



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 17-094

**Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Uniondale Union Free School District**

### **Appearances:**

Thivierge & Rothberg, PC, attorneys for petitioner, by Christina D. Thivierge, Esq.

Ingerman Smith, LLP, attorneys for respondent, by David F. Kwee, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Vincent Smith School (Vincent Smith) for the 2016-17 school year. Respondent (the district) cross-appeals from the IHO's determination that Vincent Smith was an appropriate placement for the student for the 2016-17 school year. The appeal must be sustained. The cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

According to a neuropsychological evaluation report, the student has received special education services since first grade (2011-12 school year) (Parent Ex. W at pp. 1-2; see Dist. Ex. 10). A pediatric neurodevelopmental evaluation report indicated that the student received speech-language therapy and academic intervention services (AIS) in reading and math in a general education class during first and second grade and that she began to receive resource room services

"towards the end of second grade" (Parent Ex. F at p. 1). When the student entered a general education third grade class for the 2013-14 school year, she received daily resource room services in a small group, three sessions of speech-language therapy per week, and AIS in math and reading (see Parent Ex. F at p. 1; Dist. Ex. 17 at p. 2).

On June 6, 2014, a subcommittee on special education (CSE subcommittee) convened to develop the student's IEP for the 2014-15 school year (fourth grade) (Dist. Ex. 6 at p. 1). The CSE subcommittee found the student eligible for special education services as a student with a speech or language impairment and recommended daily resource room services for 50 minutes in a small group (id. at pp. 1-2, 7).<sup>1</sup> Additionally, the CSE subcommittee recommended three sessions of speech-language therapy per week for 30 minutes in a small group (5:1), the program modification of checks for understanding (simplifying the language in directions given to the student), and testing accommodations including extended time, directions read and explained, test administration in a separate location or room and in a small group, with test passages, questions, and multiple-choice responses read to the student (id. at pp. 7-9).

On February 11, 2015, a CSE subcommittee convened to develop the student's IEP for the 2015-16 school year (fifth grade) (Parent Ex. C at p. 1).<sup>2</sup> The CSE subcommittee recommended daily resource room services for 50 minutes in a small group (id. at pp. 1, 6). Additionally, the CSE subcommittee recommended three 30-minute sessions of speech-language therapy per week in a small group (5:1), and the same program modifications and testing accommodations identified on the June 2014 IEP (compare Parent Ex. C at pp. 6-7, with Dist. Ex. 6 at pp. 7-9).

While not specifically included in the IEPs, the hearing record indicates that the student received AIS in reading and math during the 2014-15 and 2015-16 school years (Tr. pp. 79-80, 373, 595; see Parent Ex. J; Dist. Exs. 30; 35).<sup>3</sup> Regarding the 2015-16 school year, the student's AIS reading teacher testified that she provided the student with two to three 50-minute sessions of reading instruction per week, in a class of approximately six students (Tr. pp. 590-92, 663).

On February 24, 2016, a CSE subcommittee convened to develop the student's IEP for the 2016-17 school year (sixth grade) (Parent Ex. B at p. 1). The CSE subcommittee recommended daily resource room services for 43 minutes in a small group (id. at p. 6). Additionally, the CSE

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<sup>1</sup> The student's eligibility for special education as a student with a speech or language impairment is not in dispute on appeal (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

<sup>2</sup> The hearing record contains multiple duplicative exhibits. For purposes of this decision, the parent exhibit was cited in instances where multiple identical copies of an exhibit were entered into evidence. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

<sup>3</sup> Although entitled "Response to Intervention Services [RtI] Progress Reports," the progress reports were prepared by the teachers who provided the student's AIS instruction (Tr. pp. 553; Parent Ex. J; Dist. Exs. 30; 35). Review of the hearing record does not indicate the district provided the student with RtI services during the school years in dispute.

subcommittee recommended two 30-minute sessions of speech-language therapy per week in a small group (5:1) and continued to recommend the same program modifications and testing accommodations identified on the February 2015 IEP (compare Parent Ex. B at pp. 6-7, with Parent Ex. C at pp. 6-7).

On August 17, 2016, the parents notified the district of their intention to place the student at Vincent Smith at public expense for the 2016-17 school year (Parent Ex. R at p. 1).<sup>4</sup> The letter also noted that while the parents believed that the program offered on the February 2016 IEP was not appropriate for the student, they would continue to consider programs recommended by the district (id.). Beginning in September 2016, the student attended Vincent Smith for sixth grade (Tr. pp. 1042, 1748; see Parent Exs. CC; EE).

### **A. Due Process Complaint Notice**

By due process complaint notice dated August 29, 2016, the parents alleged that the district failed to recommend an appropriate program to provide the student with a free appropriate public education (FAPE) for the 2016-17 school year (Parent Ex. A at pp. 3, 5). Initially, the parents argued that the district failed to rely on sufficient evaluative information when developing the February 2016 IEP and, in particular, did not conduct an updated speech-language evaluation (id. at p. 3). The parents also maintained that the district failed to consider the "full continuum of programs" during the February 2016 CSE subcommittee meeting, the parents were not treated as "full and equal" members, and the CSE subcommittee failed to "meaningfully consider" their input or the recommendations of the student's developmental pediatrician (id. at p. 4). The parents next argued that the district improperly determined the student was eligible for special education as a student with a speech or language impairment and claimed that the student should have been classified as a student with a learning disability (id.). The parents maintained that the district failed to "fully and accurately report" the student's present levels of performance or identify that the student was diagnosed with dyslexia (id. at p. 3). The parents further asserted that the management needs contained on the IEP provided insufficient accommodations and supports (id.). The parents claimed that the district failed to develop appropriate goals for the student, and that many of the goals included in the February 2016 IEP were "identical" to the student's goals during the 2015-16 school year which the student failed to achieve (id. at p. 4). Furthermore, the parents claimed that the goals in the February 2016 IEP did not include short term objectives, making it "impossible to track [the student's] incremental progress"; and the "measurement criteria [were] not individualized" (id.). The parents also argued that the district failed to offer the student a program that addressed her deficits in the areas of decoding, language, and writing, as well as her inconsistent math abilities (id. at p. 3). Similarly, the parents claimed that despite acknowledging her "significant delays" in language, reading comprehension, decoding, writing, and math, the district recommended that the student continue to participate in a general education setting (id.). The parents also asserted that the district failed to offer the student any "intensive reading instruction" despite her reading skills being "several grades below grade level" (id. at p. 5). The

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<sup>4</sup> Vincent Smith has not been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (Tr. pp. 1034, 1064-65, 1149; see 8 NYCRR 200.1[d]; 200.7).

parents asserted that the resulting program recommendation was the same as that recommended for the student during the 2015-16 school year, despite the student making no progress and having "tremendous difficulty" in that program (*id.* at pp. 2-3). The parents argued that the district failed to recommend sufficient related services, including "individualized" speech-language therapy; additionally, the parent contended that the district inappropriately reduced the amount of recommended speech-language therapy on the February 2016 IEP (*id.* at p. 4). The parents also asserted that the district failed to offer parent counseling and training (*id.* at p. 5). The parents next claimed that the district failed to provide sufficient supplementary aids or program modifications, or sufficient behavioral interventions (*id.* at p. 4). The parents further contended that the district failed to recommend special education transportation for the student (*id.*). Lastly, the parents argued that the district inappropriately proposed that the student "participate in the same assessments as general education students" (*id.* at p. 5). For relief, the parents requested reimbursement "and/or prospective[] funding [for] the tuition, costs, and expenses" of the student's program at Vincent Smith, and that the district provide the student with special education transportation (*id.*).

### **B. Impartial Hearing Officer Decision**

The parties proceeded to an impartial hearing on December 13, 2016, which concluded on June 19, 2017, after 10 hearing days (Tr. pp. 1-1908). In a decision dated September 18, 2017, the IHO determined that the district offered the student a FAPE for the 2016-17 school year and denied the parents' request for reimbursement or direct funding of the costs of the student's tuition at Vincent Smith (IHO Decision at pp. 40-48, 52).

The IHO determined that the district had and considered sufficient evaluative materials at the February 2016 CSE subcommittee meeting to develop an appropriate program for the student, including evaluation reports and input from the student's teachers and speech pathologist (IHO Decision at p. 42). The IHO also found that the parents were not denied an opportunity to participate at the February 2016 CSE subcommittee meeting and the hearing record demonstrated that they participated in the discussion and provided the CSE subcommittee with input during the meeting (*id.* at pp. 44-45). The IHO also determined that there was no basis in the hearing record to find that the CSE subcommittee predetermined the student's program (*id.* at p. 45). The IHO determined that the district considered the recommendations in the October 2013 neurodevelopmental evaluation in 2013 and that the February 2016 CSE subcommittee was not required to review the same recommendations again "several years later," and that these recommendations were not raised during the February 2016 meeting (*id.* at pp. 45-46).

Next, the IHO determined that the goals in the February 2016 IEP were appropriate because they addressed the student's deficits and were designed to meet her needs (IHO Decision at p. 43). Additionally, the IHO determined that lowering the "success percentage . . . on a few goals" did not indicate that the district made "it easier for the student to achieve the goal" or that the student had regressed; rather, she found that it "addressed the more difficult material the student would encounter" (*id.*). The IHO then found that the recommendation for resource room and speech services did not result in a denial of FAPE as the student had made progress in a "very similar" program during the 2015-16 school year (*id.* at p. 42). Furthermore, the IHO found that there was

no reason to believe the student could not continue to make progress with the program identified in the February 2016 IEP as it recommended academic and speech goals, special education services, and supports and accommodations to address her areas of deficit (*id.*). The IHO also determined that the recommendation for resource room and speech-language therapy services was "appropriate to address the student's academic and speech deficits and complied with [least restrictive environment (LRE)] requirements" (*id.* at p. 47). The IHO further found that the reduced recommendation for speech services did not deny the student a FAPE (*id.* at p. 43).

Next, the IHO found that the failure to recommend counseling services did not constitute a denial of a FAPE as the evidence available to the February 2016 CSE subcommittee established that the student was generally compliant and did not engage in interfering behaviors or display socialization concerns that indicated counseling was necessary (*see* IHO Decision at p. 47). Finally, the IHO determined that there was no evidence in the hearing record that the district middle school could not implement the student's IEP, and that the parents' claims to the contrary were speculative (*id.* at p. 48).

Notwithstanding her determination that the district offered the student a FAPE, the IHO determined that Vincent Smith was an appropriate placement for the student (IHO Decision at pp. 49-50). The IHO also determined that equitable considerations favored the parents' request for relief, finding that the parents cooperated with the district and the contract for the student's placement at Vincent Smith did not constitute a "predetermination of placement as the parent toured the proposed public school placement" (*id.* at p. 51).

#### **IV. Appeal for State-Level Review**

The parents appeal, asserting that the IHO erroneously determined that the district provided the student with a FAPE for the 2016-17 school year. The parents contend that the IHO incorrectly found that they were "afforded meaningful participation" at the February 2016 CSE subcommittee meeting and that the district did not predetermine the student's program. The parents claim that the CSE subcommittee failed to consider any other placement options during the meeting, despite the parents' request for a special class placement. The parents next claim that the IHO erroneously found that the CSE subcommittee relied on sufficient evaluative information in developing the February 2016 IEP. The parents claim that the district failed to consider the October 2013 neurodevelopmental evaluation. Additionally, the parents claim that the IHO erred in concluding that the district was not required to consider and discuss the October 2013 neurodevelopmental evaluation at the February 2016 CSE subcommittee meeting. Furthermore, the parents argue that the IHO erroneously determined that the annual goals in the February 2016 IEP were appropriate for the student, and that the district permissibly lowered the "mastery criteria" for goals the student had not met. The parents claim that the goals did not address all of the student's areas of need, and the district "abandoned" goals on which the student did not make progress. The parents also contend that the IHO erred in finding that the recommendation for resource room and speech-language therapy services offered the student a FAPE. The parents argue that the IHO erred in concluding that the student made progress during the 2015-16 school year. Moreover, the parents contend that the district recommended a less supportive program for the 2016-17 school year. The parents also claim that the student's special education needs were not being met in "the general

education class" in which she spent the bulk of her school day, and that the provision of resource room services once per day was insufficient. The parents further claim that the district failed to recommend a "specialized reading program" to address the student's reading deficits.

Next, the parents contend that the IHO incorrectly determined that the district's recommendation for a reduction in speech-language therapy did not deny the student a FAPE. The parents assert that the student made inconsistent progress when receiving three sessions per week of speech-language therapy, and did not achieve any of her speech-language goals during the 2015-16 school year. The parents assert that the IHO did not address the district's failure to recommend 1:1 speech-language therapy, despite the student's need for frequent redirection.

Next, the parents maintain that the IHO incorrectly found that the student did not require counseling services, even though the student was withdrawn, frustrated, and isolated, and showed symptoms of anxiety. The parents also contend that the IHO erred by not addressing the district's failure to offer them parent counseling and training. The parents further contend that the IHO erred in finding that their challenges related to the implementation of the February 2016 IEP at the district middle school were speculative. Finally, the parents argue that the cumulative impact of the district's violations of the IDEA resulted in a denial of a FAPE to the student for the 2016-17 school year.

For relief, the parents request reimbursement and/or direct funding of the student's tuition costs at Vincent Smith.

In an answer and cross-appeal, the district responds to the request for review by generally denying the parents' allegations and arguing in support of the IHO's determinations that it offered the student a FAPE. The district affirmatively asserts that the record establishes the district offered the student a FAPE for the 2016-17 school year. The district contends that in addition to the services listed on the student's IEP during the 2015-16 school year, the student received AIS reading and math supports, and "would have continued receiving building-level AIS services."

In a cross-appeal, the district alleges that the IHO incorrectly found that the student's placement at Vincent Smith was appropriate. The district asserts that Vincent Smith only offers "general advantages and amenities," and the hearing record does not establish that the school provided services designed to meet the student's needs. The district further contends that Vincent Smith is overly restrictive, as the student did not require placement outside of the district in a special school. The district also alleges that equitable considerations do not favor the parents' request for tuition reimbursement because they did not allow the district "to address their concerns," but instead "merely advised" the district of their unilateral placement of the student at Vincent Smith. In addition, the district contends that the parents predetermined the student's placement at Vincent Smith for the 2016-17 school year.

In an answer to the cross-appeal, the parents generally deny the district's allegations, and contend that the IHO properly found that Vincent Smith was an appropriate placement and that equitable considerations favor an award of reimbursement or direct funding for the costs of the student's tuition at Vincent Smith.

## 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 Andrew 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]).<sup>5</sup>

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).

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<sup>5</sup> 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" (Andrew F., 137 S. Ct. at 1000).

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. Predetermination and Parent Participation**

The parents contend that they were not afforded meaningful participation during the February 2016 CSE subcommittee meeting; the parents also claim that the district predetermined the student's program and was "close minded to other program options." The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*11 [E.D.N.Y. Sept. 2, 2011] ["[T]he IDEA only requires that the parents have an opportunity to participate in the drafting process"], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*17 [E.D.N.Y. Aug. 19, 2013] [noting that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]).

As to whether the parents had an opportunity to participate during the February 2016 CSE meeting, the evidence shows that both parents attended the meeting, and that the student's special education/resource room teacher, the student's speech-language pathologist, and the student's classroom teacher were present during the February 2016 CSE subcommittee meeting (see Tr. pp. 96, 285, 423, 810; Parent Ex. B at p. 1; Dist. Ex. 34). The CSE subcommittee chairperson testified that the student's mother raised concerns related to the student's lack of progress (Tr. p. 145). The speech-language pathologist also testified that the student's mother brought up concerns related to progress during the meeting, but did not recall whether the parents had raised any additional concerns (Tr. pp. 299-300). Furthermore, the student's classroom teacher testified that the parents raised concerns related to the student's overall growth, but he did not recall the specific topics addressed by the parents (Tr. pp. 792-93). The student's mother testified that she expressed concern about the CSE subcommittee's recommendation and requested that the student be placed in a special class (see Tr. pp. 1737, 1743). The student's mother further testified that district staff

responded to her request and explained that the student was "too smart for special classes and too slow for regular classes" (see Tr. pp. 1737, 1742-43). The student's mother also questioned the CSE subcommittee's recommendation to reduce speech-language services, explaining that it was the student's "biggest problem"; in response, district staff explained that a reduction in services was necessary to ensure the student did not miss other instruction during sixth grade (see Tr. p. 1735). Accordingly, the hearing record reflects that the parents raised concerns about the recommendation made by the February 2016 CSE subcommittee and that the district explained to the parent why it did not recommend that the student attend a special class placement.

Turning to the parents' predetermination claim, the key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D.-S., 2011 WL 3919040, at \*10-\*11, aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (Dirocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at \*18 [S.D.N.Y. Jan. 2, 2013] [alteration in the original], quoting M.M. v. New York City Dept. of Educ., 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]). As to whether the district considered different program options, the February 2016 prior written notice indicated that there "were no other options considered at" the time of the February 2016 CSE subcommittee meeting and that the student would continue to receive "[r]esource [r]oom services with [s]peech as a related service" (Dist. Ex. 4 at p. 1). Moreover, the student's special education/resource room teacher ("special education teacher") testified generally that other placements were not considered for the student because it "seemed like the program was working for her" (Tr. p. 504). However, the student's classroom teacher testified that CSE subcommittee "probably talked about [other] options" for the student during the meeting, although he was unsure whether the CSE subcommittee discussed the specific "types of environments [the student] could be in for the following year" (Tr. pp. 794-95). As noted above, the student's mother testified that she requested the student be placed in a special class, and the CSE subcommittee directly addressed her request during the meeting (Tr. pp. 1737, 1742-743).

Based on the above, the evidence in the hearing record supports finding that the district gave the parents an opportunity to participate and did not predetermine the student's placement.

## **B. Sufficiency and Consideration of Evaluative Information**

The parents assert that the IHO erred in finding the district relied on sufficient evaluative information. The parents argue that the district evaluations failed to identify that the student had a reading disorder and the district did not assess the student for dyslexia. The parents further assert that the district failed to consider the results and recommendations from a private neurodevelopmental evaluation report and subsequent letters written by the evaluating developmental pediatrician.

An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). It is well settled that a CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]).

The February 2016 CSE subcommittee used the following information to develop the student's IEP: an October 2013 psychological report, a November 2013 speech and language reevaluation report, a December 2013 classroom observation, a January 2015 speech and language annual review progress report, a December 2015 Wechsler Individual Achievement Test-Third Edition (WIAT-III) clinician report, and a January 2016 speech and language annual review progress report (Tr. pp. 56-58, 88; Parent Exs. B at p. 2; I; Dist. Exs. 17; 20; 21; 27; 32).

The October 2013 psychological report provided information regarding the student's cognitive functioning (Dist. Ex. 17). As part of the psychological evaluation, an administration of the Stanford-Binet Intelligence Scale-Fifth Edition (SB-V) to the student yielded a nonverbal IQ of 91, a verbal IQ of 64, and a full-scale IQ of 76, indicating that the student's nonverbal reasoning abilities were better developed than her verbal reasoning abilities (id. at pp. 1-3).<sup>6</sup> The evaluating psychologist noted that the student demonstrated variability across the cognitive domains, and that her overall performance was considered to be "below age-appropriate" and in the borderline impaired range of cognitive development (id. at pp. 3-4). The October 2013 psychological report also noted that the current evaluative data appeared consistent with the student's previous performance on cognitive testing in 2011 (id. at p. 4). The psychologist also assessed the student's behavior by conducting a behavioral observation (id. at p. 2). According to the report, the student did not engage in spontaneous conversation with the evaluator, but answered questions and

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<sup>6</sup> On an administration of the Beery VMI Developmental Test of Visual-Motor Integration, 6th Edition, the student achieved a standard score of 88, indicating low average visual motor integration skills (Dist. Ex. 17 at p. 1).

appeared to enjoy the individual attention (id.). During challenging tasks, the student maintained attention and worked in a consistent manner, but when tasks became more difficult the student tended to give up (id.). The report also noted that when tasks proved too difficult for the student she admitted to not knowing the answer (id.).

The February 2016 CSE subcommittee also reviewed the November 2013 speech and language reevaluation, which provided information regarding the student's language skills (Dist. Ex. 20). An administration of the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) to the student yielded index standard scores (percentile rank) of 77 (6) in receptive language, 71 (3) in expressive language, 84 (14) in language content, and 70 (2) in language memory, and a core language standard score of 75 (5) (id. at p. 1). The student's standard scores suggested decreased abilities in the areas of listening skills, auditory comprehension, and expressive language (id. at p. 3). The student achieved "low average" skills related to vocabulary, concept and category development, comprehension of associations and relationships among words, interpretation of factual and inferential information presented orally, and the ability to create meaningful semantically correct sentences (id.). In addition, the student demonstrated reduced ability to recall and follow spoken directions, to generate a sentence given two target words, to interpret sentences, and in her overall application of memory skills to language tasks (id.). The report indicated that the student exhibited "good" pragmatic language skills and speech intelligibility (id.).

On December 9, 2013, the school psychologist, who later served as the February 2016 CSE subcommittee chairperson, observed the student in her third grade class, which consisted of a classroom teacher and 23 students (Tr. p. 70; Parent Ex. B at p. 1; Dist. Ex. 21 at pp. 1-2).<sup>7</sup> According to the school psychologist, the student followed the teacher's directive to copy the homework assignment, gather materials and pack her bookbag, and take out her math workbook (Tr. pp. 70-71; Dist. Ex. 21 at pp. 1-2). It was also noted that the student was attentive and focused, and appeared distracted only once during the observation; additionally, the student did not volunteer to answer any questions during the observation (id.).

The February 2016 CSE subcommittee also considered a December 2015 special education teacher report which provided information regarding the student's academic skills (Dist. Ex. 32; see Parent Ex. B at p. 1). Administration of the WIAT-III to the student yielded standard scores (percentile rank) of 84 (14) in reading comprehension, 74 (4) in math problem solving, 70 (2) in word reading, 83 (13) in numerical operations, 78 (7) in spelling, 82 (12) in math fluency-addition, 92 (30) in math fluency-subtraction, and 107 (68) in math fluency-multiplication (id. at p. 1).

The January 2015 special education related service annual review progress report provided the February 2016 CSE subcommittee with additional information regarding the student's language skills (Dist. Ex. 27). The student's speech-language therapy provider indicated the student was friendly, compliant, and an active participant in speech-language therapy (id. at p. 1). The student

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<sup>7</sup> The observation report entered into evidence was illegible and therefore the school psychologist who conducted the observation read the document aloud during testimony (Tr. pp. 68-72; Dist. Ex. 21 at pp. 1-2).

initiated interactions with both peers and adults and related well with others (id.). The report indicated the student required repetition of material and performed best when information was broken down into shorter and simpler steps (id.). The report indicated the student's vocabulary and grammar had improved but continued to be areas of difficulty (id.). The speech-language pathologist reported the student had markedly improved short-term memory skills as well as retention and comprehension of new information and details (id.). The report noted that it did not take the student as long to grasp new concepts as it had in the past, and she had begun to demonstrate knowledge of antonyms, synonyms, homonyms, and multiple meaning words (id.). The report also noted the student put forth much effort, remained focused throughout most sessions, and enjoyed assisting peers (id.).

The February 2016 CSE subcommittee also considered a January 25, 2016 speech and language annual review progress report (Tr. pp. 87-88; Parent Ex. I). The report contained information regarding the student's performance in the areas of language and grammar; the student's scores ranged from 25 percent to a 100 percent (Parent Ex. I). According to the report, the student actively participated and always tried her best during speech-language sessions (id.). The student performed best when directions and materials were repeated, and information was explained (id.). The speech-language pathologist reported that the student needed to continue to work on her goals, demonstrate comprehension of information by responding to a variety of "wh" questions, continue to improve her grammar abilities, and ability to compare/contrast objects, people, and places (id.). According to the speech-language pathologist, the student continued to demonstrate delays in receptive and expressive language (id.). The speech-language pathologist recommended a reduction in the frequency of the student's speech-language therapy from three sessions per week to two sessions per week to allow increased time in her academic classes in middle school (id.).

With respect to the parents' assertions that the evaluation reports considered by the district did not indicate the student had a reading disorder, and the district did not assess the student for dyslexia, as described above, the evaluative information the February 2016 CSE subcommittee considered reflected information regarding the student's needs and abilities in reading specifically, and skills that may affect her reading ability (Parent Exs. B at pp. 2-4; I; Dist. Exs. 17; 20; 21; 27; 32). Furthermore, a district is not required to provide diagnoses, such as dyslexia, as part of a student's assessment. Rather, federal and State regulations require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and obtain information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at \*13 [S.D.N.Y. Mar. 31, 2014] [finding that the "absence of an explicit mention" of a particular diagnosis in a student's annual goals was not fatal to the IEP because the goals were adequately designed to address the student's learning challenges as a whole and related to the particular diagnosis]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at \*10 [S.D.N.Y. Oct. 12, 2011]). Moreover, the February 2016 CSE subcommittee considered recent evaluations

that provided information about the student's reading needs including her strengths and weaknesses in developing the February 2016 IEP (Parent Ex. B at pp. 2-4; Dist. Ex. 32 at pp. 1-3).

The parents also argue that the district failed to conduct an updated speech-language evaluation and assert that the most recent speech-language evaluation was three years old; however, the February 2016 CSE considered a January 25, 2016 speech and language annual review progress report that described the student's language skills and related needs (Tr. p. 88; Parent Exs. A at p. 3; I). Additionally, New York State regulations require that 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][2]; 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 otherwise agree, and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). In this case, the November 2013 speech-language evaluation considered by the February 2016 CSE subcommittee was completed within three years of the CSE subcommittee meeting and the hearing record does not otherwise reflect that the parents had requested updated evaluations at the time of the meeting.

The February 2016 CSE subcommittee did not review an October 2013 neurodevelopmental evaluation report that contained information regarding the student's cognitive skills, academic abilities, and language needs (Tr. pp. 51, 103-04; Parent Exs. B at pp. 2-3; F). However, as discussed above, the hearing record establishes that the district considered evaluation reports that provided a considerable amount of information regarding the student's functioning, including information regarding her cognitive, academic, and language skills; information that was generally consistent with the results of the October 2013 neurodevelopmental evaluation regarding the student's cognitive and academic needs (compare Parent Ex. F, with Parent Ex. I, and Dist. Exs. 17; 20; 21; 27; 32).<sup>8</sup>

The parents also assert that the February 2016 CSE subcommittee failed to consider the developmental pediatrician's recommendations contained in the neurodevelopmental evaluation report, and subsequent letters drafted by the developmental pediatrician in 2013, 2015, and 2016 (Parent Exs. D; E; F; Dist. Ex. 18). In the evaluation report and the letters the developmental pediatrician recommended for the student a self-contained special education setting, daily reading instruction, three sessions per week of speech-language therapy, and behavioral interventions, among other recommendations (Parent Exs. D; E; F; Dist. Ex. 18). The parent testified that she provided the school psychologist with all three letters as she believed "he would be the one to distribute [them] to the" CSE subcommittee (see Tr. pp. 1739-42; Parent Exs. D; E; Dist. Ex. 18). As noted above, she also testified that during the February 2016 CSE subcommittee meeting she requested that the student be placed in a special class—which was one of the recommendations

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<sup>8</sup> Nevertheless, in the area of language functioning, CELF standard scores from the October 2013 neurodevelopmental evaluation were lower than in the November 2013 speech-language reevaluation (compare Parent Ex. F at p. 2, with Dist. Ex. 20 at p. 1). The student's speech-language pathologist testified that the student's testing performance and accuracy were inconsistent and varied greatly from day to day (Tr. pp. 260-61).

made by the student's developmental pediatrician (Tr. pp. 1737, 1742-43; Parent Exs. D; E; F at p. 4; Dist. Ex. 18). However, contrary testimony from district staff tends to indicate that the district members of the February 2016 CSE subcommittee did not have access to all of these letters and were unaware of the evaluation report at the time of the meeting. Specifically, the CSE subcommittee chairperson testified that he had never seen the neurodevelopmental evaluation report or the February 2016 developmental pediatrician's recommendation letter before the impartial hearing, and the parents had never mentioned the neurodevelopmental evaluation in relation to any CSE meetings he had chaired; moreover, he testified that the developmental pediatrician's recommendations were not brought up at the February 2016 CSE subcommittee meeting by the parents (Tr. pp. 51, 97-98, 103-04, 118-19). However, the chairperson acknowledged receiving the developmental pediatrician's March 2015 letter from the parents at some point after the student's IEP for the 2015-16 school year was developed (Tr. pp. 100-01). The chairperson testified that he submitted the letter to the CSE office (Tr. p. 101). The student's special education teacher did not recall any discussion related to the developmental pediatrician or her recommendations during the February 2016 CSE subcommittee meeting, nor did she believe she had ever seen the recommendation letters dated March 20, 2015 or February 11, 2016 (Tr. pp. 431-32; Parent Exs. D; E; see Dist. Ex. 18). Additionally, the student's general education teacher did not recognize the name of the developmental pediatrician or the recommendation letters dated October 21, 2013 and February 11, 2016 (Tr. pp. 804, 808; Parent Ex. D; Dist. Ex. 18). Finally, the developmental pediatrician testified that she did not provide the March 20, 2015 and February 11, 2016 recommendation letters to the CSE subcommittee as she assumed the parent would have provided them (Tr. pp. 1798-1800; Parent Exs. D; E).<sup>9</sup>

In summary, the hearing record supports the IHO's finding that the evaluative information available to and considered by the February 2016 CSE subcommittee provided sufficient information regarding the student's needs, abilities, and functional performance to develop her IEP (see IHO Decision at pp. 41-42). To the extent the hearing record is unclear whether the neurodevelopmental pediatrician's letters were provided to the February 2016 CSE subcommittee directly, the hearing record reflects that the parents provided the chairperson of the February 2016 CSE subcommittee with a copy of the March 2015 letter, and that the letter was not considered in the development of the student's program. Nonetheless, as the hearing record supports a finding that the district failed to offer the student a FAPE on substantive grounds as discussed below it is not necessary to consider whether the failure to consider the letters constituted a procedural violation under the circumstances of this case or whether such a failure rose to the level of a denial of a FAPE.

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<sup>9</sup> However, the CSE subcommittee chairperson testified that during the 2013-14 school year, the CSE reviewed the October 2013 recommendation letter (Tr. pp. 47-48; Dist. Ex. 18). The CSE subcommittee chairperson further testified that based upon evaluative information regarding the student's cognitive and academic strengths and weaknesses as well as social/emotional skills, a special class setting, as recommended by the developmental pediatrician, was not appropriate for the student at that time (Tr. pp. 47-48). Therefore, the hearing record reflects that the district considered the developmental pediatrician's recommendations in relation to a previous CSE meeting.



### C. Annual Goals

The parents argue that the IHO erroneously determined that the annual goals in the February 2016 IEP were appropriate for the student. The parents claim that the district did not establish that the annual goals in the IEP were designed to meet the student's needs and assert that the goals would not have enabled the student to make progress during the 2016-17 school year. The parents also assert that the district improperly lowered the mastery criteria on the annual goals.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

As to whether the annual goals in the February 2016 IEP were appropriate to meet the student's needs, the February 2016 IEP included 10 annual goals which targeted the student's needs in the areas of reading, writing, math, speaking, listening, and language skills (Parent Ex. B at pp. 5-6). The annual goals were aligned with the student's needs as described in the present levels of performance in the IEP (id. at pp. 1-6). Additionally, a review of the February 2016 IEP shows that each annual goal identified the specific skill the student was to achieve, the criteria by which the student's success toward achieving the goal was to be measured (e.g., 70 percent, 80 percent), the procedures that would be utilized to evaluate the student's success (e.g., classroom and standardized tests, structured observations of targeted behavior), and how frequently the student's progress toward meeting the goal would be measured (e.g., every two weeks, every 5 weeks) (id.).

Regarding the parents' claim that mastery criteria had been inappropriately lowered, a review of the annual goals from the February 2015 IEP and the annual goals from the February 2016 IEP shows that most of the annual goals were modified to align with the student's needs and skill levels and only two annual goals carried over from the February 2015 IEP to the February 2016 IEP—one related to reading and one related to math—had the mastery criteria lowered (Tr. pp. 417-22; compare Parent Exs. B at pp. 5-6, with Parent Ex. C at pp. 5-6). The CSE subcommittee chairperson testified that the February 2016 CSE subcommittee lowered the mastery criteria because the student was not meeting the current criteria; he also opined that annual goals were meant to be student specific and achievable within a school year (Tr. pp. 93-94). Similarly, the special education teacher testified that the mastery criteria was reduced because the student's classwork would be more challenging during sixth grade, and the adjusted annual goals would more likely be attainable within one year (Tr. pp. 414-16). The special education teacher further opined that a five percent reduction from one year to the next was not a "significant reduction," especially considering that the student was moving to middle school where the curriculum was different (see Tr. pp. 528-30).

The parents also assert that the district failed to include annual goals in key deficit areas including multistep directions, answering "wh" questions, decoding, word suffixes, and cause and effect. The IDEA does not require that a district create a specific number of goals for each deficit, and failure to create specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need. (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]; see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at \*20-\*21 [S.D.N.Y. Feb. 14, 2017]). Moreover, as noted above, the February 2016 IEP included 10 annual goals, which targeted the student's needs in the areas of reading, writing, math, speaking, listening, and language skills, in alignment with the student's present levels of performance (Parent Ex. B at pp. 1-6). The parents further assert that the district included several annual goals that were beyond the student's functioning level and were unattainable. However, a review of the February 2016 annual goals shows that the goals which targeted reading, writing, math, listening, speaking, and language skills addressed the student's needs, targeted skills with which the student had difficulty, and aligned with her abilities (*id.*). For example, the student's speaking and listening goal stated that the student would summarize "written text read aloud or information presented through . . . diverse media and formats," and there is no indication in the hearing record that these skills were beyond the abilities of the student (*id.* at p. 6). In addition, according to the CSE subcommittee chairperson, the development of the student's annual goals were based upon her ability and achievement, not as the result of comparison to her peers or against a curriculum (Tr. pp. 152-53).

The evidence in the hearing record leads to the overall conclusion that the annual goals in the February 2016 IEP aligned with and targeted the student's needs identified in the present levels of performance, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at \*18-\*19 [E.D.N.Y. Aug. 19, 2013]; D.B., 966 F. Supp. 2d at 334-35). Thus, the IHO's determination that the goals contained in the student's February 2016 IEP were appropriate and that the adjustment of the student's mastery criteria was appropriate is supported by the hearing record.

## **D. Related Services**

### **1. Speech-Language Therapy**

The parents assert the IHO erred in finding the February 2016 CSE subcommittee's reduction of the student's speech-language therapy did not deny the student a FAPE. The parents also argue that the district failed to offer the student 1:1 speech-language therapy. As set forth below, the hearing record supports the IHO's finding that the reduction of the student's speech-language therapy services did not deny the student a FAPE for the 2016-17 school year (IHO Decision at p. 43).

A summary of the student's speech-language needs is necessary to assess the February 2016 CSE subcommittee's determination regarding the frequency of speech-language services.

According to the speech-language pathologist, the student demonstrated overall delays in receptive and expressive language skills, but presented with both good pragmatic language skills and speech intelligibility, as well as relative strengths in understanding of word definitions, word classes, word associations, and categorizations (Tr. p. 255; Parent Ex. I; Dist. Exs. 20 at pp. 1-3; 27 at p. 1). The November 2013 CELF-5 results indicated that the student performed well below average in the areas of language processing, expression, content and memory compared to same age peers (Dist. Ex. 20 at pp. 1-3). In addition, according to the speech-language pathologist, the student's areas of need included short-term memory, following complex directives, grammar, sentence formulation, answering more complex "wh" questions, and inferences regarding main ideas, which were addressed during speech-language therapy sessions (Tr. p. 259). The speech-language pathologist reported that the student's difficulties with short-term memory negatively affected her language processing skills, and testified that the student's weaknesses included recalling sentences, retaining information, using correct syntax, and semantic relationships (interpreting sentences) (Tr. p. 256; Dist. Exs. 20 at p. 3; 27 at p. 1).

For the 2016-17 school year, the February 2016 CSE subcommittee recommended two 30-minute sessions per week of speech-language therapy in a group, a reduction from the February 2015 IEP provision of three 30-minute sessions per week of speech-language therapy in a group (Parent Exs. B at p. 6; C at p. 6).<sup>10</sup> Despite the weaknesses described above, testimony of the speech-language pathologist supports the CSE subcommittee's recommendation for a reduction of speech-language services. The speech-language pathologist testified that it was preferable that the student learn vocabulary, grammar, and related skills in her core academic subjects within the classroom setting, and receive instruction regarding strategies to improve her language skills during speech-language therapy (Tr. pp. 278-79). The speech-language pathologist, in addition to other district staff, testified that she recommended a reduction in speech-language therapy because the student was moving on to middle school and would miss "the majority of the class work" and classroom instruction due to pull-out speech-language sessions (Tr. pp. 163-64, 278-79, 281-82, 412). According to the CSE subcommittee chairperson, to remove the student from the classroom for additional speech-therapy sessions would be "counterproductive" (Tr. p. 164). The speech-language pathologist testified that the parents agreed with the reduction of speech-language services after the speech-language pathologist explained her rationale for the reduction in services (Tr. pp. 281-83). Furthermore, the CSE subcommittee chairperson testified that while questions were asked at the meeting regarding the reduction in services, "once the explanation was given, it made sense to everyone who was there," including the parents (Tr. pp. 91, 164-65).

While the evidence in the hearing record indicates the student's progress made with respect to speech-language skills during the 2015-16 school year was inconsistent, a discussion of the student's progress during that time is helpful to assess whether the February 2016 CSE subcommittee's recommendation to reduce the student's speech-language therapy services was appropriate. The speech-language pathologist testified that the student made progress from the

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<sup>10</sup> The speech-language pathologist testified that during the 2015-16 school year the student received three 30-minute session per week of speech-language therapy in a group of four students (Tr. pp. 252-53, 258; Parent Ex. C at p. 6).

beginning of the 2015-16 school year; however, she also noted that the student's performance was inconsistent and varied greatly from day to day, and the student's accuracy fluctuated from 20 percent to 80 percent depending on the day (Tr. pp. 260-61). The student's progress report for the 2015-16 school year indicated that as of February 2016, the student was progressing gradually toward two annual goals related to using grammatically correct sentences in conversational speech and comparing/contrasting various people/items, and progressing satisfactorily toward her annual goal of improving listening comprehension skills and ability to respond to "wh" questions (Parent Ex. H at pp. 5-6). The speech-language pathologist testified that she reported the results from the January 2016 speech-language annual review progress report at the February 2016 CSE subcommittee meeting, which indicated the student made progress in inferencing ability, answering why and how questions, understanding main ideas, and comprehension (Tr. pp. 269-70).<sup>11</sup> During the CSE subcommittee meeting she also opined that the student needed to continue to work on irregular and plurals verbs, words with multiple meanings, figurative language, and sequencing (Tr. p. 270).<sup>12</sup> The speech-language pathologist further testified that "absolutely" the student would make progress with two sessions per week of speech-language therapy (Tr. p. 284). Thus, in consideration of the student's needs, the evidence in the hearing record shows that two 30-minute sessions per week would have addressed the student's needs because the language skills that needed improvement could have been addressed in two speech-language sessions in addition to the strategies and instruction that occur within the classroom setting (see Tr. p. 279).

With respect to the parents' assertion that the district should have provided the student with 1:1 speech-language therapy, as set forth above, the student's language needs were addressed, and she made some progress towards her IEP language annual goals during the 2015-16 school year in a group speech-language therapy setting. In addition, review of the February 2016 IEP annual goals related to language does not show those goals require an individual therapy setting to be implemented (see Parent Ex. B at pp. 5-6). Rather, the annual goals related to language pertain to curriculum and typical classroom skills including oral and written communication, listening comprehension and answering "wh" questions, as well as grammar, verb tense, and vocabulary, all of which could be addressed in a group therapy session and a classroom setting (see *id.*). Furthermore, there is no indication in the hearing record that the student required individual speech-language therapy services.

Given the student's receptive and expressive language needs, and in consideration of her progress during the 2015-16 school year as well as her continued areas of need in language, the February 2016 CSE subcommittee's recommendation of two 30-minute sessions per week of speech-language therapy did not result in a denial of a FAPE to the student.

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<sup>11</sup> The CSE subcommittee chairperson testified that during the February 2016 CSE subcommittee meeting the speech-language pathologist stated that the student was "making slow progress" (Tr. pp. 88).

<sup>12</sup> The speech-language pathologist testified that she developed the annual goals in the February 2016 IEP based upon the CELF-5 results (Tr. pp. 258, 286).

## 2. Counseling Services

The parents maintain that the IHO incorrectly found the student did not require counseling services.<sup>13</sup> The parents claim evidence in the hearing record shows the student was withdrawn, frustrated, and isolated and had exhibited symptoms of anxiety. Federal and State regulations dictate that when appropriate, an IEP must include counseling services for the student to benefit from special education and receive a FAPE (34 CFR 300.34[a]; 8 NYCRR 200.1[qq]).

In this case, the student's mother testified that she had requested counseling services for the student during the 2014-15 school year because "she [did not] really have friends"; however, the district explained that they did not provide counseling services for those types of concerns, so the student's mother did not ask for counseling services again in the 2015-16 school year (Tr. pp. 1752-53).

The CSE subcommittee chairperson—who is also a school psychologist—testified there was no indication that the student exhibited self-stimulatory or disruptive behavior, or had been disciplined while at the district elementary school; in addition, no concerns regarding the student's behavior were raised at the February 2016 CSE subcommittee meeting (Tr. pp. 73-74, 139). The CSE subcommittee chairperson and the student's special education teacher described the student as "shy" and "quiet," but testified that she had "established friendships," and spent time with her friends in instructional situations (Tr. pp. 75, 87, 394-95). The CSE subcommittee chairperson opined that he did not believe the student required counseling (Tr. pp. 75-76).

The student's speech-language pathologist also testified that she did not observe the student exhibiting any behavioral issues or inappropriate behavior during sessions, and noted that the student did not have any socialization issues and engaged in conversations with her peers (Tr. pp. 266-67, 275; see Parent Ex. Z). The speech-language pathologist further testified that she would not describe the student as "socially awkward," and that the CSE subcommittee would have recommended the student for a "social skills group" if the student was having difficulties with socialization, but that she was "always an active participant and no social awkwardness was presented" to any of the professional staff in the elementary school building (see Tr. pp. 266-67, 276). Also, according to the speech-language pathologist, the parents never expressed concern at any of the CSE meetings during the 2014-15 or 2015-16 school years about the student's socialization skills or lack of friends (Tr. p. 332). The special education teacher testified that the student got along well with and was nice to others, and that while the student was "very anxious" in second grade, she "came out of that" as she became more comfortable in school, and that by the 2015-16 school year the student "was acting like a fifth grade girl for the most part" (Tr. p. 395; see Parent Ex. AA). The student's AIS teacher also testified that there were never any "issues" regarding how the student worked socially with a peer or within a small group, and she would not characterize the student's social interactions with peers as "awkward" (Tr. pp. 594-95). The

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<sup>13</sup> The parents did not raise any claims in the due process complaint notice that the student required counseling services (see Parent Ex. A), but raised the issue in their post-hearing brief (IHO Ex. II at pp. 18-20). However, the issue is discussed here because the IHO made findings related to counseling, the parents now raise this claim on appeal, and the district does not object to the issue being considered (see IHO Decision at p. 47).

student's fifth grade classroom teacher noted that the student was shy and soft spoken, and "a little reserved in large groups," but was otherwise socially appropriate with other students, did not display social awkwardness with peers, and was "just as bubbly as any of the other fifth grade students" (Tr. pp. 780, 789, 824-25, 837; see Parent Ex. BB). There was also general agreement among district staff that the student did not exhibit any maladaptive behaviors that interfered with her education or that required the district to develop a behavioral intervention plan for her (see Tr. pp. 73-74, 266-67, 394, 584-85, 758-63, 939-41).

The student's June 2014, February 2015, and February 2016 IEPs identified that the student displayed appropriate interactions with peers as well as adults and was kind and respectful (Parent Exs. B at p. 4; C at p. 4; Dist. Ex. 6 at p. 5). Moreover, the IEPs reflected that the student appeared to have no "social or emotional needs that should be addressed through special education" (Parent Exs. B at p. 4; C at p. 4; Dist. Ex. 6 at p. 5).

Finally, as noted above, the February 2016 CSE subcommittee did not consider the October 2013 neurodevelopmental evaluation report and the parties disagreed whether the CSE subcommittee had the developmental pediatrician's recommendation letters available. In the neurodevelopmental evaluation report, the parents noted that the student showed three significant symptoms of anxiety and two significant symptoms of perseverative behavior; the student's classroom and special education teachers also noted that the student had "little self confidence or [was] very self conscious" (Parent Ex. F at p. 4).<sup>14, 15</sup> Although the October 21, 2013 recommendation letter also noted that the student should be provided with behavioral interventions to "reduce symptoms of impulsivity and distractibility," none of the developmental pediatrician's letters indicated that the student exhibited social/emotional needs that required counseling services (Parent Exs. D: E; Dist. Ex. 18).<sup>16</sup> Additionally, more current information about the student's social/emotional needs than the information included in the October 2013 neurodevelopmental evaluation report, which was reviewed during the meeting, and testimony from district staff who in large part attended the February 2013 CSE subcommittee meeting, did not indicate that the student required counseling services. Thus, the IHO's determination that counseling services were not warranted for the student in the 2016-17 school year is supported by the hearing record.

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<sup>14</sup> As part of the child symptom inventory, the classroom teacher also noted the student showed one significant symptom of anxiety (Parent Ex. F at p. 4).

<sup>15</sup> The October 2013 neurodevelopmental evaluation report also noted that the student was "polite and well related" (Parent Ex. F at p. 3).

<sup>16</sup> Although the developmental pediatrician generally testified that from the time she first began seeing the student in October 2013 she noticed that she was "becoming more frustrated and withdrawn," there is no dispute that the developmental pediatrician did not participate in the February 2016 CSE meeting, and it is not clear the CSE was aware of her opinion (Tr. pp. 1777, 1780).

### 3. Parent Counseling and Training

The parents also contend that the district failed to offer parent counseling and training in the February 2016 IEP. State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's [IEP]" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]).

In this case, a recommendation for parent counseling and training was not included in the February 2016 IEP (see Parent Ex. B at pp. 6-8).<sup>17</sup> While the parents claimed that the IHO failed to address parent counseling and training in the decision, the hearing record was scarcely developed on this issue. The CSE subcommittee chairperson testified that the parents did not require counseling and training because the student did not have a "medical diagnosis of autism" (see Tr. pp. 110-11).

The parents assert that they required counseling and training to assist the student at home as a result of her difficulties completing homework during the 2015-16 school year. The parent testified that the student had difficulty completing homework, and that the student's difficulties were exacerbated as a result of the parent's language barrier (Tr. pp. 1750-51).<sup>18</sup> The student's speech-language pathologist and special education teacher also testified that, in some instances, it had taken the student a long time to complete her homework, and recalled discussing outside tutoring with the parent (see Tr. pp. 300, 505-06).<sup>19</sup> Conversely, the student's classroom teacher testified that homework was "one of [the student's] strongest areas that really helped with her report card" and that she had "good support at home," even though her homework was sometimes modified (Tr. pp. 826-27). In any case, it does not appear that the parents needed counseling and training to assist them in understanding the special needs of their child or the student's development; rather, the only issue raised relates to a language barrier between the parent and the curriculum that is otherwise unrelated to the student's needs or development, or the implementation of the student's IEP.

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<sup>17</sup> Parent counseling and training was also not recommended in either the June 2014 or January 2015 IEPs (see Parent Ex. C; Dist. Ex. 6).

<sup>18</sup> As can be gleaned from testimony, the student's mother indicated that she could not provide the student with assistance on homework because the mother had difficulty understanding English (Tr. pp. 1750-51). However, she indicated that the student did receive alternative support from her sister, a neighbor, and at some point, a tutor (id.).

<sup>19</sup> The CSE subcommittee chairperson testified that the district and the parent convened a meeting to discuss the student's homework assignments because "there were some concerns that [the student] was expressing that it was taking a while" and that it was difficult to complete; the district determined that the teacher would modify the amount of homework the student received (Tr. pp. 118, 147-48, 150-51).

In summary, the hearing record does not contain any evidence upon which to conclude that a failure to recommend parent counseling and training constituted a procedural violation or resulted in a failure to offer the student a FAPE for the 2016-17 school year.<sup>20</sup>

### **E. Educational Placement**

The parents contend that the IHO erroneously found that the district's recommendation for a program consisting of resource room and speech-language therapy services provided the student with a FAPE. The parents argue that the student did not make progress in the 2015-16 school year but the district continued to recommend the same services for the 2016-17 school year. Specifically, the parents claim that the provision of one period of resource room per day was inappropriate. The parents further claim that the district failed to recommend a "specialized reading program" to address the student's deficits in reading as a result of "her learning disorder and dyslexia." The district asserts that the student demonstrated progress during the 2015-16 school year in light of her disability, and that the February 2016 CSE subcommittee's recommendations were appropriate. However, the hearing record does not support a finding that placement in a general education setting with resource room and speech-language therapy services was appropriate to address the student's needs.

While the adequacy of the student's present levels of performance as described in the February 2016 IEP are not in dispute, a discussion thereof provides context for the following discussion. Regarding the student's educational needs, the present levels of performance set forth in the February 2016 IEP indicated the student needed to improve her skills in reading comprehension, sight word vocabulary, math calculation skills, math problem solving ability, recall of information that she has heard, and vocabulary, short-term memory, and written expression skills (Parent Ex. B at p. 4). The IEP noted that the student applied word attack skills to single syllable words and had difficulty decoding words with many syllables; it also indicated that the student reread to answer comprehension questions and needed to provide more details when answering questions (*id.* at p. 3). The IEP reflected that the student presented with reduced receptive and expressive language skills in areas including listening comprehension, grammar, and recall of events (*id.*). The IEP indicated that the student did "best" when information was repeated and broken down into smaller, simpler segments (*id.*). According to the IEP, the student solved "basic computation in addition and subtraction," but was inconsistent with regrouping to multiply and divide by more than one digit and had difficulty solving word problems involving multiplication and division (*id.*). The IEP further indicated that the student completed class and home assignments (*id.* at p. 4).<sup>21</sup>

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<sup>20</sup> Nonetheless, the district is reminded that although State regulations mandate the provision of parent counseling and training to the parents of students with autism, it must also be included on a student's IEP if necessary to provide the student with a FAPE (8 NYCRR 200.4[d][2][v][b][5]; 200.13[d]).

<sup>21</sup> The CSE subcommittee chairperson testified that in October 2015 the district held a "status meeting" with the parent to discuss the student's difficulty completing homework; at that time the district agreed to modify the student's homework assignments as necessary (*see* Tr. pp. 117-18).



In relation to the student's social development, the February 2016 IEP indicated that the student actively participated in class discussions, interacted appropriately with peers and adults, was kind and respectful, and had improved in her ability to express her feelings (Parent Ex. B at p. 4). The IEP noted the student had no social/emotional needs that required special education (id.). Regarding the student's physical development, the student demonstrated age appropriate physical development and participated in a regular physical education program (id.). The February 2016 IEP also noted the student had received a diagnosis of an attention deficit hyperactivity disorder (ADHD), which had an impact on her learning (id.). The IEP further indicated the student had no physical or medical problems that required intervention (id.).

With respect to the student's management needs, the February 2016 IEP indicated the student required additional assistance to function in the education setting, and provided a program modification of check for understanding by simplifying the language in directions (Parent Ex. B at pp. 4, 6). The IEP also contained testing accommodations including extended time (1.5), directions read and explained, testing in a separate location and with a small group, and that test passages, questions, items, and multiple-choice responses be read aloud (id. at p. 7). The IEP included annual goals targeting the student's abilities in reading, writing, math, speaking, listening, and language (id. at pp. 5-6).

### **1. Student Progress**

The parents claim that the district continued to make the same recommendations in the 2016-17 school year as were previously provided to the student, despite the student not having made any progress. The district asserts that the student exhibited progress during the 2015-16 school year commensurate with her abilities, such that her needs were sufficiently met by the program and placement the February 2016 CSE subcommittee recommended. A student's progress under a prior IEP may be a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parent expresses concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. June 24, 2013]; and at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995]). Review of the student's 2014-15, 2015-16, and 2016-17 IEPs shows that the CSE recommended a general education setting with daily resource room services and speech-language therapy for all three years (see Parent Exs. B at p. 6; C at p. 6; Dist. Ex. 6 at p. 7).

The hearing record suggests that the student exhibited some degree of progress during the 2014-15 and 2015-16 school years while in a general education setting receiving daily resource room services, speech-language therapy, and AIS reading and math services (Tr. p. 126; Parent Exs. C at p. 6; Dist. Ex. 6 at p. 7). A May 2015 progress report indicated that the student demonstrated progress in all subject areas by the third marking period, although she still struggled with the pace of fourth grade (Dist. Ex. 29). Comparison of academic achievement test results from December 2014 and December 2015 shows generally consistent performance, and the special education teacher testified those results indicated the student was maintaining her pace and making progress in reading, writing, and math (see Tr. pp. 388-89; Parent Ex. G). The 2015-16 IEP annual

goal progress report generally showed that the student was either progressing "gradually" or "satisfactorily" toward all of her annual goals through February 2016 (see Parent Ex. H).

The CSE subcommittee chairperson testified that the student was making gradual progress in all areas at the time of the February 2016 CSE subcommittee meeting (Tr. p. 93). The AIS teacher also testified that even though the student struggled with reading tasks, she made progress during the 2015-16 school year (Tr. pp. 628-29). The classroom teacher testified that the student's overall growth and maturity during the 2015-16 school year allowed her to be ready for middle school (Tr. p. 802).

However, as discussed in detail below, any progress the student made in prior school years must be viewed in light of the reading AIS she received, a service not recommended on the February 2016 IEP (see Parent Ex. B).

## **2. Reading Instruction and Needs**

While the parents assert the district failed to recommend a specialized reading program, the district argues that the student's reading needs were addressed by general education instruction, resource room, related services, and AIS.

The December 2015 administration of the WIAT-III yielded standard scores (percentile rank) of 84 (14) in reading comprehension and 70 (2) in word reading (Dist. Ex. 32 at p. 1). The special education teacher testified that based upon the December 2015 WIAT-III results, the student had significant difficulty with sight word vocabulary and below average skills in reading comprehension (Tr. pp. 380-82). Also, in November 2015 the student was reading at an end of first grade reading level (Parent Ex. J at p. 2).<sup>22</sup> However, despite awareness of these difficulties, the February 2016 CSE subcommittee did not recommend, nor did the IEP provide, specialized reading instruction (see Parent Ex. B).

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a resource room program ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>).

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<sup>22</sup> In addition, the February 2016 IEP reflected that the student had significant needs in decoding, reading comprehension, writing, and language, which inhibited her progress in the general education curriculum (Parent Ex. B at pp. 2-4).

The student's classroom teacher testified the student had difficulties with reading and distractibility within the classroom, which consisted of approximately 27 students during the 2015-16 school year (Tr. pp. 716, 726-27, 735, 749-50, 759, 829). The February 2016 CSE subcommittee recommended general education instruction and daily resource room services to address the student's reading needs (Tr. pp. 81-82, 157-58; Parent Ex. B at p. 6). A resource room program provides specialized supplementary instruction in an individual or small group setting for a portion of the school day, with the instructional group not to exceed 5 students (8 NYCRR 200.1[rr], 200.6[f]). The special education teacher testified that the student received resource room services for 50-minutes daily in a group of four students during 2015-16 school year, and that she provided instruction to improve students' reading, math, and study skills based on their IEPs (Tr. pp. 356, 362, 365-66). She further testified the student had a significant deficit in her ability to retain information and needed repetition of already learned concepts to continue to demonstrate her knowledge (Tr. pp. 507-08). Also, according to the special education teacher, the student had difficulties with understanding and processing language as well as following directions (Tr. p. 508). The special education teacher also testified that she believed the February 2016 CSE subcommittee's recommendation for resource room was appropriate because the student continued to need support with reading, needed repetition, and assistance with study skills (Tr. pp. 409-10). However, despite the student's significant weaknesses in reading and memory, the February 2016 IEP did not indicate that resource room services would be dedicated to reading instruction (see Parent Ex. B at p. 6), and the district does not assert that resource room alone was sufficient to address the student's reading needs and instead argues that the student's reading needs were also addressed through the support of AIS as a general education service (Answer ¶¶ 29-30).

While the CSE subcommittee chairperson testified that "if she needed them," the student would receive AIS in reading in middle school, the CSE subcommittee did not include a recommendation for AIS in reading or another service specific to reading instruction on the February 2016 IEP (Tr. pp. 98-99; see Parent Ex. B). State regulations define AIS as additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting State learning standards and/or student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance (8 NYCRR 100.1[g]). AIS is intended to assist students who are at risk of not achieving the State learning standards in English language arts, mathematics, social studies and/or science, or who are at risk of not gaining the knowledge and skills needed to meet or exceed designated performance levels on State assessments (id.). AIS is available to students with disabilities on the same basis as nondisabled students, provided such services are provided to the extent consistent with the student's IEP; however, AIS does not include special education services and programs (id.). Additionally, while certain additional instructional or supportive services may be available to special education students and non-disabled students alike (e.g., AIS or "building level services"), according to the State Education Department, such services should not be listed on a student's IEP (see "Academic Intervention Services: Questions and Answers," at pp. 5, 20, Office of P-12 Mem. [Jan. 2000], available at <http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf>). However, subsequent guidance by the United States Education Department indicates that services that fall into the realm of special education are required to be listed on an IEP, stating that "[t]he IEP Team is responsible for determining what special education and related

services are needed to address the unique needs of the individual child with a disability. The fact that some of those services may also be considered 'best teaching practices' or 'part of the district's regular education program' does not preclude those services from meeting the definition of 'special education' or 'related services' and being included in the child's IEP" (Letter to Chambers, 59 IDELR 170 [OSEP 2012]; see Urbandale Community Sch. Dist., 70 IDELR 243 [SEA Iowa 2017] [noting that "[i]nstruction becomes special education when it is designed or selected to meet the disability-related needs of an individual student and is necessary for that student to maintain or improve educational performance"]).

As previously stated, the district contends that the student's reading needs were addressed through the provision of AIS in reading during the 2015-16 school year (Tr. pp. 98, 590-91, 628-29; Parent Ex. J).<sup>23</sup> However, in this instance, the delivery of a specific reading program in a small group two three times per week appears to align with the guidance from the United States Education Department because it meets the definition of "specially designed instruction" (34 CFR 300.39[b][3]). Specially designed instruction is defined in part, as adapting the content, methodology, or delivery of instruction to address the unique needs of a student with a disability that result from the student's disability (*id.*). The AIS teacher—who was a New York State certified teacher in special education and reading—generally testified that her role was to collaborate with other district staff to determine if students required additional support and provide literacy instruction (Tr. pp. 563, 569). The AIS teacher indicated that AIS consisted of instruction that was tailored or differentiated to the needs of a particular student (Tr. pp. 577-78). In addition, the teacher testified that although AIS was "[n]ot always" considered a special education service, she opined that "it depends," and that it is considered a "support service" (Tr. p. 566). The AIS teacher testified that the student received AIS in fifth grade but that she did not provide the student instruction from a "specified program," instead the teacher used one she had developed from a variety of different sources (Tr. pp. 918-20, 944). During the 2015-16 school year, the student's AIS reading instruction consisted of two to three 50-minute sessions in a group of approximately six students (Tr. pp. 590-91; see Parent Ex. J). The AIS teacher testified that she provided instruction in reading and writing to the student (Tr. pp. 609-12). The AIS teacher indicated that the student "needed a little bit of more guidance," as well as redirection, to complete assignments and remain on task (Tr. pp. 593-94, 932-33). Furthermore, the teacher provided the student with strategies to improve her reading abilities (Tr. pp. 602-03, 605-06, 616). Accordingly, the hearing record reflects that the AIS teacher modified the content and delivery of instruction to address the student's unique needs in reading, such that it constituted specially designed instruction and was required to be included on the student's IEP.<sup>24</sup>

Considering that specialized reading instruction was not included on the February 2016 IEP, including the CSE subcommittee's failure to specify that the student would receive the AIS instruction in reading which she had received during prior school years, the February 2016 CSE

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<sup>23</sup> The CSE subcommittee chairperson testified that the student had also received AIS in reading during second, third, and fourth grade (Tr. p. 126).

<sup>24</sup> The AIS teacher indicated that the district did not "have any additional program to offer" the student to specifically address her reading needs (Tr. p. 917).

subcommittee's recommendation for placement in a general education setting with resource room did not address the student's reading needs. Thus, the IHO's determination is reversed to the extent the hearing record supports a finding that the district denied the student a FAPE for its failure to address the student's reading needs during the 2016-17 school year.

### **F. Challenges to the Assigned Public School Site**

The parents contend that the IHO erroneously found that their challenges related to the implementation of the February 2016 IEP were speculative. The parents contend their claims were not speculative since they were "based on [the student's] experience and lack of progress in the [d]istrict." The parents also argue that the IHO incorrectly found that the middle school could implement the February 2016 IEP since the middle school teacher who testified did not know the student.

The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at \*9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at \*25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at \*15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at \*14 [S.D.N.Y. Mar. 29, 2016]). In this case, while the IHO's reason for determining that the district middle school was capable of implementing the student's IEP was unclear, as no implementation claims had been raised by the parent in the due process complaint notice, the parent's allegations raised in the request for review do not rise to the type of claims permitted by M.O., "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245). Therefore, I affirm the IHO's determination that there is no evidence in the hearing record that indicates the district middle school could not implement the student's February 2016 IEP during the 2016-17 school year.

### **G. Cumulative Impact**

The parents argue that the cumulative impact of the district's violations denied the student a FAPE for the 2016-17 school year. Under some circumstances, the cumulative impact of procedural violations may result in the denial of a FAPE even where the individual deficiencies themselves do not (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 123-24 [2d Cir. 2016]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 190-91 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also A.M. v. New York City Dep't of Educ., 845

F.3d 523, 541 [2d Cir. 2017] [noting that it will be a "rare case where the violations, when taken together," rise to the level of a denial of a FAPE when the procedural errors do not affect the substance of the student's program]). As noted above, none of the alleged violations constituted a procedural violation, and as such there is no basis on which to find that they cumulatively rose to the level of a denial of a FAPE (see C.M., 2017 WL 607579, at \*18). In any event, as the school district denied the student a FAPE for the 2016-17 school year as a result of its failure to include specific reading supports in the February 2016 IEP, the cumulative impact of alleged procedural violations would have no effect in this case.

#### **H. Unilateral Placement—Vincent Smith**

The parents request that the district reimburse and/or directly fund the costs of the student's tuition at Vincent Smith for the 2016-17 school year. The district asserts that placement at Vincent Smith is not appropriate because the school only provided "general advantages and amenities [that would be] preferred by parents of any student," and did not provide the student with specially designed instruction. The district also argues that the IHO failed to address the restrictiveness of Vincent Smith. However, a review of the hearing record supports the IHO's finding that Vincent Smith provided the student with an educational program that met her special education needs.

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). 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. at 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. of the City Sch. Dist. of Yonkers, 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, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). 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 the 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; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["[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; Frank G., 459 F.3d at 365; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]).

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, quoting Frank G., 459 F.3d at 364-65).

### **1. Student Needs**

As presented in detail above, the hearing record shows that the student demonstrated difficulties in the areas of reading, math, writing, attention, and language skills (Parent Exs. B at p. 2; I; Dist. Exs. 17; 20; 21; 27; 32). Specifically, the student exhibited deficits in the areas of decoding, reading comprehension, sight word vocabulary, math calculation, math problem solving, written expression, and receptive and expressive language (Parent Exs. B at p. 2; I; Dist. Exs. 17; 20; 21; 27; 32). Regarding social/emotional functioning and physical development, the student related well with peers and adults and exhibits age appropriate motor skills (Parent Ex. B at p. 4).

### **2. Specially Designed Instruction**

The hearing record reflects that Vincent Smith is a nonpublic school that provides instruction to 46 students in grades one through twelve who exhibit difficulties such as attention deficits, language-based learning and auditory processing disorders, school anxiety/refusal, and deficits associated with high functioning autism disorders (Tr. pp. 1032-034, 1187; see Parent Ex. N at p. 1). Class sizes do not exceed eight students, and Vincent Smith has occupational therapists, speech-language pathologists, and counselors on staff (see Tr. pp. 1033, 1146, 1187; Parent Ex. N at p. 1). Moreover, all teachers at the school have "a minimum of five years of experience working with students that have been classified with learning disabilities" (Parent Ex. N at p. 1).

During the 2016-17 school year (sixth grade), the student received instruction in the "core subject" areas of math, English language arts (ELA), science, and social studies in a class ratio of four students to one teacher, who was certified in both special education and general education

(Tr. pp. 1045, 1115; Parent Ex. N at p. 1). The student was also provided with one individual and two group (2:1) sessions of speech-language therapy per week, one individual counseling session and one social skills class per week, and one individual and two group (2:1) sessions per week with a certified reading teacher (Tr. pp. 1629, 1198, 1200-201, 1361; Parent Exs. K at p. 1; L; N at p. 1). Related service providers consulted with the classroom teacher on a regular basis, and teachers convened for informal team meetings every one to two weeks to discuss students (Tr. p. 1047; Parent Ex. N at p. 1). The head of the school testified that the student had one teacher for most of the day except for "specials" (i.e., music, physical education), and "services" (i.e., speech-language therapy) (Tr. p. 1046).

To address the student's reading needs, the classroom special education teacher at Vincent Smith provided daily 40-minute sessions of reading instruction to the student in a group of two using SPIRE, described in the hearing record as an "intervention program for students who have dyslexia or students [who] are struggling to read"; the dean of students testified that SPIRE is a "systematic and explicit" program based on the Orton-Gillingham model (Tr. pp. 1119, 1188-89, 1375-76, 1496; Parent Ex. N at p. 1). The special education teacher also testified that SPIRE is a reading intervention program that "works on breaking down words, how to spell them, [and] how to sound them out" to improve identification of letter sounds, suffixes, and comprehension (Tr. pp. 1496-97). To teach components of reading such as comprehension, predicting skills, and grammar, the special education teacher used Harcourt, an "anthology-based, [b]asal-based reading program" (Tr. pp. 1190, 1499). During classroom tasks, the special education teacher used verbal reminders to assist the student in sounding out unknown words (Parent Ex. M). Additionally, the student's reading teacher evaluated the student in September 2016 and identified that her poor decoding and spelling skills affected her reading comprehension (Tr. pp. 1352, 1360). In addition to receiving daily classroom reading instruction, the reading teacher also provided the student with three 40-minute sessions of reading instruction per week (Tr. p. 1361). One session was provided individually, while the other two sessions were provided in a small group (Tr. pp. 1361, 1398-99). The sessions focused on improving the student's decoding and encoding skills, as well as improving the student's reading comprehension and grammar skills (Tr. pp. 1361-62). To address the student's decoding needs, the reading teacher used the Wilson Reading System, which she described as a "very structured," "repetitive," and "very programmatic" reading program (Tr. pp. 1356, 1360, 1372).

To address the student's written language needs, the special education teacher used the Step Up to Writing program, in conjunction with Harcourt, to improve the student's ability to write complete sentences, develop a paragraph, and edit her writing (Tr. p. 1499). The special education teacher also provided instruction in writing to the student at a slower pace and related the content to the student's interests (Parent Ex. M). In math, the special education teacher used a program entitled Jump Math, described as a "research-based, hands-on, multisensory math program" based on the fourth grade common core curriculum (Tr. pp. 1188, 1503-04). To address the student's difficulty interpreting the directions to her math homework, the special education teacher testified that she reviewed the math homework with the student at the end of class, and asked the student to underline or circle certain key words in the directions (Tr. p. 1505). When the student was introduced to new math concepts, she benefited from an increased number of examples and a



multisensory approach that included the use of manipulatives, drawings, and playing games (Parent Ex. M). In subjects such as science and social studies, the special education teacher provided the student with word banks, multiple choice, and study guides to accommodate the student's spelling deficits (Tr. pp. 1509-11). The special education teacher also provided lessons with step-by-step directions and examples or lessons that were first modeled by the teacher (Parent Ex. M). Moreover, the special education teacher provided flexible seating and cheat sheets that included key words related to the subject (id.).

To address the student's speech and language needs, Vincent Smith provided the student with speech-language therapy twice per week in a small group (2:1) and once per week individually (Tr. pp. 1628-29).<sup>25</sup> The speech-language pathologist who had provided the student's group sessions testified that the student exhibited deficits in auditory processing, grammar, following directions, vocabulary, and expressive language skills (Tr. pp. 1629-30). The speech-language pathologist also stated that she used therapeutic activities to address the student's needs, such as showing her a picture and asking her to complete two-step directions to improve auditory processing and direction-following skills; she also had the student put words into categories based on their association with each other to improve her vocabulary skills (Tr. pp. 1630-33). To improve the student's grammar and expressive language skills, the speech-language pathologists directly taught the student subject/verb-tense agreement, and asked the student to verbally describe a task using a logical sequence (Tr. pp. 1631, 1633).

As identified above, there was no indication that the student had social/emotional needs or required counseling at the time of the February 2016 CSE subcommittee meeting. However, to the extent that staff at Vincent Smith identified that the student had social/emotional needs, Vincent Smith addressed those needs. The special education teacher testified that at times the student exhibited difficulty expressing herself and needed support to do so (Tr. pp. 1489-90). While the special education teacher stated that she had private conversations with the student to address some of her social/emotional needs, by October 2016, school staff had determined that the student would benefit from counseling (Tr. pp. 1490-91, 1587-88). The social worker at Vincent Smith testified that she provided counseling services to the student once per week for 40 minutes and on an as-needed basis to address "symptom management, conflict resolution, [and] family support" concerns (Tr. pp. 1586-87). The social worker further indicated that the student presented as lethargic, depressed, and would "shut down"; therefore, the social worker developed counseling goals to improve the student's ability to effectively communicate, identify and express her feelings, and use conflict resolution strategies (Tr. pp. 1588-89, 1591-92). The student also exhibited self-esteem issues in the form of difficulty maintaining eye contact; for that reason, the social worker developed a goal for the student to identify positive attributes about herself (Tr. pp. 1589-90, 1592). The social worker also conducted a joint session with the student and her mother to practice being "active listeners" (Tr. p. 1597). Vincent Smith utilized Second Step, a social/emotional program, to help students cope with their feelings and to assist in interactions with others (Tr. p.

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<sup>25</sup> The speech-language pathologist testified that both the small group and individual sessions lasted for 40 minutes (Tr. p. 1629).

1144; Parent Ex. N at p. 2). During daily club period, the student was also provided with opportunities to socialize with both younger and older students (Tr. p. 1144).

Finally, Vincent Smith provided several modifications and accommodations that were built into the curriculum, including: "checking for understanding, preferential seating, extended time, directions read, simplified, and repeated, focusing prompts, breaks, visual aids, graphic organizers, wait time for processing, individualized instruction for spelling and reading, and individual time with the classroom teacher for re-teaching" (Parent Ex. N at p. 2).

### 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 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; see also Frank G., 459 F.3d at 364).<sup>26</sup> 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]; see T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]).

While not dispositive, a review of the hearing record supports the IHO's conclusion that the student made progress while at Vincent Smith during the 2016-17 school year. Overall, the special education teacher testified that the student's academic progress was "fantastic" and that her self-confidence had increased during the year (Tr. pp. 1516-17). Review of the student's second term report card showed that the student had improved in reading, language arts, and math (Parent Ex. EE at pp. 1-3, 8-10).<sup>27</sup> The student's reading teacher testified that the student made "some progress" in word attack skills over the course of the six or seven months that she worked with the student (Tr. pp. 1373-74). When using the Wilson program, the reading teacher also indicated that the student had made "quite a bit of progress" sounding out and blending words (Tr. pp. 1374-75). The special education teacher testified that the student had "done very well" in the SPIRE program over the course of the school year, and had "moved on to multisyllabic words, words with suffixes,

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<sup>26</sup> 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"]).

<sup>27</sup> The first page of this exhibit was initially labeled "P-DD," which had been crossed out and relabeled "P-EE"; while subsequent pages in this document are labeled "P-DD", this exhibit is referred to as Parent Exhibit EE, consistent with description of the document in the transcript (see Tr. pp. 1487-88; see also IHO Decision at p. 57).

[and] words that are unfamiliar [to] her" (Tr. p. 1497). She further testified that the student had exhibited much progress in her reading confidence, including her ability to read aloud, read words, and answer comprehension questions; the special education teacher also expressed that the student was now able to "decode bigger words" and apply strategies she had learned to decode (Tr. pp. 1498-99, 1501). The student's reading teacher also testified that, based upon the results of the March 2017 administration of the Woodcock-Johnson, the student had progressed "half a year" in oral fluency and made progress in listening comprehension; however, the reading teacher also noted that she did not see any discernable progress in the student's vocabulary or comprehension (see Tr. pp. 1421, 1426-27).

Regarding written expression, the special education teacher testified that the student improved her ability to recognize mistakes in her own work, and that she developed the ability to write a paragraph with a topic sentence, three detailed sentences, and a conclusion (Tr. p. 1500). Although the student's grammar was not "perfect," the special education teacher stated that it had "come a long way" from the beginning of the school year (Tr. p. 1500). The student's spelling skills improved during the school year, as she progressed from the McGraw-Hill "emergent" level to "on grade level" (Tr. p. 1502). Additionally, the student developed "good study skills" related to studying for spelling tests (Tr. p. 1502). In math, the special education teacher testified that the student did well in class and her notes were organized (Tr. p. 1504). The special education teacher also testified that she assessed the student's math skills at the end of each unit, and the student was always able to continue to the next unit (Tr. pp. 1506-07). The student also demonstrated increased participation and exhibited knowledge in science and social studies (Tr. pp. 1511-13).

The head of the school testified that the student had "flourish[ed]" during her time at Vincent Smith, and that she "went from a quiet little girl" to one who advocated for herself, asked for what she wanted, and was comfortable with her group of friends (Tr. pp. 1045, 1048-49; see Parent Ex. GG). The social worker testified that the student occasionally resorted to her "old" behaviors, including withdrawing and isolating herself; however, the social worker also testified that she saw the student making progress, and that the student was "able to navigate her way through a conflict" with encouragement and prompting (Tr. p. 1593; see Parent Ex. GG). The speech-language pathologist testified that although the student's progress was "slow," the student's ability to use grammatically correct sentences, improve vocabulary, follow simple directions, and elaborate more during expressive language tasks had progressed from the beginning of the 2016-17 school year (Tr. pp. 1631-34, 1638; see Parent Ex. FF).

Thus, the evidence in the hearing record supports the IHO's finding that Vincent Smith provided the student with specially designed instruction that met her special education needs. Furthermore, a review of the record supports the IHO's finding that the student exhibited progress academically, social/emotionally, and in relation to her language skills during the 2016-17 school year. Therefore, the IHO's determination that Vincent Smith was an appropriate placement is affirmed.

#### 4. Least Restrictive Environment

As a final note, the district also claims that the IHO failed to address the restrictiveness of Vincent Smith since the record does not demonstrate the student's need to be educated in self-contained classes in a special education school. Regarding these claims, although the restrictiveness of a parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 830, 836-37 [2d Cir. 2014]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G., 459 F.3d at 364).

Overall, the evidence in the hearing record does suggest that the student did not have any opportunities to interact with nondisabled peers at Vincent Smith (see, e.g., Tr. pp. 1033, 1069, 1115, 1120-21, 1187, 1275-77; Parent Ex. N at p. 1). Nonetheless, because parents are not as strictly held to the standard of placement in the LRE as are school districts, and as the evidence in the hearing record shows that Vincent Smith provided the student with an educational program that met her special education needs and allowed her to make progress, LRE considerations alone do not preclude an award of tuition reimbursement (C.L., 744 F.3d at 836-37; Frank G., 459 F.3d at 364-65).

#### I. Equitable Considerations

The district requests that the IHO's determination that there was no equitable bar to reimbursement be reversed. The district claims that the parents did not permit the CSE to address their concerns regarding the program recommended by the February 2016 CSE subcommittee. In addition, the district claims that the parents predetermined the student's placement at Vincent Smith when they signed a contract with the school in May 2016.

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 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).

While the parents had signed an enrollment contract with Vincent Smith on May 26, 2016 (Parent Ex. P at pp. 1, 3), 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"]). According to the CSE subcommittee chairperson, the parents never requested another CSE meeting after the February 2016 meeting (Tr. p. 106). The speech-language pathologist also testified that there was no indication from the parents that the student required more or differing services following the February 2016 CSE subcommittee meeting (Tr. p. 296). However, the parents timely submitted a 10-day notice letter to the district on August 17, 2016, before the student was removed from the district to begin attending Vincent Smith (see Tr. p. 1042; Parent Ex. R).<sup>28</sup> Additionally, there is no indication in the hearing record that the district offered to reconvene the CSE after it received the parents' 10-day notice letter to determine if it could address their concerns relating to the February 2016 IEP (Greenland, 358 F.3d at 160). Therefore, the IHO's determination that equitable considerations weighed in favor of an award of reimbursement to the parents for the costs of the student's tuition at Vincent Smith for the 2016-17 school year is supported by the hearing record and shall not be disturbed.

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<sup>28</sup> The student's mother signed a district withdrawal form on August 25, 2016 that identified the student's last day of attendance in the district as June 24, 2016 (Dist. Ex. 40).

**VII. Conclusion**

Based on the foregoing, the evidence in the hearing record shows that the district failed to offer the student a FAPE for the 2016-17 school year, that placement of the student at Vincent Smith was reasonably calculated to meet her educational needs, and that equitable considerations weighed in favor of an award of reimbursement to the parents for the total tuition costs at Vincent Smith for the 2016-17 school year. I have considered the parties' remaining contentions and find them to be without merit.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated September 18, 2017, is reversed to the extent that it found the district offered the student a FAPE for the 2016-17 school year and denied the parents' request for reimbursement of the cost of the student's tuition at Vincent Smith for the 2016-17 school year; and

**IT IS FURTHER ORDERED** that, upon proof of payment, the district shall reimburse the parents for the full cost of the student's tuition at Vincent Smith for the 2016-17 school year.

**Dated:**            **Albany, New York**  
                         **November 29, 2017**

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**