



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-081

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Liz Vladeck, General Counsel, attorneys for petitioner, by Liz Vladeck, Esq. and Ezra Zonana, Esq.

Law Office of Noelle Boostani, attorneys for respondents, by Noelle Boostani, 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 for the 2020-21 and 2021-22 school years and ordered it to reimburse the parents for their daughter's tuition costs at the Churchill School & Center (Churchill) for the 2021-22 school year. The parents cross-appeal from the IHO's denial of their request for reimbursement of the costs of tutoring and an independent educational evaluation (IEE). The appeal must be dismissed. The cross-appeal must be sustained in part.

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 speech difficulties, beginning in preschool, and received private speech-language therapy for a year when she was three years old (Parent Ex. D at p. 1). When the student entered kindergarten (October 2018) her teacher expressed concerns regarding her speech, which prompted the student's mother to refer her for an evaluation of her articulation

skills (Parent Ex. D at p. 2; Dist. Ex. 1 at pp. 1-2). The CSE conducted evaluations and observations of the student and found her eligible to receive special education as a student with a speech or language impairment (Parent Ex. D at p. 2). For first grade (2019-20), the student received two 30-minute sessions per week of group (3:1) speech-language therapy and "at-risk SETSS" (Parent Ex. D at p. 2; Dist. Exs. 9 at p. 1; 10 at p. 2). The student initially attended a general education classroom with integrated co-teaching services (ICT)¹; described by the district as an "unofficial experience"; however, midway through the 2019-20 school year she was moved to a general education classroom (Tr. p. 35; Parent Ex. D at p. 2; Dist. Exs. 9 at p. 1; 10 at pp. 2, 3).² In May 2020 the parents sought a private neuropsychological evaluation of the student, which yielded the following diagnoses: specific learning disorder with impairment in reading (dyslexia, fluency, oral reading); specific learning disorder with impairment in mathematics (fluent calculation); specific learning disorder with impairment in written language (spelling); attention deficit hyperactivity disorder (ADHD) (inattentive type); and a language disorder (Parent Ex. D at p. 8).

On June 18, 2020, the CSE convened for the student's annual review and changed the student's classification from speech or language impairment to learning disability (Dist. Ex. 10 at pp. 1, 21). The student was found to have "variable cognitive profiles," "difficulty sustaining attention," and was "performing below expectations in the areas of reading and writing" (*id.* at p. 8). For second grade (2020-21) school year, the June 2020 CSE recommended the student attend a general education classroom and receive three periods per week of direct, group SETSS in English language arts (ELA); two periods per week of direct, group SETSS in math; and two 30-minute sessions per week of speech-language therapy (3:1) (*id.* at p. 16). The student was fully remote for the 2020-21 school year (Dist. Ex. 9 at p. 1).

The CSE reconvened on October 30, 2020, to review the results of the May 2020 private neuropsychological evaluation (*see* Dist. Ex. 5).³ After reviewing the evaluation report, the October 2020 CSE did not make any changes to the student's recommended program or related services; however, the CSE added testing accommodations and special transportation to the IEP (*see* Parent Ex. D at p. 7; Dist. Ex. 5 at pp. 19, 21, 23).

¹ 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>).

² SETSS is not defined in the State continuum of special education services (*see* 8 NYCRR 200.6)

³ Two IEPs were created as a result of the October 2020 CSE meeting. Parent Exhibit B was developed during the October 2020 CSE meeting and provided to the parent (Tr. p. 41; *see* Parent Ex. B). District Exhibit 5 contains an amendment that was added without a CSE meeting and reflects the addition of special transportation which was discussed at the October 2020 CSE meeting but not included in the IEP developed at the meeting (Tr. p. 40; *see* Dist. Ex. 5). For purposes of this appeal, all citations to the October 2020 IEP shall be to District Exhibit 5 which represents the most complete version of the October 2020 IEP.

The parents disagreed with the recommendations contained in the October 2020 IEP which was also the operative IEP for the first two months of the 2021-22 school year, and, as a result, on June 23, 2021, and again on July 19, 2021, notified the district of their intent to unilaterally place the student at Churchill for the 2021-22 school year unless the district recommended Churchill or otherwise offered a suitable public placement that addressed their concerns with the IEP (see Parent Exs. G, J).⁴

On November 17, 2021, the CSE convened for the student's annual review and continued to recommend the student attend a general education classroom with SETSS for ELA and math and receive speech-language therapy as a related service for the 2021-22 school year (see Parent Ex. C). At the time of the November 2021 CSE meeting the student was in the third grade attending Churchill (Parent Ex. C at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice, dated September 10, 2021, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 and 2021-22 school years (see Parent Ex. A).

Initially, the parent made an "emergency" request for special transportation to and from Churchill as a result of the mother's disability and the student's disabilities.

Next, the parents made several general and nonspecific allegations of a denial of FAPE pertaining to both the 2020-21 and 2021-22 school years without reference to a specific IEP. The parents generally alleged that the district failed to sufficiently evaluate the student; failed to implement the student's IEPs and remote learning program; failed to report IEP progress towards goals; shifted the burden of monitoring the implementation of services to the parents; limited its recommendations to preexisting services based upon district policies and not the student's needs; failed to provide the parents with meaningful participation; and failed to recommend appropriate services in terms of class size, functional grouping, goals, executive functioning, related services, classroom accommodations, testing accommodations, and a remote learning program. Specifically with respect to the October 30, 2020 IEP, the parents alleged that the CSE failed to recommend assistive technology, occupational therapy (OT), and a 1:1 aide for the student.

As declaratory relief, the parents sought a finding that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years and that Churchill was an appropriate placement for the student for the 2021-22 school year. The parents also sought both reimbursement and direct funding of the tuition at Churchill for the 2021-22 school year. Finally, the parents requested reimbursement for the costs of 1:1 tutoring for the student and reimbursement for a neuropsychological IEE obtained by the parents.

⁴ The 10-day notice "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Here, the district did not attempt to reconvene the CSE or evaluate the student prior to the parents' unilateral placement of the student at Churchill in September 2021.

B. Impartial Hearing Officer Decision

After two prehearing conferences, an impartial hearing convened on April 7, 2022, and concluded on April 20, 2022, after two days of proceedings (Tr. pp. 1-234). In a decision dated May 24, 2022, the IHO determined that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years, that Churchill was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for tuition reimbursement (IHO Decision at pp. 13, 15). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Churchill for the 2021-22 school year (id. at p. 16).

At the outset, the IHO held that district failed to meet its burden of proof with respect to its recommendations for the 2020-21 and 2021-22 school years as the student required small classes, specialized reading instruction, and speech-language therapy (IHO Decision at p. 13). The IHO noted that the testimony of the student's SETSS provider was consistent with the recommendations of the neuropsychologist, that the student required more special education teacher support than the recommended program provided (id.). Although the IHO recognized that the parents did not believe ICT "was a viable option" and the parents did not disagree with SETSS, the IHO continued to find that the district failed to prove the appropriateness of the recommendations for either school year (id.).

Next, the IHO reviewed the parents' request for reimbursement with respect to the tutoring services obtained by the parents, finding that there was no evidence, other than the mother's testimony regarding tutoring and the invoices for the tutoring services, to show the appropriateness of the tutoring (IHO Decision at pp. 13-14). Additionally, the IHO held that there was "no basis for an award of reimbursement" for the summer 2020 as there was no recommendation for 12-month services (id. at p. 14). The IHO further held that even if she found the tutoring appropriate, equitable considerations warranted a denial of relief because the parents failed to place the district on notice prior to June 23, 2021 that they disagreed with the program the student was receiving and they intended to privately secure tutoring services for the 2020-21 school year and seek reimbursement (id.). Therefore, the IHO denied the parents' request for reimbursement of tutoring services (id. at p. 15).

Then, the IHO discussed the appropriateness of Churchill, holding that it "met the student's academic and attentional needs, by providing a small class with a high teacher to student ratio" (IHO Decision at p. 15).⁵ In making this finding, the IHO relied on the testimony of the student's teacher at Churchill who used the Wilson methodology with the student which was the "type of reading instruction recommended by the private neuropsychologist" (id.). The IHO also relied on the fact that the student received speech-language therapy and OT services at Churchill which "the student required" (id.). In addition, the IHO found the student "made significant progress in reading and progressed in her understanding of grammar" (id.). It was for these reasons that the IHO determined that the parents met their burden of demonstrating the appropriateness of Churchill for the 2021-22 school year (id.). Next, the IHO evaluated equitable considerations with respect to the unilateral placement of the student at Churchill and found that the parents cooperated

⁵ The student's ELA teacher at Churchill testified that the student's class size consisted of ten students and two teachers – one special education teacher and "an assistant teacher" (Tr. pp. 181-82).

with the district by participating in CSE meetings and notifying the district of their intent to place the student at Churchill (id.). The parents offered testimony that they were unable to pay the entire Churchill tuition which was not challenged by the district (id.). Accordingly, the IHO found the parents were entitled to tuition reimbursement for any amounts paid and direct payment by the district to Churchill for the remaining unpaid tuition (id.).

In connection with the parents' request for an IEE, the IHO held that there was no evidence in the hearing record that the parents requested an IEE prior to obtaining it, and therefore, denied the parents' reimbursement of the IEE costs (IHO Decision at p. 16).

As relief, the IHO ordered the district to reimburse the parents for any tuition paid and for the district to directly fund the remainder of the tuition at Churchill in the 2021-22 school year (IHO Decision at p. 16). Lastly, the IHO ordered the district to continue providing special transportation to and from Churchill for the 2021-22 school year (id.).

IV. Appeal for State-Level Review

The district appeals the IHO's decision that it failed to offer the student a FAPE for the 2020-21 and 2021-22 school years and seeks a reversal of the IHO's directive that the district fund the student's tuition for the 2021-22 school year. It should be noted that the district did clarify that it was not appealing the findings of the IHO that denied the parents' request for reimbursement for tutoring and a neuropsychological IEE, that Churchill was appropriate for the 2021-22 school year, that the equities favored the district for the 2020-21 school year, and that the equities favored the parents for the 2021-22 school year (Req. for Rev. at FN1).

In support of its appeal, the district argues that the recommendation for SETSS and speech-language therapy in the general education setting was appropriate as it offered the student multisensory instruction for decoding and a supportive learning environment designed to keep the student on task (Req. for Rev. at ¶ 9). The district also points to the fact that in first grade the student was removed from a general education classroom with ICT services to a general education classroom with SETSS because the parent thought it "was a better fit" for the student (id. at ¶ 6). The district argues that removing the student from the ICT class was beneficial to the student because she made progress as was recorded in the October 2020 IEP. The district further argues that the parents did not object to the program recommended in the October 2020 IEP at the time of the October 2020 CSE meeting.

Next, the district argues that the IHO's conclusion that the student required more special education support than the district's recommended program was not supported by the evidence in the hearing record. Again, the district argues that the student made progress during the 2020-21 school year and contends that the IHO "was imposing way too great of a burden on the [district] than the provision of a FAPE requires" (Req. for Rev. at ¶ 8).

In connection with both school years at issue, the district argues that it offered the student a FAPE for the following reasons: the CSEs were comprised of individuals familiar with the student and qualified to assess the student and relied upon relevant information including the private neuropsychological evaluation; annual goals were developed to meet the student's areas of need; management needs were similar to the recommendations by the private

neuropsychologist; the present levels of performance included in the IEP were based on sufficient testing information; the recommendation for SETSS offered the student a multisensory program to address the student's dyslexia; and the recommended program provided for the student's "continued progress" (Req. for Rev. at ¶¶ 9-10).

The parents submitted an answer generally denying the material allegations contained in the district's request for review. The parents raised deficiencies in the request for review alleging that the district failed to properly distinguish its claims and failed to cite to the hearing record, making it difficult for the parents to respond to the claims contained therein.

The parents argue that the evidence in the hearing record does not support a finding that the student made adequate progress with the district's recommendation of SETSS and speech-language therapy in a general education setting and the October 2020 IEP recommendations were not consistent with the private neuropsychological evaluation which recommended "a small student/teacher ratio and intensive academic instruction" (Answer at ¶ 8). In connection with the 2021-22 school year, the parents contend that the CSE had the opportunity to assess the student's progress and failed to do so.

In their cross-appeal, the parents argue that the IHO did not render findings for all issues raised in their due process complaint notices for both the 2020-21 and 2021-22 school years, to wit, whether the student's remote instruction was appropriate; whether the student missed "numerous" SETSS sessions due to provider absence; whether the failure to recommend assistive technology, OT, and a 1:1 aide was a denial of FAPE; whether the district implemented appropriate methodologies and therapeutic interventions; whether the district failed to implement portions of the IEP; whether the district failed to amend the IEP when requested by the parents; whether the CSE failed to report IEP progress; whether the district limited its recommendations based on "illegal" policies and not the student's needs; and whether the district's failure to recommend certain services (class size, functional grouping, goals, executive functioning, related services, classroom accommodations, testing accommodations) was a denial of FAPE.⁶

The parents also seek a reversal of the IHO's denial of reimbursement for private tutoring. The parents argue that they did not have the burden of proving the appropriateness of the services (Answer at ¶ 11). The parents request an order for the district to reimburse them for tutoring costs that they incurred for the 2020-21 school year. Lastly, the parents argue that they had no duty to notify the district of their disagreement with its evaluation before obtaining an IEE and since the district failed to defend its evaluation, they are entitled to reimbursement of the neuropsychological evaluation in the amount of \$3,000.

In an answer to the parents' cross-appeal, the district generally contends that the issues raised by the parents are not supported by the hearing record and the cross-appeal should be denied in its entirety.

⁶ Given that the parents were not aggrieved by the IHO's FAPE finding, I decline to consider the parents' contention that the IHO should have ruled on alternate grounds with respect to the denial of a FAPE to the student for the 2020-21 and 2021-22 school years.

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]).⁷

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).

⁷ 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).

VI. Discussion

A. Preliminary Matter - Scope of Review

For the 2020-21 school year, the district developed an initial IEP on a June 18, 2020 and a finalized October 30, 2020 IEP which reflected the CSE's consideration of the May 2020 private neuropsychological report at the October 2020 CSE meeting as well as the addition of transportation for the student (see Dist. Exs. 5, 10). In their due process complaint notice, the parents' claims for the 2020-21 school year pertain to the October 2020 IEP (Parent Ex. A at pp. 4-6). At the impartial hearing, the district elected to not defend the June 2020 IEP and instead defended the October 2020 IEP, District Exhibit 5, as the operative IEP for purposes of the parents' claims concerning the 2020-21 school year (Tr. pp. 30, 40-41).

On appeal the district raises for review that the June 2020 IEP recommended program offered the student a FAPE, but then primarily argues that the district offered the student a FAPE with respect to the October 2020 IEP (Req. for Rev. at ¶¶ 5-10). In their answer, the parents argue that the June 2020 IEP should not be reviewed in this appeal as the district failed to "defend" the June 2020 IEP and failed to raise any specific claims in the request for review pertaining to the June 2020 IEP (Answer at ¶ 2). As such, I find that this claim for the June 2020 IEP is outside the scope of my review because it was not properly raised below and I therefore decline to address it (34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii], 279.12[a]; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Student with a Disability, Appeal No. 08-020; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 06-139).

Accordingly, for the purposes of this appeal, only the final version of the October 2020 IEP as reflected in District Exhibit 5 shall be reviewed and discussed in connection with the parents' claims pertaining to the 2020-21 school year. Likewise, the parents' claims for tutoring reimbursement for summer 2020 will not be further addressed herein as the June 2020 IEP is not under review and any claims pertaining to summer 2020 services shall be precluded.

B. October 30, 2020 IEP

On appeal, the district argues that the October 2020 IEP recommendations were appropriate and offered the student a FAPE for the 2020-21 school year. First, the district argues that the October 2020 CSE members were "qualified to assess the [s]tudent's needs and deficits and create an appropriate program because they worked closely with the [s]tudent at a school the [s]tudent had attended since [prekindergarten]" (Req. for Rev. at ¶ 9). Second, the district argues that the October 2020 CSE had "an abundance of material" with respect to the student's needs including the private neuropsychological evaluation (id.).⁸ Third, the district argues that the October 2020

⁸ In order to satisfy its obligation to consider the private evaluation, the CSE was not required to simply adopt the recommendations of the neuropsychologist (J.C.S., 2013 WL 3975942, at *11 [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. July 25,

annual goals were appropriate and developed based upon the student's present levels of performance and progress. Fourth, the district argues that the management needs "dovetailed" with the recommendations made by the private neuropsychologist for a multisensory instruction to address the student's dyslexia (*id.*). Fifth, the district argues the October 2020 present levels of performance contained sufficient "cognitive data and other testing data" (*id.*). Sixth, the district argues recommendation for SETSS provided "multisensory programs that would address the [s]tudent's dyslexia diagnosis, enable the [s]tudent to develop encoding and decoding skill[s], a supportive learning environment designed to keep the [s]tudent on task, and the [speech-language therapy] recommendation addressed the [s]tudent's reading, writing and language based deficits" (*id.*).

Moreover, in support of its arguments the district relies on the fact that during the student's first grade year (2019-20 school year) the student was moved from an ICT class to a general education class and the student made progress (Req. for Rev. at ¶ 10; *see* Dist. Ex. 5 at pp. 3-4). The district also references the October 7, 2020 social history update wherein the parents were interviewed because of the recently completed private neuropsychological evaluation and stated that "the general education class had more structure and was a better fit for [the student] than the ICT class had been" (Req. for Rev. at ¶ 10; *see* Dist. Ex. 9 at pp. 1, 5). Next, the district relied on the testimony of the student's SETSS provider and speech-language therapist who each testified about the student's progress in the district's recommended program. Specifically, the district notes that although the SETSS provider testified that an ICT class would have benefitted the student, given the parents' position that the ICT classroom the student previously had attended had not been appropriate for her s, the SETSS recommendation did ultimately afford the student with an opportunity to make academic progress.

A review of the October 2020 IEP indicates that the student exhibited deficits in her reading; writing, including spelling; math and math fluency; memory, attending and following directions; organization; and functional communication (Dist. Ex. 5 at pp. 1-9). The student's strengths and weaknesses were identified based upon the results of the private neuropsychologist's evaluation together with teacher and parent reports (*see* Dist. Ex. 5 at pp. 1-8).⁹ Specifically, the present levels of academic performance indicated that the student decoded slowly, but understood what she read, could retell a story in the expected order, and could answer literal questions, but had to work on analyzing the information she had read so that she could respond to inferential questions (Dist. Ex. 5 at pp. 3-4). Additionally, the IEP indicated that by the end of the 2019-20 school year the student could read 22 words per minute; however, the IEP noted that students at the end of first grade should be able to read 72 words per minute (*id.* at p. 4). The October 2020 IEP stated that the student read four out of 20 nonsense words describing that she sounded out each letter instead of reading the entire word automatically and indicated that by the end of first grade students should be able to read 50 nonsense words (*id.*). Finally, the IEP indicated that in the beginning of second grade a running records assessment indicated that the student's

2005]; *G.W. v. Rye City Sch. Dist.*, 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; *C.H. v. Goshen Cent. Sch. Dist.*, 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; *T.B. v. Haverstraw-Stony Point Cent. Sch. Dist.*, 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]).

⁹ The private neuropsychologist's report was reviewed at the October 2020 CSE meeting but he did not participate in the meeting (Tr. p. 167; Parent Ex. D; Dist. Ex. 5 at pp. 1-3).

comprehension and retell were excellent, but her word accuracy did not meet the requirements to be considered a level I reader (id.).

In writing, the October 2020 IEP indicated that "with support" the student made progress over the course of the 2019-20 school year (Dist. Ex. 5 at p. 4). The IEP indicated that the student could write using sentences; however, she needed to improve encoding words correctly as well as recalling basic sight words in her writing (id.). The IEP noted that the student did not always integrate strategies that were taught and that she needed to include more details in her written work (id.). On dictation tasks, the student could recall the sentences, but she sounded out each word rather than automatically recalling them from memory (id.). Since beginning second grade (2020-21), the teacher noted that the student could write with some stamina, had some understanding of sentence structure, was spelling phonetically and noted that she needed to work on her handwriting (id.).

With regard to math, the teacher report contained in the October 2020 IEP indicated that the student made steady progress during the 2019-20 school year; however, the teacher report indicated that the student exhibited scattered skills throughout the school year and required teacher support to demonstrate many grade level skills (Dist. Ex. 5 at p. 5).

As memorialized in the October 2020 IEP, the student's first grade teacher reported that the student had difficulty remembering information and often required reminders of the expectations of a task (Dist. Ex. 5 at p. 5). Additionally, the October 2020 IEP indicated that the student became easily distracted and benefitted from reminders to attend to instruction (id.). The IEP stated that "consistent repetition and reminders [we]re required for [the student] to learn, understand and complete her assignments" and noted that it took her a longer amount of time to understand information taught (id.). Finally, the IEP stated that it was "useful to support [the student] individually or in small groups to ensure that she [w]as able to manage the necessary tools and practice the taught strategies using manipulatives, and visuals" (id.).

Regarding social development, the October 2020 IEP indicated that the student enjoyed participating in school activities, responded well to her service providers and was eager to engage with the teacher and peers (Dist. Ex. 5 at p. 6). The IEP further indicated that according to the results of a behavior rating scale the student received ratings in the uppermost part of the at-risk range, approaching clinical significance for attention problems and the clinically significant range for learning problems (id.). In the area of attention problems, the following behaviors were noted: difficulty sustaining attention during classwork, easily distracted; made careless mistakes; regularly has difficulty concentrating; and sometimes listens carefully to directions (id.). In the area of learning problems, the student experienced difficulties with the following: reading, spelling, and math; keeping up with the pace of the classroom; she performed poorly on school assignments and did not always complete tests (id.). In the area of adaptive skills, the October 2020 IEP stated that the student received scores consistent with her peers in adaptability, social skills, and leadership, and scored in the at-risk range in study skills and functional communication (id.). The IEP noted that the student "c[ould] sometimes stay on task"; sometimes turn[ed] her work in on time"; and that organization was an area of considerable difficulty (id.). In functional communication, the IEP reported that the student occasionally had difficulty presenting her ideas and personal narratives in a clear manner and stated that she was "sometimes able to respond to

questions appropriately" (id. at pp. 6-7). Finally, the IEP indicated that at times the student had difficulty tracking down the information she needed (id. at p. 7).

According to the October 2020 IEP, the CSE discussed concerns regarding the student's social emotional development and decided that because the service providers and teachers had not perceived that the student was anxious during their sessions, determined that school counseling was not needed and recommended that the family explore community-based support (Dist. Ex. 5 at p. 7). Additionally, the October 2020 IEP reported that the student would be all remote for the 2020-21 school year with individualized attention from her mother during lessons including redirecting her attention during instruction (id.).

The October 2020 IEP identified the following resources and strategies to address the student's management needs: literacy instruction using a multisensory, evidence based approach; deliver information in smaller units or portions; use multimodal presentation of information (visual, tactile, and auditory); teach chunking strategies; reduce distractions going on around her by having her work in a quiet area with limited visual stimuli; during whole group instruction, ensure she is sitting between two students who are behavioral models; ask her to repeat instructions and check her understanding; use a study carrel if necessary; and read test directions and assessment questions to her (Dist. Ex. 5 at p. 9). The October 2020 CSE recommended the student attend a general education classroom and receive SETSS three periods per week in ELA and two periods per week in math, along with two thirty-minute sessions weekly of speech-language therapy in a small group (3:1) (id. at pp. 9, 19). The IEP stated that the parents had observed progress during the beginning of the 2020-21 school year with the support of SETSS, speech, supportive teachers and the individualized attention of her mother during lessons (Dist. Ex. 5 at p. 6; see Dist. Ex. 9 at pp. 1-2).

The special education teacher who provided the student's SETSS during the 2020-21 school year and participated in the October 2020 CSE meeting, testified it was her impression that an ICT classroom was a better fit for the student than a general education class because of her difficulties with decoding, but she did not believe that the parents had agreed to an ICT setting (Tr. pp. 116, 121). She further testified on cross-examination that the October 2020 IEP indicated the student was "far below grade level in writing and math, and at an end of kindergarten level in reading" which was not consistent with a student who would benefit from SETSS because the student "belonged in an ICT" (Tr. pp. 120-21). The SETSS provider testified that since ICT was not an option the SETSS was appropriate for the student because she saw growth in the student (Tr. p. 117).

The parent obtained a private neuropsychological evaluation in May 2020 which was reviewed by the October 2020 CSE (Parent Ex. D at p. 1; see Parent Ex. B at pp. 1-2). The results of the evaluation indicated that the student "fac[ed] challenges with dyslexia, an attention deficit disorder (inattentive presentation), and some language weaknesses" (id. at p. 7). The evaluator reported that the student demonstrated significant variability in her Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) scores and opined that her scores were similar to those attained in the 2018 psychoeducational evaluation (id.). The scores contained in the May 2020 neuropsychological evaluation indicated that the student demonstrated high verbal abilities (77th percentile), borderline working memory (4th percentile) and low average processing speed (9th percentile) (id.). The evaluator opined that the student's verbal abilities had improved, and working

memory had remained stable, however, she displayed weaker fluid reasoning and processing speed abilities when compared to the administration of the Wechsler Preschool & Primary Scale of Intelligence (WPPSI) in 2018 (Parent Ex. D at p. 9; see Dist. Ex. 1 at p. 9).

With regard to academics, the May 2020 neuropsychological evaluation indicated that the student displayed variability in her academic abilities with scores ranging from extremely low to average (Parent Ex. D at p. 7). The evaluator reported that the student displayed impaired reading fluency and oral fluency, problems pronouncing certain words during reading tasks and noted that she met the criteria for dyslexia (id.). He further indicated that the student's math fluency was impaired (8th percentile), and her spelling abilities (13th percentile) were "well below expectation based on her verbal intelligence" (id.).

The May 2020 neuropsychological evaluation report indicated that the student had a history of "problems with concentration, observed by her teachers, parents and evaluators" (Parent Ex. D at p. 7). However, the evaluator indicated that "although [the student] exhibit[ed] some restlessness and mild hyperactivity (i.e., fidgeting and standing during tests) she predominantly present[ed] with the inattentive type of ADHD" (id.). He specifically noted that she had difficulty following directions, made careless mistakes and needed redirection (id.). Furthermore, the evaluator reported that the student's performance was impaired on tests of working memory and sustained attention and noted that her overall performance on the Conners' Kiddie Continuous Performance Test – Second Edition (K-CPT-2) "indicated a high likelihood of an attention deficit disorder (inattentive presentation)" (id.).

The evaluator indicated that the student displayed some expressive language weaknesses which were consistent with her history of speech impairment and noted that she exhibited "relative weakness in expressive vocabulary and confrontation naming" and opined that her "[l]ow [a]verage score in these areas were well below expectation for a child with [h]igh [a]verage verbal intelligence" (Parent Ex. D at p. 7). He indicated that the student's phonemic abilities were a strength and that her memory abilities were intact (id.).

Additionally, the evaluator made several recommendations including: intensive academic instruction in reading and spelling using Orton Gillingham or Wilson Method; continued speech therapy three times per week for articulation problems; preferential seating in the front of the classroom; refocusing prompts; checking for understanding; and a classroom with a small student to teacher ratio to minimize distractions (id.). The evaluator also recommended several testing accommodations (id.).

In his testimony, the neuropsychologist who administered the neuropsychological evaluation discussed the significant discrepancies in the student's cognitive abilities, specifically noting that her verbal intelligence was above average, but her other abilities such as processing speed and working memory were much lower (Tr. pp. 155, 160-61). He further explained that the student's academic difficulties in reading writing and mathematics were related to multiple learning disabilities, as well as "significant attention issues" (Tr. pp. 161-62). The neuropsychologist described that the student had articulation issues and her receptive and expressive vocabulary were much lower than her verbal intelligence (Tr. p. 162). To clarify his recommendation for intensive academic instruction, the neuropsychologist explained that instruction "can't be tutoring once a week" in reading and writing skills, rather it should be

instruction using a reading instruction method such as Orton-Gillingham or Wilson several days per week provided by a special education instructor trained in these methodologies (Tr. pp. 163-64). The neuropsychologist explained that although he did not specify a specific number when he recommended the student for a classroom with a small student-to-teacher ratio, he felt 12 students or less would have been appropriate given her attention deficits and to give her more individualized attention (Tr. pp. 164-65). He further explained that his recommendation for speech-language therapy was three times per week because of the student's articulation difficulties and weaknesses in "her receptive and expressive vocabulary" and word retrieval (Tr. pp. 165, 170-71). The evaluator could not recall being asked to participate in any CSE meetings for the student and confirmed that he did not specify a recommended class size for the student in his neuropsychological report (Tr. p. 167).

In connection with the recommendations by the neuropsychologist, the district argues that he recommended a "small student to teacher ratio" without more specifics (Req. for Rev. at ¶ 12). The district claims that the October 2020 "management needs" accommodated the student's need for minimal distractions by directing the student's teachers and providers to reduce distractions, and accounted for the student's dyslexia diagnosis by requiring the delivery of information in smaller units, multimodal presentation, chunking, and that the student be "seated next to behavioral models" (*id.*). The district contends that the further recommendations of the neuropsychologist were borne out in the October 2020 IEP by offering daily SETSS and the recommendation for speech-language therapy two times per week "was close" to the neuropsychologist's recommendation for three times per week (*id.*).

The school psychologist reported that in developing the student's October 2020 IEP, the CSE used the parent's private neuropsychological evaluation, assignments and past school records, past IEPs, information about the student's then-current performance in class and with her related services and SETSS provider (Tr. pp. 30, 31-32, 52). She indicated that even though the student was making progress she had deficits in specific areas of reading, writing, and math (Tr. p. 30). The school psychologist recalled that the October 2020 CSE recommended that the student receive SETSS as well as speech-language therapy (Tr. p. 30). In terms of how the SETSS services addressed the student's needs, the school psychologist reported that the student was receiving intervention for literacy, which targeted her encoding and decoding skills, and for mathematics, which targeted her math fluency and problem-solving skills (Tr. pp. 30-31). The school psychologist opined that the program recommended by the October 2020 CSE was appropriate because the student needed a program in which she could use multisensory skills to further develop her encoding and decoding, as well as a supportive environment that would keep her on task and help her make progress (Tr. p. 31). According to the school psychologist, the student's speech therapist and SETSS provider attended the October 2020 CSE meeting (Tr. p. 31; *see* Parent Ex. B at pp. 17-18). She testified that the October 2020 CSE recommended the same services as those recommended in the student's prior IEP, which was developed at the end of the 2019-20 school year (Tr. p. 33). In terms of the student's social/emotional development, the school psychologist stated that the student was "a very hard worker" who "tried everything that [] her teachers and intervention specialists would give her" (Tr. p. 33).¹⁰ According to the school psychologist, the

¹⁰ The school psychologist recalled that the student's mother broached the topic of the student having some anxieties regarding a family member's health and whether the CSE would consider in-school counseling but

CSE discussed why a general education class with no services was not appropriate for the student (Tr. p. 35). She noted that the student had an "unofficial experience" in an ICT class and the student's mother felt strongly that it was not an appropriate placement for the student (Tr. p. 35). The school psychologist reported that the CSE also discussed and rejected the possibility of a smaller-sized class because it seemed too restrictive (Tr. p. 35).

The school psychologist testified that she believed that the student's present levels of performance as reflected on the October 2020 IEP were accurate at the time of the meeting (Tr. pp. 42-42). She acknowledged that the student reading proficiency was at an end of kindergarten level and that the student was performing "far below grade level" in some areas of writing and math (Tr. pp. 42-44). The school psychologist reported that the student's progress toward her goals was discussed at the CSE meeting, that the student made significant progress in reading with respect to her ability to identify letters and letter sounds and was able to identify beginning, middle and ending sounds in words (Tr. pp. 44-45; see Parent Ex. B at pp. 3-5). She further reported that the student had made some progress in her sight word identification but continued to require further development in that area (Tr. p. 45). The school psychologist reported that the student's IEP did not mandate a class size and the student was eligible to attend a general education class which could have as many as 32 students in it (Tr. p. 45).

The school psychologist testified that the IEP recommendations were consistent with the neuropsychologist's evaluation report that recommended intensive academic instruction in reading and spelling in that the management needs indicated that the student required a "multisensory, evidenced reading program" which was similar to the report's assertion that the student would benefit from an Orton-Gillingham type program (Tr. p. 47). The school psychologist confirmed that the student had a history of difficulty with attention and concentration and there were times that she needed one-on-one attention to stay on task (Tr. pp. 50-51). With regard to the CSE's recommendations, the school psychologist explained that the student was working with a speech provider and a SETSS provider who were targeting her reading and writing development (Tr. pp. 52-53). She indicated that the CSE recommendation of SETSS for math to further the student's problem-solving and calculation skills seemed appropriate as well (Tr. p. 53).

The student's speech-language pathologist explained how the October 2020 CSE decided to recommend two 30-minute sessions of speech per week for the student (Tr. p. 67). She indicated that at the time of the meeting the student was already being pulled out of the classroom for "at-risk" SETSS and there were concerns from the family about placing the student in an ICT class (Tr. p. 67).¹¹ The student was also being pulled out for one-on-one Reading Recovery services (Tr. p. 68). According to the speech-language pathologist, the CSE determined that between the Reading Recovery, SETSS and speech therapy services the student was being pulled

according to the student's teachers and related services providers the student was not raising those issues in school and did not appear anxious (Tr. 34). The school psychologist reported that a suggestion was made for the family to seek community-based counseling since the anxiety described related to home and did not spill over to school (Tr. p. 34). She indicated that the CSE did not recommend school counseling for the student (Tr. p. 34).

¹¹ The speech-language pathologist reported that after the student's 2019 CSE meeting she started receiving "at risk" SETSS services for reading which in or around May 2020 were officially added to the student's IEP (Tr. pp. 67-68).

out of the classroom too much and therefore recommended that she continue to receive speech therapy twice per week (Tr. p. 68, 71-72). The speech-language pathologist reported that one-to-one speech-language therapy was considered but rejected as too restrictive as the student was making progress in and benefitted from group sessions (Tr. pp. 98-99).

The school psychologist testified that she believed that the October 2020 CSE discussed the appropriateness of an ICT classroom; however, she recollected that the mother "was not interested in that type of setting" (Tr. p. 48). On the other hand, the student's mother testified that there was no discussion at the October 2020 CSE meeting pertaining to an ICT classroom and the discussion was solely with respect to the general education setting with SETSS (Tr. pp. 208-09). The school psychologist also testified that a special class of 12 students was generally for students with "more significant impairments" and opined that a general education setting would be better aligned with the student's needs (Tr. p. 49). After reviewing the neuropsychological evaluation, the October 2020 CSE continued to recommend a program of SETSS in a general education classroom as an ICT classroom was found to be too restrictive (Dist. Ex. 5 at pp. 1-3, 8, 25).

The hearing record provides scant and inconsistent evidence as to why the student was removed from the ICT setting during the 2019-20 school year.¹² The parents reported that although they were "reluctant" to move the student from an ICT to a general education classroom during first grade, they "felt that the general education class had more structure and was a better fit for [the student] than the ICT class had been" and opined that the student was less distracted than in the ICT (Tr. pp. 223-24, 228; Dist. Ex. 9 at p. 1). The student's mother further opined that ICT classes included students with many different disorders and were therefore a disruptive setting, while general education classes were less disruptive (Tr. p. 228). The student's mother testified that initially the student's removal from the ICT classroom to the general education classroom was unknown to her (Tr. pp. 218, 223). According to the social history update, completed on October 7, 2020, the parents reported that remote learning was "working better" for the student than in-person instruction, as the student's mother was working one-on one with her and she was "learning at a faster pace" (Dist. Ex. 9 at p. 1). Additionally, the parents opined that SETSS were "very helpful," and reported that the student had a tutor over the summer and that the student was reading much better, she was more confident in her reading and her writing had improved (*id.* at pp. 1-2). The parents further reported that a general education class with SETSS and speech-language therapy, with the addition of counseling, would be the appropriate recommendation for the student because the ICT did not "work for her" (Tr. p. 225; Dist. Ex. 9 at p. 5).

While I concur with the IHO's conclusion that the district failed to offer the student a FAPE for the 2020-21 school year, I reach that determination on somewhat different grounds. The IHO held that the district failed to sustain its burden of demonstrating the appropriateness of the recommendations for the 2020-21 school year because of the "combination of her learning and attentional needs, the student required a small class" in addition to consistent specialized reading instruction and speech-language therapy (IHO Decision at p. 13). In doing so, the IHO largely relied on "[t]he testimony of the student's SETSS provider [which] was consistent with the recommendations of the neuropsychologist, that the student required more special education

¹² It is not clear if the student was enrolled in the ICT class as a general education student or if ICT services were specifically recommended for the student by the CSE.

teacher support than the recommended program provided" (*id.*). While the IHO opines that the student required a small class and more special education support than was provided by the district's recommendation, I find that the evidentiary deficiency underpinning the district's failure to meet its burden that it provided the student with a FAPE is the dearth of evidence supporting the CSE's recommendation to place the student in a large general education setting with no special education support in the classroom given her well documented attentional needs and significant academic needs in the areas of reading, writing and math.

The CSE is required to properly balance the IDEA's requirement of placing the student in the LRE with the importance of providing an appropriate educational program that addressed the student's needs (see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 143 [2d Cir. 2013]; see also 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). Accordingly, it is understandable that the district would have rejected a small special class, such as a 12:1+1, given the student's cognitive abilities. However, a special class is not the only option on the continuum available to the CSE with respect to a student who may need special education support in the classroom. The district did not provide evidence supporting the appropriateness of a general education placement for the student or why SETSS and speech-language services alone would be adequate to meet the student's needs, particularly given the student's specific need for classroom "support . . . individually or in small groups to ensure that she is able to manage necessary tools and practice the taught strategies using manipulatives, and visuals" (Parent Ex. B at p. 9). While there is some evidence that the student had previously been in a classroom that provided ICT services, the hearing record is devoid of any evidence as to whether the CSE previously recommended ICT services for the student on an IEP, whether such services were removed and why and if the student had been in a classroom with ICT services as a special education student or as a general education student. Moreover, there is some indication that the parents had rejected the student's placement due to a generalized concern that such a placement had not worked for her in the past. Overall, the hearing record gives the impression that ICT services were in some respects "off the table" for the 2020-21 school year due to parental concerns, despite the student's deficits in reading, writing and math skills and performance below grade level, as well as evidence that the student required some level of special education support in the classroom in order to address her educational needs, thereby raising the question – not answered by evidence in the hearing record - as to whether the CSE may have been acquiescing to parental misgivings rather than evaluating the potential merits of an ICT services recommendation. Given the aforesaid gaps in the record, I must concur with the IHO's determination, albeit without accepting wholesale her conclusion that the student required an undefined "small class" in order to receive a FAPE, that the district failed to meet its evidentiary burden that the October 2020 CSE's recommendation of SETSS and speech-language therapy, without any additional special education instructional support in the classroom, offered a FAPE to the student for that school year.

2021-22 School Year

The IHO found that the district also failed to offer the student a FAPE for the 2021-22 school year on the same ground she determined constituted a FAPE denial for the 2020-21 year,

namely that the student required a small class in addition to specialized reading instruction and speech-language therapy and should have been provided with additional special education support in the classroom. The district asserts that the November 2021 IEP provided the student with a FAPE and it was appropriate to recommend the same placement and program for the student as it recommended for the 2020-21 school year based on the student's progress during that year.

On November 17, 2021, the CSE convened for the student's annual review and to develop her IEP for the 2021-22 school year (Parent Ex. C at pp. 1, 24). According to the November 2021 IEP, the student continued to experience difficulties in attention, executive functions, speech and language, and academic skills as well as exhibit deficits in her fine and gross motor skills (*id.* at pp. 1-9). The November 2020 CSE continued to recommend that the student attend a general education classroom with the related services of group SETSS in ELA three periods per week and in math two periods per week and speech-language therapy two times per week for 30 minutes per session in a group of three (*id.* at p. 19). Additionally, the CSE recommended the following resource/strategies to address the student's management needs: literacy instruction using a multisensory, evidence based approach; deliver information in smaller units or portions; multimodal presentation of information (visual, tactile, and auditory); teach chunking strategies; reduce distractions going on around the student by having her work in a quiet area with limited visual stimuli; during whole group instruction on the rug, ensure the student is sitting between two students who are behavioral models; repeat instructions and check her understanding; read test directions and assessment questions; digital white board; explicit 1:1 instruction; steps broken down; chunking information; modeling; structured breaks; frequent check-ins; positive reinforcement; reference sheets; guided feedback; preview vocabulary to aid in retention; redirection/prompting when needed (verbal and nonverbal); and manipulatives (based 10 blocks, vocabulary cards, index cards) (*id.* at p. 9). Finally, the November 2021 CSE recommended the student receive the following testing accommodations: extended time (1.5); breaks; on-task focusing prompts; separate location/room; and revised test directions; preferential seating; and alternate recording (answers recorded in test booklet) (*id.* at p. 21). Comparison of the October 2020 IEP with the November 2021 IEP shows that the annual goals contained in both IEPs were identical for all intents and purposes and, as previously noted, the program recommendations remained the same (compare Parent Ex. C at pp. 11-16; 18 with Dist. Ex. 5 at pp. 10-17; 19).

On June 23, 2021, the parents wrote a letter to the district stating that although the student made "gains" in the areas of reading, writing, and math, she continued to perform "well-below grade level in each area" (Parent Ex. G at p. 1). The parents referenced that the May 2020 private neuropsychological evaluation recommended a small class size (*id.* at p. 2). The parents further stated that the student had been accepted to Churchill (*id.* at p. 3). The parents sought funding for Churchill as well as a reconvene of the school support team "as soon as possible to discuss the availability of an appropriate public program for [the student]" (*id.* at p. 4). On July 19, 2021, having received no response from the district, the parents again requested that the school support team reconvene and provided notice of the unilateral placement at Churchill (Parent Ex. J at pp. 1-3).

Once again, while I concur with the IHO's determination that the district failed to offer the student a FAPE for the 2021-22 school year, I do so for somewhat different reasons. While the district elicited extensive testimony from the student's providers for SETSS and speech-language therapy at the impartial hearing concerning the student's progress during the 2020-21 school year,

neither provider appeared at the November 2021 CSE meeting and none of their input regarding the student's performance during the school year is reflected in the November 2021 IEP (Parents' Exhibit C at pp. 6-12). Moreover, the student's performance during the 2020-21 school year in her general education classroom setting (conducted remotely) is not reflected in the IEP (id.). Rather, the entirety of the information concerning the student's present levels of performance as reflected in the November 2021 IEP appears to be derived from the approximately two months she attended Churchill prior to the November 2021 CSE meeting (id.). This is especially troubling from an evidentiary perspective given that there is also evidence in the hearing record that the student attended school entirely on a remote basis during the 2020-21 school year with extensive one-to-one support from her mother and scheduling of her SETSS and speech-language therapy sessions around her classroom instruction so that the sessions were effectively not "pull-out" sessions as envisioned by the October 2020 IEP. The student also received private tutoring sessions throughout the 2020-21 school year (Dist. Ex. 5 at p. 6; see generally District Ex 9). Accordingly, the district has failed to meet its burden that program recommendations identical to those recommended for the 2020-21 school year (which it similarly failed to demonstrate were appropriate to meet the student's needs at the impartial hearing) would be appropriate for the 2021-22 school year, particularly given that the assessment of the student's current educational needs contained in the November 2021 IEP was not based on information concerning her performance during the bulk of the 2020-21 school year, taking into account that school year's attendant unusual implementation of classroom instruction and related services on a remote basis with one-to-one support from the student's mother and private tutoring. Accordingly, I find that the district did not meet its burden of establishing that the placement and program recommended for the student by the November 2021 CSE provided the student with a FAPE and, therefore, there is no basis to disturb the IHO's finding in that regard.

D. Request for Relief

1. Unilateral Services (Tutoring)

The parents contend that the IHO exceeded her "broad discretion" in denying reimbursement for tutoring (Answer at ¶ 11). The parents further argue that the IHO erred in holding that the parents had to prove the appropriateness of the tutoring; that the parents failed to sustain their burden of proof in demonstrating that the tutoring was appropriate; and failed to place the district on notice of their disagreement with the recommended program and that the parents were obtaining tutoring (id.). As previously stated, this discussion shall only pertain to the tutoring provided to the student from September 2020 and continuing through to August 2021.¹³

More specifically, the issue in this matter is whether the tutoring obtained by the parents constituted appropriate unilaterally obtained services for the student such that the cost is reimbursable to the parents. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the dispute is resolved, if they satisfy a

¹³ According to the evidence in the hearing record, the parents last paid for tutoring on August 13, 2021, and therefore, no tutoring shall be considered after that date (see Parent Ex. V at p. 13).

three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted], cert. denied sub nom., Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]; see Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

As for the substantive standard for assessing the services that are unilaterally obtained by a parent, 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 (Carter, 510 U.S. 7; 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). 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 (id. 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 Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 [1982]). 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).

Accordingly, the parents' request for tutoring must be assessed under this framework as well; namely, having found that the district failed to offer or provide appropriate services, the issue is whether the tutoring constituted appropriate unilaterally obtained services for the student such that the cost of the tutoring is reimbursable to the parents upon presentation of proof that the parents have paid for the services or, alternatively, payable directly by the district to the provider upon proof that the parents are legally obligated to pay but do not have adequate funds to do so. However, upon review of the documentation and testimony presented by the parents during the hearing, it appears that, as found by the IHO, there is insufficient evidence to show that the tutoring was appropriate to address the student's special education needs and that the costs of same are reimbursable to the parent.

The only information concerning the nature of the tutoring services in the hearing record is testimony from the student's mother. She testified that she hired a district teacher who had previously worked with the student to provide the student with one hour of tutoring per week from July 2020 until October 2021 (Tr. pp. 213, 226; see Parent Ex. V). She chose the tutor because she was a special education tutor who had previously worked with the student and she felt they had a good relationship with each other which she wanted to continue (Tr. p. 215). However, there is no evidence in the hearing record concerning the content of the tutoring provided or whether the tutoring was appropriate to meet the student's educational needs. As a result, there is no basis in

the hearing record to support disturbing the IHO's denial of the parent's request for reimbursement of tutoring costs.¹⁴

2. Independent Educational Evaluation

In their cross-appeal, the parents argue that the IHO erred in finding that they had a duty to notify the district of their disagreement with an evaluation before obtaining an IEE (Answer at ¶ 12). Further, the parents argue that the district did not defend "its evaluation" at any time (*id.*).

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (*see* 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; *see* 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; *see* K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).¹⁵

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

In a letter from the parents to the district dated June 23, 2021, the parents informed the district that they paid \$3,000 for a neuropsychological evaluation "to have her properly assessed and finally diagnosed with specific learning impairments, ADHD, and a language disorder" and

¹⁴ The student's mother also testified that she obtained tutoring services from Pride Learning, two times per week for one hour, beginning in July 2020 and ending in September 2020 (Tr. p. 212, 226; *see* Parent Ex. U) and that this tutoring consisted of an Orton-Gillingham based methodology that is used for students "with dyslexia and learning disorders, language based disorders" (Tr. p. 214). However, as the tutoring she obtained for summer 2020 precedes the October 2020 IEP at issue here, it is not subject to reimbursement as a unilateral service obtained in response to the district's denial of FAPE to the student for the 2020-21 school year.

¹⁵ Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; *see* Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

sought reimbursement for the costs thereof (Parent Ex. G at p. 4). The parents stated that they did not believe they should have had to obtain such information as the district evaluated the student, but the district's evaluations failed to reveal similar findings (id).

In order for an IEE to be provided at public expense, State and federal regulations only require that "the parent disagrees with an evaluation obtained by the public agency"; the regulations do not speak to how a parent must manifest this disagreement to the district (34 CFR 300.502[b][1]; 8 NYCRR 200.5[g]; see Genn v. New Haven Bd. of Educ., 219 F. Supp. 3d 296, 317 [D. Conn. 2016] [a parent does not have to express disagreement "in a formalistic manner . . . to be found to have disagreed in substance with [an] assessment"]). In addition, federal guidance suggests that a district "may not require that a parent provide notification of the parent's intent to obtain an IEE at public expense as a precondition for public payment for an IEE" and that "a parent may obtain an IEE without providing prior notice to the public agency" (Letter to Saperstone, 21 IDELR 1127 [OSEP 1994]; see also Letter to Anonymous, [OSEP 2010] [it is inconsistent with federal regulations to require a parent to provide notice of a request for an IEE for consideration by the CSE]).

Here, the parents effectively informed the district that they had an independent evaluation of the student conducted because they were not satisfied that the district evaluations had properly assessed the nature of her learning needs. Given the lack of any requirement to express disagreement through formal words or phrases as long as the parents' dissatisfaction with the district's assessment of the student is conveyed to the district in order to give the district an opportunity to defend its evaluation, I find that the parents' June 23, 2021 suffices for purposes the relevant regulations and, given the district's failure to defend its evaluation of the student, the parents are entitled to reimbursement of the costs of the neurological evaluation.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years, I shall uphold the IHO's award of tuition to Churchill for the 2021-22 school year. I also find that the hearing record supports the IHO's finding that the parents were not entitled to reimbursement for tutoring costs. However, the IHO erred in denying the parents' request for a neuropsychological IEE at public expense.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that the IHO's decision dated May 24, 2022, is modified by reversing that portion which denied the parents' request for a neuropsychological independent educational evaluation; and

IT IS FURTHER ORDERED that within 30 days from the date of this decision, the district is to reimburse the parents for the cost of the private neuropsychological evaluation already conducted.

Dated: **Albany, New York**
 August 26, 2022

CAROL H. HAUGE
STATE REVIEW OFFICER