student during his writing workshop/literacy block (Parent Ex. L at p. 1). During the activity, the evaluator found that the student appeared distracted (id.). Although the evaluator found that the student responded well to visual directions, she also noted that he appeared to have difficulty following oral directions (id.). According to the evaluator, the student required a moderate amount of assistance, and level of teacher behavioral intervention (id.). Although the

student could answer correctly when asked a question about a story, when the teacher asked him to write a response, the evaluator found that the student began to get lost in his work and his responses were off-topic (id. at p. 2).

Consistent with the needs described above, the student's then-current special education teacher testified that the student required instruction which included identifying letters and the sounds the letters make, putting letters together to make little words, reading sight words, and trying to make small sentences (Tr. pp. 642-43, 645). Additionally, the special education teacher described the student as very insightful during discussions, but she noted that he struggled when he had to learn new concepts, and that he needed "things taught individually, or in very small groups, to grasp concepts" (Tr. p. 653). With respect to social/emotional functioning, she described the student's relationship with his peers as "fine," and that "he got along with everyone" (Tr. p. 651).

2. Specially Designed Instruction

Initially, regarding the parents' claims with respect to summer 2012, the Hawk Meadow director described the program for summer as "an extended visit and vetting process" to see how the program worked for the student (Tr. p. 866). She further described it as a "modified Montessori," in that academics were very much the same as during the regular school year, and the current teachers taught during the summer (Tr. p. 867). According to the Hawk Meadow director, the summer program incorporated more field trips, and more community experiences (id.). The Hawk Meadow director characterized the summer program as "70 percent academic and 30 percent recreational" (Tr. p. 963). Regardless of the amount of time devoted to academics, there is no evidence in the hearing record to demonstrate how, if at all, the summer program at Hawk Meadow offered the student specially designed instruction to address his unique needs. Moreover, aside from unsubstantiated testimony that the student would regress, there is no evidence in the hearing record to reflect that the student experienced a substantial loss of skills that necessitated a 12-month school year program in order to receive a FAPE (see Tr. pp. 987-88).[15] Accordingly, to the extent that the parents request reimbursement for the costs of the student's tuition at Hawk Meadow for summer 2012, there is insufficient evidence in the hearing record to support a finding that it was appropriate to meet the student's unique needs.

However, regarding the 10 month 2012-13 program at Hawk Meadow beginning in fall 2012, according to the Hawk Meadow director, the school employed 12 full-time teachers, "ancillary staff," and "specialist" teachers, and provided instruction to 90 students (Tr. pp. 842, 848-49). The Hawk Meadow director testified that all the head teachers held State certifications and were "Montessori certified," as were some of the co-teachers (see Tr. pp. 850-51, 939).[16] The school placed students in classrooms of "mixed age grouping" encompassing a three-year age span (Tr. p. 849). According to the Hawk Meadow director, the founder of the Montessori program

[15] Twelve-month special service and/or program means a special education service and/or program provided on a year-round basis, for students determined to be in accordance with sections 200.6(k)(1) and 200.16(i)(3)(v) of this Part whose disabilities require a structured learning environment of up to 12 months duration to prevent substantial regression (8 NYCRR 200.1[eee]; see 8NYCRR 200.1[aaa]; see also 8 NYCRR 200.6 [k][i][v]).

[16] The Hawk Meadow director testified that Montessori-certified teachers completed training in the Montessori method, presentation and use of materials, and development of individual student curriculum; however, Hawk Meadow did not employ certified special education teachers (see Tr. pp. 845-46, 851-53, 942).

created materials based on how the founder thought children learned best (Tr. p. 852). She described the Montessori method as a teaching methodology where children learned best when they had some control within a very structured environment and when given some freedom of choice as to which activity they did and in which order (see Tr. pp. 851-53). The Hawk Meadow director further noted that the Montessori founder believed that students also learned best with very hands-on material and lots of manipulatives (id.). According to the Hawk Meadow director, the Montessori founder "created a method and a set of materials that start with the very concrete, and move towards abstract" (id.). She also testified that "each lesson builds one on the other, so it's scaffolded, and [students] have to complete and master one activity, before they could move on to the next concept or skill" (id.). The Hawk Meadow director indicated that while there is a specific curriculum that each teacher must follow, there are variations on how to teach concepts, tailored to the students' needs and each student has a curriculum for the day (see Tr. pp. 856-57). According to the Hawk Meadow director, when students visit the program for admission, teachers sit with them and assess academic skills, strengths, weaknesses, and learning styles (see Tr. pp. 857, 948-49). Based on those assessments, Hawk Meadow personnel develop an educational plan for the student, which is discussed and modified over time (see Tr. pp. 857-58). The Hawk Meadow director explained that Montessori teachers keep detailed reports on students, where they "tick off what they have practiced and mastered in all the subject areas" (see Tr. pp. 858-59). The Hawk Meadow director testified that teachers review the data collected on a daily basis (see Tr. pp. 858-60).

The Hawk Meadow director testified that in September 2012, Hawk Meadow considered the student a second grader and placed him in the lower elementary school in a classroom of 20 students and three teachers (Tr. p. 878). According to the Hawk Meadow director, she and a Hawk Meadow teacher determined through listening to and reading with the student that his reading skills were at a kindergarten level, and that his math skills were at a first grade level (see Tr. pp. 878-79). The Hawk Meadow director also noted that when the student began at Hawk Meadow, he struggled with language components including reading, writing and spelling, primarily observed and watched, "had a very difficult time with remembering multistep directions," and got "stuck" if not directed by the teacher to the next step (see Tr. pp. 882-84). Additionally, the Hawk Meadow director described the student as someone who was "unsure of himself academically, not confident" (Tr. p. 883). During the 2012-13 school year, the student received instruction in language, spelling, reading, writing mechanics, penmanship, mathematics, science, geography, Chinese and Spanish (see Tr. pp. 879-80, 883-84).

To address the student's academic needs, Hawk Meadow personnel used sets of manipulatives and materials as part of the Montessori method of instruction for reading, mathematics and writing (Tr. pp. 901-04, 919-20, 936). Montessori personnel also positioned the student near a teacher who provided him visual, auditory and tactile prompts, and teachers wrote out directions for him, because they wanted him "to eventually be able to internalize those processes," and do it on his own (see Tr. p. 883). The evidence in the hearing record also shows that the student received "a lot of one-on-one" with the teacher due to his struggle with multistep directions, and need for assistance organizing his time, and "hands on" instruction (Tr. pp. 883, 901; see Tr. p. 863). To further help the student with time organization, the Hawk Meadow director testified that personnel helped him come up with a daily work plan, and a weekly work plan, which helped the student understand what he needed to accomplish in a day, and how to fit it in order to be successful (see Tr. pp. 883-84). Additionally, Montessori teachers provided the student with "a great deal of teacher direction and guidance to stay on task," and when guided by a teacher, the

student stayed focused and successfully completed his work (Parent Ex. MM at p. 11). Furthermore, to address the student's passivity about homework and finishing assignments, Montessori personnel gave him a list on his backpack to serve as a visual reminder (id.). Moreover, given that the student worked at a slower pace than the average student, his teachers afforded him extra time to complete assignments, and to help him be successful, teachers limited his assignments (id.).

More specifically, to address the student's reading needs, the Hawk Meadow director testified that teachers at Hawk Meadow used the Sequential English Education (SEE) program, which she explained incorporated multisensory components to provide language instruction and had similarities to the Orton-Gillingham methodology (see Tr. pp. 896-98, 961, 976-78).[17] She further testified that the SEE program mostly applied to language, and offered the student repetition and time to master the concepts (see Tr. p. 919). More specifically, the Hawk Meadow director described a language activity in which the student used "sandpaper letters" to touch, while both hearing and saying a particular letter to incorporate sight, touch and hearing (see Tr. pp 895-96). She further indicated that the SEE program broke down language into components such as individual phonemes, and "pieces of a word" (see Tr. pp. 896-98). The Hawk Meadow director testified that the student's teachers wrote down "exactly which sound he's working on," and "exactly where he [wa]s with his reading," monitoring his progress using class work, homework, and "sitting and reading and doing work with him" (see Tr. pp. 898-99). To address the student's needs related to mathematics, the Hawk Meadow director stated that to teach the student quantity, teachers provided him with numeral cards and different beads representing differing amounts, and asked him to solve an equation using the beads to both see and feel what the quantity looked like (see Tr. pp. 902-03). More specifically, teachers showed the student "the snake game," to aid him in a fast recall of the basic math facts (Parent Ex. MM at p. 11).

With respect to the student's social/emotional needs, as detailed above, there is sparse evidence in the hearing record to reflect that the student exhibited significant social/emotional concerns necessitating special education services; however, the parents reported that the student presented with difficulties with his self-esteem, confidence and adjustment to school (see Dist. Ex. 12 at p. 5). Specifically, the parent testified that when the student enrolled in Hawk Meadow in September 2012, after attending a summer program there, he was "crying, not good, still hated school," and was "self-conscious;" (see Tr. pp. 1164-65). Likewise, the Hawk Meadow director testified that, when the student began at Hawk Meadow in summer 2012, he was "negative about school" "reluctant to try new things," and appeared to lack confidence about his academic abilities (Tr. pp. 881-82, 978). She characterized the student as "quiet and reserved" and "not extremely social" (Tr. p. 882). According to the evidence in the hearing record, Hawk Meadow employed a guidance counselor who the Hawk Meadow director described as "a person in the classroom, that [was] there at all times, that [was] monitoring the children's wellbeing" (Tr. p. 954). The Hawk Meadow director testified that "one of the ways we can kind of judge how a student is doing socially, are they are asked to go to snack, because that's one of our social times during the day," and that the student "seemed to be feeling more confident" (Tr. pp. 904-05).

Given the student's above described needs, and the description provided in the hearing record of the instructional supports Hawk Meadow provided and the methodologies employed, the

[17] The Hawk Meadow director described Orton-Gillingham as a multisensory method of teaching or remediating with children with language difficulties (see Tr. pp. 896-97).

evidence in the hearing record supports a finding that Hawk Meadow provided the student with specially designed instruction to address his identified needs.

3. Progress

With respect to the student's progress at Hawk Meadow during the 2012-13 school year, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; L.K. v. Northeast Sch. Dist., 2013 WL 1149065, at *15 [S.D.N.Y. Mar. 19, 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 2012 WL 6646958, at *5 [S.D.N.Y. Dec. 21, 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364). However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

In this case, a comparison of the Hawk Meadow progress reports from November 2012 and March 2013 do not reflect that the student made significant gains in the areas measured; however, the Hawk Meadow director testified that the student had improved in his reading and writing (Tr. pp. 928-29; see generally Parent Ex. MM).[18, 19] More specifically, the Hawk Meadow director testified that the student's reading improved with the remediation of working on individual sounds and breaking down words (Tr. pp. 903-04). According to the 2012-13 school year progress report, the student was immersed in spelling, writing and journaling, and due to all of that practice, the student's writing improved (Parent Ex. MM at p. 11). By spring 2013, the student was beginning to use some of his spelling skills in his writing, with few reminders (id.). With respect to mathematics, the Hawk Meadow director testified that the student demonstrated mastery of skills, through his ability to "be more abstract in things like addition, into the thousands" (Tr. pp. 903-04). The Hawk Meadow director also testified that the student had also improved in terms of organizing his time, not just sitting and waiting for direction from a teacher (id.). She explained that every time she entered the classroom, the student was sitting with the materials, working through the materials, and that he seemed much more motivated, and had "made great strides in all the academic areas" (id.). With respect to the student's social/emotional needs, by fall 2012, the Hawk Meadow director opined that the student "had really started to acclimate to a different style of learning, and he had started to make friends and things like that" (Tr. p. 978). She further testified that the student had made social/emotional progress by the end of the 2012-13 school year

[18] The Hawk Meadow progress reports included general anecdotal comments and a subjective rating scale which included descriptors such as never, infrequently, usually, consistently, basic understanding, mastered concept, applies knowledge, abstraction, making good progress, shows significant strength, and having difficulty, with no objective measurability (see Parent Ex. MM).

[19] During the 2012-13 school year the student received two sessions of reading tutoring per week from October 2012 through June 2013 in his home, provided by an elementary school teacher who was seeking further certification in a multisensory reading program (see Tr. pp. 998-1001). However, the hearing record is not clear as to whether the student's progress in reading skills could be solely attributed to his instruction at Hawk Meadow; or if, in addition, the student made progress due to the tutoring he received in reading in the same school year. The hearing record contains no progress reports from the reading tutor.

and was starting to "have a community, socially, and be more outgoing" (Tr. pp. 904-05). The Hawk Meadow director further testified that the student "definitely seemed to be feeling more confident … in the spring time" (id.). Accordingly, an overall review of the evidence in the hearing record supports a finding that the student progressed in his areas of need, namely, reading, writing, and mathematics, and he developed greater self-esteem and confidence.

Based on the foregoing, a review of the evidence in the hearing record demonstrates that Hawk Meadow offered specially designed instruction to address his needs, the student demonstrated some progress, and therefore, it constituted an appropriate unilateral placement for the student for the 2012-13 school year. Accordingly, the IHO's conclusion that Hawk Meadow program was an appropriate educational placement for the student for the 2012-13 school year must be upheld.

E. Equitable Considerations

Having determined that the district failed to offer the student a FAPE for the 2012-13 school year and that Hawk Meadow was an appropriate placement for the student, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; 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"]). With respect to equitable considerations, the IDEA also 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, 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 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 IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving 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]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267

[1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G.,. at 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The district argues that the parents failed to cooperate with the CSE process, because they refused to provide their consent to the provision of special education services; therefore, equitable considerations preclude relief in this instance. A review of the evidence in the hearing record suggests that while the parents may not have submitted the consent form in a timely fashion, and that they exercised their right to challenge the June 2012 IEP, the parents ultimately consented to the provision of special education services (Dist. Exs. 18; 19; Parent Exs. F; K). Moreover, there is no other evidence in the hearing record to support a finding that the parents frustrated or obstructed the June 2012 CSE process; rather, a review of the evidence in the hearing record supports the IHO's finding that the parents attended the June 2012 CSE meeting and consented to the initial evaluations of the student (IHO Decision at p. 36; Tr. 89; Dist. Exs. 3 at p. 1; 8). Based on the foregoing, the evidence in the hearing record weighs against a finding that the parents failed to cooperate in the June 2012 CSE process to warrant a denial of relief.

The district further contends that the parents' failure to timely notify it of the student's removal from the public school precludes an award of relief in this instance, because the student had already enrolled in Hawk Meadow by the time the parents had submitted their 10-day notice. In this case, the student started in Hawk Meadow in summer 2012; the Hawk Meadow director testified that the summer program was "open to all students," and she further described it as "a program that's a nice entry for children that [we]re thinking of coming, but not strictly for students" already enrolled in Hawk Meadow or planning to attend (Tr. pp. 865, 963; 1513). In their due process complaint notice, the parents alleged that the district failed to offer the student summer services for the 2012-13 school year and sought reimbursement for summer 2012 services from the district (Dist. Ex. 1 at pp. 5, 7) On June 25, 2012, the parents paid the costs of the student's tuition at Hawk Meadow for the 2012-13 school year (Parent Ex. GG). Only on August 20, 2012 did the parents advise the district of their intention to unilaterally place the student at Hawk Meadow, and the student thereafter continued to attend Hawk Meadow for the remainder of 2012-13 school year (Tr. pp. 875-76; Dist. Ex. 15). Under the circumstances presented herein, the evidence in the hearing record shows that that the parents did not comply with the IDEA's 10-day notice requirement; however, the IHO's conclusion that equitable considerations weigh in favor of their request for relief need not be disturbed. As discussed previously, the evidence did not support the conclusion that the student required services in summer 2012 due to evidence of substantial regression, consequently, as a matter within my discretion I will limit reimbursement for Hawk Meadow to the 10-month portion of the 2012-13 school year to account for the parents' failure to provide timely notice of the summer services to the district.

F. 2013-14 School Year

1. June 2013 CSE Process—Evaluative Information

The parents allege that, in concluding that the June 2013 IEP was appropriate based on the latest information that the CSE did have, the IHO subtly acknowledged support for their contention that the IEP could not have been reasonably calculated to confer educational benefits on the student, because the district did not have updated evaluative information regarding the student's educational needs. They further allege that the IHO erred in "placing the blame on the parents for

not getting the consents in." The district denies the parents' contentions, and asserts that despite numerous requests, the parents did not provide it with the necessary consent forms to obtain updated evaluative information regarding the student from Hawk Meadow and the district of location. As explained more fully below, a review of the evidence in the hearing record supports the district's contentions, and the IHO's finding must be upheld.

In this instance, evaluative information before the June 2013 CSE included the documentation outlined above: a June 2012 classroom observation, a June 2012 psychoeducational evaluation, a June 2012 speech and language evaluation, and a June 2012 social history (Dist. Ex. 5 at p. 2; see Dist. Exs. 12; 13; Parent Exs. L; O). A review of the June 2013 IEP shows that the June 2013 CSE accurately depicted the student's academic, speech-language and social/emotional needs based on the information that it had before it at the time of the CSE meeting (compare Dist. Ex. 5 at pp. 2-5, with Dist. Exs. 12 at pp. 2-3, and 13 at pp. 2-5). Although it is undisputed that the district did not have information from Hawk Meadow or the district of location at the time of the June 2013 CSE meeting, the weight of the evidence in the hearing record supports a finding that the parents failed to provide the district with signed consent forms to obtain updated evaluative data regarding the student's educational needs from Hawk Meadow and the district of location (Tr. pp. 100-04, 157-58, 424, 429-30, 501-03, 563, 565, 568-69, 584, 587). Accordingly, assuming that the district failed to obtain sufficient and current evaluative information regarding the student's educational needs constituted a procedural violation, as explained more fully below, the hearing record does not contain sufficient evidence upon which to conclude that such a procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]). Rather, the evidence in the hearing record indicates that the June 2013 CSE discussed a consent form for the release of information from Hawk Meadow and the district of location; however, the student's mother was unwilling to sign the consent at that time (see Dist. Ex. 5 at p. 1). According to the June 2013 IEP, the CSE explained to the parent that it needed recent consents and current data in order to make an appropriate IEP recommendation (id.). The parent indicated that she would return the consent forms to the district on the following day (id.).

The executive director, who served as CSE chairperson, explained that the June 2013 CSE attempted to receive information from the "external placement, either Hawk Meadow and [the district of location]" (Tr. pp. 156-57).[20] He testified that the June 2013 CSE requested copies of the student's report cards or any reports that may have been created by the district of location (Tr. p. 157).[21] The executive director added that despite attempts to obtain information from the district of location and Hawk Meadow, the district's efforts were futile (Tr. pp. 249-50). Nor did the parents submit any additional documentation or test results during the June 2013 CSE meeting;

[20] The Hawk Meadow director testified that she was not aware whether the district had requested updated evaluative information on the student from Hawk Meadow (Tr. pp. 930-31).

[21] Here, the parents allege that the IHO erred in crediting the executive director's testimony (Answer ¶ 52). Generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist., 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). Here, the parents do not allege that the IHO erred in making any credibility findings; rather, their allegations appear to challenge the weight that should be afforded to his testimony.

however, the district principal testified that the parents discussed the private evaluation, "that mentioned dyslexia" (Tr. pp. 160, 426). The June 2013 CSE created a release form for the parent's signature, and contacted the district of location during the meeting, and in response, the district of location faxed a consent form to the director for the parent's signature (Tr. p. 158). Although the hearing record contains the signed consent form that the executive director created at the June 2013 CSE meeting, the executive director testified that the date of his testimony was the first time he had seen a signed version of the form (see Tr. pp. 168-69; Parent Ex. Z). According to the executive director, the parent never returned a signed consent form to the district (Tr. p. 159).[22]

Under the circumstances, the executive director testified that the June 2013 CSE developed the IEP, based "on the knowledge we had while [the student] was in the School District" (Tr. pp. 250-51). The executive director testified that based on the material that the June 2013 CSE had, it was appropriate to proceed in developing an annual review, that the information contained in the IEP was accurate and that it provided the student with a program and placement that was reasonably calculated for the student to learn and progress (Tr. pp. 160, 251). Similarly, the school psychologist testified that the June 2013 IEP was reasonably calculated to address the student's needs, with what it had available at that time and what was reported at the June 2013 CSE meeting (Tr. p. 563). The school psychologist further explained that the district could not make "any different recommendations because we have no progress marks," or "data points," (id.). Based on the foregoing, a review of the evidence in the hearing record supports a finding that while the district did not have updated information on the student's needs, based on the information that was available at the time, the June 2013 CSE had sufficient information on which to develop the IEP and cannot be faulted for the parents' failure to provide consent to obtain updated evaluations (see V.M., 954 F. Supp.2d at 118).

2. June 2013 IEP--15:1 Special Class Placement

In this instance, the parents do not argue that the June 2013 CSE's program recommendation was not appropriate to address the student's needs; rather, they assert that the IHO erred in failing "to consider the inappropriate and unnecessary restrictiveness of the proposed 2013-14 IEP recommending a self-contained special class with 12 students, all of which were kids with special needs and one adult."

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-

[22] The September 2012 signed consent forms included in the hearing record authorized the district to release the student's educational records to Hawk Meadow, and the district of location, not vice versa (Parent Exs. BB; II; JJ). Moreover, although the hearing record contains a June 26, 2013 facsimile verification report noting that the district of location sent 13 pages of documentation to the district, the transmission sheet does not specify what documentation was faxed or the substance of that information (Parent Ex. Y).

21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[23]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

[23] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington,546 F.3d at 120 n.4).

In this case, a review of the June 2013 IEP shows that the parents overstate the extent to which the IEP would provide supports to the student in a location separate from his nondisabled peers (see Dist. Ex. 5 at p. 1). Rather, the June 2013 CSE recommended a general education placement for the student with one 90-minute session per day of 15:1 special class language arts instruction, one 30-minute session per week of indirect consultant teacher services, and one 30-minute session per day of resource room in a group of five (see id. at p. 1). In addition, the June 2013 CSE recommended one 30-minute session per week of counseling in a group (id. at pp. 5, 7). Further, the June 2013 CSE recommended seven annual goals to address the student's needs related to study skills, reading, writing, mathematics, and social/emotional skills (id. at p. 6). Additionally, the June 2013 CSE recommended program modifications/accommodations in content areas and mathematics such as checking for understanding (daily and during class, to ensure the student had an understanding of concepts, information, and directions during new lessons and assignments), as well as special seating arrangements, daily and during class to maximize attention to the source of instruction during instructional time (id. at p. 7).

Contrary to the parents' assertions that the recommendations in the June 2013 IEP were unduly restrictive, the June 2013 CSE recommended placement of the student in 15:1 special class in language arts for 90 minutes per day, in addition to 30 minutes per day in a resource room, indicating that the student would spend the balance of the school day with the general education population (see Dist. Ex. 5 at p. 1).[24] The June 2013 CSE also recommended indirect consultant teacher services for the student (id.). The executive director explained that consultant teacher services consisted of a special education teacher who worked with the general education teacher to provide suggestions or modifications to make the student successful and that it was offered within a general education setting (Tr. p. 298). Similarly, the executive director explained that some of the students in the student's counseling group would have IEPs, while others would not (Tr. p. 301). Accordingly, a review of the evidence in the hearing record supports a finding that the June 2013 IEP was reasonably calculated to address the student's special education needs while balancing the need for an appropriate education with the need to maximize the student's participation with his nondisabled peers in the general education environment.

The parents also allege that the IHO erred in finding that the hearing record contained insufficient evidence that the student required a 12-month program recommendation, based on testimony from the Hawk Meadow director, that without ESY services, the student regressed in areas of need. The district refutes the parents' claims, and alleges that there is no evidence in the hearing record to support a finding that the student required ESY services. As explained more fully below, a review of the evidence in the hearing record supports the district's assertion.

In this instance, the Hawk Meadow director testified that "if [the student] were not in some sort of academic program for the summer, that there would be pretty severe regression" (Tr. p. 907). However, despite the Hawk Meadow director's assertion, there is no objective evidence in the hearing record to support this statement. Although the Hawk Meadow director testified that the teachers saw regression in the student after only a two-week break, the hearing record does not include teacher reports or other documentation to show that the student exhibited substantial

[24] The executive director described resource room as a supplemental service in the student's program, and further testified that the group could be comprised of classified and nonclassified students (Tr. pp. 299-300).

regression in areas of need following breaks from school (see Tr. pp. 906-07, 988-89). Rather, the Hawk Meadow director testified that following a school vacation, the student "fell behind in terms of multi-step directions," and "needed more prompting," (Tr. pp. 988-89). As such, the IHO's conclusion that the hearing record contained insufficient evidence that the student required special education services on a 12-month basis must be upheld.

G. 2014-15 School Year

At the time that the parents commenced this proceeding in September 2013, the CSE had not yet convened to develop the student's IEP, and hence, there is no way for the IHO or an SRO to determine whether the district offered the student a FAPE for the 2014-15 school year (see Dist. Ex. 1 at p. 1). Accordingly, to the extent that the parents raise claims related to the 2014-15 school year and request an award of reimbursement for the costs of the student's tuition at Hawk Meadow for the 2014-15 school year, such claims are premature and must be dismissed (see Application of a Student with a Disability, Appeal No. 12-074).

VII. Conclusion

In summary, and consistent with the IHO's conclusion, a review of the evidence in the hearing record establishes that the district did not violate its child find obligations to the student, nor did it fail to offer the student a FAPE for the 2011-12 school year, that the parents sustained their burden of establishing that Hawk Meadow constituted an appropriate unilateral placement for the 2012-13 school year and that equitable considerations weighed in favor of the parents' request for reimbursement. Having also determined that the evidence in the hearing record establishes that the district offered the student a FAPE for the 2013-14 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Hawk Meadow was an appropriate unilateral placement or consider whether equitable factors weigh in favor of an award of tuition reimbursement (see Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

In light of my determinations, I need not address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 10, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER