



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-123

Application of the BOARD OF EDUCATION OF THE WAPPINGERS CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, by Steven L. Banks, Esq.

Littman Krooks, LLP, attorneys for respondents, by Kevin Pendergast, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Southport School (Southport) for the 2020-21 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student has a history of generalized epilepsy and received services through the Early Intervention Program (EIP) to address her fine motor weaknesses and support her social/emotional development (Dist. Exs. 5 at p. 2; 6 at p. 1). The student's early medical history was otherwise notable for headaches which became increasingly prevalent over time (Dist. Ex. 6 at p. 1).

The student demonstrated learning issues in pre-kindergarten and kindergarten particularly in foundational reading skills and also exhibited attentional problems and difficulty playing with classmates (Dist. Ex. 6 at p. 2). The student's reading issues reportedly became increasingly apparent in the first grade, and she was provided pull-out reading supports (*id.*). During the second grade, the student had a Section 504 Plan in place as a student with an other health impairment and

received services including classroom and testing accommodations and extra help for reading, math, and phonics (id.). Around this time, the student showed significant learning difficulties in all subjects, required frequent repetition and re-teaching, and was easily frustrated and overwhelmed when asked to complete work on her own and within a specific time (id.).

In May 2019, during the student's second grade year, the parents signed consent for an initial evaluation that included a classroom observation, medical records, a social history, and a psychoeducational evaluation (Dist. Ex. 36). However, in a June 2019 letter the parents informed the district of their intention to have the student "completely tested by NYU," and to withdraw their referral to the CSE until the results of outside testing were received, at which time a meeting could be set up to make sure the student had the proper services and placement for the beginning of the upcoming 2019-2020 school year (Dist. Ex. 18).

The parents obtained a July 2019 private neuropsychological evaluation for the stated purpose of characterizing the student's then-current cognitive and behavioral functioning in the context of her history of epilepsy as well as to assist with ongoing treatment and educational planning (Dist. Ex. 6 at p. 1). The pediatric neuropsychologist, who conducted the evaluation, reported that the student presented as calm and cooperative with adequate eye contact (id. at p. 3). She noted that the student was motivated to perform well and did not demonstrate significant distractibility but that she often fatigued on tasks that were more challenging for her (id.). According to the neuropsychologist, the student became visibly distressed on academic tasks (specifically measures of reading), often made somatic complaints such as reporting that she was hungry, benefited greatly from encouragement and positive reinforcement, and was able to persevere through all cognitive tests with adequate effort (id.).

The pediatric neuropsychologist found the student performing in the average range in the areas of verbal and nonverbal intellectual abilities, fluid reasoning, and processing speed while performing in the very low range in the area of working memory (Dist. Ex. 6 at pp. 3, 11). The student's expressive and receptive language skills and visual spatial/motor skills were found to be within the average range (id. at p. 3). With regard to executive functioning, the neuropsychologist reported that the student demonstrated intact cognitive flexibility and response inhibition but showed weaknesses in working memory or her ability to temporarily store and mentally manipulate information (id. at p. 4). Completion of a rating scale by the parent regarding executive functioning across real-world settings endorsed significant difficulties related to shifting, specifically reporting that the student often got stuck on one topic or activity, had trouble acclimating to new situations, and was often resistant to change (id.).

In the area of reading, the student performed within the low average range on a test of single word reading, in the very low range on a test of phonemic decoding and in the below average range in the area of orthographic coding (the ability to recognize/recall irregular words/spelling patterns) (Dist. Ex. 6 at pp. 4-5). The student's overall performance was within the poor range on a measure of oral reading and comprehension skills and she performed within the very low range on a measure of reading fluency (id. at p. 5). The pediatric neuropsychologist noted that the student's significant reading weaknesses likely precluded her ability to answer questions based on read text and thus her reduced reading comprehension score should be interpreted with this consideration (id.). According to the neuropsychologist, the student's teachers reported that she exhibited anxiety, depressed mood, and somatization (headaches and stomach pain) with the

student's reading instructor rating these difficulties as much more severe and noting that the student often had panic attacks, appeared tense, and was worried about making a mistake (id.). In addition, the student's reading teacher reported that the student showed withdrawal and underdeveloped adaptive skills including problems adapting to change and setbacks, social skills difficulties, and problems assuming leadership positions (id. at pp. 5-6).

The pediatric neuropsychologist found the student did not meet the diagnostic criteria for a formal attention deficit (i.e., ADHD), but that her history of academic underperformance, together with current academic test data showing consistent weaknesses in language based academic skills, supported a diagnosis of specific learning disorder (SLD) with impairment in reading (dyslexia) and that she also met the criteria for a diagnosis of generalized anxiety disorder (Dist. Ex. 6 at p. 6).

The pediatric neuropsychologist's recommendations for school included more intensive, specialized instruction in reading and spelling using an empirically supported, phonics-based reading program such as Orton-Gillingham; placement in a full time special education school for children with learning disabilities¹; a 12-month academic curriculum; testing accommodations; and individual speech-language therapy along with accommodations and supports such as preferential seating, information presented within a meaningful context, advanced warnings and extra time in transitioning, support in planning and organizational skills (including breaking down assignments), and access to the school counselor (Dist. Ex. 6 at pp. 7-8).

The student started the 2019-20 school year (third grade) in an integrated co-teaching (ICT) class where she received academic intervention services (AIS) through response to intervention (RtI) (Dist. Ex. 7 at p. 1). Specifically, she received "Tier 3" AIS reading instruction for 30 minutes daily in a small group and "Tier 2" AIS math instruction for 30 minutes three times per six-day cycle in a small group (Dist. Exs. 7 at p. 1; 42 at pp. 1-2).

On October 30, 2019 a CSE convened to conduct an initial eligibility determination meeting and, if warranted, develop an IEP for the student for the 2019-20 school year (Dist. Ex. 1 at pp. 1-13). Finding the student eligible for special education as a student with a learning disability in reading, the CSE recommended ICT services for five hours daily (id. at pp. 1-3, 10). The October 2019 IEP included annual goals addressing decoding words in the text and in isolation, reading fluently with accuracy and appropriate rate when presented with second-grade level text, and correctly spelling teacher-selected words in written assignments; the IEP also included a recommendation for modifications and accommodations such as additional time, checks for understanding, directions read and explained, preferential and special seating, refocusing and redirection, reteaching of materials, and extra positive reinforcement due to anxiety, as well as a number of testing accommodations (id. at pp. 10-12).

The October 2019 IEP's present levels of performance stated that the student would continue to receive AIS in the area of reading and that based on then-current progress monitoring the student had made improvements although she continued to lag behind her peers, and it was

¹ The neuropsychologist recommended that in the interim the student be provided with special education teacher support services (SETSS) in reading and writing and placed in a classroom with a smaller student to teacher ratio to ensure individualized supports to address the student's learning needs and related anxiety (Dist. Ex. 6 at p. 7).

noted that her progress in AIS was characteristic of a student with dyslexia (Dist. Ex. 1 at p. 3). The student's reading teacher reported that the student could become overly emotional during the service since this was her main area of weakness and that attempts by the classroom teacher to motivate the student prior to leaving for AIS services had resulted in some success of late (id.).²

In a November 8, 2019 email the parent shared concerns that the student's reading teachers were "forcing" the student to read books at a frustration level which had created a "reading wall" between the teachers and the student and made it so that her teachers could not teach her (Dist. Ex. 21 at p. 1). The parent opined that it was unfair of the reading teachers to have wrongly advanced the student's reading level through the second grade so they could show she was making progress and the parent felt that this had caused a major problem about which she was "very unhappy" (id.).

On November 16, 2019 the parent signed consent for the initial provision of special education services (Dist. Ex. 39).

In December 2019 communications with the district, the parent stated that an emergency CSE meeting needed to be scheduled to address concerns regarding the annual goals, the vague description of the student's reading services, the lack of assistive technology devices and services, and "items missing" within the October 2019 IEP (Dist. Ex. 22 at pp. 2-3).

On January 16, 2020, the CSE reconvened to conduct a requested review to discuss the parents' concerns and the frustration the student was feeling at home because she was working very hard to read in school (Dist. Exs. 2 at p. 1; 9; 10). The January 2020 CSE meeting comments indicated that the parents were not in agreement with the IEP, wanted to increase reading services and also an individualized program to accommodate the student's dyslexia, and that they were accepting the IEP while they "explore[d] their rights" (Dist. Ex. 2 at p. 1). The resultant January 2020 IEP was modified to include more targeted annual goals addressing blending and segmenting individual phonemes to read and spell one word syllables, reading words with vowel teams (ai, ay, ea, ee), and spelling (dge, ge, ch, tch, k, ck) words and the addition of daily access to computer to access Lexia (reading program) (compare Dist. Ex. 2 at pp. 10, 11, with Dist. Ex. 1 at pp. 10, 11).

The parents attended an open house at Southport on the same day as the January 2020 CSE meeting and made arrangements for the student to participate in an interview at the school (Dist. Ex. 49 at pp. 1-2).

On March 6, 2020 the CSE reconvened for a requested review to discuss parent concerns regarding the behaviors and frustrations the student was displaying at home (Dist. Ex. 3 at pp. 1-14). The student's needs were discussed and the CSE decided that the social worker would meet with the student to conduct a needs assessment for counseling and recommended that if the student was receptive to the initial meeting, the student would receive social work services and an annual goal would be created and reviewed at the annual review meeting (id. at pp. 1-3). The student's IEP was modified to include the recommendation of one 30-minute session per six-day cycle of

² According to a November 15, 2019 reading progress report at the beginning of the school year the student struggled to get through a lesson without becoming frustrated with reading but since a self-monitoring (behavior) chart had been implemented the student had been working hard to make sure that she stayed positive, accepted mistakes, tried to solve words, and slowed down (Dist. Ex. 42 at p. 2).

individual psychological counseling services and the addition of a social/emotional/behavioral annual goal targeting accurately identifying her own emotions and feelings, the intensity of the emotions and feelings, and strategies for dealing with them (id. at pp. 1, 11, 12).

In a March 25, 2020 letter to the district, the parent noted the shortcomings of the district's recommended program and requested placement of the student at Southport along with transportation to and from the school for the 2020-21 school year (Parent Ex. I).

In a letter to Southport, dated April 20, 2020, the parents indicated that they were forwarding a copy of a "signed offer letter" to Southport and that they would send the original letter, along with a check made out to the school, the following day (Dist. Ex. 52).

On April 22, 2020 a CSE convened to conduct an annual review and develop the student's IEP for the 2020-21 school year (Dist. Ex. 4). Finding the student continued to be eligible for special education and related services as a student with a learning disability, the April 2020 CSE recommended two hours daily of ICT services for ELA, one hour daily of ICT services for math, three 45-minute sessions per six-day cycle of ICT services for both science and social studies, and one 30-minute session per six-day cycle of individual psychological counseling services (id. at pp. 1, 10). To support retention of reading skills/ability, the April 2020 IEP included 12-month services, recommending two three-hour sessions per week of resource room ELA in a group of five in school during July and August 2020 (id. at pp. 1, 2, 11). The April 2020 IEP included six annual goals that addressed blending and segmenting individual syllables to read two-syllable words, reading words with vowel teams (oa/ow and igh/y), reading words fluently with accuracy and appropriate rate when presented with second grade level text, spelling words with diphthongs (ou/ow and oi/oy), writing a narrative of up to three paragraphs using details to describe actions/thoughts/feelings about a real or imagined event including temporal words for event sequence, and accurately identifying her own emotions and feelings, the intensity of the emotions and feelings, and strategies for dealing with them (id. at p. 9). In addition, the April 2020 IEP included the same program supports and testing accommodations as were included in the student's previous year's IEP (compare Dist. Ex. 4 at pp. 10-12, with Dist. Ex. 3 at pp. 12-13).

While not listed as a program or service on the April 2020 IEP, the present levels of performance stated that along with the ICT services, the CSE recommended continued reading support from AIS (Dist. Ex. 4 at p. 2).

In a July 2020 email to the district, the parents stated that they would not send the student to virtual 12-month services as they did not feel it would be beneficial to the student (Dist. Ex. 33; see Dist. Ex. 35 at pp. 1-3).

The student was enrolled at Southport for the 2020-21 school year (Parent Ex. KK at p. 1; see Parent Exs. R; V; W; X; Y; Z; JJ).

A. Due Process Complaint Notice

In an October 9, 2020 due process complaint notice, the parents, through their counsel, requested an impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 and 2020-21 school years, and requested reimbursement for the student's 2020-21 school year tuition at Southport (Parent Ex. U).

The parents asserted that for both school years the CSE and the student's teachers: either through incompetence or indifference, continually ignored, misinterpreted, improperly graded, or mischaracterized the results of evaluations, tests, and or observations; provided the parents with improper information concerning what resources and instructional methodologies were available to address the student's deficits; impeded the parents opportunity to participate in the CSE meetings; and, failed to provide them with full disclosure of their rights under the IDEA (see Parent Ex. U at pp. 3-19, 21). With respect to the IEPs, the parents claimed that they contained inappropriate present levels of performance, annual goals, related services and supports, instructional methodologies, and instructional placements (id.).

To remedy the district's alleged failures, the parents requested reimbursement for the costs of the student's tuition and associated fees at Southport for the 2020-21 school year (Parent Ex. U at p. 23).

On September 30, 2020, the parents and district executed a contract wherein the district agreed to reimburse the parents for the cost of transportation for the student to and from Southport each school day, starting September 3, 2020 (Parent Ex. T). The parties participated in a prehearing conference on November 23, 2020, in which the IHO set forth the parameters for the hearing, including setting forth rules and scheduling dates for the hearing, for the production of evidence, and for witnesses (IHO Ex. I). The parents filed an amended due process complaint on January 14, 2021, in which the parents added a new claim that the district failed to reimburse them for the cost of the student's transportation to and from Southport as outlined in the September 30, 2020 contract due to a typographical error (IHO Ex. V at pp. 16, 21-24). The parents added a request to have the district either reinstate transportation for the student or reimburse them for transportation costs for the remainder of the 2020-21 school year (id. at p. 24).

B. Impartial Hearing Officer Decision

The parties participated in additional prehearing conferences on December 8, 2020 and December 11, 2020, in which the IHO acknowledged the parents' amended due process complaint notice and rescheduled the dates for the hearing and production of evidence (IHO Ex. II). Another prehearing conference was held on January 8, 2021, after which the IHO rescheduled the dates for the hearing, made rulings as to the admission of some exhibits, and set forth additional procedures for the production of evidence (IHO Ex. III).

An impartial hearing convened on February 5, 2021 and concluded on February 23, 2021 with a total of five hearing days being held (Tr. pp. 1-341).³ In an April 29, 2021 decision, the IHO found that the district denied the student a FAPE for the 2020-21 school year, that Southport was an appropriate unilateral placement, that Southport was physically located within the 50 mile statutory range allowable for transportation reimbursement, and that equitable considerations favored a full award of tuition reimbursement (IHO Decision at pp. 19, 22, 24, 25, 26). The IHO assessed the appropriateness of the April 2020 IEP, which set forth the student's program for the 2020-21 school year, finding that the IEP did not address the student's needs in that it did not

³ At the conclusion of the hearing, the IHO issued an order identifying dates by which the parties must submit post-hearing briefs, the expected record close date, and the expected date by which the IHO would issue a decision (IHO Ex. IV). The parents and district both submitted post-hearing briefs dates April 16, 2021.

provide a specific reading support (id. at pp. 14-15, 19-22). The IHO noted that while the district provided AIS to the student as a reading support, and that the IEP noted the student would receive AIS, no reading supports were included in the IEP as a program recommendation; the IHO found that following the AIS model for delivery of reading support as opposed to how reading supports should be identified in an IEP resulted in a denial of FAPE for this student (id. at pp. 19-22). Further, although the IHO did not make a finding as to whether the student was denied a FAPE for the 2019-20 school year, the IHO found that the student made no progress from the second grade (2018-19 school year) through the third grade (2019-20 school year) in reading and decoding, and that the continuation of a slightly modified ICT setting with the same AIS formula for delivery of reading services was both a procedural and substantive denial of FAPE for the 2020-21 school year (id. at pp. 15-19).

The IHO then determined that Southport was an appropriate placement for the student for the 2020-21 school year (IHO Decision at pp. 22-24). The IHO noted that the student received 51 minutes per day of direct instruction in decoding, as part of a total of 102 minutes per day of instruction in language arts (id. at p. 23). Overall, the IHO concluded that Southport provided a program that addressed the student's needs related to her diagnosis of dyslexia and that the student made progress at Southport (id. at p. 24). The IHO then determined that the parents acted in good faith in seeking what they believed was an appropriate placement for the student and that equitable considerations did not weigh against granting the parents' request for relief (id.).

Finally, the IHO addressed the parents' request for transportation and found that the parents were entitled to reimbursement for the cost of transportation as part of their request for tuition reimbursement because the district did not offer an appropriate placement, Southport was appropriate, and equitable considerations supported their claim (IHO Decision at pp. 24-25).

The IHO ordered that within 60 days of the parents presenting proof of the cost of and payment for tuition at Southport and presentation of proof of the mileage for reimbursement of transportation, the district was to reimburse the parents for the costs of tuition and mileage for the student's attendance at Southport for the 2020-21 school year (IHO Decision at p. 25).⁴

IV. Appeal for State-Level Review

The following issues presented on appeal must be resolved in order to render a decision in this matter:

a. Whether the IHO erred in finding that the district failed to offer the student a FAPE for the 2020-21 school year by failing to recommend appropriate special education instruction and related services to address the student's reading deficits; and,

b. Whether the IHO erred in determining that Southport was an appropriate unilateral placement for the student; and,

⁴ The district has already reimbursed the parents for transportation costs for the 2020-21 school year through a stipulation, and the claim for transportation costs has been withdrawn (Req. for Rev. at p. 2; Ans. at p. 2).

c. Whether the IHO erred in determining that equitable considerations did not require a reduction of an award of tuition reimbursement.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove 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]).⁵

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).

⁵ 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).

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. 2020-21 School Year

Turning first to the district's assertion that the IHO erred by deciding not to consider the specialized reading instruction provided through AIS in determining that the district did not offer the student a FAPE for the 2020-21 school year, the district contends that the CSE was reasonable in placing the student in an ICT class and "recommend[ing] that [the student] receive multisensory reading instruction through AIS." The district further contends that even if the AIS reading supports were required to be included on the IEP as a special education service, the failure to make that recommendation should be treated as a procedural violation that did not deprive the student of a FAPE. In review of these allegations, there is not a sufficient basis to depart from the IHO's reasoning on this issue.

According to the student's mother, as reported in the July 2019 neuropsychological evaluation report, the student had limited expressive language abilities and had difficulty learning her ABC's in preschool and she repeated a year of preschool (see Dist. Ex. 6 at pp. 1-2). According to the report, the student's learning problems continued into kindergarten, "particularly in foundational reading skills" (id. at p. 2). Moving forward to the time period at issue in this proceeding, the hearing record supports the IHO's finding that the student did not make sufficient progress in reading in the district from her second grade year (the 2018-19 school year) through her third grade year (the 2019-20 school year) (IHO Decision at p. 18). Of note, the IHO took into account several facts that deserve reiterating.

Initially, the IHO reviewed the norm-referenced reading assessments available to the April 2020 CSE, the easyCBM (a curriculum based measure used to monitor students' progress in AIS), i-Ready diagnostic assessments (provided to all students as part of the district's RtI process), the Feifer Assessment of Reading (FAR) (administered to the student in October 2019), and the Gray Oral Reading Test - Fifth Edition (administered to the student in July 2019 and September 2020) (IHO Decision at pp. 16-17; see Tr. pp. 273, 275, 283; Parent Ex. H; Dist. Exs. 15; 16).⁶ Based on these assessments, as well as taking into consideration the testimony of district staff, the IHO determined that the student did not make sufficient progress in the areas of decoding and reading fluency to support recommending a program without specialized reading instruction (IHO Decision at pp. 17-19).

With respect to the student's progress during the second and third grades, the district contends that the IHO erred, arguing that the student achieved at least partial proficiency in meeting grade level standards and was promoted to fourth grade, that the student made satisfactory progress towards her annual goals during the 2019-20 school year, that the district's norm-referenced assessments indicated the student was making "some progress in addressing her delays

⁶ The results of the FAR are reported in the student's April 2020 IEP; however, a report of the assessment is not included in the hearing record (Dist. Ex. 4 at p. 3).

in decoding and phonics," and that a running record showed the student made progress in reading (Dist. Mem. of Law at pp. 21-22). With respect to the student's third grade report card, as noted by the IHO, the report card does not indicate that the student was proficient overall in grade level standards in reading (Dist. Ex. 14; see IHO Decision at p. 19). Rather, the report card indicates that with respect to specific foundational skills—which included applying grade level phonics to decode words and reading grade level text with accuracy, expression, and appropriate rate—the student was partially proficient in grade level standards (Dist. Ex. 14 at p. 1). In addition, the student was working on three annual goals related to reading and spelling (Dist. Ex. 48 at pp. 2-4). According to the student's progress report, as of the third quarter, the student was "progressing satisfactorily" on two of the annual goals and "progressing gradually" on the other, as of the fourth quarter, the student had achieved one annual goal and was "progressing satisfactorily" towards the other two annual goals (id.).

With respect to the district's norm-referenced assessments, the hearing record indicates that the "main instruments" the district used to measure the student's progress were the easyCBM and the i-Ready assessments (Tr. pp. 375-77; see Tr. pp. 275, 283).

According to the district assistant superintendent, the easyCBM was a norm-referenced curriculum based measure, used to monitor how the student was responding to the reading supports provided in AIS (Tr. pp. 271-2, 283). The student's passage reading fluency score of 62 in February 2019 (second grade) was the same as her passage reading fluency score in February 2020 (third grade), although it fluctuated below that level throughout the February 2019 to February 2020 time period (Parent Ex. H at pp. 3, 4). The pediatric neuropsychologist who evaluated the student indicated that the easyCBM report revealed a "flat learning curve" and limited progress rather than meaningful [progress], and it could not be determined if any change in the scores over the year were meaningful since the easyCBM results did not contain pre- and post- performance data (Tr. pp. 692-93; Parent Ex. H at p. 3).

According to the district assistant superintendent, all students in the district take the i-Ready assessment at least twice per year as it is used as a screener to determine if students should be provided with AIS; in addition, for students receiving AIS, the i-Ready assessment provides information as to a student's "progress overall and [] in areas of weakness" (Tr. pp. 273, 275). The student took the i-Ready assessment for reading in September 2019 and January 2020 (Dist. Exs. 1 at p. 7; 4 at p. 6; 15). Results showed that in terms of overall reading, the student scored in the 22nd percentile in September 2019 and in the 21st percentile in January 2020 (id.). Reporting of the i-Ready assessments indicated that in September 2019, the student exhibited strengths in phonological awareness, phonics, and high frequency words, with weaknesses in vocabulary and comprehension; in January 2020, the student exhibited strengths in comprehension, high frequency words, and phonological awareness, with weaknesses in phonics and vocabulary (compare Dist. Ex. 1 at p. 7, with Dist. Ex. 4 at p. 6).

In reviewing the student's scores from the easyCBM and i-Ready assessments during the 2019-20 school year, the district assistant superintendent and the student's AIS teacher repeatedly referred to the student as "making slow and inconsistent progress" (Tr. pp. 268, 290-94, 370, 485-85, 494). According to the assistant superintendent, the student was "able to maintain her own relative position in line compared to same-age peers"; however, the student was not, at that time, closing the gap (Tr. p. 291-93). He further testified that it was not uncommon for students with

reading disorders to make progress but not close the gap with typically performing peers, especially in their areas of weakness (Tr. pp. 292-93). Additionally, according to the district assistant superintendent, the student's disability was the reason the student was not closing the gap and the district classified the student because she was not closing the gap (Tr. pp. 363, 365).

Turning to the April 2020 IEP, the IEP identified the results of the assessments the student was given, and provided a summary of the student's present levels of performance in reading (Dist. Ex. 4 at pp. 3-6). At the end of the reading summary, the IEP noted that the student required "an intensive multisensory approach to improve decoding and encoding skills" (*id.* at p. 6).

The April 2020 CSE recommended that the student receive the support of ICT services for ELA (two hours per day), math (one hour per day), social studies (45 minutes three times per six-day cycle), and science (45 minutes three times per six-day cycle) (Dist. Ex. 4 at p. 10).⁷ In addition, the CSE continued a recommendation for one 30-minute session of individual counseling services to address the student's frustration at home that was added in March 2020 (*compare* Dist. Ex. 4 at p. 10, *with* Dist. Ex. 3 at p. 12). The CSE also recommended two three-hour sessions per week of resource room in a group of five to provide the student with reading support over the summer (Dist. Ex. 4 at p. 11). The April 2020 IEP included six annual goals directed at addressing the student's needs in the areas of reading, writing, and social/emotional support (*id.* at p. 9). In addition, the April 2020 IEP included the same program supports and testing accommodations as were included in the student's previous year's IEP (*compare* Dist. Ex. 4 at pp. 10-12, *with* Dist. Ex. 3 at pp. 12-13). As determined by the IHO, the April 2020 CSE did not recommend specially designed reading instruction, rather, the April 2020 CSE recommended that the student would receive necessary "multi-sensory reading support from AIS" (Dist. Ex. 4 at pp. 2, 6).

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a resource room program, as a consultant teacher service, in a special class, or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>). In addition, the guidance specifies that the CSE should "consider what prior instructional methods and strategies have been utilized with the student to avoid reinstituting programs that have not proven effective in the past" and further indicates that "[i]nstructional methodology may be discussed at the [CSE] but is not specified on an IEP" (*id.*).

State regulations define AIS—which are available to both disabled and nondisabled students—as "additional instruction which supplements the instruction provided in the general

⁷ The student's IEPs for the 2019-20 school year had recommended that the student receive the support of ICT services for five hours per day, without identifying the specific subject areas (Dist. Exs. 1 at p. 10; 3 at p. 11).

curriculum" (8 NYCRR 100.1[g]; see 8 NYCRR 100.2[ee]). State regulation specifically contemplates that AIS be made "available to students with disabilities" provided that such services are provided in a manner consistent with the student's IEP (8 NYCRR 100.1[g]). According to State guidance, AIS are provided in addition to, and must not supplant, special education services (see "Academic Intervention Services: Questions and Answers," at p. 5, Office of P-12 Mem. [Jan. 2000] [emphasis added], available at <http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf>).

Turning to how AIS was provided to the student during the 2019-20 school year and what it might have looked like for the student for the 2020-21 school year, the student's AIS teacher testified that she did not provide the student with special education instruction in reading, and that the student would have received special education instruction from the special education teacher in the ICT setting (Tr. pp. 500-01). She further testified that she does not look at students' IEPs because she is not a special education teacher (Tr. p. 501). Additionally, the AIS teacher testified that the district is not required to deliver AIS for a specific frequency or duration, although the plan was for the student to receive daily instruction through AIS (Tr. p. 530).

Based on the above, with particular consideration of the student's exhibited needs in the area of literacy skills, the acknowledged need for the student to receive multi-sensory reading support, the inconsistent progress observed during the 2019-20 school year while the student received AIS, and the district's decision to continue virtually the same program for the 2020-21 school year (with the addition of summer services), the hearing record supports the IHO's determination that the April 2020 CSE's decision not to include a specific reading program to provide the student with specially designed reading instruction resulted in a substantive denial of FAPE for the 2020-21 school year. Finally, although I may not agree with each and every enumerated finding in the IHO's decision, after review of the hearing record, I agree with the IHO's ultimate conclusion that the district failed to offer the student a FAPE for the 2020-21 school year.

B. Unilateral Placement

The district objects to the IHO's decision as to the appropriateness of Southport on the basis that it did not provide a detailed analysis of the program provided at Southport or make a finding as to whether Southport provided the student with appropriate specially designed instruction. The district argues that the parents did not present any testimony from the student's assigned teachers and did not produce any evidence that the instruction provided by Southport was modified to meet the student's needs. In addition, the district notes the student did not receive individual counseling to address her generalized anxiety disorder; the student was not provided with 12-month services; and the student made inconsistent progress. Furthermore, the district contends the IHO decision did not address the question of whether the restrictiveness of Southport or the student's long commute made the school inappropriate. In this case, as detailed below, a review of the hearing record supports the IHO's finding that Southport was an appropriate placement.

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).

1. Student Needs

While the student's needs are not at issue in this case, a review thereof will help to facilitate the discussion of whether Southport was an appropriate placement. According to the present levels of performance in the April 2020 IEP the student continued to struggle with fluency and read in short phrases; struggled with advanced word chains; showed weaknesses in phonics and vocabulary; was decoding at a beginning of the third-grade level and needed reteaching of trigraphs

and blends; and needed an intensive multisensory approach to improve decoding and encoding skills (Dist. Ex. 4 at p. 6). With respect to writing, the April 2020 IEP stated that completing written work at home had been a struggle and that the student benefitted from teacher support to discuss a topic, needed her ideas repeated back for her to compose complete sentences, and had shown regression with the v-e spelling rule (id.). In the area of math, the student showed weakness with measurement and data and benefitted from "tricks" to solve multiplication and division problems (id.).

The April 2020 IEP indicated the student could demonstrate frustrations with completing tasks outside the classroom, that a behavior chart was helpful in aiding motivation and minimizing frustrations during reading sessions, and that the student became most frustrated when working on tasks at home (Dist. Ex. 4 at p. 7). The April 2020 IEP stated the student benefited from encouragement and positive reinforcement, a structured supportive setting with minimal distractions and a multi-sensory approach to learning; needed extra support in the classroom and in small groups for learning and maintaining phonics rules, redirection during large group instruction, directions confirmed, guidance and teacher support, and reteaching throughout the day; and required check-ins for understanding (id. at p. 8).

In his written testimony, the Southport head of school stated that the student's application and supporting materials for admission included cognitive and achievement assessments which were reviewed carefully in determining that the student's cognitive profile and achievement scores aligned with their admissions criteria (Parent Ex. KK at p. 1). The head of school noted that although the student had areas of relative strength in her cognitive profile (visual spatial skills), her significant deficit in working memory and her relative areas of weakness in fluid reasoning, verbal memory, and executive functions were aspects of her learning profile that aligned with the program at Southport (id.).

The head of school testified that Southport did assessments in the fall during the first couple of weeks of school and that they used a variety of assessments including the Gray Oral Reading Test for fluency, the Group Reading Assessment and Diagnostic Evaluation for reading, and the Group Math Assessment and Diagnostic Evaluation for math (Tr. pp. 953-54; see Parent Ex. R).

2. Southport

According to the head of school, Southport held the Academy of Orton-Gillingham Practitioners and Educators (AOGPE) accreditations as a school, summer program, and training program and all of Southport's teachers received initial and ongoing training and support in the Orton-Gillingham approach which was supervised by the school's full-time Orton-Gillingham fellow (Parent Ex. KK at p. 2). In addition, the head of school stated that all of Southport's classroom teachers were state-certified educators, had additional training in the Lindamood-Bell Visualizing and Verbalizing Program and the Southport CoLAB's Executive Function approach, and on a weekly basis received professional development which included advanced Orton-Gillingham coursework and supervised practicums, training in language acquisition and development areas, and training in areas of emphasis related to the school's specific population of students (e.g., sensory systems and processing, auditory processing) (id.).

The head of school indicated that Southport's student body was comprised of students with similar learning profiles of language-based learning disabilities and attentional issues (Parent Ex. KK at p. 2). He stated that Southport was an ungraded program where classes were organized in small groups and students were grouped by ability with respect to age, and that when they scheduled the students, they grouped them by their area of need (Tr. pp. 942-43; Parent Ex. KK at p. 2). According to the head of school, the student had two core academic instructors; one had a "Master's" in special education, completed the necessary training requirements for AOGPE classroom educator, and was working on completing associate level AOGPE training; the other teacher had a "Master's" in elementary education, achieved AOGPE classroom educator level membership and was working on completing the requirements for the associate level (Parent Ex. KK at p. 2).

While the district is correct that the parents presented no testimony at the hearing from any of the student's assigned teachers, the hearing record shows that the parents provided testimony from the Southport head of school and included December 2020 subject area reports detailing the manner in which the instruction provided by Southport was designed to meet the unique needs of the student.

The head of school testified that Southport tailored the student's instruction through use of student testing from the student application, the neuropsychological evaluation, and achievement testing "in concert with our experience doing our own testing" (Tr. p. 976). Also, the head of school testified that the student's teachers were familiar with her learning profile, used a diagnostic-prescriptive approach, could tailor instruction for the student by using visual cues and manipulatives to support her auditory learning (because of her relative strength in visual-spatial abilities), and could provide opportunities for the student to show her understanding of topics by using visual connections such as graphs, pictures, and videos (Parent Ex. KK at p. 2). The head of school indicated that the student's specific deficits in language development areas such as phonological awareness, encoding and decoding, reading comprehension, and written expression were all areas that received strong emphasis in the Southport academic program (*id.* at p. 1).

According to the head of school, as part of the student's regular instruction, her teachers would support her reading skills by encouraging her to apply various decoding strategies when reading and that when the student was unable to decode or comprehend text her teachers would "assist those words" and assess her comprehension to help her continue building her language skills (Parent Ex. KK at p. 2). The head of school stated that there were a number of specific areas of decoding and encoding that were areas of focus and that because the school used the Orton-Gillingham approach, Southport looked at the foundational building blocks of reading as identified in the National Reading Panel report from 2000 (Tr. p. 986). He identified phonemic awareness, phonics, and decoding and encoding skills as critical aspects of building a literate brain and he explained that Southport spent a substantial amount of time on these skills doing direct explicit instruction in the tutorial class which took place every day for about 51 minutes (Tr. pp. 986-87). He explained that the entire language arts block, inclusive of tutorial, was about 102 minutes and that the teachers reinforced the instruction of decoding and encoding as well as the other areas of the Orton-Gillingham approach in that literacy block (Tr. pp. 987-88). In addition to the language arts block, the head of school explained that the student had a humanities class that had a focus on literature and reading experiences (Tr. p. 988).

The student's December 2020 tutorial report stated that the class met daily and focused on the linguistic approach to reading where students were assisted in acquiring an understanding and mastery of basic word patterns and applying structural analysis to decode and encode multisyllabic words (Parent Ex. V at p. 1). The tutorial report stated that this multisensory approach to developing reading skills also incorporated active instruction in penmanship and reading fluency and that small group language instruction was also provided to foster the development of receptive and expressive skills (id.). The report indicated that the teacher used Orton-Gillingham and Wilson materials to instruct the student (id.). Areas of emphasis were identified as decoding and reading fluency, spelling and penmanship, and language skills (id. at pp. 1-3).⁸ The December 2020 tutorial report stated that the student's decoding and encoding had grown through the use of learned syllabication strategies, the sound flash card deck, simultaneous oral spelling, and passage readings and that she had begun to understand how to spell words in isolation (id. at p. 3). Reportedly, with repeated practice of a new rule or strategy followed by integration with previously learned rules and strategies, the student was becoming more confident in her reading and spelling (id.). The tutorial report also stated that direct practice, with scaffolding from commonly found phrases to leveled passages, had improved the student's fluency and that using "Classkick" the student was able to record and listen to herself read and recognize areas of improvement and growth (id.).

The student's December 2020 writing report stated that the class provided the student with daily practice with an emphasis placed on developing the writing process and applying it to a variety of narrative and expository writing tasks, penmanship and word processing skills, writing conventions, composition skills, and sentence and paragraph development (Parent Ex. W at pp. 1-2).⁹ Reportedly before initiating an independent task the student found success through verbal reminders and repetition and benefited from constructing a visual prior to brainstorming and developing ideas (id. at p. 2). The writing report also noted that the student utilized a dictation tool during the drafting phase of the writing process and that during the editing phase the student

⁸ Each of the areas of emphasis included a list of skills the student demonstrated independently and skills the student demonstrated with prompting and support (Parent Ex. V). For example, the decoding and reading fluency section indicated that the student could independently decode /cvcc/ real and pseudo-words containing initial and final consonant blends; real and pseudo-words containing VCE syllable combined with closed syllables; one-syllable real and pseudo-words containing open syllables; one-syllable real and pseudo-words with double /l/, /s/, /f/, and /z/ in the final position; and one-syllable real and pseudo-words containing the suffix /s/ (id. at p. 1). Skills the student demonstrated with prompting and support included decoding /cvcc/, /ccvc/, /ccvcc/ real and pseudo-words containing the suffix /s/; /ccvc/ real and pseudo-words containing initial consonant blends; one-syllable real and pseudo-words containing two syllable types; two-syllable real and pseudo-words containing open syllables combined with closed syllables; and two-syllable real and pseudo-words containing combined VCE (id.).

⁹ As with the tutorial report, the writing report identified areas of emphasis, as well as skills within each area that the student demonstrated independently and skills she demonstrated with prompting and support (Parent Ex. W). For example, in the area of writing conventions the report indicated that the student could independently capitalize the first word, proper nouns, and the pronoun "I" in a sentence; use a variety of nouns in a sentence; define and identify a noun in a sentence; and use correct punctuation marks to end a sentence (id. at p. 1). The report indicated that the student required prompting and support to define and identify a verb or adjective in a sentence, use adjectives within sentences, distinguish between fragments and sentences, and form and use simple verb tenses (id. at pp. 1-2).

benefited from a teacher/student conference and a checklist when revising and monitoring her writing (id.).

A December 2020 report from the student's literature class at Southport stated that a wide variety of reading strategies were introduced in the literature class to target the various levels of comprehension, and that direct instruction and contextual vocabulary activities were used in order to further develop an understanding of spoken and written text at the word, sentence, and paragraph level (Parent Ex. Y at p. 1). In addition, the report stated that various reading strategies and literacy analysis exercises were provided to enhance comprehension and retention of the text read and that a focus was placed on both the narrative and expository texts (id.). Areas of emphasis were identified as vocabulary, comprehension and reading strategies, and literary analysis (id. at pp. 1-2).¹⁰ According to the report the student was developing her comprehension skills in literature class and was encouraged to utilize learned tools such as context clues and breaking the word into known parts to identify what the word may mean (id. at p. 2). In addition, the use of Visualizing and Verbalizing helped the student to make a visual representation of the text in her mind as she read (id.). When making inferences and predictions the student was encouraged to look back in the text for evidence or support when creating oral and written responses and it was noted that identifying different literary terms helped the student to summarize a passage or text (id.). The literature report indicated that the student was working on isolating the main events within a story and recognizing their significance (id.).

Additional December 2020 subject area reports revealed that in math an emphasis was placed on computation and practical applications and in the area of social studies and science an emphasis was placed on concepts and applications, executive function, and study skills (Parent Exs. X at pp. 1-2; Z at pp. 1-2). Additionally, the reports detailed the student's skills in these subject areas (Parent Exs. X at pp. 1-2; Z at pp. 1-2).

Turning to how Southport addressed the student's social/emotional needs, the head of school stated that social/emotional learning was an important aspect of the Southport program and that faculty were trained in Responsive Classroom, which was a student-centered approach (Parent Ex. KK at p. 3). The head of school stated that Southport had a school counselor and a school psychologist on staff and provided ongoing counseling and social/emotional support services to all students through a combination of scheduled, weekly push-in sessions (small group) and short individual sessions as needed for specific situations that might arise during the school year (Tr. pp. 946-47; Parent Ex. KK at p. 3). The head of school acknowledged that the school did not provide ongoing therapeutic support or regularly scheduled individualized counseling but explained that in certain cases, on an as needed basis especially during times of transition, Southport would provide short-term individual support (Tr. pp. 945-46; Parent Ex. KK at p. 3). The head of school

¹⁰ The literature report also described the skills the student was able to demonstrate independently and with prompting and support in each of the areas of emphasis (Parent Ex. Y). For example, in vocabulary the student was able to identify common antonym and synonym pairs, identify and use context clues to determine the meaning of unknown words, and use learned vocabulary to describe events or ideas related to the text (id. at p. 1). According to the report, the student required prompting and support in order to identify common antonyms and synonyms of vocabulary words within a text, identify multiple meanings of common words, identify unfamiliar words when reading aloud or silently, and explain the meaning of figurative text used in language, based on context cues (id.).

testified that the student had not had any disciplinary issues that he was aware of and that to his knowledge the teachers had not mentioned a need for more counseling (Tr. p. 977).

With respect to 12-month services, while the April 2020 IEP included a recommendation of two three-hour sessions per week of resource room in a group of five "to support the retention of reading skills" (Dist. Ex. 4 at pp. 1, 2, 11), the student began attending Southport in September 2020 (Tr. p. 877; see Parent Exs. R; V; W; X; Y; Z; JJ; KK at p. 1). The parents informed the district that they would not send the student to virtual 12-month services as they did not feel it would be beneficial to the student (Dist. Ex. 33; see Dist. Ex. 35 at pp. 1-3). At the impartial hearing the parents further explained that at that time "COVID had hit" and the online learning was still in its growing phase and that he was not "seeing" that the taped instruction and the live instruction "as minimal as it was," was helping the student "all that much" (Tr. p. 877).

Regarding the student's progress at Southport, while the head of school acknowledged that the January 2021 testing revealed some declines in the areas of vocabulary and listening comprehension, he also stated that since the beginning of the 2020-2021 school year the student was making "solid" academic progress which was substantiated by the recent achievement testing (Tr. pp. 956-57; Parent Ex. KK at p. 3; see Parent Exs. R; JJ).¹¹ The December 2020 tutorial report stated that the student's decoding and encoding had grown, that her fluency had improved and that she was becoming more confident in her reading and spelling (Parent Ex. V at p. 3). In addition, the head of school noted that the student was making social connections, learning to advocate for herself academically and personally while in school, and that she was an empathetic and caring friend to her classmates (Parent Ex. KK at p. 3).

Overall, while the parents' failure to present testimony from a teacher of the student at Southport could have resulted in a finding that the hearing record lacked evidence detailing the specifics of the services provided to the student and how those services addressed the student's unique special education needs (see Hardison, 773 F.3d at 385 [2d Cir. 2014]), here, other evidence in the record, including the subject specific reports, identified with some degree of detail the specific skills the student was working on, how her areas of need were being addressed, and the extent to which the student was making progress (Parent Exs. V-Z). Additionally, Southport's head of school offered testimony explaining how the student's specific deficits in language development were addressed by the structure of the program at Southport, the reading instruction methodologies utilized by the school and the qualifications, experience and focus of the teachers in the areas of reading and language-based special education needs (Parent Ex. KK at pp. 1-2). Under these circumstances, the hearing record, although not ideal, includes sufficient information to support the IHO's finding that Southport provided specially designed instruction to address the student's unique needs (see Bd. of Educ. of Wappingers Cent. School Dist. v D.M., 831 Fed. App'x 29, 31 [2d Cir. 2020] [acknowledging an SRO's statement that the standard for an appropriate unilateral placement had become less demanding but reiterating that the appropriate analysis is the "totality of the circumstances" standard]; W.A. v. Hendrick Hudson Cent. School Dist., 927 F.3d 126, 148-49 [2d Cir. 2019] [indicating that "a resource that benefits an entire student population can constitute special education in certain circumstances" but cautioning that features such as small

¹¹ As the hearing took place in February 2021, the student was only in attendance at Southport for half of the school year at the time of the hearing and her progress is only assessed through that period.

class size might be the sort of feature that might be preferred by parents of any child, disabled or not], cert denied, 140 S. Ct. 934 [2020]).¹²

C. Equitable Considerations

Turning to a review of whether the parents' claim is supported by equitable considerations, the district asserts that the parents signed a contract before placement and therefore had no intent to keep the student in district schools.

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. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [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"]).

¹² To the extent that the district asserts that the IHO did not address the question of whether Southport was an overly restrictive placement for the student, it is well settled that although the restrictiveness of a parent's unilateral placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 105 [2d Cir. 2000]; Walczak, 142 F.3d at 122; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 830, 836-37 [2d Cir. 2014] [noting "while the restrictiveness of a private placement is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]). In this instance, the district recommended placing the student in an ICT classroom; as discussed above, it is possible that such placement may have met the student's needs with the provision of additional supports for reading. However, the parents were looking for a more intensive program for the student (Tr. pp. 821-22) and chose to place the student in a school with students who had similar learning profiles of language-based learning disabilities and attentional issues (see Parent Ex. KK at p. 2). Additionally, while the student does have a long commute to Southport, the hearing record does not support finding that the distance of the commute impacted the appropriateness of the unilateral placement (see Tr. pp. 826-27, 834).

The district does not point to any evidence showing that the parents were uncooperative in the development of the student's program. Rather, the district contends that equitable considerations warrant a significant reduction in relief because the parents agreed to enroll the student at Southport for the 2020-21 school year and paid a deposit prior to the CSE convening to develop the student's program for the 2020-21 school year. As a factual assertion, this chronology of events is correct, the parents agreed to enroll the student at Southport on or about April 20, 2020 and the CSE convened on April 22, 2020 (Dist. Exs. 4; 52). However, the district references no legal citations in support of its argument, and contrary to the district's assertion, even if the parents had no intention of placing the student in the district's recommended program, it is well-settled that it would not be a basis to deny their request for tuition reimbursement (see E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]). Accordingly, equitable considerations do not weigh against the parents' request for tuition reimbursement.

VII. Conclusion

Based on the above, I agree with the IHO that the district failed to offer the student a FAPE for the 2020-21 school year, Southport was an appropriate unilateral placement for the student's 2020-21 school year, and equitable considerations favor a full award of tuition reimbursement and, accordingly, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED

Dated: **Albany, New York**
 July 9, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER