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THE SCARSDALE UNION FREE SCHOOL DISTRICT, Plaintiff, v. R.C. and K.C. o/b/o R.C., Defendants.

12 CV 1227 (VB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2013 U.S. Dist. LEXIS 21194

February 4, 2013, Decided

COUNSEL: [*1] For The **Scarsdale Union Free School District,** Plaintiff: Stephanie Marie Roebuck, LEAD ATTORNEY, Keane & Beane, P.C., White Plains, NY.

For R.C., on behalf of R.C., K.C., on behalf of R.C., Defendants: Peter David Hoffman, Law Office of Peter D. Hoffman, PC, Katonah, NY.

For R.C., K.C., Counter Claimants: Peter David Hoffman, Law Office of Peter D. Hoffman, PC, Katonah, NY.

For The **Scarsdale Union Free School District,** Counter Defendant: Stephanie Marie Roebuck, LEAD ATTORNEY, Keane & Beane, P.C., White Plains, NY.

JUDGES: Vincent L. Briccetti, United States **District** Judge.

OPINION BY: Vincent L. Briccetti

OPINION

MEMORANDUM DECISION

Briccetti, J.:

Plaintiff **Scarsdale Union Free School District** (the "**District**") brings this action against defendants R.C. and K.C. (collectively, "Parents") pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), *20 U.S.C. § 1400, et seq.* The **District** seeks judicial review of a decision by a State Review Officer ("SRO") at the New York State Education Department, which found the **District** failed to offer Parents' child, R.C., a **free** appropriate public education ("FAPE") for the 2008-09 and 2009-10 **school** years.

The **District** has moved for summary judgment (Doc. #14), **[*2]** and Parents have cross-moved for summary judgment (Doc. #17). For the reasons set forth below, Parents' motion is GRANTED in part and DENIED in part, and the **District's** motion is DENIED. The SRO's decision is affirmed in all respects.

The Court has subject matter jurisdiction pursuant to *28 U.S.C. § 1331*.

BACKGROUND

I. Statutory Framework

The IDEA was enacted to promote the education of disabled children. See *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 179, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)*. States receiving public funds are required to provide a FAPE to children with disabilities. *20 U.S.C. § 1412(a)(1)(A)*. Public **school districts** must provide "special education and related services tailored to meet the unique needs of a particular child, [which are] 'reasonably calculated to enable the child to receive educational benefits.'" *Walczak v. Fla. **Union Free** Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998)* (quoting *Rowley, 458 U.S. at 207*). These services are determined by the student's individual education plan ("IEP"), which **school districts** must develop periodically in collaboration with the child's parents. See *20 U.S.C. § 1414(d)(2)(A)*.

In New York, if the parents disagree with any part **[*3]** of the IEP process they may request an impartial due process hearing, which is administered by an impartial hearing officer ("IHO") appointed by the local board of education. See *20 U.S.C. § 1415(f)*; *N.Y. Educ. Law § 4404(1)(a)*. The IHO's decision may be appealed to an SRO. See *N.Y. Educ. Law § 4404(2)*; see also *20 U.S.C. § 1415(g)*. The SRO's decision may be challenged in state or federal court. See *20 U.S.C. § 1415(i)(2)(A)*.

A board of education may be required to reimburse parents for private educational services if (1) the services offered by the board of education were inadequate or inappropriate; (2) the services selected by the parents were appropriate; and (3) equitable considerations favor the parents' claim. See *Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70, 374, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985)*; *Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993)*.

II. Factual Background

The following factual background is undisputed. Therefore, it is recited without citations to the record.

Parents moved to the **District** in 2006, prior to the start of R.C.'s fifth grade year. R.C. had completed second through fourth grade at a private **school** in a foreign country. That **school** followed the "American **[*4]** system," utilizing a curriculum similar to those used in American **schools.**

In the second grade, R.C. received a "one-on-one reading and math program" each day in response to concerns relating to her reading, writing, and attention skills. The private **school's** psychologist subsequently administered a psychoeducational evaluation of R.C., which found that R.C. exhibited problems consistent with "both dyslexia and dysgraphia." The psychologist also found R.C. was "at risk" for attention deficit hyperactivity disorder ("ADHD"). The psychologist recommended R.C. be enrolled in her **school's** "Specific Learning Disabilities" program, which hopefully would improve her reading, writing, and math skills.

In the third and fourth grades, R.C. received daily one-on-one sessions with a learning specialist pursuant to an IEP developed by the private **school** in compliance with the IDEA. According to Parents, R.C. also received extra time to complete exams.

At the conclusion of R.C.'s fourth grade year, a different psychologist conducted an updated psychoeducational evaluation of R.C. The results of that evaluation indicated R.C. "ha[d] addressed the needs that were designated, and she ha[d] made solid **[*5]** progress . . . over the last two years, particularly in written expression." R.C. also demonstrated a lack of significant social or emotional issues. The psychologist indicated that, based on her progress, R.C. may not be eligible for special education programs under the IDEA in the future, although the psychologist acknowledged R.C. would benefit from continued "tutorial support." The psychologist further noted that R.C. should continue to receive accommodations pursuant to *Section 504* of the Rehabilitation Act of 1973, *29 U.S.C. § 794* ("*Section 504*"), because she was diagnosed as having ADHD.[1]

> 1 "The Rehabilitation Act provides that no otherwise qualified individual with a disability in the United States shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. The definition of 'individual with a disability' under Section 504 of the Rehabilitation Act is broader in certain respects than the definition of a 'child with [a] disability' under the IDEA. . . . A student could therefore qualify for accommodations under Section 504 **[*6]** of the Rehabilitation Act and yet not be entitled to special education services under IDEA." *Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 287-88 (S.D.N.Y. 2010)* (internal quotation marks, citations, and alterations omitted).

R.C. attended a **District** elementary **school** for fifth grade (the 2006-07 **school** year). Upon moving to the **District,** Parents met with the principal of the **District's** elementary **school** and discussed R.C.'s educational background. Parents also hired a private tutor to work with R.C. once per week throughout the **school** year.

In October 2006, R.C.'s pediatrician diagnosed R.C. with attention deficit disorder ("ADD") and prescribed her medication.

On October 31, 2006, a committee convened to determine whether R.C. was eligible for program modifications or accommodations under Section 504 (the "Section 504 Committee"). Based on R.C.'s ADHD and ADD diagnoses, the committee recommended R.C. receive the following program modifications and accommodations: (1) preferential seating; (2) refocusing and redirection; (3) extended time for assignments; (4) testing accommodations, including extended time, special location, and adult refocusing; and (5) "learning resource **[*7]** center services."

Parents frequently communicated with R.C.'s teachers throughout R.C.'s fifth grade year. At the conclusion of the **school** year, Parents told at least one of R.C.'s teachers that they believed R.C. would benefit from continuing to receive Section 504 program modifications and accommodations in the sixth grade.

The Section 504 Committee reconvened on October 30, 2007, to discuss what modifications and accommodations, if any, R.C. should receive as a sixth grader. All of R.C.'s teachers reported that R.C. was having a successful beginning to the **school** year. In particular, R.C. had not required extra time to complete any of her quizzes or exams. Although Parents were pleased to hear the teachers' evaluations, they expressed concerns with respect to R.C.'s difficulties with reading comprehension, outlining, and organizational skills. Despite Parents' concerns, the Section 504 Committee concluded R.C. did not meet the eligibility requirements to continue receiving accommodations pursuant to Section 504 (the "Section 504 Decision").

Shortly after the Section 504 Committee meeting, Parents sent a letter to the **District** requesting a further meeting to discuss the Section 504 **[*8]** Decision. Parents believed the decision not to grant accommodations was "premature and arbitrary."

In November 2007, Parents met with the **District's** director of special education (the "Director"). Parents requested an appeal of the Section 504 Decision, a request parents later memorialized in a letter, which stated in part: "We believe that there is a substantial amount of information that supports our position that [R.C.] needs at a minimum a 504 Plan and, more likely, classification under IDEA."

On January 6, 2008, R.C.'s mother emailed the Director to check the status of Parents' appeal of the Section 504 Decision, and to inform the Director that Parents were obtaining a private neuropsychological evaluation of R.C. The email also expressed concern over the quality of some of R.C.'s recent writing assignments and requested that R.C. receive certain accommodations, asking: "How do we go about arranging this? Do we ask for another CSE meeting?" The email further stated: "we feel we cannot wait as [R.C.] desperately needs assistance."

On January 13, 2008, R.C.'s mother again emailed the Director expressing concerns about the Section 504 Decision. With respect to the IDEA, R.C.'s mother **[*9]** stated: "We are proceeding with testing and plan to pursue services for [R.C.] pursuant to the IDEA."

On February 4, 2008, R.C.'s mother sent another email to the Director indicating that R.C.'s neuropsychological evaluation would be completed by mid-March. R.C.'s mother further stated: "I want to give you sufficient time to plan a CSE meeting after this date. I would appreciate some notice as I will be asking [the doctor evaluating R.C.] to join us in this meeting."

By letter dated February 11, 2008, the Director informed Parents that their appeal of the Section 504 Decision was denied. Having conducted an independent review of the decision, the Director agreed with the committee's conclusion that R.C. did not meet the eligibility requirements for Section 504 accommodations. The Director acknowledged that R.C. was in the process of being evaluated by an independent psychiatrist, and noted the **District** would "certainly review any new information [Parents] care[d] to bring forward," with the caveat that "the findings w[ould] be evaluated in relation to [R.C.]'s **school** performance," meaning "should the evaluator state that [R.C.] has an area or areas of disability[,] there will be a need **[*10]** to see evidence of the difficulty(ies) in her **school** performance."

Between January and April 2008, Parents obtained private neuropsychological, speech-language, psychiatric, and binocular/oculomotor evaluations of R.C. In May 2008, Parents' counsel requested another Section 504 Committee meeting and provided the Director with the results of R.C.'s speech-language evaluation (but not the other evaluations). The speech-language evaluation indicated R.C. "seem[ed] to exhibit a speech and language dysfunction, affecting her

phonemic and syntactic levels of language, including her auditory processing and sequencing of linguistic data." The evaluator recommended R.C. attend regular speech-language therapy sessions.

The Section 504 Committee reconvened in June 2008 to consider the speech-language evaluation and Parents' continued belief that R.C. needed accommodations. The committee concluded the condition described in the speech-language evaluation was insufficient to entitle R.C. to Section 504 accommodations. Parents' attorney disagreed with the committee's conclusion, and asked for a "full evaluation." When asked whether she was requesting an evaluation "under 504 or under IDEA," the attorney **[*11]** said she wanted to discuss that question with Parents, and she would tell the committee members how Parents wished to proceed at a later time. However, the attorney never followed up with the committee members and Parents discharged her in July 2008.

In August 2008, Parents requested a meeting to be attended by Parents, the pathologist who prepared the speech-language evaluation, and the Director. At that meeting, Parents discussed R.C.'s educational background, including the accommodations and special education programming she had previously received, both in and outside the **District.** The Parents also gave the Director the results of R.C.'s neuropsychological and binocular/oculomotor evaluations. Both evaluations recommended R.C. receive various accommodations and special programming. R.C.'s mother told the Director she would be "forced" to enroll R.C. in a non-**District school** at the **District's** expense if the **District** failed to offer R.C. an appropriate educational program.

Between the August meeting and the beginning of the 2008-09 **school** year, Parents spoke to the Director several times on the telephone. However, these conversations resulted in "no guarantee" that R.C. would receive **[*12]** any special services, and Parents decided to enroll R.C. as a boarding student at the Kildonan **School** for the 2008-09 **school** year (R.C.'s seventh grade year). Kildonan, located in Amenia, New York, in northern Dutchess County, is "an independent day and boarding **school**" for students with dyslexia or similar language-based learning disabilities. Kildonan is approximately 70 miles from Parents' home. R.C. also attended Kildonan as boarding student in 2009-10 for eighth grade.

In February 2010, Parents filed a due process complaint alleging the **District** denied R.C. a FAPE for the 2008-09 and 2009-10 **school** years. Parents sought reimbursement for R.C.'s Kildonan tuition and boarding costs.

A. The IHO Decision

The IHO hearing consisted of nineteen days of proceedings between March and August 2010. The IHO found the **District** failed to provide R.C. with a FAPE for the 2008-09 **school** year because it failed to evaluate R.C. despite Parents' written and verbal requests, and it failed to identify R.C. as a student suspected of having a disability. (IHO Decision at 58-59).

The IHO also found the **District** breached its "child find"[2] obligations for the 2008-09 **school** year because the **District** had sufficient **[*13]** information concerning R.C.'s possible disabilities and should have conducted its own evaluations and convened a CSE to determine whether R.C. was eligible for special education services. (Id. at 61-62).

2 "Child find" refers to a local **school district's** obligation to provide special education services to disabled students placed by their parents in private **schools**. See *20 U.S.C. § 1412(a)(10)(A)(ii)(II)*; *34 C.F.R. § 300.131(b)*.

Because the **District** had failed to properly identify and evaluate R.C., the IHO found the **District** -- where Parents continued to reside -- was responsible for providing R.C. with a FAPE, not the **district** where Kildonan is located. (Id. at 62). The IHO further concluded the evidence presented at the hearing demonstrated that R.C. was eligible for special education programs under the IDEA. (Id. at 63-64). Specifically, the IHO found R.C. "certainly presented with both a language based disability which negatively impacted on her ability to read write, spell, listen or think." (Id. at 64). The IHO further found R.C. "had attention and organization issues that negatively affected her ability to produce work." (Id.). Based on these findings, the IHO concluded that R.C. **[*14]** "met the criteria for a number of classifications such as learning disability." (Id.).

Next, the IHO found Kildonan was an appropriate placement for R.C. for the 2008-09 **school** year, rejecting the **District's** argument that Kildonan did not provide R.C. with special education services in the "least restrictive environment." (Id. at 65-68).

The IHO also found that equitable considerations favored granting Parents reimbursement for the 2008-09 **school** year because Parents cooperated with the **District** at all times and offered the **District** many opportunities to evaluate R.C. (Id. at 68-69).

With respect to the 2009-10 **school** year, the IHO found (1) the **District** failed to provide R.C. with a FAPE; (2) the **District** failed to fulfill its child find obligation for R.C.; (3) the **District** failed properly to classify R.C. or offer her an appropriate educational program; (4) R.C.'s disabilities qualified her for special education services under the IDEA; and (5) Kildonan was an appropriate placement for the 2009-10 **school** year. (Id. at 69-71). The IHO made these findings for substantially the same reasons she made similar findings with respect to the 2008-09 **school** year.

Based on equitable considerations, **[*15]** however, the IHO limited Parents' reimbursement for the 2009-10 **school** year to the cost of R.C.'s tuition at Kildonan exclusive of boarding costs. The IHO found such a reduction was appropriate because Parents "did nothing to foster the cooperative process," nor did Parents provide the **District** with progress reports from Kildonan or the results of R.C.'s most recent neuropsychological evaluation until the IHO hearing. (Id. at 71). Furthermore, there was no evidence Parents sought to place R.C. in a day **school** closer to home for the 2009-10 **school** year, even though they had time to do so. (Id).

B. The SRO Decision

Parents appealed the IHO's decision to the extent it limited Parents' reimbursement for the 2009-10 **school** year, and the **District** cross-appealed the IHO's decision to the extent it found the **District** had failed to provide R.C. with a FAPE and failed in its child find responsibilities. The **District** also appealed the IHO's finding that Kildonan was an appropriate placement for R.C., and that equitable considerations favored requiring the **District** to reimburse Parents for the cost of sending R.C. to Kildonan.

The SRO affirmed the IHO's finding that Parents had requested in writing **[*16]** an evaluation of R.C., and thus the **District** was obligated to conduct an evaluation pursuant to *N.Y. Comp. Codes R. & Regs. tit. 8, § 200.4(a)*.[3] (SRO Decision at 21-22). The SRO further determined the **District's** failure to evaluate R.C. was not "inconsequential" because the IHO correctly concluded that the evidence adduced at the hearing supported a finding that R.C. was eligible for services under the IDEA. (Id. at 22-23). The SRO concluded that "the failure to evaluate [R.C.] upon parent request; combined with the failure to convene a CSE to review the relevant information and data, determine if additional evaluations were necessary, and complete the procedures to identify students with learning disabilities, resulted in denial of a FAPE." (Id. at 24).

> 3 *N.Y. Comp. Codes R. & Regs. tit. 8, § 200.4(a)* provides, in relevant part: "A student suspected of having a disability shall be referred in writing to the chairperson of the **district's** committee on special education or to the building administrator of the **school** which the student attends or is eligible to attend for an individual evaluation and determination of eligibility for special education programs and services."

The SRO also affirmed **[*17]** the IHO's determination that the **District,** as the **district** of residence, had the duty to evaluate and provide services for R.C. for the 2008-09 and 2009-10 **school** years, not the **district** where Kildonan is located. (Id. at 24-25).

The SRO further affirmed the IHO's finding that Kildonan was an appropriate placement for R.C. for the 2008-09 **school** year. The SRO noted the record indicated that the various teaching methods used by Kildonan appropriately addressed R.C.'s language needs. (Id. at 27-30). The SRO also agreed with the IHO's finding that Kildonan was an appropriate placement for the 2009-10 **school** year. (Id. at 31).

Finally, the SRO agreed with the IHO that equitable considerations warranted granting Parents reimbursement for tuition and boarding costs for the 2008-09 **school** year, but only for tuition for the 2009-10 **school** year. (Id. at 33-34).

The **District** appealed the SRO's decision to this Court, and Parents filed a cross-appeal.

DISCUSSION

I. Applicable Legal Standards

Motions for summary judgment usually resolve IDEA cases in federal court. See *Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 377 (S.D.N.Y. 2006)*. Unlike in an ordinary summary judgment motion, the existence **[*18]** of a disputed issue of material fact will not necessarily defeat the motion. Id. Rather, summary judgment in the IDEA context functions as an appeal from an administrative decision. *T.P. v. Mamaroneck **Union Free** Sch. Dist., 554 F.3d 247, 252 (2d Cir. 2009)*.

In a review action pursuant to the IDEA, the Court (1) reviews the records of the administrative proceedings; (2) hears additional evidence at the request of a party; and (3) grants such relief as it deems appropriate based on the preponderance of the evidence. *20 U.S.C. § 1415(i)(2)(C)(3)*; see *Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 380, 74 Fed. Appx. 137 (2d Cir. 2003)*.

The standard of review for IDEA cases has been characterized as "modified de novo." *M.R. v. South Orangetown Cent. Sch. Dist., 2011 U.S. Dist. LEXIS 145177, 2011 WL 6307563, at *6 (S.D.N.Y. Dec. 16, 2011)*. Although the court must engage in an independent review of the record and make a determination based on a preponderance of the evidence, its review of state administrative decisions is limited. See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. at 205-06*; *Walczak v. Fla. **Union Free** Sch. Dist., 142 F.3d at 129*. The Supreme Court and the Second Circuit have cautioned that the IDEA requires **[*19]** "substantial deference to state administrative bodies on matters of educational policy." *Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 191 (2d Cir. 2005)*. Thus, the court must be mindful "that the judiciary generally lack[s] the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy," *Walczak v. Fla. **Union Free** Sch. Dist., 142 F.3d at 129*, and should not "substitute [its] own notions of sound educational policy for those of the **school** authorities which they review." *Rowley, 458 U.S. at 206*. Deference is particularly appropriate when the SRO's review has been "thorough and careful." *Walczak v. Fla. **Union Free** Sch. Dist., 142 F.3d at 129*.

As the Second Circuit clarified in M.H. v. New York City Department of Education, "the **district** court's determination of the persuasiveness of an administrative finding must also be colored by an acute awareness of institutional competence and role." *685 F.3d 217, 244 (2012)*. Courts should afford more weight to SRO determinations when they involve the substantive adequacy of an IEP. *Id.* (citing *Cerra v. Pawling Cent. Sch. Dist., 427 F.3d at 195*). The Court should also afford more deference **[*20]** to the SRO when the decision is "grounded in thorough and logical reasoning" and when the Court's "review is based entirely on the same evidence as that before the SRO." *Id.*

II. Discussion

A. Parents' Request for a CSE Evaluation

First, the Court finds the SRO correctly concluded the **District** improperly failed to convene a CSE to evaluate R.C. in light of Parents' written requests for such an evaluation.

Upon written request by a parent, a **district's** CSE is obligated to evaluate any student suspected of having a disability and determine whether that student is eligible for special education programs and services. See *N.Y. Comp. Codes R. & Regs. tit. 8, § 200.4(a)*.

Here, the record reflects Parents communicated to the Director or other **District** personnel on numerous occasions their belief that R.C. may be entitled to services under the IDEA. For example, in an email sent on January 6, 2008, R.C.'s mother asked whether "another CSE meeting" should be scheduled to address her concerns about R.C.'s academic progress. One week later, Parents informed the Director they were "proceeding with testing and plan to pursue services for [R.C.] pursuant to the IDEA." Finally, on February 4, 2008, after **[*21]** telling the Director that R.C.'s neuropsychological testing would be completed the following month, R.C.'s mother stated: "I want to give you sufficient time to plan a CSE meeting after this date. I would appreciate some notice as I will be asking [the doctor evaluating R.C.] to join us in this meeting."

Having carefully reviewed the record, the Court agrees with the SRO and finds that the written requests outlined above obligated the **District's** CSE to evaluate R.C. and determine whether she was eligible for special education programs under the IDEA. Because the **District** failed to conduct such an evaluation, the SRO correctly concluded the **District** failed to provide R.C. a FAPE for the 2008-09 and 2009-10 **school** years. See *New Paltz Cent. Sch. Dist. v. St. Pierre ex rel. M.S., 307 F. Supp. 2d 394, 401 (N.D.N.Y. 2004)* (student "should have been referred to the CSE for evaluation" after parent informed **district** that student "was experiencing difficulties").

Further, the Court's finding that the **District** improperly failed to honor Parents' request to evaluate R.C. forecloses the **District's** argument that the **district** in which Kildonan is located, rather than the **District,** was responsible **[*22]** for providing R.C. a FAPE for the 2008-09 and 2009-10 **school** years. It would be contrary to law -- not to mention common sense -- to hold another **district** liable for the **District's** failure to meet its obligations under the IDEA with respect to R.C. See *J.S. v. **Scarsdale Union Free** Sch. Dist., 826 F. Supp. 2d 635, 667-68 (S.D.N.Y. 2011)* (noting Second Circuit holding that parents were "entitled to reimbursement even though their child had *never* attended the defendant's public **schools** and had *always* attended out-of-**district** private **schools**," and thus parents were not required

to seek "special education services from the local **districts** encompassing the child's various private **schools**") (citing *Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 367-68 (2d Cir. 2006))*.

B. Eligibility Under the IDEA

The Court also agrees with the SRO that the record supports the IHO's conclusion that R.C. was eligible for programs and services under the IDEA. Parents' privately obtained neuropsychological, speech-language, and binocular/oculomotor evaluations all expressed concerns that R.C. had learning difficulties affecting her academic performance. The February 2008 neuropsychological evaluation concluded **[*23]** that R.C. required "considerable support" to address her difficulties with attention/executive, language, and social/emotional functioning. The April 2008 speech-language evaluation indicated R.C. had substantial speech and language difficulties, and recommended she receive speech-language therapy. Also, R.C.'s private social skills group therapist testified that R.C. had difficulty with verbal expression and auditory processing. This evidence supports the SRO's determination that the IHO correctly found R.C. was eligible for special education services under the IDEA.

Although the **District** never conducted its own evaluation of R.C., it maintains R.C. "did not present with indicia of learning disabled, or any other educational classification, or exhibit any need for accommodations during the years in question." (**District's** Mem. Supp. Summ. J. at 7). In support of its position, the **District** cites R.C.'s satisfactory academic performance in the sixth grade, when she received no accommodations or special programming. (Id. at 8). The **District** further contends the SRO erred by crediting Parents' private evaluations over the testimony of R.C.'s teachers and the results of R.C.'s quizzes and **[*24]** tests.

Although the Court is not unsympathetic to the **District's** arguments, "an assessment of educational progress is a type of judgment for which the **district** court should defer to the SRO's educational experience," particularly when the Court's decision is "based solely on the record that was before the SRO." *Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d at 367* (internal quotation marks omitted). Therefore, the Court defers to the SRO's judgment with respect to R.C.'s educational progress, and concludes the SRO correctly weighed the evidence in affirming the IHO's determination that R.C. was eligible for programs or services under the IDEA.

C. Reimbursement

When a **district** fails to provide a disabled child with a FAPE under the IDEA, the child's parents may unilaterally place the child in an appropriate private **school** and seek tuition reimbursement. See *Sch. Comm. of Burlington, Mass. v. Dep't of Educ., 471 U.S. at 369-70*; *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. at 12*. "Under the *Burlington-Carter* test for tuition reimbursement, [parents] are entitled to reimbursement of private **school** tuition if (1) the IEP was not reasonably calculated to enable the child **[*25]** to receive educational benefits, (2) the private schooling obtained by the parents is appropriate to the child's needs, and (3) equitable considerations support the [parents'] claim. *A.D. v. Bd. of Educ. of City Sch. Dist. of City of N.Y., 690 F. Supp. 2d 193, 205 (S.D.N.Y. 2010)* (internal quotation marks omitted).

Parents have satisfied the first prong of the *Burlington-Carter* test because the **District** failed in its obligation to develop an IEP for R.C., meaning the **District** necessarily failed to provide an IEP "reasonably calculated to enable [R.C.] to receive educational benefits." Id.

As to the second prong, the Court agrees with the SRO's determination that Kildonan was an appropriate placement for R.C. "Under New York law, the burden of proof falls upon the parents to show that their unilateral placement at a private **school** was appropriate." Id. (citing *Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 58, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005)*; *N.Y. Educ. L. § 4404(1)(c)*). The standards for determining whether a private **school** placement is "appropriate" under the IDEA are similar to the standards for assessing the adequacy and appropriateness of a proposed public placement. As the Second Circuit has explained, **[*26]** "[s]ubject to certain limited exceptions, the same considerations and criteria that apply in determining whether the **school district's** placement is appropriate should be considered in determining the appropriateness of the parents' placement." *Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112 (2d Cir. 2007)* (internal quotation marks omitted). "The issue turns on whether a placement -- public or private -- is reasonably calculated to enable the child to receive educational benefits." *Id.* (internal quotation marks omitted). "A private placement meeting this standard is one that is 'likely to produce progress, not regression.'" *Id.* (quoting *Walczak v. Fla. **Union Free** Sch. Dist., 142 F.3d at 130*.) "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." *Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d at 364* **[*27]** (internal quotation marks and citations omitted).

Here, the preponderance of the record evidence supports the SRO's finding that Kildonan was an appropriate placement for R.C. As the IHO noted, Kildonan's curriculum is specifically geared toward teaching students with language-based disabilities, including dyslexia, and R.C. "matches the profile of the students the **school** is designed to serve." (IHO Decision at 66). Moreover, the record indicates R.C. succeeded academically at Kildonan. Although evidence of R.C.'s progress is not dispositive in determining whether Kildonan was an appropriate placement, it is a factor that may be considered. See *Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d at 115*. Having reviewed the record, the Court agrees with the SRO that, based on the totality of the circumstances, "the placement reasonably served [R.C.]'s individual needs, providing educational instruction specially designed to meet the unique needs of [R.C.]." (SRO Decision at 31). The record also supports the SRO's finding that Kildonan offered an educational benefit for R.C. in the least restrictive environment under the circumstances. (Id. at 32-33). Because the SRO's review of the evidence **[*28]** on this issue was "thorough and careful," the Court defers to the SRO's determination. See *Walczak v. Fla. **Union Free** Sch. Dist., 142 F.3d at 129*.

Finally, the Court agrees with the SRO's analysis of the equitable considerations in determining Parents' entitlement to reimbursement. With respect to the 2008-09 **school** year, the record indicates Parents cooperated with the **District,** participated at meetings, and made numerous requests to have R.C. evaluated by the **District** before they ultimately decided to enroll R.C. at Kildonan. Furthermore, the SRO credited the testimony of R.C.'s mother, who stated she told the Director she would hold the **District** liable if she was "forced" to place R.C. in a non-**District school.** Therefore, the Court agrees with the SRO's decision to grant Parents full reimbursement for the 2008-09 **school** year.

With respect to the 2009-10 **school** year, however, the record supports the SRO's conclusion that Parents failed to (1) provide the **District** with R.C.'s progress reports or evaluations from Kildonan; (2) provide the **District** with a psychoeducational evaluation completed after Parents placed R.C. at Kildonan until the time of the due process hearing; and (3) attempt **[*29]** to find a **school** closer to their home, which would obviate the need for R.C. to attend a boarding **school.** As the SRO noted, "unlike the 2008-09 **school** year, [Parents] had ample opportunity to identify a day program for [R.C.]." Therefore, the Court agrees with the SRO's determination that Parents' reimbursement for the 2009-10 **school** year should be reduced by the cost of the boarding component of the program. To the extent Parents' summary judgment motion seeks full reimbursement for the 2009-10 **school** year, the motion is denied.

Having found the SRO correctly determined the **District** failed to provide R.C. with a FAPE for the 2008-09 and 2009-10 **school** years, the Court need not consider Parents' request for an adverse inference based on the alleged spoliation of evidence.

CONCLUSION

Plaintiff's motion for summary judgment (Doc. #17) is DENIED. Defendants' cross-motion for summary judgment (Doc. #14) is GRANTED in part and DENIED in part. The Court therefore affirms the decision of the SRO and dismisses the complaint.

The Clerk is instructed to terminate these motions and close the case.

Dated: February 4, 2013

White Plains, NY

SO ORDERED:

/s/ Vincent L. Briccetti

Vincent L. Briccetti

United **[*30]** States **District** Judge