The University of the State of New York

The State Education Department
State Review Officer
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No. 17-078

Application of the BOARD OF EDUCATION OF THE HEWLETT-WOODMERE UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Ingerman Smith, LLP, attorneys for petitioner, by S. Fahad Qamer, Esq.

The Law Offices of Neal H. Rosenberg, attorneys for respondents, by Lakshmi Singh Mergeche, Esq.

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 for the 2016-17 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student first received services through Early Intervention and the Committee on Preschool Special Education (Dist. Ex. 24 at p. 2). The student attended nonpublic school from kindergarten through eighth grade and since elementary school has received special education services (mainly resource room) through an individual education services plan (IESP) developed

by the district of location (Parent Ex. 36 at p. 1; Dist. Exs. 24 at p. 2; 28 at p. 2). From sixth through eighth grade, the student attended a nonpublic middle school where she received resource room services and small group pull-out services provided by a special education teacher in the private school's learning center (Parent Ex. 36 at p. 1; Dist. Ex. 28 at p. 2).

Prior to January 2015, the student had a history of chronic migraines, an attention deficit hyperactivity disorder (ADHD), and generalized anxiety (Dist. Ex. 29 at p. 1). In January 2015 during seventh grade the student sustained a concussion (Dist. Exs. 24 at p. 1; 28 at p. 2; 29 at p. 1). Following the student's concussion, she reported "experiencing headaches, dizziness, fatigue, increased sleep, sensitivity to light and noise, increased irritability, difficulties with concentrations and memory, trouble completing academic work and understanding instruction, and increased concrete thinking" (Dist. Ex. 29 at p. 1). Since sustaining the concussion the student has had ongoing academic struggles despite the supports available at her school (id.).[1]

The parents completed a public school registration form for the district dated April 6, 2016 (Parent Ex. 27). The district's assistant director for special education emailed the parent on April 18, 2016 and indicated that she had received the registration packet (Parent Exs. 3; 4 at p. 2).[2] The assistant director informed the parent that the student also had to be enrolled in the district (Parent Ex. 3). On May 17, 2016, the parent wrote a note to the special education office which stated that she was considering placing her daughter in the public school for the coming school year and requested that "all the steps are taken to speed this process and start her evaluation" (Parent Ex. 37). The district began evaluations of the student in June 2016 (Dist. Ex. 21 at p. 1).[3] [4] The district obtained the parents' consent for reevaluation on July 7, 2016 (Dist. Ex. 6).

The district's Committee on Special Education (CSE) convened on July 28, 2016 (Dist. Ex. 4). The CSE determined that the student was eligible for special education as a student with a traumatic brain injury and recommended a 15:1+1 special class placement for English, social

[1] The student was hospitalized for several short periods in the first year following her concussion (Parent Ex. 36 at p. 1). Additionally, while she attended classes, at times she was unable to complete any school work (id.). From September 2015 to June 2016, she was "able to attend classes more consistently and slowly, and began to do some work" (id.).

[2] The district's assistant director of special education testified that she spoke with the parent in March 2016 and that the parent requested her daughter be evaluated by the district (Tr. pp. 48-50). The parent confirmed this, testifying that she contacted the assistant director in March 2016 and informed the assistant director that she wanted the evaluation of her daughter to be completed by the district (Tr. pp. 1488-89, 1499-1500).

[3] A speech language evaluation was completed on June 27, 2016 (Dist. Ex. 21). An educational evaluation was completed on July 5, 2016 (Dist. Ex. 22). A social history was completed on July 7, 2016 (Dist. Ex 23). A psychological evaluation was conducted on July 11 and 14, 2016 (Dist. Ex. 24). A transition assessment was completed on July 14, 2016 (Dist. Ex. 25). A supplemental speech-language evaluation was completed on July 18, 2016 (Dist. Ex. 26).

[4] The CSE also had an August 3, 2015 neurological report; the report indicated that neuropsychological testing was attempted, but the student was unable to sit and concentrate for the testing (Dist. Exs. 4 at p. 6; 17 at p. 4).

studies, math, and science at the district's high school (id. at pp. 13-14).[5] Resource room, adapted physical education, individual counseling, and small group speech-language therapy were also recommended (id. at p. 14).[6] At the CSE meeting, the parent expressed concerns about the size of the district's high school and the student's ability to function in the general high school setting (id. at p. 9). In an August 2016 prior written notice, the CSE explained that it rejected general education classes with the support of integrated co-teaching services (ICT) because the student required more support (Dist. Ex. 9 at p. 1). The CSE noted that the parent requested consideration of nonpublic school placements because she felt the student may require a smaller school setting (id.). The CSE rejected this option because the recommendations "appropriately meet [the student's] needs and goals and an out-of-district placement would be too restrictive" (id.).

In August 2016, the parents obtained an independent neurological evaluation of the student from New York University (NYU) (Dist. Ex. 27 at p. 1).[7] Based on the recommendations included in the report, the parent requested that the CSE reconvene to review the new information (Parent Ex. 11).[8] The parent indicated that she would like to have a representative from the NYU Concussion Center participate in the CSE meeting via telephone (id.).

On September 30, 2016, the parent contacted the director of special education for the district and informed her that her request to visit the 15:1+1 special class and obtain a class profile was denied by the high school (Parent Exs. 17 at p. 1; 35). The director of special education indicated that the parent would be able to receive the class profile and that she would contact the high school regarding the visit (Parent Ex. 17 at p. 1). The parent testified that she was able to visit the class in early October 2016 and obtained the class profile during that visit (Tr. pp. 1546-47; 1550).

On October 7, 2016, the CSE reconvened and recommended the same special class placement as the July 2016 IEP (compare Dist. Ex. 3 at pp. 1, 14, with Dist. Ex. 4 at pp. 1, 13-

[5] Prior to the July 28, 2016 CSE meeting, the student's classification was other-health impairment (Parent Ex. 2 at p. 1).

[6] The July 2016 CSE recommended that the student undergo an occupational therapy (OT) evaluation and assistive technology evaluation (Dist. Ex. 9 at p. 2).

[7] The August 2016 neurological report specifically recommended "a specialized program with individualized modalities in order to make progress" for the student and indicated that a 15:1+1 class size was "too large in the larger general education setting" (Dist. Ex. 28 at p. 11). The report further recommended that the student receive "specialized instructions and should be placed in a small, structured, and supportive classroom and school with peers of similar cognitive potential and good peer role models for appropriate social interaction" (id.).

[8] The parents provided notice that they would not be sending their daughter to school in the district based on the recommendation of the NYU physicians, who advised them that the student should not attend school until an appropriate placement was identified (Parent Ex. 32 at p. 2). The student did not begin school in September 2016; the parents requested home instruction on September 21, 2016 (Parent Ex. 24). The student received home instruction from September 27, 2016 to October 21, 2016 (Parent Exs. 24; 31).

14).[9] The resultant IEP did not reflect that staff from NYU participated in the meeting; however, it indicated that the CSE had available the August 2016 neuropsychological evaluation report, and a September 2016 NYU medical letter (Dist. Ex. 3 at pp. 1-2). According to the October 2016 prior written notice, the CSE considered ICT services, but found that to be inappropriate to meet the student's physical needs (Dist. Ex. 12 at p.1). The prior written notice indicated that the parents requested consideration of an out-of-district placement, but the "public school option in the least restrictive environment has not been implemented" (id.).[10] The parents informed the district, via a letter dated October 7, 2016, that they did not agree with the placement recommendation and would unilaterally place the student at Churchill (Parent Exs. 19; 20 at p. 2). The student began attending Churchill on October 26, 2016 (Parent Exs. 20 at p. 2; 24).

In an email dated January 17, 2017 the parents requested the CSE reconvene to consider "updated information" (Parent Ex. 22 at pp. 1-2). The parents requested that the district's director of special education participate in the CSE meeting; however, the director informed the parents that she was unable to attend (Parent Ex. 23). The CSE subcommittee convened on March 1, 2017 (Dist. Ex. 5 at p. 1). The CSE subcommittee did not modify the recommendation for a 15:1+1 special class placement (id. at p. 14). According to the March 2017 prior written notice, the parents again disagreed with the placement and indicated that the student would remain at Churchill (Dist. Ex. 15 at p. 1). The prior written notice indicated that the CSE did not consider other options, and that a relevant factor to the proposed or refused action was that the student had never attended the district's high school (id.).

A. Due Process Complaint Notice

By due process complaint notice dated March 29, 2017, the parents alleged that the district failed to offer the student a FAPE for the 2016-17 school year (Dist. Ex. 1 at pp. 1, 15-16). The parents assert that the district failed to timely evaluate the student after the parent referred the student in April 2016 and delayed evaluations by refusing to accept the student's registration package and the parents' consent for evaluation (id. at pp. 3-4).

The parents asserted that the July 2016 IEP was "substantively and procedurally inappropriate, inadequate, and [was] not reasonably calculated to offer the Student an opportunity to make academic, social or emotional progress" (Dist. Ex. 1 at pp. 5-6). The parents asserted that the IEP was developed without meaningful parental participation as the program recommendation was predetermined prior to the CSE meeting (id. at pp. 6-7). The parents asserted that the CSE failed to consider input from representatives of the student's nonpublic school and traumatic brain injury associates and that the CSE based its decision on the availability of programming options

[9] The October 2016 IEP was modified from the July 2016 IEP to allow the student extra time between classes (Dist. Ex. 3 at pp. 15-16).

[10] The October 2016 IEP reflected that the parents indicated "that while the special class setting may be appropriate for [the student] academically, they believe[d] that the regular large school setting would be overwhelming to her, and therefore not appropriate" (Dist. Ex. 3 at p. 9). Further, the parents felt the social setting was important for their daughter and were unsure if the 15:1+1 special class was appropriate for her socially (id. at p. 10).

within the district instead of the student's needs (id.). Generally, the parents asserted that the "program recommendation failed to adequately address the Student's academic, emotional and attention needs in the least restrictive setting" (id. at p. 6). They also contended that the July 2016 IEP failed to reflect the results of evaluations, did not identify the student's needs, included generic goals without a baseline or method of measurement, and did not include an appropriate methodology for implementation of the goals (id.). The parents further alleged that "the procedural inadequacies in the development of the IEP impeded the Student's right to a [FAPE], significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE; and caused a deprivation of educational benefits" (id.).

The parents asserted that the delay in holding the July 2016 CSE precluded them from visiting the proposed program at the district public school, which deprived "them of their rights to meaningful participate in the process, to evaluate the school assignment and the right to acquire relevant and timely information as to the proposed school" (Dist. Ex. 1 at p. 7). The parents alleged that after they visited the proposed class on October 5, 2016, they determined that the school was too large given the student's difficulties with anxiety and visual processing (id. at p. 8). The parents also alleged that the other students in the class would have been lower functioning than the student and that their varied needs would have detracted from the student's ability to learn (id. at p. 9).

Regarding the October 2016 CSE, the parents asserted that the IEP was again procedurally and substantively inappropriate, inadequate, and not reasonably calculated to enable the student to make progress (Dist. Ex. 1 at p. 9). Further, the parents asserted that some of the CSE members had not reviewed the materials provided (id.). They further asserted that the October 2016 IEP was developed without meaningful parental participation because the program recommendation was predetermined prior to the CSE meeting (id. at p. 10). The parents also contended that the IEP failed to accurately reflect the results of the evaluations, the CSE selectively incorporated portions of the August 2016 neurological report, and "missed the recommendations" contained in the report (id. at p. 9). The parents further contended that the annual goals were generic, the goals did not "respond to the student's deficits" and lacked a baseline or method of measurement, that there was no methodology for implementation of the goals, that the recommended class size was too large, and that the IEP did not address the student's anxiety or need for small structured classes, individualized attention, specialized teaching strategies, and multisensory techniques (id. at pp. 9-10). Finally, the parents asserted that the district failed to evaluate the student for assistive technology despite the CSE making a recommendation for the evaluation and the parents providing consent (id. at pp. 10-11).

Regarding the March 2017 CSE convened at the parents' request, the parents asserted that the resultant IEP was again procedurally and substantively inappropriate, inadequate, and not reasonably calculated to enable the student to make progress repeating the same issues that they challenged regarding the October 2016 IEP (Dist. Ex. 1 at p. 11-12). The parents also asserted that the CSE selectively incorporated portions of Churchill's reports in a manner that was inconsistent with the overall findings and contended that to the extent the March 2016 IEP adopted goals from the Churchill progress reports, those goals could not be implemented in a larger school environment (id. at p. 12). The parents asserted that the failure to provide an assistive technology

evaluation denied the student a FAPE as the student's need for and use of assistive technology at Churchill was discussed by the CSE (id. at pp. 12-13).

The parents requested a finding that the district failed to provide the student a FAPE for the 2016-17 school year, that the parents' unilateral placement of the student at Churchill was appropriate, and that the equitable considerations favor the parents' request for relief (Dist. Ex. 1 at p. 15). The parents requested "direct payment/reimbursement for tuition for the 2016-17 school year at Churchill, transportation and all associated costs," as well as attorney fees and other costs associated with the proceeding (id. at pp. 15-16).

B. Impartial Hearing Officer Decision

On May 24, 2017, the parties proceeded to an impartial hearing, which concluded on July 10, 2017 after six days of proceedings (see Tr. pp. 1-1833).[11] In a decision dated August 9, 2017, the IHO concluded that the district failed to offer the student a FAPE for the 2016-17 school year (IHO Decision at pp. 24-25).

The IHO made several findings of fact which pertain to her conclusions of law and are relevant to the issues on appeal (IHO Decision at pp. 15-17). The relevant findings of fact are: the parents first requested an evaluation from the district in March 2016, the parents specifically requested someone from NYU participate in the October 2016 CSE meeting, and the CSE did not call NYU (id. at pp. 15-16).

The IHO found that the student was denied a FAPE for the 2016-17 school year as the district failed to comply with the procedural requirements of the IDEA, impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provisions of a FAPE, and caused a deprivation of educational benefits (IHO Decision at p. 18).

The IHO found that the district, as the district of residence, was required to evaluate the student after the parents requested an evaluation (IHO Decision at pp. 18-21). The IHO acknowledged that the district may advise the parents that they could seek an evaluation through the district of location; however, the district was obligated to conduct the evaluation (id. at p. 18). The IHO determined that it is possible for parents to request evaluations from both the district of residence and the district of location; however, the IHO found that in this case "it made infinitely more sense for the [d]istrict of [r]esidence to do the evaluation" since the student was not going to continue going to the school in the district of location (id. at pp. 19-20). The IHO found that the parents had the right to have their daughter evaluated once they made the request in March 2016

[11] The IHO Decision indicates that a portion of the hearing was held on June 22, 2017; however, there is no transcript from a June 22, 2017 hearing date and the transcript is consecutively paginated from the June 19, 2017 hearing date to the July 10, 2017 hearing date (Tr. pp. 1432-33). Additionally, while the transcript indicates a hearing date was, at one point, scheduled to be conducted on June 29, 2017, there is no indication a hearing date was scheduled for June 22, 2017 (Tr. pp. 1377-79).

and the district had a responsibility to complete the evaluation within 60 days of the request (id. at p. 21).

The IHO found that the district failed to evaluate the student in all aspects of disability by not requesting or conducting a neurological or neuropsychological evaluation, noting that the student sustained a head injury in January 2015 which significantly impacted her school performance (IHO Decision at p. 21) Further, the IHO found that while the parents had a neurological and neuropsychological evaluation of the student conducted, the CSE did not include the participation of the NYU psychologist as requested by the parent, and the CSE did not include someone who had the expertise to interpret the instructional implications of the privately obtained evaluation reports (id.).[12] The IHO also found that changing the student's classification to a traumatic brain injury "without having the relevant evaluations and someone on the committee to interpret the instructional implications" impeded the student's right to a FAPE (id. at pp. 21-22). Moreover, the IHO found that the "[p]arents have the right to invite people with special expertise to the CSE meeting" and the district cannot decide whether it wants the parents' invited participant to attend (id. at p. 22). By not including the requested NYU psychologist at the October 2016 CSE meeting, the IHO found the district significantly impeded the parents' opportunity to participate in the decision-making process and hindered the development of an appropriate IEP (id.).

Additionally, the IHO found that the CSE did not develop an IEP designed to meet the student's unique needs (IHO Decision at pp. 22-23). The IHO found that the district failed to obtain the previous records from the district of location and "did not acknowledge, much less delve into the fact, that the student was on home instruction because her doctors thought that the recommended placement would be detrimental for her" (id. at p. 22). Further, the IHO indicated that the district failed to have the student's home instruction teacher (who was also the biology teacher for the proposed 15:1+1 class) attend the CSE meeting (id. at pp. 22-23). The IHO found that the district personnel on the committee did not know the student as a learner and that they discounted input from parent (id. at p. 23).

The IHO found that the district's insistent refusal to consider any placement outside of the district simply because the student had not attended a district public school was misguided, impeded the parents' meaningful participation regarding placement, and denied the student a FAPE (IHO Decision at p. 23).

The IHO further found that the parents' unilateral placement of the student at Churchill for the 2016-17 school year was appropriate, and equitable considerations favored the parents' request for relief (IHO Decision at p. 24). The IHO directed the district to reimburse the parents for the

[12] In an email to the district dated August 29, 2016, the parent requested "N[YU] to be on the [p]hone" when the CSE reconvened (Parent Ex. 11). The parent testified that she informed the October 2016 CSE that the psychologist from NYU who conducted the student's August 31, 2016 neuropsychological evaluation was available to participate during the October 2016 CSE meeting (Tr. pp. 1558-59; see Dist. Ex. 28). The NYU psychologist has obtained a Psy.D., and the parents and the IHO refer to him interchangeably as "doctor," and "psychologist" (see e.g. IHO Decision at p. 21; Dist. Exs. 1 at pp. 7, 10; 28 at p. 16). For consistency, this decision will refer to the person who conducted the August 2016 neuropsychological evaluation as the NYU psychologist.

cost of tuition at Churchill for the 2016-17 school year, transportation, and all associated costs, as well as the parents' attorney's fees and other costs associated with this proceeding (id.).

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in finding that it failed to offer the student a FAPE for the 2016-17 school year, that Churchill was an appropriate placement, and that equitable considerations weighed in favor of the parents. More specifically, the district alleges that the program recommended was appropriate, as the 15:1+1 special class provided the student a small classroom setting in the least restrictive environment. The district argues that it was under no obligation to consider a more restrictive setting, such as the nonpublic school requested by the parents, since there was a program available in the district that would fit the student's needs.

The district argues that the delay in evaluating the student did not deny the student a FAPE because the evaluations were ultimately completed and an IEP was developed before the start of the school year. The district further contends that the assistant director of special education services acted reasonably by advising the parents that they could seek an evaluation from the district of location.

The district argues that the July 2016 CSE had sufficient evaluative information and completed all required evaluations of the student. Further, the district argues that the CSE had sufficient information from the district of location, including evaluations and reports. The district argues that the issue of the lack of a neurological evaluation of the student was not raised in the due process compliant notice and "cannot be raised by [the IHO] to rule against the [d]istrict."

Moreover, the district argues that the October 2016 CSE was duly constituted with all required members, including multiple members who were qualified and capable of interpreting the evaluation reports and determining the instructional implications of the recommendations contained in the evaluation reports. The district asserts that the parents did not clearly indicate to the CSE that they wanted the NYU psychologist to participate in the meeting and that the NYU psychologist was not a mandatory participant in the October 2016 CSE meeting. Additionally, the district argues that the student's home instruction teacher was not required to participate in the October 2016 CSE meeting. The district argues that the members of the CSE meeting were knowledgeable of the recommended placement and class, and that the teacher was not required for the CSE to make an appropriate recommendation.

The district argues that the IHO erred when she held that the student was not offered a FAPE because of the decision to change the student's classification to TBI. The district argues that this issue was not raised in the due process complaint notice and therefore cannot be raised by the IHO to rule against the district. Further, the district contends that the record demonstrates that the classification was changed based on the consent of all CSE participants, including the parents, and there is sufficient evidence to establish that this classification was appropriate in light of the student's concussion in 2015.

The district asserts that the placement at Churchill was not appropriate. The district contends that Churchill failed to determine the student's individual needs and placed the student in

a 12:1+1 class because it is the only classroom ratio available, Churchill failed to provide the student with individual counseling, which she requires due her anxiety issues, and Churchill failed to develop any goals or an IEP for the student.

The district argues that the equitable considerations do not favor the parents because the parents did not have an open mind regarding placement of the student in a public school. The district contends that although the parents went through the CSE process, it was clear from the first CSE meeting that the parents were seeking a private school placement. The primary reason behind the parents' rejection of the placement was that the district continued to recommend a public school setting. The district requests that the parents' request for reimbursement be denied.

In an answer, the parents respond to the district's allegations and argue to uphold the IHO's decision in its entirety.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). 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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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]). 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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]), 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]).[13]

[13] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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).

VI. Discussion

A. Scope of Impartial Hearing

The district asserts that the IHO exceeded her jurisdiction by raising issues not raised in the due process complaint notice. Specifically, the district asserts that the parents' due process complaint notice did not include allegations that the district failed to conduct a neurological evaluation of the student or that the district improperly changed the student's classification (Req. for Rev. ¶¶ 18, 26). The parents "dispute" the district's allegations, but do not specifically address them or point to any portion of the due process complaint notice that might be read as including these issues (Answer ¶¶ 7, 9).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b]; 300.508[a]; 8 NYCRR 200.5[j][1]). Under the IDEA and its implementing regulations, the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see, e.g., N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y. 2013]).

The parent did not allege that the district failed to conduct a neurological evaluation of the student or that the district improperly changed the student's classification in the due process complaint notice (see Dist. Ex. 1). With respect to the student's classification category, the parties seemed to agree during the hearing that it was not at issue in this proceeding (Tr. pp. 1064-66). Additionally, although the district asserts that the IHO improperly found that the July 2016 CSE's decision to change the student's classification to traumatic brain injury resulted in a denial of FAPE, the IHO's finding was focused on the lack of a neurological evaluation and the composition

of the July 2016 CSE (see IHO Decision at pp. 21-22). However, a review of the parents' due process complaint notice indicates that neither the lack of a neurological evaluation nor the composition of the July 2016 CSE were identified as issues (Dist. Ex. 1). Notably, the parents did not specifically assert in their due process complaint notice that the failure to conduct a neurological evaluation denied the student a FAPE (id.). Although the parents discussed the evaluative information, the parents specifically identified the lack of assistive technology and occupational therapy evaluations (id. at p. 14). Additionally, the due process complaint notice described all of the evaluations completed by the district prior to the July 2016 CSE meeting, but did not identify any deficiencies in those evaluations that might have put the district on notice that the sufficiency of the evaluations was being questioned (id. at pp. 3-4). Accordingly, the parents' due process complaint notice cannot reasonably be read to have included these issues.

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or seek to include them in an amended due process complaint notice, they are not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011] [internal quotations omitted]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the SRO because it was not raised in the party's due process complaint notice]).

Additionally, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Nevertheless, since the IHO drew conclusions on these issues notwithstanding the fact that the parents' due process complaint notice did not include them, the next inquiry focuses on whether the IHO properly reached determinations on the issues because the district "open[ed] the door" under the holding of M.H. v. New York City Dep't of Educ. (685 F.3d 217, 250-51 [2d Cir. 2012];

see also D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K., 961 F. Supp. 2d at 584-86; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S., 2013 WL 3975942, *9; B.M., 2013 WL 1972144, at *5-*6). During direct examination, counsel questioned district witnesses about when the district decided to evaluate the student and reviewed the evaluations that were conducted (Tr. pp. 63-66, 412-13, 416-20, 436-40, 442). The district's assistant director of special education testified regarding the NYU evaluation in relation to the October 2016 CSE during direct questioning (Tr. pp. 73-76), and on re-direct, was asked whether the district had sufficient evaluative information in October 2016 to develop an appropriate program and determine the student's needs, to which she responded affirmatively (Tr. p. 203). Based on the above, these issues arose as a part of routine questioning developing general background information regarding the information relied on by the July 2016 CSE and October 2016 CSE; accordingly, the district did not open the door to the parents' challenges (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9).

B. Evaluation Process

The district argues that the delay in evaluating the student did not deny the student a FAPE because the evaluations were ultimately completed and an IEP was developed before the start of the 2016-17 school year.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district agree otherwise (34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]). In this instance, the parent requested that the district evaluate the student in March 2016. The district's assistant director of special education acknowledged that the parent contacted her in March 2016 and requested her daughter be evaluated (Tr. pp. 48-50). She acknowledged that in April 2016 she spoke again with the parent, who informed her that she did not want the district of location to conduct the evaluation, but wanted the district to conduct the evaluation as soon as possible (Tr. p. 53). The assistant director acknowledged multiple times that she knew the parents wanted the district to evaluate the student rather than the district of location (Tr. pp. 48, 50, 53, 54, 118-19, 123, 127).

The assistant director testified that she did not initiate an evaluation during the 2015-16 school year because the parents indicated the student was going to continue attending the nonpublic school in the district of location through the end of the 2015-16 school year (Tr. pp. 53-54). According to the assistant director, the parent wanted the student to attend summer school in the district in July 2016, which was part of the 2016-17 school year (Tr. p. 54). She further testified that she explained to the parent that the evaluation would take place when the student began attending school in the district and would inform planning for the 2016-17 school year (Tr. p. 54). Contrary to the testimony of the district's assistant director, the parent testified that she informed district staff she was willing to enroll her daughter in a district school, if needed, as she wanted the evaluations done right away (Tr. p. 1498).

The district obtained the parents' consent for reevaluation on July 7, 2016 (Dist. Ex. 6) and the CSE convened on July 28, 2016 to review the competed evaluations (Dist. Ex. 4).

While a district must complete an initial evaluation within 60 days from receipt of the parent's consent to evaluate the student (20 U.S.C. § 1414[a][1][C][i][I]; 34 CFR 300.301[c][1][i]-[ii]; 8 NYCRR 200.4[b][1]), there is no corresponding timeframe for completing an evaluation of a student who has already been found eligible for special education (see 34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]). However; "assessments of students with disabilities who transfer from one school district to another school district in the same school year are coordinated with such student's prior and subsequent schools, as necessary, and as expeditiously as possible to ensure prompt completion of full evaluations" (8 NYCRR 200.4[b][6][xvii]; see 34 CFR 300.304[c][5]). Accordingly, accepting the parent's testimony that she was seeking to enroll the student in the district during the 2015-16 school year, the district was obligated to coordinate with the district of location and ensure prompt completion of the evaluation.

Additionally, even assuming the parents did not intend to enroll the student in the district until the start of the 2016-17 school year, delaying evaluations until the student began attending school in the district was not reasonable. The IDEA requires districts to have an IEP in effect at the beginning of each school year for every student with a disability in the district's jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]). The student's enrollment in a nonpublic school outside of the district during the 2015-16 school year did not alter this obligation.[14]

Based on the above, the district should have initiated the evaluation process and sought to obtain consent from the parents promptly following the parents' request for an evaluation from the district. However, even though the district should have begun the evaluation process promptly following the parents' request, the parents have not asserted at any point during this proceeding that the district should have provided the student with 12-month services and accordingly, the delay in evaluations did not impede the student's right to a FAPE, deny the parents meaningful

[14] The district's duty to offer the student a FAPE is triggered by the student's residency in the district, not the student's enrollment status or the parent's intent (see E.T. v. Bd. of Educ., 2012 WL 5936537, at *14-*15 [S.D.N.Y. Nov. 26, 2012] [noting that "residency, rather than enrollment, triggers a district's FAPE obligations" and "the issue of parental intent vis-à[-]vis the child's enrollment is not dispositive of whether a school district has a FAPE obligation to a disabled child"] [internal quotations omitted]). Under the IDEA and State law, a district must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. 1412 [a][1][A]; Educ. Law § 4402[2][a], [b][2]). The IDEA also requires districts to have an IEP in effect at the beginning of each school year for every student with a disability in the district's jurisdiction (20 U.S.C. § 1414 [d][2][A]; 34 CFR 300.323 [a]). The district of residence has an obligation to provide a FAPE to a resident student with a disability that does not end with the enrollment of the student in a nonpublic school outside the district or when the student is not enrolled in a district school (see Doe v. East Lyme Bd. of Educ.,790 F.3d 440, 450-51 [2nd Cir. 2015]; District of Columbia v. Vineyard, 901 F. Supp. 2d 77, 87-88 [D.D.C. 2012] [noting that a district's obligation to provide a FAPE is triggered by a student's residency in the district, not the student's enrollment in a public school in the district]; E.T., 2012 WL 5936537, at *14-*15 [noting that "[n]othing in the language of the IDEA divests a district of residence of its FAPE obligations simply by virtue of a parental placement at an out-of-district, but in-state, private school" and "a district of residence's FAPE obligation does not disappear when parents unilaterally place their children elsewhere"] [internal quotations and punctuation omitted]; see also N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1209 [9th Cir. 2008] ["A school district cannot abdicate its affirmative duties under the IDEA"]).

participation, or cause a deprivation of educational benefits as the student was evaluated and an IEP was in place before the beginning of the 10-month school year.

C. October 2016 CSE Meeting

The IHO concluded that the district impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE by not including the NYU psychologist in the October 2016 CSE meeting (IHO Decision at p. 22).[15] The IHO also faulted the district for failing to have personnel at the CSE who were knowledgeable of the student, including the student's home instruction teacher (id. at pp. 22-23). The district argues that the IHO erred in finding that the October 2016 CSE was not duly constituted with all required members. The district argues that the parents did not clearly indicate during the October 2016 CSE meeting that they wanted the NYU psychologist to participate in the meeting, and further asserts that the NYU psychologist was not a mandatory participant (id.). Additionally, the district argues that the student's home instruction teacher was not a required member of the October 2016 CSE as a special education teacher did attend the meeting (id. at p. 7).

The IDEA requires a CSE to include the following members: the parents; one regular education teacher of the student (if the student was, or may be, participating in the regular education environment); one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a district representative; an individual capable of interpreting instructional implications of evaluation results; at the discretion of the parent or district, other persons having knowledge or special expertise regarding the student; and if appropriate, the student (see 20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). Specifically, 8 NYCRR 200.3(1)(a)(ix) allows the parents to designate person having knowledge or special expertise of the student to participate in the CSE meeting.

On August 29, 2016 the parents requested that the CSE reconvene to discuss the results of privately obtained testing conducted by NYU (Parent Ex. 11). The student's mother testified that based on a discussion with the NYU psychologist, she decided to keep the student out of school in the beginning of the 2016-17 school year and sought home instruction services (Tr. pp. 1542-44).

[15] The due process complaint notice included allegations that the meeting was conducted to consider the updated evaluation of the student by the NYU psychologist, but that the CSE substantially missed the recommendations in the report, selectively incorporated portions of the private reports into the IEP in a manner that was not consistent with the overall findings in the report, and that that the IEP was developed in a predetermined manner and without parental participation (Dist. Ex. 1 at pp. 9-10). The inclusion of the NYU personnel in the CSE meeting is reasonably related to the parents' participation and predetermination claims and the district does not challenge the IHO's decision treat the matter in part as a CSE composition claim. Although a claim may be waived because it was not raised in a party's due process complaint, the waiver rule "is not to be mechanically applied" because "the IDEA itself contemplates some flexibility" (E.M. v. New York City Dep't of Educ., 213 F. Supp. 3d 607, 615 [S.D.N.Y. 2016] quoting C.F. v. New York City Dep't of Educ., 746 F.3d 68, 78 [2d Cir. 2014]), and in this case the district neither defends against the claim on the basis of waiver, nor argues that it was impermissibly sandbagged by the parents on this issue. The district defends this claim on the merits and, in light of the circumstances, I will consider it.

The student began receiving home instruction on September 27, 2016 and the CSE reconvened on October 7, 2017 (see Parent Ex. 31; Dist. Exs. 3 at p. 1; 11 at p. 1).

The assistant director of special education served as the chairperson of the October 2016 meeting (Dist. Exs. 3 at p. 1; 11 at p. 1). Additionally, the CSE was composed of two school psychologists from the high school, a high school regular education teacher, a high school special education teacher who provided instruction in a 15:1+1 special class, a high school speech-language therapist, a guidance counselor from the high school, the parents, the student's grandparent, and the parents' advocate (Tr. p. 77; Dist. Exs. 3 at p. 1; 11 at p. 1). The assistant director of special education testified that a 15:1+1 special education teacher was specifically chosen to participate in the October 2016 CSE because a 15:1+1 special class was the placement recommended in July 2016 (Tr. p. 78). The district "wanted to have that person be familiar with the types of accommodations that are made for a student with [the student's] level of need and profile in the [15:1+1] versus other programs" (Tr. p. 78).

The IDEA requires a CSE to include a special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][iii]; Educ. Law § 4402[1][b][1][a][iii]; 34 CFR 300.321[a][3]; 8 NYCRR 200.3 [a][1][iii]; see 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified [to provide related services] . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person . . . certified or licensed to teach students with disabilities . . . who is providing special education to the student"]). The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). The evidence in the hearing record demonstrates that a special education teacher of the proposed 15:1+1 class attended the October 2016 CSE meeting (Tr. pp. 77-78; Dist. Exs. 3 at p. 1; 11 at p. 1). The assistant director testified that the district selected a special education teacher who taught a 15:1+1 special class as a CSE member because that person would be familiar with the types of accommodations available to students of similar needs within a 15:1+1 special class (Tr. pp. 77-78).

The student's home instruction teacher was a certified special education teacher and testimony shows she would have taught the student's biology class if the student had enrolled in the district high school (Tr. pp. 374, 1549). The parent testified that during the October 2016 CSE meeting she questioned why one of the student's home instruction teachers was not present during the meeting and was told "it didn't work out" (Tr. p. 1557). While it may be preferable to the parents to have the participation of a teacher who was providing special education instruction to the student at the time of the CSE meeting, by October 7, 2016 the student had only been receiving home instruction for approximately 8 school days, and the hearing record does not specify how many sessions of home instruction the student had received prior to the CSE meeting (see Parent Ex. 31). The October 2016 CSE included the participation of the 15:1+1 special class special education teacher "who will be responsible for implementing the student's IEP", and accordingly, the absence of the student's home instruction teacher was not a procedural violation, nor did it contribute to a denial of a FAPE to the student.

However, the district's failure to include the NYU psychologist at the October 2016 meeting after the parents requested the presence of someone from NYU at the CSE meeting is more problematic to the district's case. The IDEA provides that the CSE shall include, "at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child" (20 U.S.C. § 1414[d][1][B][vi]; Educ. Law § 4402[1][b][1][a][ix]). "The determination of knowledge or special expertise of such person shall be made by the party (parents or school district) who invited the individual to be a member of the committee on special education" (8 NYCRR 200.3[1][a][ix]; see 34 CFR 300.321[a][6], [c]). The October 2016 CSE meeting convened to review and discuss the results of the NYU neuropsychological evaluation conducted in August 2016 (Parent Ex. 11; Dist. Ex. 28). Moreover, in the August 29, 2016 email, in which the parents first requested that the CSE reconvene, the parents explicitly notified the district that they would like NYU staff to participate in the meeting by telephone (Parent Ex. 11).[16] In the absence of such a specific request by the parent to include an NYU participant at the CSE meeting, I would be more accepting of the district's contention that the NYU psychologist was not a mandatory member that the district was required include in the meeting, but those are not the facts of this case. Additionally, subsequent correspondence confirmed the parents' intention to have someone from NYU attend the meeting by telephone (Parent Ex. 39). Further, during the October 2016 CSE meeting, the student's mother requested that the NYU psychologist participate in the meeting (see Tr. pp. 1253, 1256, 1331-34, 1558-59, 1741-43). During the impartial hearing, both the student's mother and the parents' advocate who attended the October 2016 CSE meeting testified that the district CSE personnel were aware the NYU psychologist was available to participate by telephone but told the parent "[w]e'll call him if we need him" (Tr. pp. 1256, 1331-32, 1559).[17] By dismissing the parents' request to have the NYU psychologist present by telephone, the CSE violated the parents' right to have an individual who had knowledge or special expertise regarding the child. The parents, as the party who requested that the NYU psychologist be invited to participate, were entitled to determine the relevance of the psychologist's expertise to the discussion (see 8 NYCRR 200.3[1][a][ix]; see 34 CFR 300.321[a][6], [c]). Additionally, in some circumstances, part of obtaining an independent educational evaluation is to have "the evaluator to present her findings at an IEP meeting that necessarily includes the District's assessment team" (M.M. v. Lafayette Sch. Dist., 2012 WL 398773, at *11 [N.D. Cal. Feb. 7, 2012], aff'd in part, rev'd in part and remanded, 767 F.3d 842 [9th Cir. 2014]; Meridian Joint Sch. Dist., No. 2 v. D.A., 2013 WL 6181820, at *5 [D. Id. Nov. 25, 2013][teleconference for evaluator to present findings for determination of eligibility was part of benefit of the evaluation]).

The evidence in this case demonstrates that it was important to the parents that the NYU psychologist be allowed to attend the CSE meeting. The Supreme Court has also opined on the reasons why this may be so important to a parent noting that "IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic

[16] The October 2016 CSE meeting was originally scheduled for September 28, 2016 (see Dist. Ex. 10-11).

[17] The testimony of the assistant director of special education, the only district witness who attended the October 2016 CSE meeting, does not reveal any information about the parent's request to have the NYU psychologist participate (see Tr. pp. 45-217).

opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition" Schaffer v. Weast, 546 U.S. 49, 60–61 [2005]). While I find the firepower language that the Court used regrettable in view of a statute that highlights the need for collaboration, it nevertheless captures the particularly important role that IEEs have with respect to parental participation. Based on the above, the district's actions that precluded the NYU psychologist's participation during the October 2016 CSE meeting contrary to the expressed wishes of the parents significantly impeded parents' right to participate in the CSE process.

This situation differs from other cases regarding the attendance at the CSE of other individuals who have knowledge or special expertise regarding the student (see Application of a Student with a Disability, Appeal No. 15-042 [district's failure to call a private neuropsychologist during the CSE meeting did not deny the student a FAPE as there was no evidence the parents invited or advised the district he would attend the CSE meeting]; Application of the Dep't of Educ., Appeal No. 13-082 [there was nothing in the hearing record to indicate that the parents availed themselves of the opportunity to invite or request a nurse attend the CSE meeting]; see also L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *13 [S.D.N.Y. Sept. 27, 2016][there was no evidence that the parent or district requested the student's related service providers attend the CSE meeting, or that the parents voiced concerns to the providers absence; further, the district invited the related service providers to attend the CSE meeting]. As noted above, this case can be distinguished from these cases as the parents notified the district of their intent to have the NYU psychologist participate in the October 2016 CSE meeting and the meeting was specifically requested to review the NYU psychologist's report and recommendations. Therefore, the student was denied a FAPE for the 2016-17 school year as of October 7, 2016 based on the district's actions that precluded the NYU psychologist from participating in the October 2016 CSE meeting.

D. Unilateral Placement – Churchill

Having determined that the district failed to offer the student a FAPE for the 2016-17 school year, the next issue to determine is whether Churchill was an appropriate unilateral placement. The district contends that Churchill was not an appropriate placement for the student because the school failed to conduct an appropriate screening to determine the student's individual needs and the 12:1+1 class was the only ratio available at Churchill. In addition, the district argues that Churchill failed to provide individual counseling; develop an IEP, a written plan or goals for the student; and that there was insufficient evidence that Churchill implemented or utilized the district IEP to address the student's needs. However, a review of the evidence in the hearing record supports a finding that the parents sustained their burden to establish that Churchill was an appropriate unilateral placement for the 2016-17 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 13-14). Parents seeking

reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]).

"Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006], quoting Rowley, 458 U.S. at 207 [identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115, citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "[e]vidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; see Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; see also Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

1. The Student's Needs

In this instance, although the student's needs are not directly in dispute, a discussion thereof provides context for the discussion of the disputed issue to be resolved—namely, whether the student's unilateral placement at Churchill was appropriate for the 2016-17 school year.

The student's ninth grade English teacher at Churchill stated that before the student arrived the school principal created a summary of the student's overall functioning, learning challenges and needs, and deficits from the "neuropsych evaluation" and that the principal, along with the school psychologist, presented the summary to the teachers (Tr. pp. 1175-79).

The August 2016 NYU neuropsychological report indicated that the student presented as a cooperative young woman whose attention and concentration skills were adequate for testing (Dist. Ex. 28 at pp. 2-3). The examiner noted the student occasionally appeared fatigued and benefitted from brief attention breaks; had some trouble following multi-step verbal directions; spoke slowly and in a soft tone; was generally slow to respond; and benefitted from a slower presentation, repetition, and clarification of instructions (id.). In addition, the examiner noted that the student presented with some anxiety and irritability, particularly when presented with tasks perceived as challenging, and that those feelings appeared to impede the student's performance (id. at p. 3). She exhibited good effort on measures of motivation and the examiner concluded that current testing was likely an accurate reflection of her current level of functioning (id.).

The examiner explained that the student was recently tested by her school district and therefore overall intellectual functioning was not re-measured (Dist. Ex. 28 at p. 4; see Dist. Ex. 24 at pp. 1-14). Regarding the results of the district's testing, the examiner noted that it was important to stress the caveat provided by the school district's psychologist's interpretation which stated; "[w]hile her Full Scale score fell in the below average range, her performance in different intellectual areas varied. Her cognitive profile is better explained by examining how she performed in each individual area, rather than using global score to summarize her as a learner. It should also be noted that her scores may be adversely affected by any post-concussion effects." (Dist. Ex. 28 at p. 4). Although cognitive testing revealed the student's verbal fluency skills were adequate; the examiner noted the student had some difficulty with open-ended questions assessing common-sense social knowledge, practical judgement in social situations, level of social maturation and understanding of social norms and behaviors (id.).

Regarding visual motor and processing speed skills, the student was found to have significant difficulty working quickly, particularly when the tasks involved visual tracking; however, within untimed conditions her scores fell solidly in the average range in assessments of visual motor and visual perceptual functioning (Dist. Ex. 28 at p. 4). In the areas of attention and working memory, the student's overall performance fell in the average range, yet the examiner indicated that this represented a decline from prior testing and suggested that her attention deficits had likely worsened secondary to the concussion as well as because demands were increasing (id. at p. 5). The examiner stated that the teacher, parent, and student reported the student struggled with distractibility and maintaining appropriate attention levels (id.). Assessments of verbal memory found the student's performance to be in the average range, yet revealed the student

benefitted from repetition (id. at p. 7). In the area of visual memory, the examiner stated that the student's performance suggested the student may have had trouble getting the "big picture" and had an easier time remembering smaller details (id.). With respect to executive functioning, the testing found the student performed in the average or above average range; however, the examiner noted that in the real world (as reported by her teachers) the student was experiencing significant difficulties with completing novel, timed tasks that require sustained effort; planning ahead and multi-tasking; and being flexible (id. at pp. 5-6). The examiner indicated that these difficulties are likely influenced in part by the student's literal thinking and anxious disposition and noted the student required supportive services to address the student's attentional capacity, working memory, executive functioning, and emotional well-being in order for her to make proper academic gains (id. at pp. 6-7).

With respect to academic functioning, the student's sight word reading and reading comprehension were found to be in the average range; however, the examiner noted that the student struggled to independently read and understand the passages and struggled to respond to both fact-based and inferential-based questions (Dist. Ex. 28 at pp. 7-8). The student performed below grade level in essay composition, and while an analysis of her writing revealed her mastery of grammar and mechanics, the student only wrote two short paragraphs with some detail and was unable to complete the task in the allotted time (id. at p. 8). The examiner noted that it was clear the student struggled to plan and organize her ideas efficiently and that her ability to express her ideas orally outstripped her ability to do so in writing (id.). In sum, the examiner found that the student would continue to underachieve when faced with more complex reading and writing assignments and that the student would need additional intensive supports (id.).

Turning to the student's emotional functioning, the parent and student rating scales revealed clinically elevated results in the areas of hyperactivity, somatization, anxiety, and atypicality (Dist. Ex. 28 at p. 9). Since the concussion the student was reportedly easily frustrated, overwhelmed, and had lost her "know how" ability (id. at p. 8).

The examiner summarized the student's weaknesses as the following: attention, processing speed, visual spatial reasoning and organization, reading comprehension (particularly with abstraction and pragmatics), written expression, and anxiety (Dist. Ex. 28 at p. 10). Within the recommendations of the August 2016 NYU neuropsychological report, the examiner stated that the student required a specialized program with individualized modalities to make progress and noted that the class size 15:1+1 was still too large in the larger general education setting (id. at p. 11). The examiner recommended accommodations of a multi-modal presentation of material, organization and planning support, extended time, breaks, use of a computer, check-ins, questions and instructions read/reread/clarified, prompts to remain on task, preferential seating, a copy of teacher notes, and tests presented in more than one session and in a separate location; as well as related services of counseling and speech-language therapy (id. at pp. 11-14).

A review of the additional evaluative information available at the time the student began attending Churchill reveals results consistent with the August 2016 NYU neuropsychological report. A February 2016 counseling annual review update stated that the student was mandated for individual counseling for 30 minutes per week, was working on the goal of identifying and

appropriately using a coping skill to maintain acceptable school behavior, and had sought out support from the counselor for assistance with executive functioning deficits, including planning and time management (Dist. Ex. 19).[18] An April 2016 classroom teacher's report indicated that the student worked very hard, had a strong desire to do the right thing, was performing in the low average range of her class, needed support in making inferences and comprehending instructions and complex social studies events, and needed all modalities employed for her to learn (Dist. Ex. 20 at pp. 1-2). In a July 2016 educational evaluation report, the examiner noted that the student worked hard, yet appeared tired at times (Dist. Ex. 22 at pp. 1, 5). The student scored in the below average range in the areas of passage comprehension, reading vocabulary, word reading fluency, and applied problems in mathematics; and in the lower extreme in reading recall (Dist. Ex. 22 at pp. 1-2, 5). The July 2016 speech-language supplemental evaluation report found the student's core language, supralinguistic language, and receptive and expressive vocabulary skills to be below average (Dist. Ex. 26 at p. 4).[19] Within the July 2016 psychological evaluation report the examiner stated that on a rating scale, the student reported clinically significant attention problems and concerns in the areas of anxiety and sense of inadequacy; while the parent reported concerns in the areas of hyperactivity, anxiety, somatization, and executive functioning (Dist. Ex. 24 at p. 9).

2. Specially Designed Instruction

The Churchill social worker explained that Churchill was a school for students with learnings disabilities and that students that attended Churchill were functioning at a cognitive and academic level such that, with supports, they had the potential of passing with a Regents diploma (Tr. pp. 624-29). For the 2016-17 school year, Churchill's enrollment was about 140 students (Tr. pp. 636, 703, 1209). The social worker stated that the school day at Churchill began with an advisement period; followed by four 40-minute class periods, lunch, three more class periods, and a return to advisement (Tr. pp. 637-38). [20]

Regarding curriculum planning, the student's ninth grade English teacher at Churchill explained that the school started with the common core standards and the knowledge that their students ultimately took the English Regents exam in the 11th grade, but the school also worked to individualize the curriculum based on students' learning needs (Tr. p. 1138). The English

[18] The counselor indicated that the student no longer struggled with negative emotions at school and therefore, had appeared to have lost her motivation to learn additional coping strategies (Dist. Ex. 19).

[19] The district had also conducted a speech-language evaluation of the student in June 2016 (Dist. Ex. 21). Administration of both a receptive and expressive language assessment and an auditory processing skills assessment yielded overall scores in the average range of performance (Dist. Ex. 21).

[20] The social worker described advisement as similar to a homeroom period where students had the opportunity to check-in regarding homework or seek clarification on something from class and that the "homeroom teacher" was a "go-to person" that could communicate with parents and help the students start their day (Tr. pp. 637-38, 727-28).

teacher stated that she would modify each unit and specific lessons based on students' needs (Tr. p. 1139).

With respect to academic needs, the English teacher stated that students at Churchill received instruction in class sizes of 12:1+1 and that during the 2016-17 school year the student was in a 12:1+1 English class, global studies, and earth science class of 11 students, and math class of 10 students; each of those classes had a teaching assistant (Tr. pp. 1164-65, 1208). The English teacher stated that in addition to the English class, she also saw the student once every six days for writing lab and one-to-one at lunch and after school "as she's needed extra support" (Tr. p. 1139). The English teacher added that the speech-language pathologist was in the classroom once per week and also during writing lab (Tr. p. 1141).

Consistent with the above testing results, the English teacher described the student as a strong student who worked hard and really cared about doing well, had deficits in writing and reading comprehension, and required a lot of clarification, in part as a result of her anxiety (Tr. pp. 1143-44). In response to her comprehension needs, the English teacher stated that the class read at a "much slower pace than [the] mainstream class" (Tr. p. 1144). The English teacher also noted that at the end of the day the student was often tired and was unable to pay close attention to teacher responses to questions; therefore, the English teacher "wrote something down" or sent an email so the student could refer to it later (Tr. p. 1145). In addition, the English teacher stated that teachers had identified that the student benefitted from having fewer math problems or diagrams on a page and in some cases, a larger version to address the student's headaches, which occurred from looking at crowded pages (Tr. p. 1148). Further, the English teacher stated she created groups of students with "complimentary skills;" for example, a student with stronger oral comprehension skills may be in a group with another student who may be strong in figurative language (Tr. p. 1155). The English teacher testified that in her class the student was provided accommodations, which included; extra time to complete assignments and quizzes, preferential seating, rephrasing of questions, and breaks (Tr. pp. 1212-14). She was working with the student to improve her ability to answer inferential questions, paraphrase text, and compose essays (Tr. pp. 1212-13). The English teacher stated that because of the supports provided (i.e. slower pacing of instruction, chunking of assignments, graphic organizers, outlines), she felt that Churchill was an appropriate placement for the student (Tr. pp. 1157-58, 1212).

The English teacher testified that the student used assistive technology to access the curriculum every day via a laptop computer (Tr. p. 1148). She explained that the student preferred to read books on Bookshare because she could manipulate the fonts and color of the background and text, as well as copy and paste quotes from the text for writing assignments (Tr. pp. 1148-49). The student was provided note-taking worksheets via the computer and predictive software which helped with spelling in written assignments (Tr. pp. 1149-51). In addition to the program used to check her spelling and grammar, the student also accessed software that read aloud her written work, which reduced her need to check-in with the teacher for confirmation and clarification (Tr. p. 1149).

Regarding the student's speech-language needs, the 2016-17 speech-language progress report dated February 2017 stated that language collaboration was provided to the student in the

classroom and focused on a variety of written language assignments (Parent Ex. 34 at p. 15). The February 2017 speech-language report stated that over the course of the semester the student was introduced to a variety of preplanning and planning strategies to facilitate the organization of written compositions, and strategies to increase comprehension of material presented (id.). To increase retention and recall, the student had worked to use graphic organizers and active reading strategies to increase understanding of material presented (id.). The report also noted that with abstract information the student benefitted from peer/adult facilitated discussion to increase understanding (id.). In addition, the February 2017 speech-language report indicated that the student benefitted from having strategies to break-down written expression task demands, strong support during all stages of the writing process, explicit instruction, peer models, and listening to her written work read aloud in order to monitor for errors (id.).

With respect to the student's social/emotional needs, the social worker stated that she met with the student once every six-day cycle in a group of six students called health and human relations (HHR) (Tr. pp. 615, 622-23). The social worker stated that the group covered a variety of issues including: health, substance abuse prevention, sex education, social issues, problem solving, decision-making, stress management, and other things that would "pop-up" (Tr. pp. 615-16). The social worker also explained that she consulted with the faculty by helping them support students that were struggling either emotionally or behaviorally in the classroom (Tr. p. 616). To address the student's fatigue and headaches which occurred at the end of the day, the social worker explained that the student was given more breaks and opportunities to "sort of walk around" (Tr. pp. 657-58).

The social worker acknowledged that she did not know that the district's IEP mandated individual counseling sessions for the student, and stated that at Churchill it was very rare that a student was mandated 1:1 counseling (Tr. pp. 617, 690, 692). However, the social worker explained that she met with students individually, because she felt it was "nice" to be accessible to students with "larger issues" or if "something does come up" (Tr. p. 617). Within a counseling report, which, according to a February 2017 email, was provided to the district and the parents prior to the student's March 2017 CSE subcommittee meeting, the counselor indicated that she met with the student 1:1 and in her HHR group (Parent Ex. 34 at pp. 1, 13).

3. Progress

A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, [2d Cir. Dec. 26, 2012]; L.K. v Northeast Sch. Dist., 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at

*22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).[21] However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Regarding progress in ELA, the English teacher stated that she mostly used formative assessments (i.e. homework, responses to comprehension questions, written work) to measure progress and that she felt, during the 2016-17 school year, the student had made progress in organization, her written expression, and her independent reading comprehension (Tr. pp. 1152-54). The student's 2016-17 school year's fourth quarter progress report reveals the student received the following grades; Common Core Algebra I 96, English 90, Global History I 90, Math/Science/Technology Seminar 100, and Earth Science 88 (Parent Ex. 25 at pp. 1-2). Within the counseling report sent to the parents in February 2017, the social worker noted that the student had positive feelings about her placement at Churchill, had made some connections with her peers, and had begun advocating for her needs more (Parent Ex. 34 at pp. 1, 13). The social worker indicated that although it was a slow progression, by the end of the school year the student was participating more and feeling more comfortable (Tr. p. 646).

Based on the foregoing, a review of the evidence in the hearing record demonstrates that Churchill offered specially designed instruction to address the student's individual needs, the student demonstrated progress, and therefore, Churchill constituted an appropriate unilateral placement for the student for the 2016-17 school year.

E. Equitable Considerations

Having concluded that Churchill was an appropriate unilateral placement for the student for the 2016-17 school year, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the

[21] The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . 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"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

The IDEA allows that reimbursement may be reduced or denied if parents did not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The hearing record reflects that the parents cooperated with the CSE, did not impede or otherwise obstruct the CSE's ability to develop an appropriate special education program for the student, made the student available for evaluations, and did not fail to raise the appropriateness of an IEP in a timely manner or act unreasonably (E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]). On October 7, 2016, the date of the CSE meeting, the parents notified the district in writing that they rejected the IEP and were unilaterally enrolling the student at Churchill (Parent Exs. 19). The hearing record demonstrates that the parent actively participated at all three CSE meetings (see Dist. Exs. 2; 3; 4). The parents fully cooperated with the CSEs, even working through issues such as delayed evaluations, an incorrect schedule, and confusion over the parents' initial request to visit the placement and obtain a class profile (Tr. pp. 1488, 1496-97; 1500-05; 1544-46; Parent Exs. 3; 4; 5; 14; 17; 35). Based on the foregoing, there are no equitable factors that weigh against awarding tuition reimbursement.

VII. Conclusion

Based on the foregoing, I find that the district failed to offer the student a FAPE during the 2016-17 school year, that the parents' unilateral placement of the student at Churchill was

reasonably calculated to meet her educational needs, and that equitable considerations favor an award of reimbursement to the parents for the cost of the student's tuition at Churchill for the 2016-17 school year.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 9, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER