



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-088

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

### **Appearances:**

Law Office of Irina Roller, PLLC, attorneys for petitioner, by Irina Roller, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at The Child School for the 2019-20 school year. Respondent (the district) cross-appeals from the IHO's decision to the extent it failed to address the district's argument that the parent's claims relating to the 2017-18 school year were barred by the statute of limitations. 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**

In 2015, the student received diagnoses of an attention deficit hyperactivity disorder (ADHD), predominantly inattentive type, a language disorder, a developmental motor coordination disorder, as well as specific learning disorders with impairments in reading and written expression (see Parent Ex. C at p. 3). For the 2017-18 school year (fifth grade), the student attended a 12:1 special class in a district public school (see id. at pp. 1, 2, 10). Based on a referral from the student's psychiatrist "due to significant concerns about his learning abilities in his current educational setting," the student underwent a neuropsychological evaluation on January 12, 2018,

which resulted in a report dated February 28, 2018 (id. at p. 1). According to the neuropsychologist, "[d]espite receiving ongoing special education services, [the student's] academic progress ha[d] been limited" (id. at p. 2).

On March 23, 2018, a CSE convened to conduct the student's annual review and developed an IEP with an implementation date of March 23, 2018 (Parent Ex. Y). Finding that the student remained eligible for special education as a student with a speech or language impairment, the March 2018 CSE recommended that the student attend a 12:1 special class for English language arts (ELA) (10 times weekly), math (10 times weekly), social studies (three times weekly), and sciences (two times weekly) in a nonspecialized school and receive related services of one 30-minute session of group counseling services per week and three 30-minute sessions of group speech-language therapy per week (id. at pp. 1, 8, 10).<sup>1</sup>

According to the March 2018 IEP, the parent expressed concern during the CSE meeting that the "student [wa]s not in an appropriate setting," and that he was "show[ing] very small gains in reading and writing" (Parent Ex. Y at p. 11). The parent did not agree with the CSE's recommendations and requested that the student's placement be referred to the central based support team (CBST) to locate a State-approved nonpublic school for the student (id. at p. 12). The parent shared that she had obtained or was obtaining outside testing of the student "to determine the extent of his learning disability" (id. at p. 11).

An amendment to the student's IEP without a meeting was proposed in a waiver form dated August 2, 2018, which the parent signed on September 24, 2018 (Dist. Exs. 35; 36). The amendment adjusted the student's program to provide for a 12:1+1 special class and increased the frequency of the special class to five times weekly for social studies and sciences (compare Dist. Ex. 36, with Parent Ex. Y at p. 8). In addition, the student's speech-language therapy services were changed from three 30-minute group sessions per week to two 40-minute group sessions per week (compare Dist. Ex. 36, with Parent Ex. Y at p. 8).

The student attended a 12:1 special class for the 2018-19 school year (sixth grade) (Tr. pp. 169-70; Dist. Ex. 15 at p. 2).

A CSE convened on March 8, 2019 to conduct the student's annual review and developed an IEP with an implementation date of March 22, 2019 (Dist. Ex. 16). The CSE recommended the student attend a 12:1 special class for ELA (ten times weekly), math (ten times weekly), social studies (five times weekly), and science (five times weekly) in a nonspecialized school and receive related services of one 30-minute session of group counseling services per week and two 45-minute sessions of group speech-language therapy per week (id. at pp. 10-11, 13).

At the March 2019 meeting, the parent shared the February 2018 private neuropsychological evaluation report with the CSE (see Dist. Ex. 16 at p. 4; see Dist. Ex. 31). The parent requested that the district conduct a reevaluation of the student and expressed her hope that the student could be "moved into a specialized school" (Dist. Ex. 16 at p. 4; see Dist. Ex. 31).

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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 (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

Between March and April 2019, the district conducted a social history update, a classroom observation, a psychoeducational evaluation, and an occupational therapy (OT) evaluation (see Dist. Exs. 11; 15; 20; 27; see also Parent Ex. H; Dist. Ex. 1). A CSE reconvened on May 3, 2019 to review the results of the district reevaluation of the student (Dist. Ex. 18). The May 2019 CSE continued the recommendations for a 12:1 special class and related services set forth in the March 2019 IEP (compare Dist. Ex. 18 at pp. 12, 15, with Dist. Ex. 16 at pp. 10-11, 13). During the May 2019 CSE meeting, the parent again expressed concern that the student's needs were not "being met in his current setting" and stated her belief that "he would thrive in a nonpublic school setting" (Dist. Ex. 18 at p. 6).

In a letter dated August 20, 2019, the parent informed the district that she felt the student's "academic and social needs ha[d] not been met under his current IEP program or school" and that the IEP did not offer the student a free appropriate public education (FAPE) (Parent Ex. B). The parent notified the district that the student had been accepted into The Child School for the 2019-20 school year and requested that the CSE reconvene to recommend the student attend The Child School at district expense (Parent Ex. B).<sup>2</sup> On September 5, 2019, the parent executed a contract for the student's attendance at The Child School for the 2019-20 school year (seventh grade) (Parent Ex. M). In a letter to the district dated September 5, 2019, the parent reiterated her statements from the August 2019 letter and notified the district that she intended to enroll the student at The Child School and seek district funding for the costs thereof (Parent Ex. R at p. 1).

On September 20, 2019, the student underwent an academic evaluation as an update to the January 2018 private neuropsychological evaluation and "to assess his current level of academic functioning" (Parent Ex. D). "Given [the student's] profile and ongoing deficits," the neuropsychologist opined that it was "clear that he require[d] a more intensive educational placement to remediate his language and learning delays, especially since he has made such limited progress since his previous evaluation" (id. at p. 5).

A CSE convened on October 2, 2019 and reviewed an assistive technology evaluation that had been completed on July 31, 2019 (Parent Ex. G; see Dist. Ex. 5). The parent was not in attendance at the October 2019 CSE meeting (Parent Ex. G at pp. 8-9). The October 2019 CSE made no changes to the student's recommended program and services (compare Parent Ex. G at pp. 19-20, 24, with Dist. Ex. 18 at pp. 12, 15).

In a letter to the district dated October 2, 2019, the parent expressed her concern that the October 2019 CSE meeting "took place without [her] presence or without [her] even confirming that [she] was aware the meeting was taking place" (Parent Ex. I).<sup>3</sup> The parent explained that her neighbor had received and signed for the CSE meeting notice and had delivered the letter to the parent on October 2, 2019 (id.). The parent indicated she received no other notice that the meeting was scheduled "besides a call the day of the meeting informing [her] that the meeting was taking place without [her]" (id.). The parent requested that the district notify her of what occurred at the

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<sup>2</sup> The Commission of Education has approved The Child School as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

<sup>3</sup> Although the letter was dated October 2, 2019, the hearing record indicates that the letter was sent to the district on October 8, 2019 (Parent Ex. J; Dist. Ex. 22).

October 2019 CSE meeting and reconvene on a date and time when she would be able to attend (id.). On October 15, 2019, the district sent the parent a prior written notice explaining what occurred at the October 2019 CSE meeting (Dist. Ex. 30).

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

In a due process complaint notice dated October 21, 2019, the parent alleged that the district denied the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years (Parent Ex. A).<sup>4</sup> The parent alleged that, although the student received special education, he made limited progress while attending the district public school (id. at p. 2). For the 2017-18 school year, the parent alleged that the CSE was not duly constituted, the recommendations included in the IEP were not appropriate, and the student did not make progress (id. at pp. 4-5). Likewise, for the 2018-19 school year, the parent asserted that the recommendations in the IEP were not appropriate and that the student "continued to fall further behind" (id. at p. 5). The parent also alleged that the district failed to "implement or properly implement" the student's IEP during the 2018-19 school year (id. at p. 8).

Relating to the 2019-20 school year, the parent asserted that the CSE that convened to develop the student's IEP was not duly constituted and that the district predetermined the program recommendations and deprived the parent the opportunity to participate in the development of the student's annual goals (Parent Ex. A at pp. 6-7). In addition, the parent alleged that the district failed to "use meaningful assessments" to evaluate the student and failed to conduct a vocational assessment (id. at pp. 5, 7). As for the student's IEP for the 2019-20 school year, the parent argued that it failed to sufficiently identify the student's present levels of performance and management needs, included insufficient and inappropriate annual goals that were vague and unmeasurable, and failed to specify methodology appropriate for the student (id. at pp. 5-7). The parent asserted that "[t]here was no academic reasoning as to how the recommended program could meet the student's needs" (id. at p. 5). The parent alleged that, despite the student's lack of progress during the previous school years, the student's IEP for the 2019-20 school year recommended a "substantially similar" program (id.). The parent also contended that public school site to which the district assigned the student to attend for the 2019-20 school year was not appropriate (id. at p. 7).

Regarding the October 2019 CSE meeting, the parent alleged that the CSE reconvened without giving her proper notice and inappropriately proceeded with the meeting without the parent in attendance (Parent Ex. A at pp. 7-8). The parent also contended that the district inappropriately denied her request that the CSE reconvene and consider recommending that the student attend The Child School or another State-approved nonpublic school (id. at p. 3).

For relief, the parent sought compensatory education to remedy the district's "failure to provide the student with appropriate services in the past" (Parent Ex. A at p. 9). In addition, the parent requested that the district be required to fund the student's attendance at The Child School for the 2019-20 school year, as well as the costs of related services and transportation to and from

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<sup>4</sup> Subsequent to the parent's due process complaint notice, she wrote the district on November 4, 2019, again requesting that the CSE reconvene and providing the district with a copy of "an updated neuropsychological evaluation" (Parent Ex. J).

the unilateral placement (*id.* at p. 10). The parent also requested that the district reimburse her for the costs of a neuropsychological evaluation (*id.*).

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

An impartial hearing convened on February 5, 2020 and concluded on August 10, 2020 after six days of proceedings (see Tr. pp. 1-395). In a decision dated March 5, 2021, the IHO found that the parent's allegations relating to the 2017-18 and 2018-19 school year were "a nullity" and that the evidence in the hearing record supported a finding that the district offered the student a FAPE for the 2019-20 school year (IHO Decision at pp. 26-27).

As for the 2017-18 and 2018-19 school years, the IHO found that the parent had not sought relief relating to a denial of a FAPE to the student in the form of compensatory education (IHO Decision at p. 25). Specifically, the IHO indicated that, although the due process complaint notice had alleged that the student was entitled to compensatory education, "the relief clause" did not set forth a request for compensatory education and the parent did not propose a "'well-articulated' plan" for compensatory services to address the student's needs (*id.* at pp. 25-26).<sup>5</sup> Thus, the IHO found that, "[e]ven if there were a finding of a denial of FAPE for the 2017-2018 and 2018-2019 school years, the relief awarded for such a denial would not amount to an award of 'compensatory educational services'" (*id.* at pp. 25, 26).

Regarding the May 2019 CSE meeting, the IHO found that the CSE was duly constituted and that the lack of an additional parent member did not result in a denial of FAPE because the parent was accompanied by her advocate (IHO Decision at pp. 16-17). The IHO found that the May 2019 CSE "had a comprehensive list of evaluative materials" consisting of district evaluations conducted in March and April 2019 and further found that the May 2019 IEP reflected the results of such evaluations, as well as the results of the January 2018 private neuropsychological evaluation (*id.* at pp. 17-19). The IHO rejected the parent's contention that the March 2019 OT evaluation was deficient (*id.* at pp. 22-25). Regarding the student's behavioral needs, the IHO found that the district's failure to conduct a functional behavioral assessment (FBA) did not amount to a denial of a FAPE, noting that the January 2018 neuropsychological evaluation did not indicate the student's behaviors impeded his learning or the learning of others (*id.* at pp. 20-22). The IHO acknowledged that the district did not conduct a speech-language evaluation until after the CSE meeting, but found that the eligibility category of speech or language impairment appropriately described the student's needs and was not "mutually exclusive of other classifications" (*id.* at pp. 19-20). In sum, after opining about the FAPE standard set forth in the United States Supreme Court's decision in Andrew F. v. Douglas County School District RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 998-1001 (2017), the IHO found that the May 2019 IEP was "procedurally and substantively

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<sup>5</sup> The IHO also indicated that, in her closing brief, the parent attempted to justify her request for relief for the 2019-20 school year by alleging deficiencies in a March 2019 IEP, which the IHO indicated the parent erroneously referred to as a March 2018 IEP, whereas the IHO determined the "relevant IEP" to the parent's allegations regarding the 2019-20 school year was the May 2019 IEP (IHO Decision at p. 25). The IHO further held that the parent's arguments regarding the annual goals in the March 8, 2019 IEP were "not germane to the 2019-2020 school year" (*id.*).

sufficient" to support a finding that the district offered the student a FAPE for the 2019-20 school year (id. at p. 26).

Finally, the IHO denied the parent's request for district funding of the private neuropsychological evaluation, finding that there was no evidence the parent requested an independent educational evaluation (IEE) from the district or objected to a district evaluation (IHO Decision at pp. 27).

The IHO denied all of the relief sought by the parent but ordered the district to "conduct a re-evaluation of the student in all areas of his suspected disabilities" that had not been evaluated within the last two years and thereafter reconvene the CSE to consider the evaluations and "any other relevant information" and develop "a new IEP for the student's 2021-2022 school year" (IHO Decision at p. 28).

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

The parent appeals arguing that the IHO erred in denying her request for district funding of the costs of the student's attendance at The Child School for the 2019-20 school year. First, the parent argues that the IHO erroneously permitted the district to offer documents into evidence that it had not timely disclosed to the parent at least five business days prior to the hearing. In addition, the parent asserts that the IHO lowered the district's burden by misinterpreting the standard set forth in Andrew F. and misapplied the burden of proof.

Regarding the 2019-20 school year, the parent argues that the IHO never examined whether the May 2019 IEP substantively offered the student a FAPE. In particular, the parent alleges that the IHO failed to consider the May 2019 IEP in light of the student's prior "ineffective IEPs" under which the student "made no meaningful progress." In addition, the parent alleges that May 2019 IEP did not reflect the 2018 private evaluation or the district's own evaluations, offered "almost none of the recommended [specially designed instruction] and supports," and "did not offer an intensive, research-based literacy program, ambitious goals in reading or math, . . . adequate social/emotional and behavioral support," or sufficient goals to address the student's "profound deficit in written expression."

The parent also asserts that The Child School was an appropriate unilateral placement and that equitable considerations support an award of district funding of the full costs of the student's tuition for the 2019-20 school year.

In an answer and cross-appeal, the district responds to the parent's allegations and argues that the IHO's decision should be upheld.<sup>6</sup> As for a cross-appeal, the district alleges that the IHO

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<sup>6</sup> The district also argues that the parent's appeal should be dismissed as untimely because, although the parent timely served the district with the request for review, she served the notice of request for review one day late. Each request for review filed with the Office of State Review must contain a "Notice of Request for Review," the content of which is set forth in State regulation and generally notifies a responding party of the requirements with respect to preparing, serving, and filing an answer to the request for review (8 NYCRR 279.3). Here, the district does not allege how the later delivery of the notice compromised or prejudiced its ability to timely prepare, serve, or file an answer. Therefore, in this instance it is unclear why the late delivery of the notice would warrant dismissal of the parent's request for review as the district requests. Accordingly, I decline to dismiss the parent's

erred in failing to rule on the district's defense that the parent's claims relating to the 2017-18 school year were barred by the statute of limitations.

## 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

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appeal on this basis.

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" (Andrew 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>7</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>7</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. Preliminary Matters**

#### **1. Scope of Review**

Before turning to the merits of the parent's appeal, it is necessary to examine which claims are properly before me. State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Here, while the district contends that the IHO failed to rule on the district's application that the parent's claims related to the 2017-18 school year be dismissed based on the statute of limitations, the IHO found that the parent's claims relating to the 2017-18 and 2018-19 school year were "a nullity" as the parent did not request any relief related to those school years (IHO Decision at pp. 25-27). Neither party has appealed from the IHO's determinations that the parent's claims related to the 2017-18 of 2018-19 school years were a "nullity" or from his determinations denying the parent's requests for compensatory education services and reimbursement for the costs of the private neuropsychological evaluation. In addition, although the parent asserts generally that the IHO erred in only addressing procedural claims relating to the May 2019 CSE, she does not directly appeal the IHO's determination that the CSE was properly composed, that the CSE had sufficient evaluative information about the student, that the OT evaluation was sufficient, that the lack of an FBA did not amount to a denial of a FAPE, and that speech or language impairment was an appropriate eligibility category to describe the student's needs. As such, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

Finally, as the IHO's determination that the parent's claims relating to the 2017-18 and 2018-19 school year were "a nullity" is now final and binding on the parties, I find it unnecessary to address the district's cross-appeal of the IHO's failure to address whether the statute of limitations barred the parent's claims pertaining to the 2017-18 school year.

#### **2. Five-Day Disclosure**

The parent argues that the district "unfairly hindered Parent's counsel's preparation not only by twice violating the IDEA's 5-day rule, but also by saying [it] would not put on a Prong I case" (Parent Mem. of Law at p. 5).

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). However, federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). If a party fails to disclose all completed evaluations, the prohibition against introduction of evaluations is discretionary insofar as an IHO "may" bar a party from introducing an evaluation (34 CFR 300.512[b][2]; 8 NYCRR 200.5[j][3][xii][a]).

Courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at \*4-\*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. Apr. 9, 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at \*18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

At the outset of the hearing, the parent objected to the district's evidence based on it being provided to the parent on January 30, 2020 (Tr. pp. 9-10). The hearing commenced on February 5, 2020, four business days after the parent's receipt of the district's exhibits (Tr. pp. 1, 9). In assessing the parent's request to preclude the district's evidence, the IHO asked the parent's attorney to explain how the parent was prejudiced by the late disclosure and the attorney indicated that the district produced "a fairly high volume of exhibits" and that it was prejudicial that the district had time to prepare for the hearing that the parent did not have (Tr. p. 10). When asked if there was anything specific, the parent referenced the district's events log and "many other internal [district] documents" as not being previously available to the parent (Tr. pp. 10-11). Eventually, after some additional discussion, the IHO found that there was not a sufficient basis to preclude the district from introducing evidence and the hearing continued (Tr. pp. 11-20). After the district submitted its evidence, the parent renewed her objection to the late disclosure of the evidence but stipulated to the admittance of a number of the district's exhibits (Tr. pp. 39, 41-42). The testimony of one district witness was taken on February 5, 2020 and the witness returned for further questioning on the next hearing date, March 2, 2020 (Tr. pp. 57-153, 158-65). The hearing continued for four additional days of hearing, eventually concluding on August 10, 2020 (Tr. pp. 238-394). On appeal, the parent does not object to any specific evidence produced by the district, and, rather, generally asks that none of the district's evidence or witnesses be considered in determining whether the student was offered a FAPE. Under these circumstances, any prejudice to the parent appears minimal and there is insufficient basis to find that some, much less all, of the district's evidence should be precluded as requested by the parent.

### **3. Legal Standard and Burden of Proof**

Regarding the legal standard, the IHO stated as follows:

In Endrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 998-1001 [2017], decided on March 22, 2017, the Court held that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (emphasis added) This standard of review is below all of the recognized standards of review in the law, such as, "beyond a reasonable doubt", "clear and convincing evidence", "preponderance of the evidence" and even "substantial evidence." The IEP need only be "reasonable" in light of the child's circumstances.

(IHO Decision at p. 26). The parent argues that the IHO's articulation of the standard was clear error since the Supreme Court in Endrew F. set forth "a substantive floor for FAPE" and "did not address burdens of proof" (Parent Mem. of Law at p. 2). The parent asserts that the IHO's interpretation of Endrew F. lowered the FAPE standard and was akin to a "'rational basis' review" and resulted in the IHO shifting the burden to the parent since the IHO did not hold the district to its burden to prove that the May 2019 IEP was substantively designed to allow the student to make progress appropriate in light of this circumstances (Parent Mem. of Law at p. 2).

Initially, I agree with the parent in that the IHO's comparison of the Supreme Court's articulation of disabled students' entitlements under the IDEA (i.e., the substantive standard) to various standards of proof used in assessing a party's burden was error. The burden of proof has been described as one of "the slipperiest member[s] of the family of legal terms," in part, because it encompasses different components, including the burden of production and the burden of persuasion (Shaffer v. Weast, 546 U.S. 49, 56 [2005]). The burden of proof is also related to the "standard of proof" or the quantum of proof required to sustain the burden of persuasion. For example, the preponderance of the evidence standard, which is the common burden of proof in a civil case, means proving that something is more likely so than not so (Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Tr. for S. California, 508 US 602, 622 [1993]).<sup>8</sup>

The Supreme Court did not address the burden or standard of proof in Endrew F., rather the Court set forth "to articulate an overarching standard to evaluate the adequacy of the education provided under the Act" (Endrew F., 137 S. Ct. at 993, 998). The Court determined that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances (id. at p. 1001). In addition, the Court explained the "reasonably calculated" qualification, highlighted by the IHO, "reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials" (Endrew F., 137 S. Ct. at p. 999). To the IHO's point, the Court did reference that some deference is owed to school officials; however, the Court also noted that "[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances" (id.).

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<sup>8</sup> The IDEA and its implementing regulations specify that the standard of proof at the judicial review stage is the civil standard of preponderance of the evidence (see 20 U.S.C. § 1415[i][2][C][iii]; 34 CFR 300.516[c][3]).

When the Supreme Court did address the burden of proof under the IDEA, the Court found the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). Here, the IHO's deficient fact analysis based on application of an erroneous standard of proof is reversible error.

## **B. May 2019 IEP**

### **1. Annual Goals**

The parent asserts that the May 2019 IEP did not include ambitious goals in reading or math and that the one goal directed at writing was too vague and insufficient to address the student's profound writing needs.

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]).

The May 2019 IEP included eight annual goals to address the student's speech-language, social/emotional, math, and ELA needs (Tr. pp. 96-98; Dist. Ex. 18 at pp. 9-12). Specifically, the goals were designed to improve the student's comprehension skills to answer questions both verbally and in writing, improve reading comprehension and auditory memory skills to answer "wh" questions and use inference skills, identify "catalysts" for when he "appears to check out during class," engage in discussions by sharing his experiences during counseling sessions, solve word problems which include multiplication, add and subtract fractions with like denominators, decode words with initial two to three letter s- blends, and identify story elements from second grade or higher level texts (Dist. Ex. 18 at pp. 9-12).

While the parent makes a persuasive argument that, given the student's "profound" deficits, the annual goals provided in the May 2019 IEP were too narrow, did not identify specific component skills, and were not calculated to teach the student to read and write in a broader sense (i.e. the one decoding goal was specific to only reading words with initial two and three letter s- blends, and the one goal that incorporated any written language was limited to using grammatically correct sentences with irregular past tense verbs), the arguments are mostly offered as support for the parent's allegations that the district did not offer a sufficiently supportive program for the student, i.e. that the student "needed a more intensive, specialized program than the 12:1 program

offered by the DOE" and "a comprehensive, evidence-based writing program" (see Parent Mem. of Law at pp. 14-15). Additionally, the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a 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]). In any event, it is unnecessary to determine whether or not the deficiencies in the annual goals, without more, would amount to a denial of a FAPE in this instance, since, as set forth below, the district has otherwise failed to meet its burden to demonstrate that it offered the student a FAPE for the 2019-20 school year.

## **2. 12:1 Special Class and Related Services**

The parent argues that the IHO failed to analyze the May 2019 IEP in light of the student's "past ineffective IEPs" (Parent Mem. of Law at p. 6). Specifically, the parent asserts that the student's IEPs for the 2017-18, 2018-19, and 2019-20 school years offered "virtually the same ineffective program" but that the student was not demonstrating "meaningful progress" under the IEPs in effect for the 2017-18 and 2018-19 school years (*id.* at pp. 7-13). Additionally, the parent asserts that the May 2019 IEP "did not propose intensive, evidence based instruction for [the student's] literacy or math needs."

One of the essential functions of a CSE when conducting an annual review is to review the IEP currently in place to determine if the student is making progress as expected, and if not to attempt to ascertain why if possible. A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]).

A CSE convened on March 28, 2018 for the student's annual review (see Parent Ex. Y). The March 2018 CSE had before it the results of classroom assessments and selected subtests from a March 2018 administration of the Wechsler Individual Achievement Test – Third Edition (WIAT-III) (id. at p. 1). The results of classroom assessments indicated that the student's reading abilities fell at the beginning second grade level (Fountas & Pinnell Level J) (id.). Further, the results of the WIAT-III indicated that the student's reading comprehension, word reading, and spelling skills fell at or below the fifth percentile, and his numerical operations skills fell at the 12th percentile (id.). Specifically, the student needed concepts reviewed multiple times to gain mastery and took a lot of time to solve problems (id.). The student was inconsistently able to identify main topics and stated details, and demonstrated weakness in his ability to identify implied details, hypothesize, sequence, and make inferences (id.). The test results indicated that the student exhibited skills in the low average range on measures of written mathematics calculation under untimed conditions, with his spelling skills falling in the very low range (id. at p. 2). In the classroom setting, the student reportedly excelled in math (id.). According to the March 2018 IEP, the student required a small class setting in order to succeed in school, that included setting up the room so that he had his own space, working on social skills in small groups/partners, forming supportive learning groups for reading and math, using larger print worksheets/tests, and a specific format for presenting lessons (id.). Interventions that had been put into place including small group work, seating, grouping/partner, transcription, extra time, breaks, and choices (id.). In counseling the student worked on reading nonverbal cues and taking turns during group activities (id. at p. 3). Management needs the CSE identified included leveled reading materials, scaffolded work in all academic areas, graphic organizers, separate work folders, etc. for each subject, leveled word work each week to support reading and writing, transcription, work read to the student, computer use, reduced number of problems given, seating, grouping, frequent breaks, consistent daily routines, limited distractions, a class wide behavior management system, verbal rather than written answers, and project-based learning (id. at pp. 3-4). The March 2018 CSE recommended a 12:1 special class placement in a public school, and one 30-minute session per week of counseling in a group, and three 30-minute sessions per week of speech-language therapy in a group (id. at p. 8).

Turning to the educational planning that took place for the student for the school year at issue, a CSE convened on March 8, 2019 for the student's annual review (see Dist. Ex. 16). The March 2019 CSE had before it the student's January 30, 2019 iReady assessment scores (Dist. Ex. 28 at p. 1). According to the IEP, the student reportedly exhibited overall reading skills at the first-grade level (Dist. Ex. 16 at pp. 1, 2). The student exhibited well below grade level abilities in "all main areas of reading, including, phonemic awareness, reading decoding, fluency, reading comprehension, listening comprehension, spelling, word choice, and organization," but was approaching grade level in his ability to make inferences (id. at p. 2). The student reportedly worked well in a group due to his "strong relationships" with peers (id.). The student was "developing proficiency" with respect to comprehension of below grade level informational texts in skills such as sequencing events, identifying cause and effect, understanding key ideas, comparing and contrasting, identifying the main idea, and retelling important concepts (id. at p. 3). Further, the student demonstrated difficulty with copying material, verbal expression, processing speed, memory, and articulation (id. at p. 2). While the student was able to understand and verbalize the concepts taught in history class "very well," he struggled to express those concepts in written short answer format (id. at p. 3). The student benefitted from scaffolded

questions and sentence starters, and was "extremely successful" in providing "higher order" verbal answers to verbal questions, given text read aloud to him (id.).

At the time of the March 2019 CSE meeting the student displayed grade level proficiency in multi-digit addition and subtraction, and graphing skills (Dist. Ex. 16 at p. 1). However, the student exhibited "extreme difficulty" with memorizing multiplication tables, resulting in below grade level understanding of multiplication and division (id.). The student also exhibited "extreme difficulty" with solving word problems due to his reading difficulties (id.). The student reportedly struggled to remain on task during math class, causing him to struggle to complete classwork, even given frequent redirection and teacher guidance, which negatively affected his grade (id.). Additionally, the student often could not find his homework in order to turn it in because his backpack was disorganized (id.). According to his iReady math developmental analysis, the student exhibited abilities at the fourth grade level in the area of numbers and operations, fifth grade level in algebra, second grade level in measurement and data, and third grade level in geometry (id.).

The March 2019 IEP described the student as "well behaved" during his speech-language therapy sessions and indicated that he enjoyed participating and interacting with his peers in a group (Dist. Ex. 16 at p. 3). The student reportedly had made progress in his phonemic awareness skills and his ability to decode words within texts (id.). However, the student continued to exhibit below grade level comprehension skills, showing difficulty answering questions both verbally and in writing, using grammatically correct sentences when retelling events in a story, and using supporting details (id.). The student's weakness in auditory memory and information recall contributed to his difficulty answering "wh, inference and comprehension questions" based on passages presented auditorily (id.).

The March 2019 CSE considered a January 12, 2018 private neuropsychological evaluation report, and incorporated portions of it into the March 2019 IEP, such as testing accommodations and management needs (Tr. pp. 226, 271-72; see generally Parent Ex. C; Dist. Ex. 16 at p. 4). At the time of the January 2018 private neuropsychological evaluation, the student's overall IQ of 87 was in the low average to average range (Parent Ex. C at p. 4; Dist. Ex. 16 at p. 4). The student met the criteria for a developmental motor coordination disorder diagnosis based on below average scores in the area of visual motor integration (Parent Ex. C at pp. 6, 11; Dist. Ex. 16 at 4). The student exhibited "major deficiencies" in both receptive and expressive language skills, described as "low compared to his cognitive ability," indicative of a language disorder, and, in the area of attention, the student exhibited "significant deficits" due to ADHD (Parent Ex. C at pp. 6-7, 11; Dist. Ex. 16 at p. 4). Further, the student's academic skills were characterized as falling "well below" grade level expectations "in all areas" as he functioned at a second grade level in ELA and third grade level in math, indicating specific learning disorders in reading, written expression, and math (Parent Ex. C at pp. 7-8, 11; Dist. Ex. 16 at p. 4). At the time of the March 2019 CSE, the parent requested a re-evaluation of the student as she wanted him placed in a specialized school (Dist. Ex. 16 at p. 4).

According to the March 2019 IEP the student had a "pleasant personality" and was a positive participant in his counseling sessions (Dist. Ex. 16 at p. 4). The student was described as friendly, happy, and sociable when he was comfortable with others (id.). The student liked sharing his personal feelings, and although he got along with peers he was "sometimes . . . mean with

them" (*id.*). The student was described as "humorous and fun when comfortable," but socializing and joking "sometimes" interfered with his ability to focus in class (*id.*). Physically, although the student's development reportedly "seemed to be progressing at the average rate" compared to his peers, "his gross and fine motor skills display some minor deficits," including sloppy written work which took time for him to "physically carry out" (*id.*). The March 2019 IEP identified the student's management needs including leveled texts to enhance reading comprehension, scaffolded comprehension questions, graphic organizers for note taking, checklists for problem solving, sentence starters for writing tasks, the option to respond to tasks verbally, use of a scribe, long texts read aloud, reduced classwork, fixed student groups, consistent daily routines, and limited distractions (*id.* at p. 5).

At the March 2019 CSE meeting, the CSE determined that the student remained eligible to receive special education services as a student with a speech or language impairment, and recommended a 12:1 special class placement with one 30-minute session per week of counseling in a group, and two 45-minute sessions per week of speech-language therapy in a group (Dist. Ex. 16 at pp. 10-11).

Subsequent to the March 2019 CSE meeting, the district conducted a March 20, 2019 social history update, a March 28, 2019 district OT evaluation, an April 1, 2019 speech-language progress update, and an April 10, 2019 district psychoeducational evaluation (*see* Dist. Exs. 15; 20; 26; 27). The student's teachers also prepared a report outlining the student's skills and needs in math and ELA (Dist. Exs. 14; 19).

According to the March 2019 OT evaluation report, the student was able to consistently stay on task in spite of various distractions around him, was engaged and well-behaved (Dist. Ex. 20 at pp. 2, 9). The student's ELA teacher reported that he was functioning comparably or "somewhat below" his peers in the areas of life skills, management of classroom materials, and work behaviors (*id.* at p. 2). The student was functioning above or comparable to peers in self-regulation, self-management, social/emotional learning, and access/movement (*id.* at pp. 2, 5-6). The results of the OT evaluation indicated that the student exhibited no significant difficulties in life skills such as using the bathroom, maintaining hygiene, dressing, eating, organizing his folders and book bag, managing classroom materials, telling time, providing his personal information, counting change, and using public transportation (*id.* at p. 3). In addition, the student was able to use various classroom tools, a calculator to solve math problems, and a ruler to draw geometric shapes (*id.* at pp. 3, 4). In a timed test of copying written words the student demonstrated the ability to write legibly with appropriate sizing, spacing, formation, and alignment (*id.* at p. 4). The student's writing speed was "marginally, not significantly, below expected standards" (*id.*). The student's expressive writing skills were assessed, and he was able to write a paragraph that was legible and an accurate description of a picture (*id.*). However, his writing contained many spelling errors and misuse of capital letters rendering the passage "difficult to read" (*id.*). The occupational therapist concluded that the student possessed "adequate" skills to access and participate in his educational environment, and OT was not recommended (*id.* at pp. 6-7).

The April 2019 speech-language progress report indicated that the student had been making progress with phonemic awareness, was decoding more words within text, and was more confident during group read aloud (Dist. Ex. 26 at p. 2). However, the student continued to exhibit below grade level comprehension skills, and had difficulty answering questions verbally and in writing,

and with auditory memory skills (id.). The student required extra processing time and repetition, and benefitted from using the strategy to "stop and reflect" and verbalize what he had read (id.). Similarly, the student benefitted from having comprehension questions read aloud and discussed before attempting to provide a written answer (id.).

The April 2019 ELA and math teacher reports included in the hearing record provided information regarding then current areas of concern and difficulties the student exhibited in the classroom setting but provided no information regarding the student's progress over time in any of the areas identified (see Dist. Exs. 14; 19). The student's ELA and math teachers identified areas of concern including poor copying skills, short attention span, speech, verbal expression, processing speed and memory, language difficulties related to articulation, oral expression, speaking in complete sentences, and understanding what was said to him (Dist. Exs. 14 at pp. 1-2; 19 at p. 2). Further, the student exhibited difficulty working independently, interacting with peers, interacting with adults, working in groups, and participating in class, although the math teacher noted that those difficulties related to the student's "incredibly quiet and introverted" nature and not behavioral issues (Dist. Exs. 14 at p. 3; 19 at p. 3). The student was reportedly approaching grade level expectations in math computation, problem solving, and proportional reasoning; but fell well below grade level in phonemic awareness, decoding, fluency, reading comprehension, spelling, word choice, and organization (Dist. Exs. 14 at p. 4; 19 at p. 4). In ELA the student was approaching grade level in his ability to make inferences; in math class, the student was slow when copying and his penmanship and work organization was "very messy" (Dist. Ex. 14 at p. 4; 19 at p. 4). The student had reportedly demonstrated mastery of math concepts related to graphing on a coordinate plane, using prime/composite numbers, place value/absolute value, and comparing/ordering integers, and ELA concepts such as writing in complete sentences, citing textual evidence to support claims, assembling paragraphs in logical order, and explaining themes and central ideas (Dist. Ex. 14 at p. 5; 19 at p. 5).

The April 2019 district psychoeducational evaluation was conducted to determine the effectiveness of the student's current academic program (Dist. 27 at p. 1). During the evaluation, the student demonstrated a "friendly demeanor," was polite and responsive, maintained eye contact, and engaged in reciprocal speech (id. at p. 2). The student did not initiate conversations with the examiner, but he expanded upon conversations about his likes and dislikes (id.). The student spoke in a logical and socially appropriate manner, and rapport was established and maintained (id.). According to the report the student's speech was mostly intelligible, but he occasionally needed to repeat himself (id.). The student completed all tasks presented and his attention was "adequate" (id.). Although the student was able to understand simple directions, he struggled with complex directions; however, he requested clarification when needed and benefitted from additional time to process information (id.). The student was able to transition between tasks easily (id.).

The student obtained a full scale IQ of 75 (percentile rank 5) on the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), which fell in the very low range (Dist. Ex. 27 at p. 6). The student's composite scores were as follows: verbal comprehension 78 (very low), visual spatial 100 (average), fluid reasoning 76 (very low), working memory 69 (extremely low), and processing speed 86 (low average) (id. at pp. 5-6). Specifically, the student demonstrated difficulty with verbal knowledge and reasoning, fluid/inductive reasoning, broad visual intelligence, simultaneous processing, conceptual thinking, classification, and the ability to attend to

information, process that information in memory, and formulate a response (id. at p. 6). Administration of the WIAT-III to the student yielded a basic reading composite standard score of 68 (low), with the following subtest standard scores: reading comprehension 75 (below average), word reading 65 (low), and pseudoword reading 70 (below average) (id. at p. 6). The student also achieved a numerical operations subtest standard score of 102 (average) and a spelling subtest standard score of 77 (below average) (id.). The evaluator indicated that the student's basic reading skills were "significantly below grade level" including reading comprehension, and that his spelling skills were also below grade level (id. at pp. 6-7). Further, the evaluator concluded that the student "may perform best when instruction is presented in a multisensory format" and in a small-group setting; providing a number of suggested instructional strategies for teachers to use that would benefit the student (id. at p. 7).

The student's special education teacher for history and math during the 2018-19 school year testified that the student exhibited progress (Tr. pp. 169, 175).<sup>9</sup> According to special education teacher and the May 2019 IEP, the student's January 2019 iReady reading assessment indicated that the student's reading skills were at a first grade level overall, although his comprehension of informational text was considerably higher, at a third grade level (Tr. pp. 175-76; Dist. Ex. 18 at pp. 1-2). The May 2019 IEP reflected that the student's October 2018 iReady reading assessment score was at a kindergarten level overall, and as such according to that measure he had demonstrated progress from an overall kindergarten to first grade level over a four-month period (see Dist. Ex. 18 at p. 2). The student's February 2019 iReady math assessment was at a third grade level overall, with algebra skills at a fifth grade level (id.). The student's October 2018 iReady math assessment scores were at a first grade level, indicating that the student demonstrated progress in math in the four months between assessments (id.).<sup>10</sup> The school psychologist who conducted the April 2019 psychoeducational evaluation and attended the May 2019 CSE meeting also testified that the student had made progress during the 2018-19 school year based on his iReady assessment scores (Tr. pp. 251-53, 255, 261-62; 266-67).

The May 2019 CSE had before it the updated evaluative information about the student as described above, some of which was incorporated into the student's IEP (Dist. Exs. 18 at pp. 1-7; 29 at pp. 1-2). Management needs the CSE identified included leveled reading materials, scaffolded questions in all academic areas, graphic organizers, checklists to help retain steps in a procedure, sentence starters, a scribe, work read to the student, reduced number of problems given, fixed grouping, consistent daily routines, limited distractions, verbal rather than written answers, and frequent breaks—many of which were similar to the management needs recommended in the March 2018 IEP (compare Parent Ex. Y at pp. 3-4, with Dist. Ex. 18 at pp. 7-8). The May 2019 CSE again recommended a 12:1 special class placement, with one 30-minute session per week of counseling in a group, and two 45-minute sessions of speech-language therapy in a group;

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<sup>9</sup> However, the special education teacher also testified that she was concerned about a decline in the student's behavior and academics during the final quarter of the 2018-19 school year, in that he was producing less work and his "attendance dropped greatly" (Tr. pp. 226-27).

<sup>10</sup> District witnesses testified that the October 2019 iReady math assessment date included in the May 2019 IEP was a typographical error and that the assessment was administered to the student in October 2018 (Tr. pp. 107-08, 282; Dist. Ex. 18 at p. 2).

recommendations that remained essentially unchanged from prior school years (Dist. Ex. 18 at p. 12; see Parent Exs. C at pp. 1, 2; Y at p. 8).

Although according to the results of the iReady assessments it appeared that the student was making progress in reading, other measures show that the student's reading skills continuously hovered between a kindergarten to beginning second grade reading level during the 2018-19 and previous school years. For example, in February 2017 the student's Fountas & Pinnell reading level was at "G" (first grade) and in March 2018 was at "J" (beginning second grade) (Parent Exs. C at p. 2; Y at p. 1). As noted above, iReady measures indicated that in October 2018 the student's overall reading skills were at a kindergarten level; by January 2019 they were at an overall first grade level (Dist. Ex. 18 at pp. 1-2).<sup>11</sup> In April 2017, the student had memorized 80 percent of the Dolch word lists from pre-primer through second grade (Parent Ex. C at p. 2). Additionally, the neuropsychologist reported in January 2018 that since August 2015, the student's reading skills "progress ha[d] been very limited, despite being provided with significant educational supports and academic interventions" (*id.* at pp. 7-8). Comparison of the student's WIAT-III reading comprehension and word reading subtest scores from March 2018 and April 2019 reflected in his IEPs show minimal changes, and that the student's reading skills remained in the low and below average ranges (compare Parent Ex. Y at p. 1, with Dist. Ex. 18 at p. 1).<sup>12</sup>

Further, the hearing record lacks other measures of progress, including progress reports for most of the student's IEP goals. Leading up to the relevant CSE reviews, the IDEA required the district to have provided the parents with periodic reporting regarding the student's progress towards achieving his annual goals while she was provided with programming during the 2018-19 school year (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3][ii]; 8 NYCRR 200.4[d][2][iii][c]).<sup>13</sup> Further, when the CSE convened, it should have reviewed whether or not the student had achieved some or all her annual goals from his last IEP (see 20 U.S.C. § 1414[d][4][A][1]; 34 CFR 300.324[b][1][i]; 8 NYCRR 200.4[f]). The student's March 2018 IEP featured four goals to address the student's needs in the areas of speech-language, ELA, math, and counseling (Parent Ex. Y at pp. 5-7). Specifically, the student was working towards increasing his phonemic awareness to decode multisyllabic words in text, identify the meanings of prefixes and

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<sup>11</sup> I note that the special education teacher and school psychologist's testimony that the student made progress in reading during the 2018-19 school year was based on his performance on the iReady assessments and they did not describe other methods used to assess progress (see Tr. pp. 175-76, 201-02, 217, 261, 296).

<sup>12</sup> Comparison of iReady results from October 2018 and January 2019, as well as the student's performance on the numerical operations subtest of the WIAT-III in March 2018 and April 2019 shows that the student made progress in some aspects of math (see Parent Ex. Y at p. 1; Dist. Ex. 18 at pp. 1-2).

<sup>13</sup> The State Education Department's Office of Special Education has issued guidance indicating that "[t]he method or combination of methods to inform the parents of their child's progress is left to local discretion" and that "reports to the parent do not need to be lengthy or burdensome, but they need to be informative" ("Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 36, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The guidance indicates that "the report to parents could include a statement of the goals with a written report of where the student is currently functioning in that goal area and/or a rating of progress to indicate whether the student's progress to date will likely result in the student reaching the goal by the end of the year" (*id.*).

suffixes in order to "apply grade-level phonics and word analysis skills in decoding words," fluently multiply multi-digit whole numbers, and work cooperatively in a group activity (id.). The student had reportedly met his phonemic awareness goal and had made progress towards but not achieved his other three goals at earlier points in the school year, but the hearing record lacked a progress report reflecting the progress the student made towards the goals by the end of the 2018-19 school year, or any other form of teacher progress report (id.; see Parent Exs. A-D; G-Z; Dist. Exs. 1-9; 11-16; 18-24; 26-32; 34-36; 38-39).

Additionally, the January 2018 private neuropsychological evaluation report indicated the student had made only "very limited" progress in reading since the prior evaluation in August 2015 in spite of "significant" academic supports and interventions (Parent Ex. C at p. 8). Similarly, the student's math skills had "shown poor growth" since 2015 as he now demonstrated "delays across all domains" of skill acquisition (id. at pp. 8-9). The neuropsychologist concluded that due to the student's "profile and ongoing deficits, it is clear that he requires a more intensive educational placement to remediate his language and learning delays, especially since he has made such limited progress since his previous evaluation" despite having received "intensive educational interventions" (id. at p. 11). Further, the neuropsychologist recommended a "small, supportive, specialized program" with "multisensory learning and intensive remediation of his language and learning delays," that specifically included an "empirically based" reading remediation program, as well as numerous other academic interventions, speech-language therapy, classroom accommodations, modified assignments, alternative presentation and response formats, testing accommodations, and counseling (id. at pp. 12, 16).

As noted above, the student's progress in his 12:1 special class during the 2018-19 school year is a relevant consideration for purposes of examining whether the May 2019 IEP was properly developed (see H.C., 528 Fed. App'x at 66-67; Adrienne D., 686 F. Supp. 2d at 368; M.C., 2008 WL 4449338, \*14-\*16; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18).

Consistent with the parent's argument, the district failed to meet its burden to prove that the student exhibited progress during the 2018-19 school year or that the CSE weighed the student's progress or lack thereof in making recommendations at the May 2019 CSE meeting. Other than the conclusory testimony of the student's special education teacher and the school psychologist, and the student's iReady assessment scores upon which that testimony was based, the district failed to demonstrate that the student had made progress in reading, such that it was appropriate to continue to recommend a 12:1 special class placement with related services, without adjusting or adding specific reading interventions to address the student's minimal gains in reading skills.

The parent also alleges that, putting aside the IHO's failure to consider the student's lack of progress, the IHO also failed to review the substantive appropriateness of the May 2019 IEP. The parent asserts that the May 2019 CSE disregarded the recommendations set forth in the January 2018 private neuropsychological evaluation, "offering almost none of the recommended [specially designed instruction] and supports," such as "an intensive, research-based literacy program" or "adequate social/emotional and behavioral support" (Parent Mem. of Law at pp. 13-14).

Although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d

735, 753 [2d Cir. 2018]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at \*19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]). However, as discussed above, the evidence in the hearing record is insufficient to show that the student made more than trivial progress from year to year when provided with similar special class settings with speech-language therapy and counseling. Therefore, the district failed to prove that, absent targeted services and interventions to address the student's reading needs, the May 2019 was reasonably calculated to enable the student to make progress appropriate in light of his circumstance. The IHO's conclusion to the contrary without considering the parent's concerns about the student's lack of progress was error.

### C. Unilateral Placement

After determining that the district offered the student a FAPE during the 2019-20 school year, the IHO declined to "determine whether the student's private school placement was appropriate for the 2019-2020 school year" (IHO Decision at pp. 26-27). However, as discussed above the district failed to demonstrate that it offered the student a FAPE for that school year; therefore it is necessary to determine whether The Child School was an appropriate unilateral placement. On appeal, the parent asserts that The Child School addressed the student's needs and that he made progress. In the answer with cross-appeal, the district does not raise any issues with respect to The Child School.

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 a 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] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is 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]; 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]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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).

A description of The Child School included in the hearing record indicates that it is New York State approved nonpublic school that serves students with disabilities from kindergarten through 12th grade (Tr. p. 369; Parent Exs. K; U at p. 1). The Child School offers a 12-month school year program with small class sizes, "special education approaches," "academics aligned with the common core curriculum," and OT, PT, counseling, and speech-language therapy (Parent Exs. K; U at p. 1).<sup>14</sup> According to the description, The Child School staff collaborate with parents to accommodate each student's learning style and embrace their unique set of skills (Parent Ex. K). Classrooms were equipped with smartboards to provide visual and auditory support in addition to "lots of repetition, graphic organizers, and checklists provided to students to assist with their learning" (Parent Ex. U at p. 4).

The student attended The Child School during the 2019-20 school year (seventh grade) and received instruction in science, math, English language arts (ELA), and social studies among other electives such as "[t]ech" and health (Parent Exs. L; O). All of the student's teachers held master's degrees and all of his classes were a 12:1+1 student to teacher ratio (Parent Ex. U at p. 4). The student also received two 30-minute sessions per week of speech-language therapy in a group of five, and one 30-minute session per week of counseling in a group of five (Parent Ex. P at pp. 2, 5). Further, the student worked with a reading specialist for two 30-minute individual sessions per week and once per week in his English classroom (Parent Ex. U at p. 2). Curriculum modifications,

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<sup>14</sup> According to the school psychologist, The Child School follows the New York State curriculum, with modifications based on each student's abilities (Parent Ex. U at p. 3).

accommodations, and strategies that were provided to the student included: leveled texts, scaffolded questions, frequent teacher check-ins, small groups, positive reinforcement, multimodal instruction, scaffolding, modeling, repetition, graphic organizers, sentence starters, preferential seating, and extended time (Parent Ex. P at p. 1). These strategies were reinforced by the reading specialist and the classroom teacher assistant also provided additional support (Parent Ex. U at p. 2).

The school psychologist at The Child School testified that the student's "particular problem areas include[d] spelling, writing mechanics, reading, and some expressive limitations," such that English was a "particularly tough subject for [the student], given his disabilities" (Parent Ex. U at pp. 1, 4). His English teacher followed the New York State curriculum, which was modified to accommodate the student's needs by assigning vocabulary words appropriate for his academic level, using visual and audio aids, repetition, rephrasing, and comprehension checks (*id.* at pp. 2, 3). In math, the student struggled with word problems, and his teacher provided supports including helping to underline key words, identifying relevant information in problems, rephrasing questions, providing models of similar problems, and demonstrating the process of problem solving (*id.* at p. 2). According to the school psychologist, the student's science teacher employed strategies such as visual aids and repetition to ensure the student was fully engaged (*id.* at p. 2).

The reading specialist, who "has a background in Lindamood-Bell," provided multisensory methods to address the student's needs, including using letter pattern cards (making the associated sound with the card, tracing the letter in the air, imagining the letter), imagining full words with specific letter patterns, blending sounds phonetically with attention to mouth movement, and applying methods learned to work through reading errors (Parent Ex. U at pp. 2-3, 4). The reading specialist also provided the student with graphic organizers and sentence starters (*id.* at p. 4). The school psychologist testified that the student's speech-language therapist used "specific methods" with the student including introducing new vocabulary and discussing synonyms that accompany the new vocabulary, applying new vocabulary to writing and spoken language, discussing idioms, providing passages to read aloud and answer comprehension questions, working on written expression and descriptive language, identifying the main ideas, supporting details, and inferential language, and developing deductive reasoning skills (*id.* at p. 3).

To address executive functioning needs, The Child School used color coded notebooks for each subject, and a homework planner that was checked by the teacher assistant on a daily basis to ensure students had correctly inputted information and knew what tasks needed to be completed (Parent Ex. U at p. 4). The student received testing accommodations such as extra time, a scribe, and test directions and questions read to him (*id.*). He also was administered tests in a smaller group of students, with extra time, breaks every 45 minutes, and on-task focusing prompts (*id.*).

In November 2019, teachers commented that the student worked hard, and exhibited executive functioning deficits such as not showing work, needing prompts to stay focused, rushing through classwork, misplacing papers/homework assignments, and struggling with organization and ensuring all tasks were completed (see Parent Ex. P at pp. 3-6). The fall 2019 speech-language progress report identified the areas of focus during therapy including improving expressive and receptive language skills and pragmatics and making inferences (*id.* at p. 7). Regarding progress, the school psychologist testified that the student was "performing well academically," noting that his grades and in-class test and assignment scores had shown some improvement since he started

at The Child School (Parent Ex. U at p. 5; see Tr. pp. 372-73; Parent Ex. P at pp. 2-9; W; X). The school psychologist stated that in English the student had demonstrated "very rapid progress since September" in that he started the school year at a first grade reading level and after six months was reading at a second grade level (Parent Ex. U at pp. 2, 5; see Tr. pp. 370-71). His English teacher further reported improvement in the student's confidence and engagement as a reader (Parent Ex. U at p. 2). According to the school psychologist, the student had made "a lot of progress" in science and he was engaged, took notes, and displayed comprehension of the material (id. at pp. 2, 5). She further testified that the speech-language therapist had reported "concrete improvement since September in [the student's] confidence and comfort as a student," adding that he was "more engaged than before," and that was a benefit to his progress (id. at p. 3). Overall, the school psychologist testified that the program provided to the student enabled him "to make meaningful progress" (id. at p. 4).

As described above, the evidence in the hearing record supports a finding that The Child School identified the student's academic and executive function needs, provided specially designed interventions and supports to address his deficits and he made progress, such that it was an appropriate unilateral placement for the 2019-20 school year.

#### **D. Equitable Considerations**

The parent contends that equitable considerations support her request for tuition reimbursement for the student's attendance at The Child School for the 2019-20 school year. The parent indicates that she attended multiple CSE meetings, provided the district with independent evaluations, produced the student for evaluations, and visited potential placement for the student, and that the district has not produced any evidence indicating that the parent was not cooperative during the CSE process.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 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"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten 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., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

As noted by the parent, and not contested by the district, the hearing record does not indicate that the parent was not cooperative during the CSE process. Additionally, the parent notified the district of her intent to place the student at The Child School and seek funding from the district for the cost of that placement (Parent Exs. B; R), and the district has not asserted any deficiencies in the parent's notices. Accordingly, there is no basis upon which to reduce the parent's requested relief on equitable grounds in this matter.

## **VII. Conclusion**

Based on the above, the district failed to prove that it offered the student a FAPE for the 2019-20 school year, The Child School was an appropriate unilateral placement for the 2019-20 school year, and equitable considerations support the parent's request for relief.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations above.

**IT IS ORDERED** that the IHO's decision dated March 5, 2021 is modified by reversing that portion which found that the district offered the student a FAPE for the 2019-20 school year; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parent for the cost of the student's tuition at The Child School for the 2019-20 school year, upon presentation of proof of payment.

**Dated:** Albany, New York  
June 1, 2021

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**