



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-107

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

Appearances:

Law Offices of Regina Skyer and Assoc., LLP, attorneys for the petitioner, by William Meyer, Esq. and Linda A Goldman, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for the respondent, by Hae Jin Liu, Esq. of counsel.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of their daughter's tuition at the Bay Ridge Preparatory School (Bay Ridge) for the 2019-20 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student attended a parochial school for kindergarten (Dist. Ex. 5 at p. 9). Due to concerns regarding her handwriting and fine motor skills, the student's teacher referred her for an occupational therapy (OT) evaluation (id.). The district conducted an assessment of the student and she subsequently received OT services (id.). The student transferred to the public school for first grade and remained there through fifth grade (id.). Despite the parents' request that the student be placed in a collaborative team teaching (CTT) class, the district assigned the student to a general education setting for first grade (id.). Shortly after the beginning of first grade, the

student's teacher expressed concerns about the student's ability to manage the curriculum without greater individualized support than could be provided by the general education teacher (*id.* at pp. 9-10). Based on an evaluation conducted by the district the student was transferred to a CTT class where she received related services of speech-language therapy and OT within the school setting (*id.* at p. 10).¹ In addition, the parents provided the student with a tutor for second through fifth grades (*id.*). Initially the student attended a sixth-grade general education classroom at Bay Ridge; however, on the advice of the school, the student was moved to the Achieve Program at Bay Ridge for seventh and eighth grades where she remained in a "small 'mainstream' class but with additional supports" (Parent Ex. G at p. 1; *see* Dist. Ex. 5 at p. 10).²

On or around July 25, 2016, the parents sought a private neuropsychological evaluation "in order to attain a better understanding of [the student's] learning style and to determine how they c[ould] continue to best support [her]" (Dist. Ex. 5 at p. 8). As will be discussed in greater detail below, the July 2016 neuropsychological evaluation included an assessment of the student's cognitive abilities, academic achievement, social/emotional development, and executive functioning skills (*id.* at pp. 13-24). Based on the student's response to various assessment tools, the evaluating psychologist offered the following diagnoses: receptive/expressive language disorder, pragmatic language disorder, reading disorder-comprehension, mathematics disorder, and anxiety disorder, NOS (*id.* at pp. 26-27). The evaluator opined that because of the student's multiple learning needs she required a small, structured and specialized school setting (*id.* at p. 27).

A level one vocational interview, completed by the student's mother, indicated the student was uncertain about her post-secondary intentions (Dist. Ex. 4 at p. 1). The interview form identified the student's interests, strengths, and areas of independent living in which the student required instruction (*id.* at pp. 1-3). The student's mother noted that the student lacked independence in self-advocacy, travel, and financial management (*id.* at p. 3).³

¹ State guidance indicates that the district has previously "used the term 'collaborative team teaching' (CTT) to identify a service that meets the regulatory definition of integrated co-teaching services"; however, in recommending integrated co-teaching services, school districts are "required to use the terminology 'integrated co-teaching'" (Continuum of Special Education Services for School-Age Students with Disabilities - Questions and Answers, Off. Of Spec. Educ. Mem., April 2008, Updated November 2013, available at <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum-revNov13.htm#inte>).

Nevertheless, it appears that the parents and district both used the term "CTT" throughout the hearing record.

² The director of the Bridge program in the Upper school of Bay Ridge reported that the school is a co-educational program that offers three programs: a mainstream general education program; Achieve, a program for students who are in the "mainstream program but have some degree of learning challenges and disabilities that require additional supports, typically in one area of learning/academic domain"; and the Bridge Program, which is for students "with significant learning disorders (e.g., learning disabilities, speech and language impaired, other health impaired) and is much more supportive" than the Achieve program (Parent Ex. F at p. 2).

³ The level one interview with the parent was entered into evidence as a June 3, 2018 document (Tr. p. 14). The document itself is undated but the February 26, 2019 CSE minutes indicate that the vocational assessment was conducted at the time of the February 2019 CSE meeting and the resultant IEP included reference to the vocational interview with the parent also dated February 26, 2019 (Dist. Exs. 1 at p. 1; 3 at p. 1). Both the February 2019 CSE minutes and the IEP reflect the information included in the Level One Vocational Interview (*compare* Dist.

A CSE convened on February 26, 2019, to determine the student's continued eligibility for special education and develop an IEP to address the student's needs for the 2019-20 school year (Dist. Ex. 1 at p. 18). Finding the student remained eligible for special education as a student with a speech or language impairment the CSE recommended that the student receive ICT services for mathematics, English Language Arts (ELA), social studies, and science for five periods per week each (id. at p. 12). To address the student's social/emotional and speech-language needs, the CSE recommended related services including one individual session of counseling for 30-minutes per week and one group counseling session for 30-minutes per week, one individual session of speech-language therapy for 30-minutes per week, and one group speech-language therapy session for 30-minutes per week, with all related services provided in the provider's office (id. at p. 13). In addition, the CSE recommended 24 annual goals and numerous management strategies for the student, as well as eight testing accommodations (id. 1 at pp. 4, 6-11, 15). The February 2019 CSE also developed post-secondary goals related to education/training and employment and identified activities the student needed to participate in and/or complete in order to achieve her post-secondary goals (id. at pp. 5-6).

In recommending that the student receive ICT services, the IEP indicated that a general education program with special education teacher support services (SETSS) was considered, but determined to be "insufficient in addressing [the student's] academic needs," and further, that a special class in a community school (15:1) was "too restrictive in addressing [the student's] academic as well as social/emotional needs" (Dist. Ex. 1 at p. 20).

By letter dated July 26, 2019, the district notified the parents of the student's continued eligibility for special education services for the 2019-20 school year, indicated the CSE recommended the student attend a district non-specialized school and receive ICT and related services, , and identified the other service options considered by the CSE and reasons for rejecting those options (Dist. Ex. 6 at p. 1). By letter dated that same day, the district notified the parents of the assigned school where the student would receive the recommended IEP program (Dist. Ex. 7).

On July 12, 2019, the parents signed an enrollment contract with Bay Ridge for the 2019-20 school year (Parent Ex. C at p. 3). By letter dated August 21, 2019, the parents notified the district of their intention to unilaterally place the student at Bay Ridge in the Bridge Program and seek public funding for the costs of the student's tuition, if the district did not cure procedural and substantive problems associated with the proposed IEP and offer the student an appropriate program within ten days (Parent Ex. B at p. 1). In addition, the parents requested that the student be provided with transportation to and from their Bay Ridge (id.). The parents identified the reasons they believed the district failed to develop a procedurally and substantively appropriate IEP for the student thereby denying the student a FAPE for the 2019-20 school year (id. at pp. 2-3).

Ex. 1 at p. 1; and Dist. Ex. 3 at p. 1; with Dist. Ex. 4 at pp. 1-3).

A. Due Process Complaint Notice

In a due process complaint notice dated June 1, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year on procedural and substantive grounds (Parent Ex. A at p. 1). The parents asserted that a CSE convened on March 13, 2019, six months prior to the start of the 2019-20 school year, and that the CSE was not duly composed (as several required members were not present "including anyone expected to teach [the student] under this IEP, currently employed as a [district] classroom teacher, or with experience in the recommended setting" (id. at p. 2)).⁴

Further, the parents maintained that the February 2019 CSE "did not conduct, secure, or rely on sufficient evaluative measures to make a determination of the student's present levels of performance, educational and cognitive profile, and areas of need" (Dist. Ex. A at p. 2). The parents asserted that the CSE acknowledged at the meeting that the testing on file was "quite old" and further asserted that the CSE "significantly impeded" the parents' ability to participate in the development of the IEP (id.).

Regarding the present levels of performance, the parents asserted that they did not adequately represent the student's strengths and weaknesses or the results of the evaluations and state tests, nor did they adequately represent the parents' concerns (Parent Ex. A at p. 2). The parents maintained that the management needs portion of the IEP did not address all the issues discussed at the CSE meeting and they were insufficient to adequately support the student in the recommended ICT program (id.). The parents alleged that the annual goals failed to address every area of the student's deficits and that the recommended annual goals failed to specify the baseline of functioning, actual targets to be achieved, or by what means the goal would be considered achieved (id. at p. 3).

With respect to the recommended placement, the parents argued that the recommendation for ICT services along with related services was not "consistent with or supported by the weight of the information provided and available" to the CSE as it failed to provide a setting "suitably structured and supportive" to meet the student's needs "especially in light of the student's most recent educational setting" (Parent Ex. A at p. 2). The parents contended the recommended program did not provide for adequate supports to address the student's management needs or achieve the recommended goals (id.).

The parents also alleged that the post-secondary goals and transition activities were "inadequately vague and conclusory" and did not provide adequate supports through the school environment to support the student in the transition to the post-secondary environment (Parent Ex. A at p. 2).

The parents further asserted that the district failed to offer a placement suitable to implement the IEP, able to provide appropriate peer grouping, or "reasonably calculated to provide

⁴ The due process complaint notice stated that the CSE convened on March 13, 2019 (Parent Ex. A at p. 2). However, the IEP in dispute for the 2019-20 school year was developed by a CSE that convened on February 26, 2019 (Parent Ex. G at p. 2; Dist. Ex. 1 at p. 18).

the student a FAPE, based on the information presently available to the [p]arents" (Parent Ex. A at p. 3).

For relief, the parents requested that the district fund the costs of the student's placement at Bay Ridge for the 2019-20 school year as well as transportation to and from the unilateral placement (Parent Ex. A at p. 3). The parents maintained that Bay Ridge was appropriate, able to address the student's academic and social/emotional needs, and reasonably calculated to enable the student to receive educational benefits (id.). The parents asserted that they cooperated with the CSE review and placement process at all relevant times, and as such there were no equitable considerations to bar funding tuition at Bay Ridge (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 30, 2020, for a status conference and concluded on February 22, 2021, after two additional days of proceedings (see Tr. pp. 1-106). In a decision dated April 1, 2021, the IHO found that the district offered the student a FAPE for the 2019-20 school year (IHO Decision at pp. 7-12).

In response to the parents' assertion that the CSE convened too early in the school year, the IHO noted that there was no requirement that a CSE meeting take place during any particular month of the school year and found no reason the CSE should have been later in the year or that the CSE should have reconvened prior to September 2019 without a request indicating that the student's needs had changed (IHO Decision at p. 9).

The IHO determined that the February 2019 CSE, composed of a special education teacher, the parent, a district representative, a school psychologist, and three participants from Bay Ridge (a math teacher, speech-language pathologist, and school psychologist) was duly composed (IHO Decision at pp. 7-8). The IHO noted that the participants from Bay Ridge were familiar with the student's functioning and needs in the classroom, the psychologist could interpret the private neuropsychological report, and as noted on the attendance page, the student's mathematics teacher was designated as a general education teacher, and along with the district representative, fulfilled the regulatory requirements (id. at p. 8). With respect to the parent's allegation that the general education teacher should have been a teacher who could be expected to teach the student and/or someone who had experience in the recommended setting, the IHO determined that the regulations do not specify that the general education teacher must be such an individual but rather must be a regular education teacher of the student (id.). The IHO found "no reason why the teacher from Bay Ridge Prep could not have served that role" (id.).

Regarding the parents claim that the CSE did not use sufficient evaluative information to determine the student's cognitive levels, the IHO determined that, although two and half years old, the neuropsychological evaluation was not unduly old as it was within the three year regulatory requirement, and there was no allegation that the student's profile had changed or that a more recent cognitive evaluation was needed (IHO Decision at p. 8). Additionally, the IHO noted that information regarding the student's then-current academic functioning was provided by the student's Bay Ridge providers and the parent, which provided the CSE with the requisite information to develop an appropriate IEP (id. at p. 9).

The IHO determined that the present levels of performance were based on the 2016 neuropsychological evaluation and the reporting from the student's current providers (IHO Decision at p. 9). Finding that the parents did not reiterate or expand on their concern regarding the inadequacy of the present levels of performance in their opening or closing statement, the IHO found no reason to conclude that the present levels of performance were incorrect (id.). The IHO also noted that the hearing record supported a finding that the student was functioning on an eighth-grade level with respect to reading comprehension and functioning at a ninth-grade level in calculations, as well as on an eighth-grade level for "applies problems" (id. at p. 10).

With respect to the recommended program, the IHO concluded that the program offered by the district would have met the student's needs because the ICT class had a general education teacher and a special education teacher and the management strategies were appropriate to address "all areas of need" (IHO Decision at p. 12). The IHO also determined that the recommended speech-language therapy and counseling services would have addressed the student's speech-language needs, as well as her needs regarding self-esteem, self-help needs, self-knowledge, community, and career options (id.).

The IHO indicated that the February 2019 CSE believed the student "could learn in an ICT class because she had average skills in logical reasoning, processing speed and working memory" (IHO Decision at p. 10). The IHO also noted that the CSE believed the student's verbal comprehension skills were addressed with speech-language therapy and that the management strategies included in the IEP addressed the student's verbal comprehension challenges as they manifested in the classroom (id.).⁵ The IHO stated that the management strategies recommended in the February 2019 IEP were "the very same strategies used at Bay Ridge Prep to address [the student's] difficulties in language, in all areas of academics, and any difficulty in focusing, and in organization" (id.). She indicated that the management needs were derived from participation of the school staff regarding what had been successful as well as the "expertise of the IEP team" and the parents' opinion regarding what would be useful, and that an ICT class had two teachers which would allow for the implementation of the management strategies (id. at pp. 10-11). The IHO acknowledged the parents' concerns about the student's lack of progress in an ICT class during the student's 6th grade school year; however, the IHO found that this was insufficient to find ICT services inappropriate for the student given "the purpose of special education is to ready a student to move into more mainstream classes" (id. at p. 11).

Although the February 2019 IEP did not identify ongoing social concerns, the IHO indicated that the recommended counseling would have addressed the student's anxiety in addition to the testing accommodations which addressed anxiety related to testing (IHO Decision at p. 11).⁶

⁵ The IHO cited scaffolding, refocusing, modeling, previewing and pre-teaching of concepts, instruction broken down into manageable steps, multi-sensory approach to learning when feasible, graphic organizers and outlines, editing and revision checklists, teacher/student check ins, and aid with mathematical word problems as the recommended strategies that would support the student's verbal comprehension challenges in the classroom (IHO Decision at p.10).

⁶ The IHO cited to the testing accommodations, which included five-minute breaks every 30 minutes as needed, use of a calculator, preferential seating, and on-task focusing prompts as "likely to alleviate emotional concerns during test taking" (IHO Decision at p. 11).

Regarding the recommended annual goals, the IHO determined the "[goals] were developed based upon what was learned at the [CSE] meeting, as reported by the [p]arent, the school, and in response to questions asked by the [CSE] regarding what the [s]tudent was learning, what she was working on and where she was exhibiting strengths and need" (id.). The IHO noted that the goals were developed for transitional needs, mathematics, ELA, speech, and counseling, and found no reason to conclude that the goals were inappropriate (id.).

Regarding the parents' assertion that the recommended post-secondary goals and transition activities were vague and conclusory and did not provide adequate supports throughout the school environment to support the student in the transition to a post-secondary environment, the IHO determined otherwise (IHO Decision at pp. 11-12). The IHO concluded that the parents completed a level one vocational interview where they indicated that "the [s]tudent [wa]s very unsure about what she'd like to do after graduating high school" but provided little additional information, and therefore the CSE "appropriately developed a strategy to assist the [s]tudent in determining how to decide on her next steps after high school and how to prepare for those steps" (id. at p. 12). Noting that the student's needs included working with a guidance counselor to track graduation requirements, and to explore the characteristics of occupations consistent with her interest and explore college programs as well as career programs for training and employment, the IHO found that the transition goal for the student to create a resume was appropriate (id.).

With respect to the parents' assertion that the district's placement was not suitable to implement the IEP, the IHO determined that the parents' conversation with the assigned school employees with whom she was familiar, was not a "sufficient basis to conclude that the school could not offer an appropriate placement" and that "[a]ny presumption that the program would not be appropriately implemented would be speculative" ((IHO Decision at p. 12).

Therefore, that IHO found that the program offered by the district was appropriate and denied the parents' request for tuition funding. (IHO Decision at pp. 12-13).

Although unnecessary in light of the IHO's finding that the district offered the student a FAPE, the IHO went on to find that the parents' unilateral placement of the student at Bay Ridge was appropriate and that there were no equitable considerations that would have warranted a reduction in an award for the costs of tuition (IHO Decision at p.13).

IV. Appeal for State-Level Review

On appeal the parents argue that the IHO erred in ruling that the timing of the February 2019 CSE, held seven months prior to its date of implementation, was appropriate. The parents allege that the IHO ignored approximately four months of progress the student made during the 10-month school year. The parents argue that the protracted time span between the creation of the IEP and its implementation date operated to deprive the student of educational benefit and impeded her right to a FAPE because the CSE evaded its obligation to conduct a triennial evaluation "by prematurely scheduling the CSE meeting." In so doing, the parents maintain that the CSE relied on scores that dated back to the student's middle school years "even though she was well on her way to graduating from high school."

Next, the parents contend that the IHO erred in determining that the February 2019 CSE's consideration of the 2016 neuropsychological evaluation and input from the parent and Bay Ridge staff was sufficient to determine the student's needs. The parents point to the district's witness who testified that the CSE did not consider the 2016 neuropsychological evaluation report "at all" when recommending a substantive program for the student and that the record is unclear regarding what evaluative information was considered as the sources cited by the IHO recommended continuing the student in a "small, specialized educational setting." The parents maintain that the IHO's finding that they made no allegation that the student's "profile had changed or that a more recent evaluation was needed" was in error. In support of this allegation, the parents cite the 10-day notice and due process complaint notice which indicated that the neuropsychological evaluation was "quite old" and that the CSE did not rely on sufficient evaluative measures to determine the student's present levels of performance in areas of need and educational/cognitive profile.⁷ The parents assert that the CSE did not have an auditory processing evaluation, classroom observation, speech-language evaluation, completed vocational assessment, or student interview, and there was also a lack of comprehensive evaluative material to support a recommendation for a large and less supportive educational setting than what the student was attending at Bay Ridge. The parents contend that the lack of current evaluative information resulted in unaddressed auditory processing issues and a lack of current "objective and technically sound data" regarding the student's present levels of comprehension or speech-language needs. The parents assert that given the student's progress at Bay Ridge, the grade equivalencies in the 2016 neuropsychological evaluation report were not a sound measure of the student's performance or present functioning. The parents argue that the lack of current evaluative data resulted in a "loss of educational opportunity because it resulted in a substantively deficient IEP and deprived the [p]arents of an opportunity to participate and assess the propriety of the IEP program offer based on the [student's] objective and current needs, which warranted reevaluation."

Next, the parents contend that the IHO erred in determining that the present levels of performance, annual goals, management needs, and transition plans included in the February 2019 IEP were adequate. The parents maintain that the lack of current evaluative information, as previously argued, rendered the present levels of performance lacking and that the information provided by the Bay Ridge staff was only "relevant in the context of [the student's] performance in a small, specialized setting of approximately [eight] students, not a large general education ICT classroom in a community school." The parents assert that the IHO did not address the fact that there are no annual goals or program recommendations to address the student's auditory processing disorder, anxiety, or pragmatic language deficits. The parents contend the February 2019 IEP did not adequately address the student's distractibility and lack of focus, and the management needs did not identify small group instruction as necessary for the student despite evidence from the neuropsychological evaluation report and information provided by the Bay Ridge school psychologist. Lastly, the parents maintain the transition information contained in the February 2019 IEP did not address that the student had failed several Regents exams impacting her ability to graduate with a Regents diploma, which in turn impacted the student's post-secondary goals and transition plans.

⁷ The parents assert that the triennial evaluation was due by at least July 2019, giving the district several months to evaluate the student before the start of the 2019-20 school year (Req. for Review at p. 6-7).

In the request for review, the parents also allege that the IHO erred by not finding the program recommended in the February 2019 IEP substantively deficient. The parents assert that the IHO did not hold the district to its burden of providing a cogent explanation justifying how the IEP would meet the student's needs or whether the ICT program was sufficient to enable the student to "function, perform, and make progress in a large general education classroom, even with ICT support, in light of her documented areas of need." The parents allege that the district's evidence was largely derived from the testimony of a single witness who had not observed or met the student and who had no knowledge of whether any of the other district participants had ever met the student. The parents again assert that the CSE ignored evidence that the student would not be able to function in a large general education ICT classroom due to challenges with communication, attention, comprehension, language, memory, visual-spatial, and processing domains, in addition to anxiety. The parents assert that the IHO "failed to analyze how a large classroom could accommodate [the student's] documented areas of deficit when those at [Bay Ridge], who knew [the student] best, specifically indicated otherwise."

The parents seek a reversal of the IHO's findings as to the appropriateness of the February 2019 IEP and request that the SRO grant their request for tuition reimbursement at Bay Ridge for the 2019-20 school year.

In an answer, the district responds to the parent's allegations and argues that the IHO's decision should be upheld and the parent's appeal should be dismissed.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural

violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁸

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

The parents' appeal primarily concerns the sufficiency of the evaluative information relied on by the February 2019 CSE and the CSE's ultimate recommendation for ICT services. More specifically, the parents assert on appeal that "the only written evaluation the CSE had before it was [the] 2016 neuropsychological evaluation" and "the information gleaned by the CSE from [Ridge] staff regarding present levels of performance was relevant in the context of [the student's] performance in a small, specialized setting of approximately 8 students, not a large general education ICT classroom in a community school." As a result, the parents argue, the present levels of performance, annual goals, management needs, and transition plan for the student contained in the February 2019 IEP were not based on sufficient evaluative information and therefore were inappropriate for the student. More specifically, the parents assert that the present levels of performance were not accurate because they were not based on objective measures and only showed how the student functioned in a small class at Bay Ridge Prep. In addition, the parents contend that the annual goals did not address auditory processing, anxiety, or pragmatic language—areas that the parents alleged the CSE had not conducted current evaluations of the student's needs. With regard to the student's management needs, the parents' contend that the IEP did not identify small group instruction, which was a need specifically identified in the July 2016 neuropsychological evaluation report. Finally, the IEP indicated college attendance as part of the transition plan but omitted any reference to the number of credits the student earned towards graduation or the student's failed attempts at taking Regents exams.

⁸ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

With regard to the reevaluation of a student with a disability, Federal and State regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

A CSE convened on February 26, 2019, to determine the student's continued eligibility for special education (Dist. Ex. 1 at p. 18). According to the July 2019 prior written notice, the CSE considered an April 26, 2016 auditory processing evaluation, a July 26, 2016 neuropsychological evaluation, and a January 6, 2017 classroom observation (Dist. Ex. 6 at p. 1).⁹ However, neither the classroom observation report nor the auditory processing evaluation report are included in the hearing record, nor were they discussed in testimony, or memorialized in the February 2019 IEP (see Tr. pp. 1-106; Dist. Ex. 1 at pp. 1-3). The February 2019 IEP, as well as the CSE meeting minutes and testimony elicited at the hearing, indicated that when developing the student's IEP, the CSE primarily considered the July 2016 neuropsychological evaluation report in conjunction with the level one vocational interview with the parent and information provided by the student's Bay Ridge mathematics teacher, speech-language pathologist, and school psychologist regarding the student's program at Bay Ridge including grade level performance in reading and mathematics (Tr. pp. 31, 39, 44, 51, Dist. Exs. 1 at pp. 1-2; 3 at pp. 1-2).¹⁰

⁹ The July 2019 prior written notice indicated the July 26, 2016 evaluation was a psychoeducational evaluation; however, the evaluation in the hearing record for that date is a privately obtained neuropsychological evaluation (Dist. Exs. 6 at p. 1; 5 at p. 1). This discrepancy is clarified in a footnote on the IHO's exhibit list (IHO Decision at p. 15). In addition, the school psychologist testified that the CSE relied primarily on the July 2016 neuropsychological evaluation report (Tr. p. 51).

¹⁰ Although the parent contends in the request for review that the district representative testified that the "CSE did not consider the 2016 [neuropsychological] report 'at all' in recommending a substantive program" for the

Prior to delving into the parents' particular concerns regarding the evaluative information used by the February 2019 CSE in developing the student's program for the 2019-20 school year, a review of the information available at the time of the February 2019 CSE, including an assessment of the student's needs, is necessary.

At the time of the July 2016 neuropsychological evaluation report the student was 12 years old and, on formal assessment, presented with a verbal comprehension index score of 84, visual spatial index score of 72, fluid reasoning index score of 103, working memory index score of 103, processing speed index score of 103, and a full-scale IQ score of 88 on the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) (Dist. Ex. 5 at pp. 1, 13). The student's overall performance was classified as falling within the low average range with a percentile rank of 21 (id. at p. 13). The evaluator opined that the student's variable performance, as well as significant challenges in language and visual spatial processing, "pulled down" the student's composite score and that her average range performance on the remaining three sections of the WISC-V suggested the student possessed "greater intellectual potential than what was indicated by her composite Full Scale IQ score alone" (id. at p. 13).

Regarding the student's verbal/language abilities, the July 2016 neuropsychological evaluation report noted the student performed overall in the low average range (14th percentile) on the WISC-V, with below average performance on measures of verbal concept formation (16th percentile) and word knowledge (16th percentile) (Dist. Ex. 5 at pp 13-14). The evaluator noted that the student exhibited word finding challenges, which were observed both formally and informally, and reported that the student's borderline performance on the One-Word Picture Vocabulary Test (4th percentile) stood in contrast to her performance in the upper-limits of the low average range on the counterpart receptive language measure (23rd percentile) (id. at p. 14). Based on the student's performance, the evaluator indicated that while the student had "somewhat of an underdeveloped vocabulary, she [could] present as far more limited in this area than she actually [wa]s as a result of difficulty retrieving words fluently" (id.). The July 2016 neuropsychological evaluation report indicated that despite the student's word retrieval difficulties she "performed overall well within age-expectancy (61st percentile) on [the] CELF-5 measure of expressive language skills" but noted that she performed the "most strongly when she did not need to generate language independently" (id.).¹¹ The evaluator also found that, while not an area of significant deficit, the student's overall performance on receptive language on the CELF-5 was "substantially weaker" (32nd percentile) (id.).¹² However, the neuropsychological evaluation report indicated that the student exhibited significant weaknesses on subtests of the Comprehensive Assessment of Spoken Language (CASL), which assessed higher-level processing skills with the student scoring in the low average range on a measure of understanding non-literal

student, a review of the hearing record shows that the witness's testimony was in response to a specific question regarding a recommendation in the neuropsychological evaluation calling for a "small, structured, and specialized school setting" (Tr. p. 52). The witness responded, "We didn't consider it at all, because to our knowledge, and with our level of expertise, we would not have considered [the student] for a specialized school at all" (Tr. p. 52).

¹¹ The CELF-5 refers to the Clinical Evaluation of Language Fundamentals-F Edition (Dist. Ex. 5 at p. 2).

¹² The July 2016 neuropsychological evaluation report indicated that working memory issues impacted the student's performance with respect to following multi-step oral directions (Dist. Ex. 5 at p. 14).

language, as well as a measure of inferential reasoning which required the student to draw conclusions after hearing only part of a story (14th percentile). (id. at p. 15). According to the neuropsychological evaluation report, pragmatic language emerged as a challenging area as evidenced by the student's low average range performance on the CASL pragmatic judgement subtest (14th percentile) which was influenced by word retrieval issues (id.). Topic maintenance and understanding how to adjust language in relation to the age of listener were also deemed to be challenging areas for the student (id.).

The July 2016 neuropsychological evaluation report indicated that the student demonstrated variability on the NEPSY-II subtests which assessed "language skills thought to underlie the reading process" (Dist. Ex. 5 at p. 15). The student scored in the upper limits of the average range with respect to phonological processing ability (63rd percentile), yet a weaker performance was noted on a speeded naming test (25th percentile) (id.).

With respect to fluid reasoning/nonverbal reasoning abilities, the July 2016 neuropsychological evaluation report indicated that the student's fluid reasoning ability as assessed by the WISC-V, was in the average range (58th percentile) (Dist. Ex. 5 at p. 15). A significant weakness was noted in the student's visual spatial processing where she performed overall in the borderline range (3rd percentile) on the WISC-V (id. at p. 16). The student displayed variable performance on additional testing within this domain, specifically scoring in the high average range (84th percentile) on a NEPSY-II activity that assessed her ability to determine the direction and angularity of lines, but in the deficient range on the Hopper Test of Visual Organization (< 1st percentile) (id.). The evaluator reported that deficits in visual organization and visual spatial processing were associated with difficulty spacing information on a page and organizing materials when performing tasks, and noted that "delays in mathematics [we]re strongly correlated with inefficiencies in these domains" (id.).¹³

According to the July 2016 neuropsychological evaluation report, the student presented with graphomotor/visual motor and processing speed skills in the average range although the student demonstrated significant challenges with respect to memory (Dist. Ex. 5 at pp. 16-17). While the student's performance on a measure of meaningful visual memory fell in the average range (37th to 50th percentile), she demonstrated a much weaker performance on a dot location subtest (<1 percentile total score) (id. at p. 17). Global delays were noted on measures of verbal memory, with the student's performance ranging from the low average to borderline range on a story recall task (id.). The student's performance was higher on a repeated trials learning task, where the student scored in the lower limits of the average range after much review; however, some of the information the student learned seemed to "decay" following a delay (id.).

The July 2016 neuropsychological evaluation report indicated that the student's executive functions performance was likewise variable (Dist. Ex. 5 at p. 18). According to the report, the student was able to remain seated for lengthy stretches during testing but presented some impulsivity when she was insecure about her abilities (id.). Administration of the Conner's Continuous Performance Test - Second Edition yielded variable findings (id.). While the student

¹³ In the July 2016 neuropsychological evaluation report the evaluator noted that in the upper grades, deficits in visual organization and visual spatial processing can interfere with the higher-level mathematical processing required for subject areas such as geometry and trigonometry (Dist. Ex. 5 at p. 16).

made few omission errors, which was a sign of attentiveness, she exhibited a high number of commission errors which were a reflection of impulsivity (*id.*). The neuropsychological evaluation report characterized the student's performance as "solid" on all additional measures within the executive functions domain noting that she scored in the average range of on a measure of selective auditory attention (*id.*). In addition, on a color-word interference test, the student was able to maintain her performance as conditions changed, which revealed that she was able to filter out competing and potentially distracting stimuli when performing an activity (*id.* at p. 19). With respect to working memory, the evaluation report indicated that although the student earned an overall score in the average range it was somewhat misleading given the significant variability (16th to 75th percentile) within the student's performance (*id.*). Verbal deductive reasoning reportedly emerged as a "clear challenge" for the student (percentiles ranging from 9-16), as was divergent reasoning (percentile range 16-25) (*id.* at p. 20). The evaluator indicated that the student presented with challenges in organization/planning throughout the assessment as the student "tended to perform tasks in a roundabout manner which limited her efficiency" but was found to be "a far more effective problem solver when tasks were structured for her and/or she was provided with ongoing feedback to help guide her performance" (*id.*).

With respect to the student's academic performance, as assessed by the Wechsler Individual Achievement Test-Third Edition (WIAT-III), the student demonstrated a strength in core reading skills, in conjunction with significant weaknesses in reading comprehension and mathematics (Dist. Ex. 5 at p. 21). The neuropsychological evaluation report indicated that the student's composition skills were generally age-appropriate, but she was "found to have difficulty elaborating upon and organizing her ideas" (*id.*). According to the report, the student presented with well-developed core reading skills, exhibited a solid grasp of phonics (82nd percentile), and performed "nicely" on a measure of word reading skills (73rd percentile) (*id.*). The student's reading fluency was found to be weaker, albeit still within age-expectancy (55th percentile) (*id.*). However, the evaluator noted that the student displayed a "striking gap" between her core reading skills and performance on a reading comprehension measure (16th percentile), appeared to retain little of what she read, and was "often unclear as to what part of the passage to refer back to when searching for answers to comprehension question, needing to reread the material several times" (*id.*). When given ample time, the student was generally able to report on details stated directly within a story, but she struggled to grasp the main idea of the text, deduce the meaning of unfamiliar vocabulary for context, and make inferences (*id.*).¹⁴

In the areas of written expression, the student performed in the 45th percentile range relative to sentence composition, and an activity that required her to formulate sentences in response to target words and stimulus pictures on the WIAT-III, and performed in the average range (50th percentile) when required to combine short sentences into a single more complex sentence (Dist. Ex. 5 at p. 22). She performed within age-expectancy on the essay composition portion of the WIAT-III (*id.*). The evaluator indicated that test standardization practices were not maintained, and the time limits were extended for the student as she was "slow to generate ideas and then formulate her thoughts in writing" but with additional time, the student produced an essay

¹⁴ According to the July 2016 neuropsychological evaluation report, the student's spelling skills were in the 50th percentile and she demonstrated good use of her phonetic knowledge when spelling novel words; however, homophones and irregularly spelled words were more challenging for the student (Dist. Ex. 5 at p. 22).

of adequate length (45th percentile), and grammar/writing mechanics at the 47th percentile, which answered the question asked and contained some organizational features (id.). The evaluator noted that the student's writing failed to contain any elaboration, concluding statements, or ideas broken down into individual paragraphs (id.).

Regarding mathematics, the evaluator indicated that, consistent with the student's challenges in visual spatial processing/organization and executive functions, mathematics "emerged as an area of significant weakness" for the student as she struggled with measures of numerical operation (14th percentile) and mathematic problem-solving skills (9th percentile) (Dist. Ex. 5 at p. 22). Additionally, the student reportedly exhibited a lack of fluency on subtests assessing her speed and accuracy while performing calculations in basic addition (27th percentile) subtraction (34th percentile) and multiplication (34th percentile) (id. at pp. 22-23). At the time of the assessment, the student was noted to be prone to careless errors when performing multi-step calculations particularly regarding division, she presented with limited understanding of fractions and common geometric calculations, and she was unable to solve basic algebraic calculations, work with negative numbers, or determine place value (id. at p. 23). The evaluator also indicated that, consistent with the student's challenges in reading, she presented with limited comprehension when presented with word problems (id.).

Socially, the July 2016 neuropsychological evaluation report indicated the student's social perceptual skills were in the 50th percentile range, yet she demonstrated a significant weakness on a theory of mind subtest which assessed her ability to understand mental functions, the awareness that others have their own thoughts/feeling/ideas, and the knowledge of how emotion relates to social context (2nd to 5th percentile) (Dist. Ex 5 at p. 23). The evaluator indicated that the student had no difficulty with the nonverbal portion of the NEPSY-II but her language-based issues limited her performance within the verbal domain, which pulled down her composite score (id.). The evaluation report noted that the student was found to struggle with those test items that required her to interpret figurative language (id.). By self-report on the BASC-3, the student presented with a level of detachment from her emotions in general and the evaluator observed that the student presented with anxiety during testing, resulting in disengagement (id. at pp. 22-23). Thus, the evaluator found, the student failed to put forth full effort into her work and performed impulsively when she did not feel she could be successful (id. at p. 24). The student responded positively to praise and encouragement (id.). The evaluator opined that the student likely struggled with social anxiety and noted that the student's pragmatic language challenges impacted her social interactions with peers and that the student did not have the verbal skills to be able to effectively express herself, handle situations with tact, or grasp implied meanings in conversations (id.).

Based on the student's performance, the evaluator put forth several diagnoses including receptive/expressive language disorder, pragmatic language disorder, reading disorder-comprehension, mathematics disorder, and anxiety disorder, NOS (Dist. Ex. 5 at pp. 26-27). To address the student's needs as they presented at the time of the July 2016 neuropsychological evaluation, the evaluator made a number of recommendations (id. at p. 27). She opined that the student required a small, structured and specialized school setting with a curriculum that emphasized language development and a repetitive approach to learning with opportunities for individual and small group support throughout the day, as well as speech-language therapy for word retrieval, higher-order language processing, and pragmatic language skills (id.). The evaluator also recommended testing accommodations including testing in a distraction-free

separate location, additional time (x2), marking answers directly on the test forms, use of a calculator, presentation of a minimal number of problems per page, and use of graph paper (*id.*). The evaluator recommended short-term cognitive behavioral therapy to assist the student in developing an emotional vocabulary and learning techniques to better manage her anxiety (*id.* at pp. 27-28). To address the student's executive function weaknesses the evaluator recommended that the student be assisted with developing organizational strategies, that goals for assignments be made explicit, that larger assignments be broken up into smaller parts, that school materials be organized with labels and color coding, that the student be encouraged to make checklists for homework, that the student be taught the strategy of underling/highlighting key information when reading and that writing is a process, and that the student be given structured checklists to help guide her through the proof reading process (*id.* at p. 28).

The February 2019 CSE also considered the level one vocational interview completed by the student's mother at the CSE meeting, which indicated that the student was "very unsure about what she'd like to do after graduating high school" (Dist. Ex. 4 at p. 1; *see* Dist. Ex. 3 at p 1). The student's mother conveyed that the student was doing well in mathematics, the student was in good health, she participated in household chores with guidance, and it was anticipated that the student would remain living at home after graduation (Dist. Ex. 4 at pp. 1-2). The parent expressed interest in the student being able to travel independently to and from work and identified the student's leisure activities and instructional needs for independent living (*id.* at pp. 2-3). The parent noted the student did not yet demonstrate independence with respect to self-advocacy skills, travel, and financial management, and indicated that she would like the school to advise the student of the need to obtain working papers, register to vote, and possibly take driver's education courses (*id.* at p. 3).

The February 2019 IEP indicated that the student's Bay Ridge school psychologist, speech-language pathologist, and mathematics teachers participated in the CSE meeting and provided information regarding the student's performance at Bay Ridge (Dist. Ex. 1 at p. 2). The speech-language pathologist who taught the student in a reading and writing class indicated that the student read on an eighth-grade level with supports, she "often" needed information repeated to her, had trouble following directions but had improved in her ability to use context clues (*id.*). She also indicated the student used annotated text as a helpful strategy, responded well to literal questions, but that open ended questions were challenging for the student (*id.*). The speech-language pathologist reported that the student had difficulty with making transitions in her writing and benefited from proofreading, graphic organizers, and checklists (*id.*). The district school psychologist testified that there was "no hard data" with respect to the student's then current reading comprehension levels and that no normative data was included in the review (Tr. p. 58).¹⁵ The student's mathematics teacher reported that the student was taking modified Algebra 1, where her grade was "running" a B in the class and indicated that the student was on a ninth-grade level in calculations and an eighth-grade level with respect to applied problems (Dist. Ex 1 at p. 2).¹⁶

¹⁵ The district school psychologist testified that the Bay Ridge staff were asked at the CSE meeting what the student's overall level of reading was "with the knowledge that a tenth-grade student, when reading, is really no longer reading for decoding but reading for understanding"; however, the testimony does not elaborate on what was conveyed at the February 2019 CSE meeting (Tr. pp. 56-57).

¹⁶ The February 2019 IEP indicated that the student's mathematics teacher conveyed that the student lost valuable

According to the February 2019 IEP, the school psychologist conveyed that in science, the student was reportedly easily distracted and was "running a B+" (*id.*).¹⁷ Regarding the student's social development, the February 2019 IEP indicated that the student received counseling in the form of academic mentoring and that the parent conveyed that, on occasion, the student exhibited signs of anxiety, but no social emotional needs were identified in the IEP (*id.* at p. 3). With respect to the student's physical needs the February 2019 IEP noted the student was in good health but suffered from leg pain that may be impacted by anxiety and that the student had missed three weeks of school due to a health issue (*id.*). Other than noting the student was not particularly active there were no physical needs identified (*id.*). The district school psychologist testified that the CSE was made aware by the teachers and parents that the student could be distracted easily (Tr. p. 59).

The February 26, 2019 CSE meeting minutes indicated that according to the speech-language pathologist at Bay Ridge who taught the student reading and writing, the student was working on reading and writing skills by using strategies, and was writing a three-page research paper broken down into smaller steps; the minutes also noted the student had improved in the last year and a half (Dist. Ex. 3 at p. 1). The speech-language pathologist reported that the student had challenges with respect to receptive language, comprehension, recall, and following directions and required repetition, and multiple examples (*id.* at pp. 1-2). The speech-language pathologist also noted that the student had a limited vocabulary and although she made some improvement with context clues to determine vocabulary, she needed additional supports (*id.* at p. 2). As noted in the meeting minutes, the student was able to glean the main idea by herself but required help with higher order thinking and she annotated when reading (*id.*). The CSE minutes also indicated that a lack of critical thinking was evident in the student's writing assignments and the student required outlines to be provided "to prep" writing assignments, models and verbal cues as well as help with proofreading and punctuation (*id.*). The speech-language pathologist reported that the student needed a reader for exams and was 1-2 years behind in reading and writing (*id.*). The CSE meeting minutes indicated that according to the student's math teacher at Bay Ridge, the student was in a modified algebra class of eight students (*id.*). The math teacher reported that the student was one grade level behind in computation skills and two years behind with respect to applied problems (*id.*). With respect to science, the meeting minutes showed that the student had difficulty focusing and needed to take the biology regents again as she had failed it twice (*id.*). Regarding counseling, the CSE meeting minutes indicated that at Bay Ridge the student was seen on an as needed basis and she was enrolled in an academic mentoring class (*id.*).

Here, although the February 2019 CSE had verbal reports from the student's teacher and providers at Bay Ridge, the hearing record does not include any current written academic progress reports from Bay Ridge, including assessments or progress reports from the speech-language pathologist or counseling provider, which would typically provide more detailed information relevant to the student's then-current academic and social needs than what was included in the February 2019 IEP. Additionally, this type of information is particularly pertinent as the CSE was relying on a neuropsychological evaluation report that was nearly three years old at the time of the

time in terms of Regents prep and needed extensive review for the June regents after having already failed the Algebra regents twice (Dist. Ex. 1 at p. 2).

¹⁷ Despite taking earth science at the time of the February 2019 CSE meeting, the IEP noted that the student would be retaking the biology regents after taking it twice previously (Dist. Ex. 1 at p. 2).

CSE meeting. Further, while the district contends that the February CSE also considered an April 2016 auditory processing evaluation and a January 6, 2017, classroom observation those documents were not included in the hearing record. Accordingly, even if additional evaluative information was available to the CSE, the hearing record does not include this information and the July 2016 neuropsychological evaluation report, absent additional information from either the student's current educational placement or from the district, was insufficient to show that the student's present levels of performance, annual goals, and management needs accurately reflected or addressed the student's special education needs for the 2019-20 school year.

Considering the above, I must now turn to whether the limited information before the February 2019 CSE, including the neuropsychological evaluation report and opinions expressed by Bay Ridge staff who participated in the CSE meeting, supported the CSE's recommendation for ICT services, or whether, as the parents assert, it established that the student required a small school setting such as the classroom the student attended at Bay Ridge.

The parties disagree on whether the ICT setting provided the small student-to-teacher ratio recommended by the neuropsychologist and Bay Ridge staff. ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" in a classroom staffed "minimally" by a "special education teacher and a general education teacher" (8 NYCRR 200.6[g]). ICT services provide for the delivery of primary instruction to all of the students attending such a setting ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 14-15, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>).

The district psychologist testified that, the student's IQ was not significantly delayed and that the student had the ability to learn within an ICT program in a community school (Tr. p. 30). She reported that in recommending placement in a class with ICT services and related services, the February 2019 CSE considered data that showed the student "demonstrated average level skills in terms of her logical reasoning, her processing speed, and her working memory" (Tr. p. 31). The psychologist testified that the student's low average verbal comprehension skills would be addressed by speech-language therapy, that the CSE continued to recommend supplemental supports, and that the CSE obtained information from Bay Ridge staff who shared their impressions, concerns, and the student's strengths as part of the tenth-grade program at Bay Ridge (Tr. pp. 31, 39). Although the information provided by Bay Ridge staff was memorialized in the CSE meeting minutes and IEP, it was not supplemented by progress reports, report cards, or the results of classroom assessments (see Dist. Exs. 1 at pp. 1-3; 3). The psychologist reviewed the academic testing results included in the July 2016 neuropsychological evaluation and opined that the student's significant delays were in reading comprehension and math (Tr. p. 35). She opined that based on the student's profile an ICT program would have addressed her academic delays and the student's strengths could be addressed in a general education setting (Tr. p. 36). According to the district school psychologist, an ICT program was a general education classroom in which two teachers, a regular education teacher and a special education teacher, conducted instruction (Tr. p. 36). She reported that approximately 40 percent of students in an ICT classroom had IEPs (Tr. p. 36). The district school psychologist stated that although she could not speak to the specific teacher at the student's assigned school, a special education teacher employed by a specific school and asked to be part of an ICT classroom "should indeed be able to address a student's"

educationally related needs (Tr. pp. 36-37). With respect to the resources/strategies recommended to address the student's management needs, the district school psychologist explained that they were derived from information provided by the Bay Ridge representatives regarding what had been successful with the student, the expertise of the CSE members, and what the parents indicated would be useful for the student (Tr. p. 37). The district school psychologist stated that the student's management needs could be addressed by any staff member who was working with her (Tr. pp. 37-38). According to the meeting minutes, the Bay Ridge school psychologist stated that an ICT class was too large and school staff would be concerned about how the "management needs" would be implemented (Dist. Ex. 3 at p. 2).

Regarding the student's anxiety, the district school psychologist testified that the district would have addressed it through counseling services and that the teacher in the ICT classroom would have addressed it "in conjunction with a related service provider, in this particular case the counselor" using a team approach (Tr. p. 38). According to the district school psychologist, the student was classified as having a speech or language impairment, in part, because she was receiving speech-language therapy (Tr. p. 39). She noted that there was "some information obtained from previous IEPs and school records" and Bay Ridge had expressed and the committee knew from the data that the student was having difficulty with reading and her response to questions based on text and literature (Tr. p. 39). In recommending the ICT classroom, the district psychologist testified that the CSE considered, as one factor, the Bay Ridge participants' feedback regarding the student's instructional/functional level with respect to reading (eighth grade) and mathematics (ninth grade) (Tr. pp. 43-44).

Lastly, the district school psychologist indicated that the February 2019 CSE considered a general education program with special education teacher support services (SETSS) and ruled out a special class in a community school (15:1), ultimately determining that the ICT classroom was the least restrictive environment for the student (Tr. p. 45).¹⁸ The district school psychologist characterized Bay Ridge as a "low-register school" and acknowledged that the typical Bay Ridge classroom consisted of ten students or less (Tr. pp. 52-53, 54, 55). The school psychologist did not recall if the student was attending a "specific designated program" at Bay Ridge or whether she attended a mainstream setting versus a "special education specific environment" (Tr. pp. 53-55). She agreed that such information would have been relevant as far as the consideration of what program the student required (Tr. p. 55).

The director from Bay Ridge testified by affidavit that, based on his knowledge of the student and district ICT classrooms, he did not believe that the student would be able to keep up with the instruction in an ICT setting for eleventh grade (Parent Ex. F at p. 15). He stated that the student required more support than an ICT classroom could provide but noted that the management strategies in the recommended IEP were similar to those employed by the Bridge Program at Bay Ridge with the "notable exclusion" of "small groupings," which was not included in the IEP management strategies (*id.*). The Bay Ridge director testified that the student "absolutely need[ed]" close support from a special education teacher within a small group of students (*id.*). Lastly, the director indicated that he believed that there were "inherent challenges in providing

¹⁸ The February 2019 IEP indicated that the CSE rejected the general education program with SETSS because it would be insufficient to address the student's academic needs and a special class in a community school (15:1) was too restrictive (Dist. Ex. 1 at p. 20).

several of the listed management needs consistently and adequately in an integrated co-teaching classroom, given the typical size of those classrooms and the level of teacher support therefore afforded any one student" (id.).

The student's mother testified by affidavit that the student struggled for years in a public school ICT classroom which was the reason the parents moved the student to Bay Ridge for sixth grade (Parent Ex. G at p. 1). She indicated that the student started Bay Ridge in their mainstream program, and it was the parents' hope that the small classes and nurturing environment might be enough to support the student (id.). However, the school advised the parents that the student needed more support than the mainstream program could provide and, as a result, for seventh and eighth grades the parents moved the student into the Achieve program at Bay Ridge "where she remained in a small 'mainstream' class but with additional supports" (id. at pp. 1-2). According to the student's mother, by high school, the student's needs had increased to the point that Bay Ridge recommended the student be placed in their Bridge program, which consisted of smaller, specialized classes (id. at p. 2). The student's mother testified that it was her understanding that the recommended ICT class would consist of 30 students being taught by two teachers—as it was in past years—and noted that historically it was not a helpful setting for the student (id.). The parent stated that the student had been in ICT classrooms for years and she had no reason to believe that an ICT class was going to be more effective for her tenth grade year, especially when the student needed to continually move to more supportive classrooms (id.).¹⁹ The parent also expressed concern about the district's proposal to pull the student out of class four times a week for therapies as, at Bay Ridge, the student's language and anxiety needs were worked on in the classroom (id. at pp. 2-3).

Based on the above, the parents' concerns regarding the recommendation for ICT services were justified; it does not appear that the February 2019 CSE was reasonable in recommending placement of the student in an ICT classroom with related services based on the information that was available to the CSE and included in the hearing record. While the July 2016 neuropsychological evaluation report provided detailed information regarding the student's educational strengths and needs as of 2016, it appears that the student's needs changed in the following years, with the student requiring additional supports at Bay Ridge, and it is difficult to ascertain from the hearing record how a recommendation for ICT services could have addressed the student's needs as presented to the February 2019 CSE. As previously discussed, due to the lack of updated progress reports and more detailed descriptions of the student's performance at the time of the CSE meeting, the hearing record does not provide sufficient information to precisely determine the student's needs as of the February 2019 CSE meeting and, further, there is not a sufficient explanation in the hearing record to justify the CSE's rationale for recommending ICT services. Accordingly, based on the above, the IHO's determination that the district offered the student a FAPE for the 2019-20 school year must be reversed.

Having determined that the district did not offer the student a FAPE for 2019-20 school year, generally, the next step would be to determine whether the parents' unilateral placement of the student at Bay Ridge was appropriate and whether equitable considerations supported the

¹⁹ It appears that the parent meant the student's eleventh grade year as she noted that the district had already settled a claim for tenth grade and the hearing record indicates the student was going into eleventh grade (Tr. p. 65; Parent Ex. G at p. 2).

parents' request for relief (see Carter, 510 U.S. 7 [1993]; Burlington, 471 U.S. at 369-70 [1985]). However, in this matter, although it was not necessary to do so, the IHO addressed the appropriateness of Bay Ridge and equitable considerations (IHO Decision at pp. 12-13). The IHO found that the program at Bay Ridge Prep was appropriate and that equitable considerations did not impede an award of tuition (id.). As 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]) and neither party appealed the IHO's findings related to the appropriateness of Bay Ridge or equitable considerations, the IHO's determinations on these issues has 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 Dept of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

VII. Conclusion

Having determined that the district did not offer the student a FAPE for 2019-20 school year, and that neither party appealed from the IHO's determinations that Bay Ridge was an appropriate placement for the student and that equitable considerations supported the parents' request for relief, the necessary inquiry is at an end. The parents' appeal is sustained.

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

IT IS ORDERED that the IHO's decision dated April 1, 2021, is modified, by reversing the portion of the decision which determined 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 parents for the full costs of the student's tuition at Bay Ridge for the 2019-20 school year upon presentation of proof of payment.

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

STEVEN KROLAK
STATE REVIEW OFFICER