The University of the State of New York

The State Education Department
State Review Officer
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No. 13-183

Application of the XXXXXXXXX for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Francesca J. Perkins, Esq., of counsel

Skyer & Associates, L.L.P., attorneys for respondents, Jesse Cole Cutler, 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') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Churchill School (Churchill) for the 2012-13 school year. The appeal must be sustained.

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

According to the hearing record, the student attended an integrated co-teacher (ICT) class at a district public school for the 2010-11 and 2011-12 school years (Tr. pp. 29, 291). On February 14, 2012, the parents signed an enrollment contract with Churchill for the 2012-13 school year (Parent Ex. Y at pp. 1-2).

By letter, dated March 21, 2012, the parents requested that the CSE convene to consider a "full-time special education school setting" for the student (Parent Ex. G at p. 1). On May 9, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (Parent Ex. H at p. 12). The May 9, 2012 CSE determined that the student was eligible for special education and related services as a student with a speech and language impairment and recommended ICT services, as well as related services consisting of speech-language therapy and occupational therapy (OT) (id. at pp. 1, 8).

By an undated letter to the district, the parents expressed their concerns about the manner in which the CSE meeting had been conducted, as well as the recommendations made by the CSE (Parent Ex. I at p. 1). Specifically, the parents: objected to the failure of the district to ensure the presence of an additional parent member until the conclusion of the May 9, 2012 CSE meeting; stated that they were denied an opportunity to meaningfully participate in the development of the student's IEP; stated that the student should have been deemed eligible for special education services as a student with a learning disability, rather than with a speech and language impairment; offered an alternative annual goal to be included in the May 9, 2012 IEP; inquired whether, in order to measurable, all of the annual goals should specify that they be implemented a second grade level; indicated that they should have been provided copies of evaluative materials in advance of the CSE meeting; and indicated their desire that the results of the private evaluation be added to the IEP (id.). Finally, the parents requested that their disagreement with the CSE's recommendations be clearly stated in the May 9, 2012 IEP (id.).

In response to the parents' concerns, on May 23, 2012, the CSE reconvened to develop an amended IEP for the 2012-13 school year (Tr. pp. 45, 66; Parent Ex. K at p. 12). The May 23, 2012 CSE changed the student's category of eligibility to a student with a learning disability and recommended a 12:1+1 special class in a community school, along with the related services of speech-language therapy and OT (Parent Ex. K at pp. 1, 8-9).

The parents visited the public school site to which the district had assigned the student (Tr. p. 313). By letter, dated June 12, 2012, the parents rejected the public school site as not appropriate for the student (Parent Ex. L at p. 1). The parents requested that the CSE reconvene to consider a non-public school for the student (id.).

Per the parents' request, the CSE again reconvened a third time on July 10, 2012 (Tr. p. 70; Parent Ex. M at p. 15). The July 2012 CSE continued the student's eligibility for special education programs and services as a student with a learning disability (Parent Ex. M at p. 1).[1] The July 2012 CSE recommended that the student receive ICT services and special education teacher support services (SETSS) for math, one session per week in the classroom, and for English language arts (ELA), two sessions per week in the classroom and two individual sessions per week in a separate location (id. at pp. 10-11). The July 2012 CSE also recommended that the student receive the related services of speech-language therapy and OT, both in a small group (id. at p. 11).

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

By letter to the district, dated July 12, 2012, the parents rejected the July 2012 IEP as not appropriate for the student and stated their impression that the district predetermined the recommendation (Parent Ex. N at p. 1). By letter dated August 22, 2012, the parents rejected the July 2012 IEP as not appropriate for the student and stated further reasons for their objections (Parent Ex. A at pp. 1-3). Specifically, the parents stated that: the July 2012 CSE's recommendation of ICT services with SETSS in ELA and math was not appropriate for the student and was predetermined by the district; the July 2012 CSE did not review sufficient evaluative information to recommend such a program; the student's annual goals on the July 2012 IEP were not measurable; and the July 2012 CSE failed to consider "the full continuum of special education programs" (id. at p. 2). The parents also informed the district that, unless an appropriate placement was recommended, they would enroll the student at Churchill at public expense (id. at p. 3). The parents also notified the district of their intent to request transportation from the district for the student to and from Churchill (id.). By subsequent letter, dated October 9, 2012, the parents requested that the CSE reconvene to "consider a more appropriate recommendation" for the student (Parent Ex. O at p. 1).

A. Due Process Complaint Notice

The parents filed a due process complaint notice dated November 19, 2012, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year on both substantive and procedural grounds (Parent Ex. B at p. 1). The parents alleged that (1) the district engaged in impermissible "predetermination" and deprived the parents the opportunity to meaningfully participate in developing the student's IEP; (2) the district failed to adequately assess and evaluate the student and/or failed to adequately review existing evaluative information and, therefore, the July 2012 CSE did not have sufficient information on which to base its recommendations; (3) the annual goals listed in the July 2012 IEP were not sufficient to meet the student's needs; (4) the CSE's recommendation for ICT services with SETSS was not appropriate for the student; and (5) the CSE did not properly consider the programs available within the continuum of placement options (id. at pp. 2-4).

In addition, the parents alleged that the student's placement at Churchill was appropriate and that equitable considerations favored the parents' request for relief (Parent Ex. B at p. 4). As relief, the parents requested that the IHO award them the costs of the student's tuition at Churchill for the 2012-13 school year and transportation to and from Churchill (id. at p. 2).

B. Impartial Hearing Officer Decision

On June 25, 2013, an impartial hearing was convened and it concluded on August 5, 2013, after three days of proceedings (Tr. pp. 1-408). By decision dated August 20, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, that Churchill was an appropriate placement for the student, and that equitable considerations favored the parents (IHO Decision at pp. 8-17). The IHO determined that (1) contrary to testimony of a district witness, the July 2012 CSE did not sufficiently review the privately obtained October 2011 neuropsychological and educational assessment report and the April 2012 addendum thereto; (2) the July 2012 CSE improperly relied upon a May 2012 psychological update prepared by the district to determine that the student was only a few months behind in her

reading and writing skills and could adequately function in an ICT classroom; (3) the recommendation for ICT services with SETSS was not appropriate to meet the student's needs (id. at pp. 12-13).

The IHO also held that the parents satisfied their burden of proving that Churchill was an appropriate placement for the 2012-13 school year, finding that: Churchill utilized appropriate "methods and curriculum for the presentation of all academic subjects;" the student made "substantial progress and development in most areas;" and that the private school, which was established for students with average or above-average cognitive intelligence but difficulties reading, was appropriate for the student (IHO Decision at pp. 13-15). Lastly, the IHO determined that equitable considerations favored the parents because the parents forcefully advocated for an appropriate placement for the student, attended all CSE meetings, obtained private evaluations of the student, visited the assigned public school site recommended based on the May 23, 2012 IEP, and provided appropriate notice to the district of their objections (id. at pp. 15-16). Consequently, the IHO ordered the district to pay the costs of the student's tuition at Churchill for the 2012-13 school year (id. at p. 17).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year, that Churchill was an appropriate placement for the student for the 2012-13 school year, and that equitable considerations favored the parents request for relief. Specifically, the district asserts that the July 2012 CSE reviewed the private evaluations, as well as other evaluative information, to determine the student's functional levels and needs and that the CSE's recommendation of ICT services with SETSS was appropriate for the student and consistent with the private evaluations. The district also asserts that the IHO erred in refusing to credit the testimony of the school psychologist that she reviewed the private evaluations prior to the July 2012 CSE meeting. Additionally, the district alleges that the IHO erred to the extent that he implied that the district predetermined the recommendations set forth in the July 2012 IEP. Additionally, although not addressed by the IHO, the district contends that the parents actively participated in developing the student's IEP and that the district was not required to consider other programs available within the continuum of placement options because the recommendation was reasonably calculated to enable the student to receive educational benefits and constituted the least restrictive environment (LRE) for the student. In addition, in response to recitations in the parents' due process complaint notice, relating to the assigned public school site, relative to the May 23, 2012 IEP, the district asserts that, since the parents rejected the IEP, the district was not required to demonstrate that the assigned school was appropriate.

The district also alleges that the IHO erred in finding Churchill to be an appropriate placement because the school was too restrictive and there was insufficient information in the hearing record regarding whether the private school's curriculum addressed the student's academic and social needs. Next, the district alleges that equitable considerations did not favor the parents' request for relief because they did not seriously intend to enroll the student at a public school. The district seeks an order reversing the IHO's decision in its entirety.

The parents answer the district's petition, opposing the district's positions and asserting that the IHO correctly determined that the district failed to offer the student a FAPE, that Churchill was an appropriate placement for the student, and that equitable considerations weighed in favor of awarding the parents tuition reimbursement.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction"

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

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

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

expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Predetermination / Parent Participation

The IHO did not explicitly make any findings that the CSE impermissibly predetermined the July 2012 IEP program recommendation or that the parents were denied an opportunity to meaningfully participate in the development of the IEP but did recount testimony relating to these issues in his findings of fact, and both the district and the parents have addressed the issues on appeal (see IHO Decision at p. 13). The district also challenges the IHO's finding that the July 2012 CSE did not adequately consider the privately obtained evaluations of the student (IHO Decision at p. 12).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

Moreover, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. June 13, 2012], aff'd, 2013 WL 3868594 [2d Cir. July 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y., 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't

of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009], aff'd, 2010 WL 565659 [2d Cir. Feb. 18, 2010]).

Here, the hearing record reflects meaningful and active parental participation in the development of the student's July 2012 IEP. The parents attended all three of the CSE meetings together with their attorney (Tr. p. 352; Parent Exs. H at p. 14; K at p. 15; M at p. 18).[2] Significantly, the July 2012 CSE meeting cannot, in view of the evidence in this instance, be examined in isolation, without consideration of the May 9, 2012 and May 23, 2012 CSE meetings that preceded it. The evidence shows that the July 2012 IEP document culminated from discussions and contributions that took place at all of the CSE meetings (see generally Parent Ex. M). All three CSE meetings convened in response to the parents' requests, and many of the parents' concerns, as set forth in those requests, were considered and addressed (see Tr. pp. 45, 66, 70; Parent Exs. G; I; K at pp. 1, 8-9; L; M at pp. 10-11).

Although the parents testified that they felt "ambushed" at the May 9, 2012 CSE meeting (Tr. p. 307), the supervisor of school psychologists, who attended the meeting, testified that the parents offered significant input into formulating the student's management needs and, in particular, prompted a detailed discussion regarding the assignment of a scribe for the student, which resulted in a recommendation for such (Tr. pp. 56-57; Parent Ex. H at p. 3). The parents' attorney testified that the May 23, 2012 CSE meeting was smaller, "less intense," and "more collaborative" (Tr. p. 357). Similarly, the school psychologist testified that the parents "participated thoroughly" in the July 2012 CSE meeting (Tr. p. 128).[3] She indicated that the July 2012 CSE reviewed the student's present levels of performance and that the parents stated their concerns, which were memorialized in the student's IEP (Tr. p. 118; Parent Ex. M at pp. 2-3).

After the May 9, 2012 CSE meeting, the student's mother, who was also teacher herself, requested the opportunity to consult with a professional colleague with regard to additional annual goals for the student (Tr. pp. 45, 66, 308-10; Parent Ex. I at p. 1). The parents offered an adjusted math goal and requested that the annual goals specify that the student would work "at a second grade level" (Parent Ex. I at p. 1). Consistent with this request, the May 23, 2012 IEP reflects that the annual goals were modified from the May 9, 2012 IEP by adding language specifying that the student would work on some of her goals "on a second grade level" and adopting the wording of the annual goal dealing with math word problems, which was offered by the parents, as well as adding a goal requiring the student to verbally answer "wh" questions

[2] Neither party offered into evidence an attendance page with the signatures of members who attended the May 9, 2012 CSE meeting (see Tr. pp. 47-49; Parent Ex. H at p. 14).

[3] While the IHO held that the school psychologist's testimony that she reviewed the privately obtained evaluations was "unworthy of belief," he did not hold that the school psychologist's testimony, as a whole, was not credible (see IHO Decision at p. 12).

about a story that she read independently on a second grade level (compare Parent Ex. H at pp. 5-6 with Parent Ex. K at pp. 4-8). The parents' attorney testified that the July 2012 CSE reviewed and discussed the student's annual goals "piece by piece" (Tr. p. 355). The evidence shows that the annual goals from the May 29, 2012 IEP, along with some further refinements, were carried over to the July 2012 IEP (compare Parent Ex. K at pp. 4-8 with Parent Ex. M at pp. 5-10). Moreover, the school psychologist testified that the parents requested an additional goal to address the student's difficulty processing information and the July 2012 IEP reflects the addition of this additional goal (Tr. p. 124; Parent Ex. M at pp. 10, 16).

The May 23, 2012 CSE also acceded to the parents' requests that the student's eligibility classification be changed from speech and language impairment to learning disability and that the CSE recommend a 12:1+1 special class placement for the student (Parent Exs. I at p. 1; K at pp. 1, 8-9). Although the parents did not reject the May 23, 2012 IEP but objected only to the assigned public school site, the CSE reconvened in July 2012 and recommended ICT services with SETSS for the student (Parent Exs. L at p. 1; M at pp. 2, 10-11). According to the school psychologist, by recommending SETSS for the student, the CSE responded to the parents' expressed concerns about the student's ability to work in large groups and her delays in reading and writing (see Tr. pp. 129-30).[4]

The foregoing evidence indicates that the district attempted to respond to many of the parents' identified concerns and held multiple CSE meetings to fashion an IEP that would address the student's needs. While the parents may not agree with the ultimate recommendations made by the July 2012 CSE, mere parental disagreement does not amount to a denial of meaningful participation (see P.K., 569 F. Supp. 2d at 383; Sch. for Language & Commc'n Dev., 2006 WL 2792754, at *7).

Furthermore, contrary to the IHO's determination, the hearing record also shows that the CSE sufficiently considered the privately obtained evaluations, including the October 2011 neuropsychological and educational assessment report and the April 2012 addendum thereto (see IHO Decision at p. 12; Parent Exs. D; E). One aspect of the parents' right to participate is the requirement that the CSE must consider private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]).

The IHO found that the testimony of the school psychologist was "unworthy of belief" on this point and that the reports were not "properly reviewed" at the meeting (IHO Decision at p. 12).[5] Upon review, due deference is given to the credibility findings of an IHO unless non-testimonial evidence in 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]; M.W., 869 F. Supp. 2d at 330; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a

[4] The parents testified that this recommendation did not address her concerns (Tr. p. 346; see also Tr. p. 360).

[5] The parents and their attorney testified that the school psychologist appeared unaware that the private evaluations existed and printed and reviewed them during the meeting (Tr. pp. 316, 318-19, 359-62). The school psychologist testified that she did review the private evaluations prior to the July 2011 CSE meeting and did not recall the exchange described by the parents and their attorney (Tr. pp. 110, 114-16, 140-41).

Student with a Disability, Appeal No. 12-076). In this instance, the non-testimonial evidence compels a contrary conclusion to the one reached by the IHO, who did not offer any explanation regarding why the school psychologist's testimony on this issue was "unworthy" of belief. Notwithstanding the IHO's credibility finding, the documentary evidence shows that the CSE incorporated aspects of the private evaluations in the July 2012 IEP (compare Parent Exs. D; E with Parent Ex. M). For example, the July 2012 IEP itself actually cites the September 2011 neuropsychological assessment report for the information that the student presented with "average working memory and processing speed abilities" (Parent Ex. M at p. 2).[6] Moreover, the evidence shows that the May 9, 2012 and the May 23, 2012 CSEs reviewed the private evaluations and that aspects of the evaluations were incorporated into the descriptions of the student in the May 23, 2012 IEP, which were carried over into the July 2012 IEP (Tr. pp. 37-38; Parents Ex. K at p. 1). Even if the July 2012 CSE did not actually discuss the private evaluations during the course of the meeting, the requirement that the CSE consider such evaluations does not necessitate substantive discussion (T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993], citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *18-*19 [S.D.N.Y. Sept. 16, 2013]; K.E. v. Indep. Sch. Dist. No 15, 2010 WL 2132072, at *19 [D. Minn. May 24, 2010], aff'd, 647 F.3d 795 [8th Cir. 2011]; James D. v. Bd. of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Based on the foregoing and in the instances of this case, the level of review committed by the July 2012 CSE to the review of the privately obtained evaluations did not result in a denial of a FAPE.

With respect to allegations of predetermination, the school psychologist disavowed this claim, stating that the July 2012 CSE met for two hours or more to discuss the student's program recommendation (Tr. p. 128). The school psychologist testified that the July 2012 CSE had before it a draft IEP, which was prepared in advance of the CSE meeting, but that the program recommendation and other portions of the IEP were completed during the meeting (Tr. pp. 135-36). She testified that certain CSE members conducted a pre-conference the morning of the July 2012 CSE meeting, in order to review documents (Tr. p. 137, 154-55; see also Tr. pp. 92-93). The parents and the parents' attorney testified that, upon commencing the July 2012 CSE meeting, the school psychologist immediately announced that the CSE should recommend ICT services for the student (Tr. pp. 316, 359). The school psychologist did not recall this announcement and testified that the July 2012 CSE discussed the parents' preference for a smaller classroom setting and/or a non-public school for the student (Tr. p. 130-31, 137). The July 2012 IEP reflects that the CSE considered other placement options for the student, including placement in a general education class with related services, a general education class with SETSS, or a special class in a community school, which were rejected, respectively, as insufficiently supportive or too restrictive for the student because of the student's academic needs (Parent Ex. M at p. 16).

In this instance the hearing record does not show that the preparatory activities that the district engaged in prior to the July 2012 CSE meeting led to impermissible predetermination of the program and placement recommendations (see M.W., 869 F. Supp. 2d at 333-34 [holding that the fact that the district CSE participants were prepared for the meeting did not mean that the

[6] This information did not appear in the May 9, 2012 or May 23, 2012 IEPs (see generally Parent Exs. H; K).

IEP developed for the student was predetermined). Even if the evidence showed that the program recommendation was discussed by certain members of the CSE in advance of the July 2012 CSE meeting, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; M.W., 869 F. Supp. 2d at 333-34; D.D-S., 2011 WL 3919040, at *10-11; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R., 615 F. Supp. 2d at 294). In this case, the hearing record amply shows that the CSE considered multiple options over the course of several meetings (Parent Exs. H at p. 8; K at pp. 8-9; M at pp. 10-11). There is also evidence that establishes the July 2012 CSE discussed and considered placement options other than the ICT services with SETSS ultimately recommended, and CSE members including the parents, discussed the proposed recommendations with the understanding that changes to the IEP could be made at that time, thus affording the parent the opportunity to participate in the development of the student's IEP (see Parent Ex. M at p. 16).

B. Evaluative Data

The parents have not challenged the sufficiency of the data available to the July 2012 CSE directly; rather, they contend that the ultimate program recommendation was not supported by the available evaluative information (see J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9-*10 [S.D.N.Y. Aug. 5, 2013] [noting the distinction between claims of whether a CSE has adequate information to develop an IEP and whether the CSE gave due consideration to the available information]). In this instance, discussion of the available evaluative data before the CSE facilitates discussion of the issue to be resolved—the appropriateness of the program recommendation set forth in the July 2012 IEP.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments, as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

In this case, in addition to the October 2011 neuropsychological assessment report and the private April 2012 addendum to the October 2011 report, the July 2012 CSE's review of which is discussed above, the school psychologist indicated that the July 2012 CSE also reviewed a May 2012 psychological update and a May 2012 classroom observation, both conducted and prepared by a district school psychologist, as well as a December 2011 OT evaluation (Tr. pp. 109-10, 126; see Dist. Exs. 1; 2; Parent Exs. D; E; F).

The October 2011 neuropsychological assessment report indicated the student had "many cognitive strengths and a willingness to work diligently in school and at home" (Dist. Ex. D at p. 12). The evaluator reported that the student's overall intellectual functioning based on results of formal administration of the Wechsler Intelligence Scale for Children- Fourth Edition (WISC-IV) was in the average range and on par with her peers in several domains (id. at pp. 2, 6).

However, the evaluator noted there was variation and scatter among the student's scores that ranged between the below average range to the average range (id. at p. 6). The evaluator reported that many cognitive tasks for school success placed the student's testing performance in the average range (id. at pp. 2, 6). The neuropsychological assessment report provided an explanation of the student's difficulties in language processing, memory span, fine motor skills, and processing visual information that made it difficult for her to complete tasks adequately (id. at pp. 2-3). The evaluator indicated that the student's first grade teacher corroborated the results indicating the student's struggles with language processing and concluded that the student continued to require ongoing speech and language support to maintain her progress (id. at p. 2). Additionally, the evaluator reported that the student's cognitive deficits in language, visual processing, and memory affected her ability to develop phonological awareness and rapid naming skills, which the private evaluator characterized as skills that "underlie reading" (id. at p. 3).

According to the neuropsychological assessment report, academically, the student required explicit individualized attention to develop her phonological awareness and rapid naming skills in order to make gains in reading (Parent Ex. D at p. 3). With regard to reading, the evaluator noted that, while the student was beginning to gain foundational reading skills, she required reading remediation and a structured curriculum to ensure appropriate gains (id. at p. 10). The report explained that, as writing involved the ability to visually perceive letters, translate letters into sounds, string words together to create meaning, and use linguistic knowledge to make coherent and organized sentences, the student required structured instruction in a small group setting in order to master the component parts of writing, a skill also affected by her motor difficulties (id.). The neuropsychological assessment report described mathematics as one of the student's "relative strengths" (id. at p. 4). The report indicated the student's difficulties with language processing and memory affected her receptive and expressive language skills (id.). The student did better during testing when presented with tasks in a clear format, when given adequate practice, and when motor and expressive language demands were limited (id.). The student performed better on word retrieval/ naming tasks when given fewer options from which to choose (id.). The neuropsychological assessment report indicated that the student learned best when provided with hands-on, straightforward, and structured presentation of information, and worked most effectively when provided with simple, clear directions presented in small chunks (id. at pp. 4, 12).

The April 2012 addendum report indicated the purpose of the academic testing update conducted by the same evaluators who conducted/supervised the October 2011 neuropsychological assessment report six months earlier, and as requested by the parents, was to assess the student's functioning at the time, help the parents understand areas in which the student needed continued support and remediation, and determine the nature of an appropriate educational placement for the student (Parent Ex. E at p. 1). The evaluator observed that the results of formal testing placed the student within, above, or below the average range as defined by her peers (id.). Formal re-administration of several of the same academic assessment tools, as well as newly administered subtests or tests, revealed the student continued to have significant deficits in her foundational reading skills and actual reading ability (id. at pp. 1-2). Although the student was able to decode non-words within the average range, showing an ability to make sound-symbol correspondences for individual letters and up to three letter words, she was unable

to use phonetic and structural cues to decipher blends and decode longer words (id. at p. 2). Consistent with this, the student was unable to read stories aloud and answer questions based on the stories (id.). Test results fell below first grade equivalency level on a test that measures fluency, accuracy and comprehension (id.). On a different test of reading comprehension, the student performed at the K.9 grade equivalent level for tasks in which she needed to decode and understand text (id.). The addendum report indicated, that "[t]aken together," the results demonstrated that the student had not made significant gains in reading in the six months between the October 2011 and April 2012 assessments (id.). In writing, test results indicated the student was able to write letters of the alphabet at an adequate pace, and combine two simple sentences into one sentence (id. at p. 3). The addendum report indicated that such tasks did not involve much expressive language, as the task items provided all of the necessary words, which a student can copy to complete the task (id.). When asked to generate a sentence using a target word, without the availability of words to copy, the student needed to simultaneously activate cognitive and academic skills including expressive language, visual perceptual skills, knowledge of letter formation, organization and planning, attention, and graphomotor skills (id.). The evaluator indicated that when the student needed to activate all of these skills simultaneously, she was unable to develop an idea and produce information at a level commensurate with her same-age peers (id.). The addendum report indicated the student was not making adequate writing gains in her school placement at that time (id.). Test results revealed that since the previous assessment, the student made progress at an adequate pace in math (id.).

Review of the July 10, 2012 IEP shows that the July 2012 CSE also considered its own testing conducted in May 2012 (Dist. Ex. 1 at pp. 1-2). The May 2012 psychological update reported results of administration of the Wechsler Abbreviated Scale of Intelligence (WASI) (id.). The evaluator indicated that the student's full scale IQ of 104 fell within the average range of cognitive functioning, her verbal IQ of 113 fell within the high average range, and her performance IQ of 94 also fell within the average range (id.). Based on these results, the evaluator observed that the student performed somewhat better on verbal expression and comprehension than on tasks requiring manipulations with concrete materials and visual motor integration (id. at p. 2). The evaluator concluded that the student was friendly and cooperative, exhibited age appropriate attention span and frustration, and did not present as a behavior problem (id.). The IHO pointed out that improvements in the student's scores on the WJ-III as reported in the April 2012 addendum report as compared to the May 2012 psychological update, could be attributed to the student's "familiarity with the [t]est" (IHO Decision at p. 6; compare Dist. Ex. 1 at p. 2 with Parent Ex. E at p. 5). However, even without considering the student's scores on the WJ-III as reported in the May 2012 psychological update, the hearing record indicates that the July 2012 IEP offered the student an appropriate special education program and related services tailored to address the student's strengths and delays as described in the evaluative materials available to the CSE.

C. July 2012 Placement Recommendation

The parties dispute the appropriateness of the July 2012 IEP's provisions for ICT services with SETSS in math and ELA for the student (see Parent Ex. M at pp. 10-11). State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]).

The number of students with disabilities who receive ICT services in a class may not exceed 12 students, and the classroom is required to be staffed by, at a minimum, one special education and one regular education teacher (8 NYCRR 200.6[g][1]-[2]). The supervisor of school psychologists explained that the SETSS recommendation in the IEP would provide the student with more direct and specific reading remediation and, to a lesser extent, math remediation (Tr. p. 73). The school psychologist elaborated that the SETSS would consist of another special education teacher coming into the student's classroom and helping her with lessons there, as well as providing individualized assistance to the student outside of the classroom twice weekly (Tr. p. 130).

The parents have consistently asserted that the student failed to make progress in an ICT class during the 2011-12 school year and, therefore, the July 2012 CSE erred in recommending a similar program (see Parent Exs. A at p. 2; B at p. 2; I; N; O; see also Tr. p. 91). A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2013 WL 3155869, at *2 [2d Cir. June 24, 2013]); Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation" at p. 18 [NYSED Office of Special Education, December 2010]). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153–54 [10th Cir.2008]; Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D.D-S., 2011 WL 3919040, at *12; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Bd. of Educ. Champaign Cmty. Unit Sch. Dist. #4, 2007 WL 2681207, at *3 [C.D. Ill. Aug. 10, 2007]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

As an initial matter, there are distinct differences between the student's special education program implemented during the 2011-12 school year and the recommendations found in the July 2012 IEP. The evidence in the hearing record reveals that the student attended an ICT class for the 2011-12 school year and received speech-language therapy (Tr. pp. 29, 291; see Dist. Ex. 1 at p. 1; Parent Ex. D at p. 1).[7] According to a March 21, 2012 correspondence from the parents, a previous CSE meeting had been held on December 20, 2011, which added the related service of OT, as well as the services of a reading specialist, to the student's special education

[7] Neither party offered a copy of the student's IEP for the 2011-12 school year into evidence at the impartial hearing.

program (Parent Ex. G at p. 1).[8] Additionally, according to the March correspondence, the parents indicated that they would arrange for private tutoring for the student (id.). The July 2012 IEP continued the recommendation for ICT services, with related services of speech-language therapy and OT, but added SETSS, consisting of once weekly push-in session for math, twice weekly push-in sessions for ELA, and twice weekly pull-out individual sessions for ELA (Dist. Ex. M at pp. 10-11). Furthermore, the July 2012 IEP also provided for an occupational therapist to act as the student's scribe at school on a trial basis (id. at p. 3). However, because the student attended an ICT classroom during the 2011-12 school year and the July 2012 IEP recommended, among other things, the student's attendance in an ICT classroom, the student's progress in the prior school year is a relevant area of inquiry for purposes of evaluating the appropriateness of the July 2012 IEP.

The neuropsychologist indicated that ICT services would not be appropriate for the student because she had already been in a similar placement for 2011-12 and did not make progress (Tr. p. 199). However, although on the one hand the October 2011 neuropsychological assessment report went on to recommend more intensive instruction for the student, on the other hand the evaluator also observed that the student benefited from the structure and supports in her then-current school placement (Parent Ex. D at p. 12). The supervisor of school psychologists testified that participants at the May 9, 2012 CSE meeting, including the student's special education teacher, general education teacher, and speech-language therapist, reported that the student was doing well and making progress (Tr. p. 64).

The student's report card for the 2011-12 years indicated that the student fell behind in reading, but improved or remained consistent in writing, listening and speaking, math, science, and social studies (Parent Ex. Q at pp. 2-3). As of the first quarter, the student's teacher reported that the student exhibited "excellent participation skills" and was "working well in math" but noted the student's need to "work on basic reading and writing skills and organizing information" (id. at p. 4). By the second quarter, although the teacher again reported that work was needed on "sight words and comprehension skills," she indicated that the student had shown improvement in math and writing (id.). The student's promotion to the second grade remained in doubt until the last quarter of the school year (Parent Exs. Q at p. 4; R). The hearing record also indicates that during the course of the 2011-12 school year, the student progressed in her reading program from a level "A" on the Fountas & Pinnell Benchmark Assessment in September 2011 to a level "D" in April 2012 (Tr. pp. 95-96; Parent Ex. T at pp. 1-2).[9]

The neuropsychologist indicated that, but for one test targeting math, the student did not exhibit statistically significant improvement from administration of the tests in October 2011

[8] The April 2012 addendum report states that the student received specialized reading instruction, OT, and the services of a private tutor during the 2011-12 school year; however, the parent's correspondence indicates that such services were not recommended until the December 2011 CSE meeting (IHO Decision at pp. 4-5; Parent Exs. E at p. 3; G at p. 1).

[9] According to the academic update, the expected progress for the period of September through April for a first grade student consisted of advancement from level "C" to level "G" (see Parent Ex. T at pp. 1-2). Thus, the evidence in the hearing record shows that, although the student was below grade level in this respect, she did exhibit progress.

until April 2012, when the testing for the addendum report was completed (Tr. p. 191-93). Focusing on WJ-III subtests relevant to the student's reading skills, the hearing record indicates that the student stayed the same or exhibited some progress (compare Parent Ex. D at p. 19 with Parent Ex. E at p. 5). For example, in October 2011, the student received a standard score of 92 (29th percentile) on the word attack subtest, compared to a score of 99 (46th percentile) in April 2012, indicating some progress (Parent Exs. D at p. 19; E at p. 5).[10] However, in October 2011, the student received a standard score of 89 (24th percentile) on the letter word identification subtest, compared to a score of 88 (21st percentile) in April 2011, exhibiting no change in the student's performance (id.).

While the student struggled in some respects during the 2011-12 school year, the evidence in the hearing record reflects that the delays she experienced were largely in reading and writing, which the July 2012 CSE addressed by modifying the student's IEP to add SETSS in ELA to the student's special education program (see Parent Ex. M at pp. 10-11). Moreover, in acknowledgement of the student's delays in this respect, the July 2012 IEP reflects that the CSE changed the student's promotion criteria from standard to 50 percent of the second grade ELA standards (id. at p. 16).

The supervisor of school psychologists, who participated in the May 9, 2012 CSE meeting, testified her view that the July 2012 CSE's recommendation for ICT with SETSS was "quite an excellent recommendation," stating that the student did not "require anything more intensive or restrictive" (Tr. p. 73). Specifically, she indicated that an ICT class would be a "perfect fit" for the student since she was only a few months below grade level and an ICT class incorporated students that are a year or less below grade level (Tr. p. 129). She explained that the student's cognitive and academic performances fit the criteria for an ICT class (Tr. p. 149). Given the information in the private evaluations, detailed above, as well as the parents' expressed concerns regarding the student's delays in processing and reading and writing, the SETSS component of the July 2012 CSE's program recommendation was an appropriate recommendation in order to maintain the student's involvement in the ICT class, where she showed progress in most subjects, but provide additional services to target the student's delays in reading and writing.

The July 2012 IEP reflects that the CSE considered other special education programs for the student and stated the reasons for rejecting them (Dist. Ex. M at p. 16). The CSE rejected a special class in a community school as too restrictive for the student, noting that the student's "intellectual skills fall within the average to high average parameters" and that her academic skills "are not uniformly developed" but that the student has "areas of strength that in combination with her good intelligence make a special class much too restrictive for her needs" (id.).

Addressing the parents' preference for a small special class for the student, the school psychologist explained that such a program would not be appropriate because the student was "functioning properly" in the ICT class, in that "she was able to raise her hand, answer questions" and participate in the class (Tr. p. 131). She indicated that, according to the

[10] The neuropsychologist testified that there was not a significant change in the student's score on the word attack subtest (Tr. p. 187).

evaluative materials, and particularly the May 2012 classroom observation, the student did not exhibit frustration in the ICT class (id.). Consistent with this description, the May 2012 classroom observation stated that the student: appeared engaged in the book being read to the class, raised her hand; appropriately participated in the class activity; seemed interested in the activity and finished it quickly; and understood the teacher's directions and instructions and was motivated to complete her work (Dist. Ex. 2 at p. 1). The observer concluded that the student was well behaved and appropriate during the lesson, appeared motivated and engaged in the assignment, demonstrated an understanding of the task, worked diligently and persistently, and appeared proud of her work (id.). Based on her review of the classroom observation, the school psychologist concluded that the student was at ease in such a setting (Tr. p. 152).

In contrast, the neuropsychologist testified that ICT services would be inappropriate for the student because being in a classroom with 25 students and two teachers would not be as beneficial as being in a classroom of 12 students and one teacher (Tr. p. 199). She indicated that, in an ICT class, the student would be exposed to more external stimulation, the pace of language would be faster, and there would be constant competing language (id.). According to the neuropsychologist's testimony, the underlying principal in an ICT class is to differentiate instruction for regular education and special education students in the same classroom, whereby special education students work within the general education curriculum of an ICT classroom with a little extra support (Tr. pp. 199-200). The neuropsychologist indicated the student in the instant case required a curriculum "geared towards teaching her language skills, all day, every day, throughout all instruction" (Tr. pp. 200-01). She stated the student needed a curriculum that "understood" the student could not hold more than three pieces of information in her mind simultaneously, and encode and learn, notwithstanding modifications and special education teacher support (id.). [11]

Both the October 2011 neuropsychological assessment report and the April 2012 addendum recommended placement in a small self-contained special education classroom that was warm and nurturing, and with teachers specially trained to work with students with language-based disabilities and reading and writing disabilities (Parent Exs. D at p. 13; E at p. 4). The addendum report concluded that the student required a classroom setting designed to meet the needs of bright students with specific learning disabilities, and be able to provide the student with individual support to remediate her learning difficulties (Parent Ex. E at p. 4).

Notwithstanding the recommendations set forth in the private evaluations or the testimony of the neuropsychologist, the evidence in the hearing record shows that the recommendation for ICT services with SETSS and related services was designed to support the student's special education, language and academic needs, while providing her with appropriate access to her nondisabled peers. Moreover, while the recommendations set forth in the private evaluation reports were not included in the student's IEP, the district was required only to consider the parents' privately obtained evaluations; it was not required to adopt the private evaluators' recommendations over those of district personnel (Watson v. Kingston, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004], aff'd 2005 WL 1791553 [2d Cir. July 25, 2005]; see also Marshall

[11] The neuropsychologist made reference to a "famous study" from the 1950s that indicated most people can hold seven pieces of information in their mind (Tr. p. 200).

Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 641 [7th Cir. 2010]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *10 [S.D.N.Y. Jan. 13, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *12 [S.D.N.Y. Feb. 16, 2011]; Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at *6 [S.D.N.Y. Sept. 29, 1998]). This is particularly so in this case. While evidence above shows that the neuropsychologist explained that the ICT may not be as beneficial to the student as a special class setting advocated by the parents, it also shows that the student was previously making some progress in the ICT setting with less supports than recommended under the proposed IEP, and the fact that a student may make greater academic progress in a more restrictive setting does not dictate the conclusion that a less restrictive setting is therefore inappropriate under the IDEA (Newington, 546 F.3d at 120 [adopting the Third Circuit's test in Oberti]; Oberti v. Board of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1217 [3d Cir. 1993] [noting that a determination that a child with disabilities might make greater academic progress in a segregated, special education class may not warrant excluding that child from a regular classroom environment].

Throughout the process, the parents consistently requested that the district place the student in a specific nonpublic school (see Tr. pp. 63-64, 91-92, 109; Parent Exs. B at p. 4; L at p. 1). In regard to this request, the district was not required to consider removing the student altogether from the public school and placing of the student in a nonpublic school if it believed that the student could be satisfactorily educated in the public schools (W.S., 454 F.Supp.2d at 148-49). "If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school . . . IDEA views private school as a last resort" (W.S., 454 F.Supp.2d at 148; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate *public* education"] [emphasis in original]; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]; T.G., 2013 WL 5178300, at *19-*20; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009]; Patskin, 583 F.Supp.2d at 430-31). Thus, although the parents might have preferred otherwise, given the availability of an appropriate program for the student in this instance, the district was not required to recommend a private school.

The July 2012 IEP also provided additional supports to the student by recommending strategies aligned to the student's needs, including: repetition of instructions and directions; provision of adequate time to express her verbal options during classroom activities; further instruction after completion of a task; and provision of reminders to revise work before submitting it (Parent Ex. M at p. 3). Additionally, consistent with the neuropsychological

assessment report, the July 2012 IEP recommended that the student be provided a scribe on a trial basis (Parent Exs. D at p. 13; M at p. 3). The July 2012 IEP also provided for speech-language therapy to address the student's language deficits and OT to target the student's motor integration difficulties (Parent Ex. M at p. 11). The July 2012 CSE also included many goals on the IEP that were aligned to the student's needs, were specific and measurable, and comprehensively addressed the areas of reading, math, and writing, as well as multiple OT and speech-language therapy related functions, and auditory processing functions (id. at pp. 5-10). Thus, the totality of the July 2012 IEP offered the student an appropriate special education program designed to meet the student's needs.

Based upon the foregoing and contrary to the IHO's finding, the evidence contained in the hearing record supports the conclusion that the district's recommendation for ICT with SETSS and related services was reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year.

VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year must be reversed as it is not supported by the hearing record. It is therefore unnecessary to reach the issue of whether Churchill was appropriate for the student or whether equitable considerations support the parents' claim, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S., 2011 WL 3919040, at *13).

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated August 20, 2013, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2012-13 school year.

Dated: **Albany, New York**
October 21, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER