



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-091

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 Fiona M. Dutta, Esq.

Law Offices of Adam Dayan, PLLC, attorneys for respondent, by Amled Pérez, 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 respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at The Shefa School (Shefa) for the 2021-22 school year. The parent cross-appeals from the IHO's reduction of the tuition reimbursement award for religious instruction at Shefa. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student attended private parochial schools for pre-kindergarten where he had a hard time managing his balance, sitting still at circle, dressing, and manipulating fasteners (Dist. Exs. 2 at p. 2; 6 at p. 2; see Dist. Ex. 7). He began receiving private occupational therapy (OT) (Dist. Ex. 2 at p. 2). Prior to entering kindergarten, the parent referred the student to the CSE for an evaluation due to concerns regarding his fine motor development and "clumsiness" (Dist. Exs. 2 at p. 2; 8 at p. 1). The district conducted an initial evaluation of the student, and in August 2018 he was found eligible for special education as a student with an orthopedic impairment and began

receiving weekly OT through an individualized education services program (IESP) (Parent Ex. P at p. 1; Dist. Ex. 6 at p. 3).¹ During the 2019-20 school year (first grade) the student had difficulty writing legibly and applying phonics skills to decode unfamiliar words (Dist. Ex. 7 at pp. 2, 4). He received small group remedial instruction for reading, writing, spelling, and comprehension (id. at p. 7).

In July 2020 the parent obtained a private neuropsychological and educational evaluation of the student (Dist. Ex. 6). The evaluator concluded that the student met the criteria for diagnoses of specific learning disability with impairments in reading and written expression, as well as a developmental coordination disorder, and opined that the student required placement in a highly structured classroom with a low student-to-teacher ratio (id. at p. 15). The evaluator further opined that the student should attend a school that caters to students with language-based learning disabilities (id.).

In a letter dated September 2020 the parent requested that the CSE convene as soon as possible to recommend a public-school placement for the student and to develop an IEP that included the recommendations from their private evaluation (Parent Ex. P at p. 2). The parent indicated that the last time a CSE had convened to discuss the student's need was August 20, 2018 (id. at p. 1). The parent also advised the district that the student was enrolled in Shefa and that she expected the district to fund the full cost of the school until it provided an appropriate program and placement for him for the 2020-21 school year (id. at p. 2). The student began attending Shefa in second grade (2020-21 school year) (see Dist. Ex. 1 at p. 4).²

On October 8, 2020, the CSE convened and found the student eligible for special education as a student with a learning disability (Dist. Ex. 1 at pp. 1, 27).³ The October 2020 CSE found the student had difficulty with "learning, attention, and executive functioning" which required "moderate assistance of special education services and related services of OT and counseling" (id. at p. 8). The October 2020 CSE recommended that the student attend a 12:1 special class for English language arts (ELA), math, science, and social studies and receive special education teacher support services (SETSS) in ELA five periods per week (id. at pp. 22, 28). In addition, the October 2020 CSE recommended the student receive two 30-minute sessions per week of individual counseling, and two 30-minute sessions per week of individual OT (id.). The October 8, 2020 IEP had an implementation date of October 26, 2020 and a projected annual review date of October 8, 2021 (id. at pp. 1, 22).

¹ Although the district social history and educational evaluation conducted in August 2018 both indicated that the student was in first grade, the March 2018 private school psychoeducational evaluation indicated that it was conducted as part of a prekindergarten screening and the district's OT evaluation conducted in August 2018 indicated that the student was entering kindergarten (Dist. Exs. 2 at p. 1; 3 at p. 1; 5 at p. 1; 8 at p. 1). The student was five years old when the evaluations took place (see Dist. Exs. 2 at p. 1; 3 at p. 1; 5 at p. 1; 8 at p. 1).

² The Commissioner of Education has not approved Shefa as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

³ The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

Through a due process complaint notice dated November 5, 2020, the parent initiated a separate proceeding, alleging that the district failed to offer the student a FAPE for the 2020-21 school year (see Answer & Cr.-Appeal Ex. X); the status or outcome of the impartial hearing arising from the November 2020 due process complaint notice (2020-21 proceeding) is not reflected in the hearing record in the present matter.⁴

By prior written notice dated January 1, 2021, the district summarized the recommendations made by the October 2020 CSE (Parent Ex. W at pp. 1-2). The district also informed the parents via a school location letter of the school to which it assigned the student to attend to receive the program and services recommended by the October 2020 CSE (id. at p. 5). In a letter dated March 10, 2021, the parent informed the district that she had tried to reach the assigned school and the CSE chairperson to learn more about the assigned public school site but had not received a response (Parent Ex. U).

On April 14, 2021, the parent executed a contract for the student's attendance at Shefa for the 2021-22 school year (Parent Ex. G).

On June 28, 2021, the district sent the parents a second prior written notice that again summarized the recommendations of the October 2020 CSE, along with a second school location letter that identified the same public-school site (Parent Ex. C). Thereafter, by letter dated August 25, 2021, the parent notified the district of her intent to unilaterally place the student at Shefa for the 2021-22 school year as a result of the district's failure to offer him a free appropriate public education (FAPE) for the 2021-22 school year (Parent Ex. B at pp. 1-2). The parent indicated that she had not received a copy of the October 2020 IEP until "weeks later," "did not receive a list of available providers" for the recommended SETSS, and did not receive a school location letter until January 2021 (id. at p. 1). The parent reiterated her unsuccessful attempts to reach the assigned school and indicated that, since she received the March 2021 school location letter, she had spoken to a parent coordinator who informed her that tours were not being offered at that time but that the principal would call her back (id. at pp. 1-2). The parent indicated that she did not receive a call back (id. at p. 2). The parent also set forth her questions about how remote instruction would be conducted during school closures related to the COVID-19 pandemic if the student attended the assigned public-school site (id.).

Beginning in September 2021, the student attended Shefa for the 2021-22 school year (third grade) (see Parent Ex. M).

On October 12, 2021, the CSE convened for the purposes of an annual review and developed an IEP with an implementation date of October 26, 2021 (see Parent Ex. E). The October 2021 CSE recommended that the student receive integrated co-teaching (ICT) services in

⁴ During the impartial hearing in the present matter, the IHO declined to receive the November 2020 due process complaint notice into evidence (see Tr. pp. 160-61); however, insofar as the IHO considered the November 2020 complaint in order to deny the request for consolidation, the document was before her (see Interim IHO Decision) and, therefore, should have been included as part of the hearing record (see 8 NYCRR 200.5[j][5][vi]; 279.9[a]). The parent has included the document with her Answer and Cross-Appeal and labels it "Exhibit X." The document has been considered to the extent necessary to describe the procedural history and the relationship between this matter and the 2020-21 proceeding.

math, ELA, social studies, and science (id. at pp. 15, 21). The October 2021 CSE also recommended one 30-minute session per week of individual counseling, one 30-minute session per week of group counseling, and two 30-minute sessions per week of individual OT (id. at pp. 15-16, 21).

In a letter dated November 4, 2021, the parent set forth her disagreements with the program and services recommended in the October 2021 IEP and informed the district that the student would continue at Shefa (Parent Ex. F at pp. 1-2).

A. Due Process Complaint Notice

On November 8, 2021, the parent filed a due process complaint notice alleging a denial of FAPE for the 2021-22 school year (see Parent Ex. A).

First, the parent alleged that, on June 28, 2021, the district sent the parent a school location letter, assigning the student to attend the same school for the 2021-22 school year as the student had been assigned to attend for the 2020-21 school year (Parent Ex. A at p. 5). The parent alleged that she had tried to reach out to the school prior to the 2020-21 school year "to no avail" and that, prior to the 2021-22 school year, she contacted the parent coordinator and was informed there would be no school tours but that the principal would contact her (id.). The parent asserted that the school did not call her back (id.). In addition, the parent alleged that she informed the district of her concerns with the October 2020 IEP and of her intent to unilaterally place the student if the district did not provide the student an appropriate program and placement by the beginning of the 2021-22 school year (id.).

The parent argued that the district had an obligation to offer the student a program and placement by September 9, 2021 for the 2021-22 school year but the CSE did not convene until October 12, 2021 after the school year began (Parent Ex. A at p. 5). The parent stated she participated in the October 2021 CSE meeting and "expressed concern about the need for a curriculum geared toward language-based delays" and the student's need for individual attention with a modified curriculum (id. at pp. 5-6). The parent argued that the October 2021 CSE failed to "seriously consider" the July 2020 private neuropsychological evaluation (id. at p. 6). Additionally, the parent claimed that the October 2021 CSE's recommendation for ICT services with OT and counseling failed to "provide enough support" as the student required "Orton Gillingham reading support, grouping with students with similar learning profiles and a smaller, more supportive setting" (id.).

Furthermore, the parent argued that since the district failed to offer an appropriate program for the 2021-22 school year, the parent enrolled the student at Shefa, which was appropriate and "reasonably calculated to result in his educational benefit" (Parent Ex. A at p. 6). The parent claimed that she communicated her concerns to the district and cooperated with the CSE process (id.).

As relief, the parent sought a determination that the district failed to offer the student a FAPE for the 2021-22 school year, that Shefa was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent (Parent Ex. A at p. 7). The parent sought tuition reimbursement for the amounts paid to Shefa and direct funding for any amounts owed for

the 2021-22 school year (id.). Further, the parent requested reimbursement for any out-of-pocket expenses incurred for the student's education during the 2021-22 school year (id.). Lastly, the parent sought "appropriate transportation" by the district or reimbursement of transportation expenses incurred for the 2021-22 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 22, 2021 and concluded on April 28, 2022, after four days of proceedings (see Tr. pp. 1-178).⁵ In a decision dated June 17, 2022, the IHO found that the district failed to offer the student a FAPE for the 2021-22 school year, Shefa was an appropriate unilateral placement, and equitable considerations weighed in favor of an award of tuition reimbursement subject to a reduction for non-secular portions of the program (IHO Decision at pp. 10-16).

The IHO found that the October 2020 CSE's program recommendation was not "designed to address the student[s] educational needs" and would not enable him to make "meaningful progress" for the 2021-22 school year (IHO Decision at p. 10). The IHO recognized the district's argument that the parent failed to challenge the October 2020 IEP in her November 2021 due process complaint notice (id.). However, the IHO did not agree with the district and held that the parent's due process complaint notice "clearly challenge[d]" the appropriateness of the October 2020 IEP and that, therefore, "any challenges" thereto would be considered (id.).

With respect to the October 2020 CSE's recommendations for a 12:1 special class and SETTS, the IHO contrasted the recommendation in the July 2020 neuropsychological evaluation for a "small, specialized setting," as well as evidence that the student required "a lot of individual support" (IHO Decision at p. 11).⁶ The IHO found that the recommended SETSS may not have offered "the support he required" given that the group could be up to eight students and the student would be reading and writing throughout the day and not just for the single period (id.). Further, the IHO noted that at the time of the October 2020 CSE meeting the student was receiving instruction at Shefa in groups of six or eight students with two teachers and the student made progress in these smaller classes (id.).

As for the October 2021 IEP, the IHO held that the district did not defend the program and services recommendations as the district argued that the October 2020 IEP was the operative IEP at the time of the student's unilateral placement at Shefa (IHO Decision at p. 11). Moreover, the IHO noted that the October 2021 IEP offered less support to the student as the CSE did not recommend SETSS and that the CSE did not develop the IEP until after the beginning of the 2021-22 school year (id. at pp. 10-11). For all these reasons, the IHO found that the district failed to offer a FAPE for the 2021-22 school year (id. at p. 11).

⁵ In an interim decision dated November 9, 2021, the IHO denied consolidation of the matter with the pending 2020-21 proceeding (Interim IHO Decision).

⁶ In her decision, the IHO referenced the recommendation as a 12:1+1 special class; however, the October 2020 IEP recommended a 12:1 special class (compare IHO Decision at pp. 3, 5, 10-11, with Dist. Ex. 1 at p. 22).

Turning to the appropriateness of Shefa, the IHO noted testimony that the student's homeroom consisted of 13 students with two teachers and a teaching assistant, his reading group contained four students, and his math group consisted of five students (IHO Decision at p. 13). The IHO further found that Shefa offered related services, multi-sensory instruction, and a "flexible approach to teaching," which the student required in order to make progress (*id.*). The IHO found that the evidence in the hearing record showed that the student made progress for the 2021-22 school year and that, therefore, Shefa was an appropriate unilateral placement for the student (*id.* at pp. 14, 16). As for equitable considerations, the IHO found that the hearing record demonstrated that the parent cooperated, participated in CSE meetings, provided timely notice of concerns about programs developed for the student, and did not obstruct the special education process thereby supporting an award for tuition reimbursement (*id.*).

Although the IHO found the parent was entitled to an award of tuition reimbursement, she held that the religious instruction provided at Shefa should be excluded from the award (IHO Decision at p. 15). Based upon the evidence in the hearing record, the IHO found 11.96 percent of the student's week was devoted to religious studies (*id.*). Accordingly, the IHO ordered the district to reimburse the parents and fund any unpaid tuition at Shefa minus the proportional amount attributable to religious instruction for the 2021-22 school year (*id.* at pp. 15-16).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that it failed to offer the student a FAPE for the 2021-22 school year and in awarding the parent funding of the costs of the student's tuition at Shefa for the 2021-22 school year.

More specifically, the district argues that the evidence in the hearing record shows that the October 2020 IEP was "likely to produce progress" and allow the student to obtain an educational benefit. The district contends that the October 2020 CSE considered the student's needs in recommending the 12:1 special class with daily SETSS for "targeted small group instruction" in ELA together with counseling and OT related services. In addition, the district argues that the recommendation for a community school would allow the student access to his nondisabled peers. The district argues that the IHO failed to consider both documentary and testimonial evidence presented by the district and gave "undue weight" to the private neuropsychological evaluation. The district claims that the October 2020 CSE "considered and adopted most" of the recommendations made by the private neuropsychologist including the recommendation for a small class. In addition, the district argues that the IHO failed to consider the impact of the recommendation for SETSS. With respect to the recommended class size, the district argues that the recommendation for a 12:1 special class was comparable to the Shefa homeroom class of 13 students with only one teacher for most of the day. Therefore, the district argues that if the student was able to make progress in a classroom of 13 students the logical extension was that the student would have been able to obtain educational benefit in a 12:1 special class. Further, the district argues that the CSE recommended appropriate related services and that the student was receiving supports at Shefa similar to the management needs described in the October 2020 IEP.

Next, the district reiterates its position that the October 2020 IEP was the operative IEP in that it was the IEP "in effect" at the time of the parent's unilateral placement of the student. The district argues that the October 2020 IEP was in place for one calendar year and was not set to

expire until October 8, 2021. Furthermore, the district argues that the parent failed to raise any claims pertaining to the October 2020 IEP in her due process complaint notice and that, therefore, the IHO erred in considering any challenges to the October 2020 IEP.

The parent responds in an answer and cross-appeal. In the answer, the parent generally denies the material allegations contained within the district's request for review. The parent seeks to uphold the IHO's findings that the district denied the student a FAPE for the 2021-22 school year, that Shefa was an appropriate placement, and that equitable considerations favored an award of tuition reimbursement. As for a cross-appeal, the parent alleges that the IHO erred by reducing the amount of tuition to be reimbursed by the amount devoted to nonsecular instruction.

The district answers the parent's cross-appeal, generally denying the material allegations contained therein.

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.

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).

Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Operative IEP, Scope of the Impartial Hearing, and Scope of Review

Initially, it is necessary to identify which IEP should be examined for purposes of reviewing the appropriateness of the educational programming developed for the student for the 2021-22 school year. The CSE developed two separate IEPs: the October 2020 and October 2021 IEPs (see Parent Ex. E; Dist. Ex. 1). To be clear, the IHO examined both IEPs (see IHO Decision at pp. 10-11). On appeal, the district reiterates its position that the October 2020 IEP was the operative IEP and argues that the parent failed to raise challenges to the October 2020 IEP in the November 2021 due process complaint notice. In her answer, the parent does not appear to disagree with the contention that the October 2020 IEP was the IEP in effect at the time of her decision to unilaterally place the student at Shefa for the 2021-22 school year but alleges that the district failed to also defend the October 2021 IEP which was in effect for the majority of the 2021-22 school year.

The Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unliterally] place" their child before the beginning of a school year (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]). There is some authority that indicates that a later-developed IEP is operative that has arisen from circumstances where a school district attempts to defend an IEP developed later (usually after the beginning of the school year) that includes additional recommendations in line with a course of action discussed with the parents at an earlier date (McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP" where it "incorporate[d] recommended classes, accommodations, and goals that were presented to Parent prior to her unilateral decision to enroll" the student in a private school]; see also M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *25 n.3 [S.D.N.Y. Sept. 28, 2018] [finding the later developed IEP to be operative even though it was developed during the first weeks of school]; Application of the Dep't of Educ., Appeal No. 12-215).

Here, the October 2021 CSE did not convene to effectuate a previously discussed course of action; instead, it was an annual review meeting that resulted in a new set of recommendations for the student including the shift from the 12:1 special class to the general education class with

ICT services (compare Dist. Ex. 1, with Parent Ex. E). Further, the evidence in the hearing record indicates that the parent based her decision to unilaterally place the student for the 2021-22 school year on her disagreements with the October 2020 IEP and the assigned school recommendation. Specifically, on August 25, 2021, the parent sent a letter notifying the district of her intent to unilaterally place the student at Shefa for the 2021-22 school year, prior to the development of the October 2021 IEP (see Parent Ex. B). The October 2021 CSE convened well after the expiration of the 10-day notice period (see Parent Exs. B; E).⁸ Moreover, the student's attendance at Shefa began on September 9, 2021 (see Parent Ex. M). The October 2020 IEP was in effect until October 8, 2021 (Dist. Ex. 1 at p. 1).⁹

In line with the prospective analysis required by the Second Circuit, the October 2020 IEP was the operative IEP at the time of the parent's placement decision and the district was not required to defend the October 2021 IEP, which was developed after the student was attending the unilateral placement (see Bd. of Educ. of Yorktown Cent. Sch. Dist., 990 F.3d at 173; R.E., 694 F.3d at 187-88).¹⁰ Therefore, to the extent the IHO made findings about the October 2021 IEP that contributed to a determination that the district failed to offer the student a FAPE for the 2021-22 school year, this was error (see IHO Decision at p. 11).

Having found that the October 2020 IEP set forth the operative educational program and services for the student at the time of the parent's placement decision, it is necessary to address the

⁸ The Second Circuit recently emphasized that "[t]he ten-day notice requirement gives school districts an opportunity to discuss with parents their objections to the IEP and to offer changes to the IEP designed to address those objections—all before the parents enroll their child in a private school and file a due process complaint" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171; see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]; Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004] [noting that the statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools"]. During the ten-day notice period, a district "may seek to correct the IEP" after it has been given notice of the parents' objections and "may defend against a claim for tuition reimbursement by pointing out that parents did not cooperate in the revision of the IEP, or that the corrected IEP, if accepted by the parents, would have provided the child with a FAPE" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171).

⁹ While it may be convenient to meet and revise a student's IEP during the spring for the following school year, a school district does not offend the IDEA's procedural requirements if the CSE meets at a different point during the school year so long as it conducts a review of a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). In a slightly different context involving the timing of when IEPs must be provided to teachers (and using a December meeting example), the United States Department of Education recently reemphasized that "[t]he statute and regulations also make clear that an IEP Team meeting may be convened at any time throughout the year" (Letter to Frumkin, 79 IDELR 233 [OSERS 2021]). Thus, the mere fact that CSE meetings were conducted in the fall of a given school year is of no particular significance and, to the extent the IHO found that the timing of the October 2021 CSE after the beginning of the school year contributed to a finding that the district failed to offer the student a FAPE, this was error (see IHO Decision at pp. 10, 11).

¹⁰ If the district offered the student a FAPE as of the October 2021 IEP but not prior, the parent would no doubt argue that the October 2020 was operative, and that the October 2021 IEP should not be relied upon to defeat a request for tuition reimbursement for the entire school year.

district's assertion that the parent did not raise any allegations in her due process complaint notice pertaining to the October 2020 IEP.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

In finding that the parent raised challenges to the October 2020 IEP in her due process complaint notice, the IHO quoted that portion of the parent's November 2021 due process complaint notice in which she describes receiving from the district a prior written notice and a school location letter both dated June 28, 2021, attempting to contact the assigned public school, and, thereafter, sending the district the August 25, 2021 letter in which she challenged the October 2020 IEP (see IHO Decision at p. 10; Parent Ex. A at p. 5). The parents' due process complaint notice contains more of a factual history pertaining to the 2020-21 school year or, at most, an allegation relating to her difficulties communicating with the assigned public school site (see Parent Ex. A at p. 5). Beyond referencing the August 2021 10-day notice letter, there is no other mention of the October 2020 CSE meeting or IEP within the due process complaint notice (see Parent Ex. A).¹¹ Thus, even a broad reading of the due process complaint notice does not support the IHO's finding that the parent challenged the recommendations contained within the October 2020 IEP (id. at pp. 5-6).

However, the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]).

¹¹ Even if it was appropriate for the parent to incorporate the allegations in the 10-day notice letter into the due process complaint notice without articulating them, review of the letter in this instance shows that the concerns raised therein related to implementation of SETSS and the assigned school (Parent Ex. B). The letter does not raise any concerns with the procedures underlying the October 2020 CSE or the recommendations contained within the IEP (id.).

In this matter, the district offered the October 2020 IEP into evidence during the impartial hearing and stated its intent to defend the October 2020 IEP as the operative IEP for the start of the 2021-22 school year (Tr. pp. 21-23; Dist. Ex. 1). The parent's attorney indicated that she understood the district's position but had not known of it prior to that hearing date since the district had not answered the due process complaint notice (Tr. pp. 22-23). In light of the district's position, the parent's attorney indicated that she may produce additional documents and that the parent had previously disagreed with the October 2020 IEP and assigned public school site (*id.*). With the purpose of defending its offer of a FAPE to the student for the 2021-22 school year, the district then called a witness and elicited testimony exclusively about the October 2020 IEP (*see* Tr. pp. 33-56). Specifically, the district inquired about participation of the parent and the Shefa staff at the October 2020 CSE meeting, the October 2020 CSE's consideration of documents, the management needs section of the IEP, and the CSE's recommendations for a 12:1 special class in a community school, along with SETSS and counseling and OT services (Tr. pp. 43-56). Indeed, the testimony regarding the October 2020 IEP "composed a significant portion of testimony during the hearing, opening the door to this issue" (*Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D.*, 2017 WL 4466613, at *4 [S.D.N.Y. Oct. 5, 2017], *aff'd*, 739 Fed Appx 79). The district did not argue that the October 2020 IEP was outside the scope of the impartial hearing until its post-hearing brief (IHO Ex. I at p. 6). Accordingly, although the parent failed to specifically include claims pertaining to the October 2020 IEP in her due process complaint notice, the district opened the door by defending the October 2020 IEP during the proceedings.

Based upon the foregoing, the October 2020 IEP was in place when the parent made her decision to unilaterally place the student, and the district "opened the door" to the issue of the October 2020 IEP; therefore, the appropriateness of the October 2020 IEP will be examined for purposes of determining whether the district offered the student a FAPE.

Since the parent did not initially identify any issues she had with the October 2020 IEP in her November 2021 due process complaint notice, it is difficult to track the appropriate issues to be addressed on appeal.¹² As noted, during the impartial hearing, the district elicited testimony to support that the parent was afforded an opportunity to participate in the October 2020 CSE meeting, that the October 2020 reviewed certain information about the student, and that CSE recommended appropriate educational programming and services (Tr. pp. 43-56). The IHO based his determination that the October 2020 IEP did not offer the student a FAPE on the appropriateness of the 12:1 special class and SETSS in contrast to recommendations in the July 2020 neuropsychological evaluation for a "small, specialized setting," as well as evidence that the student required "a lot of individual support" and benefited from a smaller class setting (IHO Decision at p. 11). The district appeals this finding, arguing that the October 2020 CSE reviewed all available evaluative information including the July 2020 private neuropsychological evaluation

¹² The parent points to her due process complaint notice underlying the proceeding challenging the 2020-21 school year as setting forth specific claims, which she includes as a proposed exhibit with her answer. While I decline to rely on the November 2020 due process complaint notice—given that it alleged a denial of a FAPE for the 2020-21 school year and is or was the subject of a separate proceeding—review of the complaint, shows that, other than the parent's allegation more specific to the 2020-21 school year (i.e., that the district failed to have an IEP in place prior to the beginning of the school year), the parent's allegations directed at the October 2020 IEP were raised by the district during the present matter and are discussed below (Answer & Cr.-Appeal Ex. X at pp. 5-6).

in making its recommendations in the October 2020 IEP. More specifically, the district contends that the October 2020 CSE "considered and adopted most" of the private neuropsychologist's recommendations even though it was not "obligated to adopt" all the recommendations including for a "small, specialized school" (Req. for Rev. at ¶ 17). The district argues that the recommendation for a 12:1 special class comported with the private neuropsychologist's recommendation for a small class as the evaluation failed to identify a specific class size for the student. In her answer, the parent argues that the IHO's finding of a denial of FAPE was "based on fact and on evidence in the [hearing] record" and "warrants deference" (Answer at ¶ 9). The parent disputes the district's argument that it conducted comprehensive evaluations or that the October 2020 CSE meaningfully considered the July 2020 private neuropsychological evaluation insofar as it did not follow some of the recommendations contained therein.¹³ Based on the foregoing, the issues raised by the parties generally concern the degree to which the October 2020 CSE considered the July 2020 private neuropsychological evaluation and the appropriateness of the 12:1 special class and SETSS to address the student's needs.

B. October 2020 IEP

1. Evaluative Information

The parties dispute the degree to which the October 2020 CSE considered the July 2020 private neuropsychological evaluation. In addition, the parent argues that the remaining information available to the CSE was outdated and insufficient.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR

¹³ The parent also alleges that the October 2020 IEP was inappropriate as of the beginning of the 2021-22 school year due to the passage of time; however, the district is required to conduct a review of a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). As of the beginning of the 2021-22 school year, the student was not due for an annual review, and there is no indication in the hearing record that the parent requested that the CSE reconvene prior to the annual review date. The parent also alleges that the district failed to defend the October 2021 IEP and that, therefore, failed to show it offered a FAPE for a substantial portion of the school year; however, as discussed above, the October 2020 IEP was operative at the time of the parent's placement decision.

200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Regarding the private neuropsychological evaluation, a CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

The January 6, 2021 prior written notice indicated that the October 2020 CSE used the following evaluations and reports in developing the student's IEP: a March 9, 2018 psychoeducational assessment, a social history report, an educational evaluation report, and an OT evaluation report, all dated August 2, 2018; an August 10, 2018 classroom observation; a June 30, 2020 progress report; and a July 14, 2020 neuropsychological evaluation report (Parent Ex. W; see Dist. Exs. 2-8). The 2018 reports had been conducted as part of the CSE's initial evaluation of the student for special education as a school-age student with a disability and included a prekindergarten screening conducted by the student's then-current private school (see Dist. Exs. 2 at p. 1; 3 at p. 1; 4; 5 at p. 1).

The parent provided the July 2020 private neuropsychological evaluation to the district in September 2020 and requested that the CSE convene for consideration of the evaluation (Parent Ex. P). Attendees at the October 2020 CSE meeting included a district school psychologist who also served as a district representative, a district special education teacher, and the parent (see Dist. Ex. 1 at p. 29). While not listed on the attendance page, the evidence in the hearing record also indicates that two teachers from Shefa attended the meeting and shared information about the student's needs (see Tr. pp. 43, 92, 141-43; Dist. Ex. 1 at pp. 4-7). The parent testified that she recalled that the October 2020 CSE reviewed some of the student's "recent report cards" and reviewed the neuropsychological evaluation at "the very end" of the meeting (Tr. p. 143). The district special education teacher could not recall if she reviewed the July 2020 private neuropsychological evaluation but indicated that, if it was listed on the prior written notice, the committee had considered it (Tr. p. 60). According to the district special education teacher, the

committee believed it had enough information about the student in order to develop the IEP (Tr. p. 45).

The parent's July 2020 neuropsychological and educational evaluation included background information on the student, behavioral observations of the student during the remote assessment, and evaluation results related to the student's intellectual functioning, language functioning, visual and motor functioning, attention and executive functioning, learning and memory, academic achievement, and social/emotional functioning (Dist. Ex. 6). The background information recounted the student's developmental and medical history and noted that the student achieved his gross motor milestones within normal age expectations, if not precociously, but that he was slower to meet his fine motor milestones related to feeding and dressing himself and continued to be sensitive to certain tactile sensations (*id.* at p. 1). With regard to the student's educational history, the report highlighted the student's higher-than-average activity level in preschool, his delay in mastering sound-symbol correspondence and retaining new sight words in kindergarten, and his lag in literacy development and difficulty with letter formation in first grade (*id.* at p. 2). The report indicated that in first grade the student attended small group (2:1) reading and writing instruction and, although his skills were improving, he had more difficulty attending in the smaller group (*id.* at pp. 2-3).

With regard to behavioral observations, the evaluating neuropsychologist described the student as "socially interested, charming and humorous" and noted that he quickly established rapport with her (Dist. Ex. 6 at p. 4). She noted that in both remote sessions and in person the student's activity level was higher than average and that he was "restless, fidgety, and had a high need to move about" (*id.*). The evaluator reported that the student stood up when he worked but that even when moving he remained engaged, hardworking, and motivated to perform well (*id.*). According to the evaluator, the student's attention and focus "fluctuated" during the evaluation, depending on the demands of the task (*id.* at pp. 4, 14). The student showed excellent ability to focus when he was confident in his skills but was much less attentive during reading and spelling tasks requiring prompts and redirection to stay focused (*id.*). The evaluator observed that during the evaluation, the student worked quite slowly and demonstrated anxiety with reading tasks but was cooperative and persevered through the testing (*id.* at pp. 4-5).

Administration of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) by the neuropsychologist to assess the student's intellectual functioning yielded a full-scale IQ of 97, which fell in the average range (Dist. Ex. 6 at p. 5). The evaluator noted variability in the student's index and subtest scores and suggested that the student's performance was impacted by a combination of weaknesses in fine motor skills, self-generated organization, and attention to detail (*id.*). The evaluator cautioned that, as such, the student's full-scale IQ and visual spatial index were not considered valid indicators of the student's intellectual or visual spatial capacities (*id.*). The evaluator reported that the student exhibited well developed verbal and nonverbal reasoning skills (*id.*). The student's performance on verbal comprehension (verbal) subtests suggested that the student had a strong ability to acquire knowledge from his environment, to draw connections between concepts, and to use language to guide and convey his thinking (*id.*). His performance on fluid reasoning (nonverbal) subtests highlighted his ability to discover underlying concepts, patterns, or hidden rules and apply them in order solve novel problems (*id.*). The evaluator reported that, although the student's visual spatial skills were sufficiently developed, they were

compromised by relative weaknesses with self-generated organization and integration of fine motor and visual-perceptual skills (id. at pp. 5, 6).¹⁴

With respect to working memory, the evaluator reported that the student's index score was above average, however the discrepancy between his scores on individual subtests was statistically and clinically meaningful (Dist. Ex. 6 at p. 6). She indicated that the student was "extremely effective at holding on to meaningful information" and "he used his language skills to facilitate his retention and recall" (id. at p. 6). However, the student had a harder time keeping meaningless information in mind for rote recall or mental manipulation (id.). According to the evaluator, the differences in the student's scores suggested that "pure" auditory working memory was a relative weakness for the student (id.). In terms of processing speed, the evaluator reported that the student's ability in this domain was more modest relative to his other cognitive skills (id.). The evaluator concluded that the student's slower processing speed and more modest capacity for the retention of short-term information might make the student less efficient in his information processing (id.). The evaluator opined that the student's weaknesses in working memory limited "his automaticity and fluency when reading" (id. at p. 13).

Turning to the student's language functioning, the evaluator reported that the student's speech was normal in terms of rate, volume, prosody, and articulation (Dist. Ex. 6 at p. 6). She stated that, informally, the student was effective at communicating his thoughts and ideas through verbal language, although his responses to open-ended questions suggested a subtle weakness in word retrieval (id.). The evaluator indicated that the student was able to comprehend all orally presented test directions without repetition and demonstrated age-appropriate ability in both receptive and expressive language (id.). The student exhibited a very strong understanding of relationships between words based on meaning, features, functions, or place or time of occurrence (id.). According to the evaluator, formal evaluation of the student's language skills using the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5) revealed that the student was able to use correct word structure rules, referential pronouns, and could formulate descriptive sentences using correct syntax and semantic rules (id. at pp. 7, 19). However, he had difficulty forming sentences with narrow structural constraints due to difficulty with planning, flexible thinking, and organization (id. at p. 7).

With respect to the student's visual and motor functioning, the evaluator reported that the student showed intact perception, analysis, and synthesis of visual-spatial percepts but that his performance varied greatly as a function of the demands in self-generated organization, visual-motor integration, and attention to detail (Dist. Ex. 6 at pp. 7, 19). The evaluator noted that the student exhibited diminished control over his writing implement and had difficulty with handwriting as he formed letters and numbers atypically and his penmanship was immature (id. at p. 7). In addition, the student was very slow and deliberate in producing letters and numbers and made frequent reversals (id.). The evaluator indicated that the student's fine motor dexterity and speed were significantly below average, and he had difficulty with tracing and copying (id. at pp. 7, 14, 19).

¹⁴ The evaluator reported that the student was subsequently administered a multiple-choice test that more purely assessed his visual-perception, analysis, and synthesis capacities while minimizing production demand and the student performed within normal limits on this assessment (Dist. Ex. 6 at p. 5).

In terms of the student's attention and executive functioning, the evaluator reported that he was extremely cooperative but fidgety and restless; however, she noted that this did not detract from his engagement and that he worked well while moving and standing (Dist. Ex. 6 at p. 7). The student's attention to task varied significantly depending on task demands and confidence in his ability, and his performance varied on formal measures of attention regulation (*id.* at pp. 7-8, 19). The student benefitted from support such as prompts, redirection, encouragement, and praise during reading and spelling tasks (*id.* at p. 7). The parent reported minimal symptoms of inattention on behavior rating forms but indicated that the student's attention was compromised by tasks he perceived as challenging or non-preferred (*id.* at p. 8).

According to the evaluation report, in school, the student's teachers reported varied attention and activity level, with his general studies teachers expressing fewer issues with his attention, engagement, and activity level in the larger classroom (Dist. Ex. 6 at p. 8). According to the evaluator, the general studies teachers described the student as hardworking, with an excellent capacity to tolerate academic frustration (*id.*). He required teacher support during independent work due to difficulty understanding task demands and multi-step directions, forgetfulness, and slower work pace (*id.*). The evaluator noted that the student's attention suffered during reading and writing tasks and he benefitted from adult support to stay on task (*id.*). Although the student's general studies teachers did not raise specific concerns regarding his attention and focus, his learning center teacher described the student as having a high level of inattention in the small group setting, especially during tasks requiring increased mental effort (*id.*). During learning center, the student exhibited a lack of focus, high activity levels, and impulsivity which was distracting to himself and others (*id.*). The student's learning center teacher reported that the demands of the small literacy group caused him to lose focus and his engagement to fluctuate (*id.*).

According to the evaluator, the student's executive functioning skills were more consistently weak as his mother reported that he was disorganized, forgetful, had trouble with transitions and keeping track of his materials, and was slow to collect his belongings (Dist. Ex. 6 at p. 8). In addition, the student's teachers indicated that he struggled with working memory, planning, organization, and self-monitoring (*id.*). Formal testing captured the student's difficulties with organization, self-monitoring, inhibition, and working memory (*id.* at p. 9). The evaluator stated that, although the student was an eager learner, he needed adult support to remain engaged in certain activities, understand task demands, start work, and complete work commensurate with his cognitive capabilities (*id.*).

Turning to the student's learning and memory, the evaluator reported that the student performed in the average to above average range on tests of memory, however he recalled stories he heard in random order rather than sequentially (Dist. Ex. 6 at p. 9). He performed within the average range on a task assessing his ability to learn decontextualized information with the benefit of repetition (*id.*). He performed below average on delayed recall tasks, but superior on a measure of short-term memory for increasingly long spans of objects (*id.*).

In terms of his academic abilities, the evaluator indicated that the student exhibited scattered skills ranging from well above average on math subtests, to well below average on reading and writing subtests (Dist. Ex. 6 at pp. 10-12, 13, 20-21). Specifically, the student's naming speed was within normal limits when identifying letters, but he was slower in naming

familiar objects (id. at p. 10). In a broad screening of the student's phonological awareness, he fell at the 79th percentile, as he was able to recognize and produce rhymes, match words based on initial sounds, and segment words into syllables (id.). However, he exhibited difficulty segmenting words into individual phonemes and isolating sounds within words and fell below average on a blending task (id.).

According to the evaluator, the student performed below average on early reading tasks (Dist. Ex. 6 at pp. 10, 21). He was able to name all upper- and lower-case letters and their corresponding sounds, but his phonic decoding and word recognition were less robust than expected for his age (id.). The evaluator noted that the student's oral reading accuracy, rate, and fluency were weak for his age as he read most words in a slow, deliberate, letter by letter manner (id.). The student's reading comprehension was variable due to the inaccuracy with which he read connected text (id. at p. 11). Specifically, the student was unable to decode sight words to match with a corresponding picture (id.). Based upon the foregoing, the evaluator concluded that the student was "an emerging reader" with "strong verbal reasoning skills" which she opined suggested the student "should evolve into a capable reader once he ha[d] mastered the foundations of reading through appropriate intervention" (id. at p. 13).

In terms of writing, the evaluator described the student as a motivated and creative writer but noted that he struggled with written expression (Dist. Ex. 6 at p. 11). The student had difficulty with the mechanical aspect of writing, as he worked in a slow, deliberate, and labored manner (id.). The evaluator reiterated that the student's letters were poorly formed, over-sized, reversed, and fell above or below the lines (id.). She noted that the student performed below average on a spelling to dictation subtest, although he lost credit for otherwise accurate spelling due to letter reversals (id.). On the written expression subtest, the student performed at the fourth percentile, but his score was limited by his handwriting difficulties (id.). He looked for ways to shorten sentences before writing them (id.).

According to the evaluator, the student's math skills were an area of strength as he performed average to well above average on math subtests (Dist. Ex. 6 at pp. 11, 13). His math facts and computations were always accurate, but he lost credit due to reversed numbers (id. at p. 12). The student's applied math skills were excellent as he understood an analog clock, coin values, units of measurement, graphs and tables, number patterns, and word problems read aloud (id.).

Lastly, in terms of social/emotional functioning, the evaluator described the student as friendly, kind, empathic, eager to please, and sensitive (Dist. Ex. 6 at p. 12). She noted that his teachers reported that the student often seemed nervous, worried, self-conscious, and fearful of making mistakes (id.). However, his teachers also described him as extremely determined, hardworking, and usually able to tolerate frustration very well (id.). The evaluator noted that although the parent expressed concerns regarding some occasional anxiety displayed by the student, responses on anxiety scales by the student, parent, and teachers did not yield any clinically elevated results (id.). The student's responses indicated he had faith in his ability to overcome obstacles through his internal and social resources, however the evaluator recommended that his psychological well-being should continue to be closely monitored (id.).

Review of the October 2020 IEP shows that most of the formal testing scores reported by the private neuropsychologist were included in the "[E]valuation [R]esults" section of the IEP (compare Dist. Ex. 6 at pp. 18-21, with Dist. Ex. 1 at pp. 1-4).

On the other hand, much of the narrative description of the student's needs contained in the October 2020 IEP present levels of performance came from the June 2020 report card from the student's prior private school, as well as from the oral report from the student's Shefa teachers, who as noted above, participated in the October 2020 CSE meeting (Tr. pp. 43, 92, 100-01, 141-43; Dist. Exs. 1 at pp. 4-7; 7).

One of the student's teachers from Shefa estimated the student's reading ability to be at the beginning of first grade level (Dist. Ex. 1 at p. 4). According to his Spring 2020 report card from the student's prior private school, the student was having difficulties with applying phonics skills to decode unfamiliar words and identifying the main topic and important details from a grade level nonfiction text (id. at p. 4). The student was nearing expectations in re-telling a story sequentially and in making connections between himself and text (id.).

According to his Shefa teacher the student mixed up short vowel sounds in consonant-vowel-consonant (CVC) words (Dist. Ex. 1 at p. 4). The student was still working on fluency with CVC words and would be moving to blends and diagraphs next (id.). The student was having difficulties with higher level thinking skills during read aloud, and struggled with connections between problems and solutions, as well as understanding characters' motivation and feelings (id. at p. 5). The student was able to retell a short story (id. at pp. 4-5).

According to the October 2020 IEP, the student's spring 2020 report card noted he was having difficulties in applying strategies from lessons to written work and in revising and editing with prompts (Dist. Ex. 1 at p. 5). The student was "nearing expectations" in his use of punctuation with prompts but experiencing difficulties in accurate use of upper- and lower-case letters (id.).

The IEP noted that the student had difficulties with encoding and put letters out of order and mixed up vowels (Dist. Ex. 1 at p. 4). According to his Shefa teacher, the student was working on letter formation but was inverting letters and mixing sounds (id. at p. 5). The student used a pencil grip, a seat cushion, and a foot swing at his desk, which helped him to stay in place in the classroom (id.). According to his teacher the student was functioning at the kindergarten level in writing (id.). The student was working on oral language with writing and exhibited strength in identifying the difference between a fragment and complete sentences and could fix a sentence orally (id.). The student struggled with generating ideas, and often shut down with frustration while writing (id.). The student had difficulty putting ideas on paper independently and avoided writing activities at home (id.). The IEP indicated that, according to his spring 2020 report card, the student was a social, happy, and hardworking student who was determined to perform his best (id.). The student was reportedly respectful and cooperative throughout the transition to online learning and an active participant in lessons (id.). As memorialized in the IEP, the student's spring 2020 report card indicated that he learned especially well during small group instruction and benefitted from direct instruction (id.). The student was working on applying reading and writing skills taught during learning center sessions, and he benefitted from support in phonics group to work on penmanship, as well as reviewing and applying phonics skills he had learned (id.). A noted goal was for the student to independently write a complete sentence (id.).

The October 2020 IEP indicated that, according to the student's Shefa teacher, the school followed a "modified curriculum" in math (Dist. Ex. 1 at p. 5). In math, the student was working on writing numbers and automaticity of facts up to 10 and was meeting expectations in adding and subtracting up to 20 (id.). He was able to add numbers up to 100, tell time to the half hour, identify and add coins, and interpret data represented in graphs and met age expectations with regard to these skills (id.). The student's spring 2020 report card noted the student had worked extremely hard and was meeting grade level expectations in computation skills (id. at p. 6). The student's math skills were reportedly a strength, however he had difficulty with word problems, automaticity, and actual writing of numerals (id.). The student was noted to be at a second-grade level in math (id.).

The student needed support in writing as he tended to write his letters out of order, reversed, and poorly formed (Dist. Ex. 1 at p. 6). In addition, the student had difficulty independently generating ideas for essays (id.).

The IEP indicated that, as reported by the student's mother, the student enjoyed interacting with his peers, although his lack of academic confidence resulted in insecurities in school relationships and socially, and he had difficulty bouncing back after conflict (Dist. Ex. 1 at p. 7). The IEP noted that, according to Shefa staff, the student was friendly, well-liked by peers, and an active participant in the classroom (id.). He was working on improving academic confidence and frustration tolerance during writing activities (id.). According to the IEP, the student needed to work on recognizing social cues, which would be accomplished during counseling (Tr. p. 55; Dist. Ex. 1 at p. 7).

With regard to physical development the IEP described the student as having difficulty with "fine motor skills in writing" (Dist. Ex. 1 at p. 7). The IEP noted that the student was "clumsy" and accident prone, and he had difficulty with spatial awareness of his body (id.). The IEP stated that the student needed help with sensory regulation, body awareness, and writing, which would be addressed with OT services (Tr. p. 55; Dist. Ex. 1 at p. 7).

The IEP detailed the resources needed to address the student's management needs including "sound[ing] one sound at a time," explicit phonics instruction, multisensory instruction, seat cushion, pencil grip, repetition, explicit instruction, modeling, foot swing, sentence starters, words on desk, positive praise, and breaks as needed (Tr. pp. 48-51; Dist. Ex. 1 at p. 8).

Given the information available to the CSE from the June 2020 progress report from the student's prior private school, the July 2020 private neuropsychological evaluation, and the verbal report from the student's Shefa teachers, there is no merit to the parent's argument that the information before the October 2020 CSE was outdated, notwithstanding that the prior written notice also referenced that the CSE considered evaluations conducted in 2018. Moreover, although the hearing record is unclear as to the degree to which the CSE engaged in substantive discussion of the July 2020 neuropsychological evaluation report, as noted, the CSE reviewed the evaluation, and the IEP listed the formal testing scores (see Tr. p. 143; Parent Ex. W; Dist. Ex. 1 at pp. 1-4). The degree to which the recommendations from the evaluation are reflected in the IEP is discussed further below. Based on the foregoing, the evidence in the hearing record supports a finding that the October 2020 CSE had sufficient evaluative information to develop an educational program for the student and properly considered the information before it.

2. 12:1 Special Class and SETSS

As described above, the crux of the dispute in this matter surrounds the appropriateness of the October 2020 CSE's recommendations for a 12:1 special class and SETSS.

The October 2020 IEP featured 15 annual goals that addressed the areas of OT, counseling, reading, writing, and math (Dist. Ex. 1 at pp. 10-21). Specifically, to address his writing and focusing needs, the recommended goals targeted improving strength, endurance, and postural control to facilitate hand use for a 10-minute writing activity, improving copying speed, and demonstrating optimal arousal levels for participation in social and academic activities (*id.* at pp. 10-11). In addition, to address his social/emotional needs and confidence, the student's goals in counseling included using calming techniques, identifying feelings of others in pictures, and identifying his academic strengths and how to use them to address academic difficulties (*id.* at pp. 12-14). Further, the CSE recommended goals to address the student's needs in reading including reading aloud with appropriate fluency, expression, intonation, and understanding; reading unfamiliar multisyllabic words in and out of context; and decoding text that incorporated newly taught letter-sound combinations, with sufficient fluency and accuracy for comprehension (*id.* at pp. 14-16). To address his needs in the area of writing, the CSE recommended goals related to writing an opinion paper with support for his view, producing complete sentences for detail or clarification, and using and expanding complete simple and compound sentences (*id.* at pp. 17-19). Finally, the student's needs related to math were addressed with goals that targeted his ability to solve one step word problems with addition and subtraction; solve multi-step word problems involving money, measurement, and data presented in graphs, tables, and charts; and demonstrate automaticity with addition and subtraction facts through 10 (*id.* at pp. 19-21).

The October 2020 CSE recommended that the student attend a 12:1 special class for ELA, math, social studies, and science and receive direct, group SETSS in ELA five periods a week in a community school (Tr. pp. 45-46; Dist. Ex. 1 at p. 22). The October 2020 CSE also recommended two 30-minute sessions per week of individual counseling and two 30-minute sessions per week of individual OT (Dist. Ex. 1 at p. 22).¹⁵ The student was also recommended for testing accommodations of extended time, breaks, use of aids/assistive technology, focusing prompts, direction read aloud and re-read aloud, and tests read aloud and re-read aloud (*id.* at p. 24).

¹⁵ In her answer, the parent indicates that the October 2020 IEP did not recommend speech-language therapy despite the student's needs therefor (Answer ¶ 10). The student's need for speech-language therapy was not an issue raised by the parent or to which the district opened the door; accordingly, I decline to delve into the issue. Briefly, however, the private neuropsychological evaluation report described the student's speech-language skills as normal in most areas with a subtle weakness in word retrieval (Dist. Ex. 6 at pp. 6-7) and the private evaluator did not recommend speech-language therapy. To support her contention that the student required the services, the parent cites the testimony of the Shefa assistant head of the lower school that, according to Shefa's speech-language therapist's evaluations of the student, the student needed speech-language therapy (Parent Ex. R ¶ 23); however, the referenced evaluations were not before the October 2020 CSE and this after-the-fact opinion cannot be relied upon to challenge the appropriateness of the IEP (see *C.L.K. v Arlington Sch. Dist.*, 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]).

According to State regulation, a 12:1 special class placement is designed for students "whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). In reaching the decision to recommend a 12:1 special class placement, the October 2020 CSE considered and rejected ICT services as insufficient to meet the student's needs given that he was having academic difficulties "that impede[d] [his] ability to generalize information to the classroom" (Dist. Ex. 1 at p. 28). The CSE also considered and rejected a 12:1+1 special class in a community school because it "would be too restrictive to meet his educational needs" taking into account that the student had "good cognitive ability and with the right supports c[ould] access the curriculum" (*id.*). As noted in the October 2020 IEP, the CSE ultimately recommended a 12:1 special class placement at a community school as the setting that would best meet his needs with OT and counseling "for additional support for skills" (*id.*). The CSE also recommended SETTS in ELA five times per week for one period (*id.*). The IEP reflects concerns expressed by the parent and the Shefa teachers that the recommended programming would "not adequately meet [the student's] needs" and that the student needed "a smaller ratio of classes and much more support than proposed by th[e] IEP" (*id.* at pp. 28-29).

The district special education teacher who attended the student's October 2020 CSE meeting testified that the CSE determined a 12:1 special class in a community school was appropriate for the student because it was the LRE in which he would have opportunities to interact with his regular education peers and would encourage generalization of his skills (Tr. pp. 41-43, 46, 55-56; *see* Dist. Ex. 1 at p. 29). Further, the district special education teacher testified that the student was recommended for a 12:1 special class because he needed "a fair amount of support" from a special education teacher and related services and "because he was coming from a smaller ratio [at Shefa]" (Tr. p. 47). The special education teacher testified that the SETSS provider could determine the appropriate group size for the student based on his abilities and the group could be "as large as eight or a group as small as one" (Tr. p. 52). She testified that the SETSS in ELA provided "focused instruction" in reading and writing and offered a smaller student-to-teacher ratio (Tr. p. 53). The SETSS would provide the "extra support" the student needed to work on his goals (Tr. pp. 53-54).¹⁶ The special education teacher testified that the October 2020 IEP included counseling in order for the student to develop more academic confidence, and OT in order for him to improve his stamina while writing (Tr. pp. 54-55).

The student had been attending Shefa since September 2020 leading up to the October 2020 CSE meeting (*see* Dist. Ex. 1 at p. 4). In finding the 12:1 special class with SETSS inappropriate, the IHO noted that the student had been making progress at Shefa in a smaller class of six to eight students with two teachers (IHO Decision at p. 11). On appeal, both of the parties point to evidence about the class size at Shefa: the district arguing it was up to 13 students and the parent arguing that the student attended reading and writing classes of six of up to six or eight students with two teachers (Req. for Rev. ¶ 19; Answer ¶ 16). However, at the time of the CSE meeting, the student had only attended Shefa for one month (*see* Dist. Ex. 1 at p. 4), and, as such, he had not had an opportunity to demonstrate progress in the classes offered to the extent that it would or would not

¹⁶ The IHO opined that one period of SETSS per day "may not have" provided the support he required, observing that the student would be reading and writing throughout the day, not just for one period per day (IHO Decision at p. 11); however, this reasoning seems to disregard the other recommendations in the IEP including the 12:1 special class which would support the student's reading and writing (*see* Dist. Ex. 1 at p. 22).

lend support to recommendations in the IEP with respect to class size. Moreover, generally, districts are not required to replicate the identical setting used in private schools (see, e.g., M.C., 2018 WL 4997516, at *28; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]).

In finding the October 2020 IEP inappropriate, the IHO also noted information in the neuropsychological evaluation that the student struggled even with 2:1 literacy reading support and that the student needed adult support to stay on task when engaged in heavy reading or writing demands (IHO Decision at p. 11; see Dist. Ex. 6 at pp. 2-3). However, the evaluator also noted that, per teacher report, the student's focus and attention were varied and that the student was more attentive, engaged, participatory, and willing to take academic risks in the larger classroom whereas in the small literacy group his attention was less consistent and he was prone to daydreaming (Dist. Ex. 6 at pp. 2-3, 8). The report also indicated that the student's struggles in the literacy group were related to the demands of the group (id. at p. 8).

The July 2020 private neuropsychological evaluation report included a recommendation for "a highly structured classroom with a low student-to-teacher ratio" (Dist. Ex. 6 at p. 15). The neuropsychologist further recommended that the student receive "a high dose of evidence-based instructional programming that is systematic, explicit, recursive, and can be individualized to his own unique learning profile" and literacy instruction with "additional explicit, phonics-based remedial support outside of school" (id.). The neuropsychologist recommended that the student's parents consider a "small, specialized school that cater[ed] to students with language-based learning disorders" with individual reading and writing instruction (id.). The neuropsychologist also recommended daily, individualized support in ELA to "include a) systematic, phonics-based, multi-sensory reading instruction (i.e., Orton-Gillingham-based approach); b) explicit instruction in spelling rules, with spelling words taught in concert with sight words to improve automaticity; and c) explicit instruction in written expression, including grammar, sentence formulation, paragraph organization, and mechanics" (id. at p. 16). Further, the neuropsychologist recommended the continuation of OT and that the student be taught letters in way that helped him associate the visual stimulus with its sound (id.). She noted that alternately mnemonics should be developed to help the student distinguish between letters that were easily confused (id.). Lastly, the neuropsychologist recommended classroom and testing accommodations as follows: preferential seating near teacher and away from environmental distractions; support starting and remaining on task and with transitions; subtle re-focusing prompts; breaking tasks down into smaller parts; multisensory instruction; clear, simple directions; modeling and scaffolding for new tasks; minimize copying work; movement breaks; and extended time on assignments, quizzes, and tests (id. at pp. 16-17).

The October 2020 IEP reflected recommendations similar to several of the neuropsychologist's recommendations (see Dist. Ex. 1 at pp. 8, 22, 24). More specifically, the resources and strategies to address the student's management needs outlined in the October 2020 IEP are similar to the neuropsychologist's recommendations in that they include explicit phonics instruction, multisensory instruction, repetition, explicit instruction, modeling, and breaks as needed (compare Dist. Ex. 1 at p. 8, with Dist. Ex. 6 at pp. 15-16). Additionally, the neuropsychologist recommended the continuation of OT services which the CSE similarly recommended (compare Dist. Ex. 1 at p. 22, with Dist. Ex. 6 at p. 16). Further, the October 2020 CSE recommended testing accommodations similar to those recommended by the

neuropsychologist of extended time, refocusing, and breaks (compare Dist. Ex. 1 at p. 24, with Dist. Ex. 6 at pp. 16-17).

As to the neuropsychologist's recommendation for "a highly structured classroom with a low student-to-teacher ratio" in a "specialized school," the evaluator did not define what was meant by a small class (Tr. p. 87; Dist. Ex. 6 at p. 15). Further, the CSE was not obligated to adopt the neuropsychologist's recommendations wholesale (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, 325 F. Supp. 2d at 145 [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"]).¹⁷ This is particularly so given the additional information available to the CSE regarding the student's functioning in the school setting, and that, in addition to considering what supports and services the student needed in order to receive educational benefits, the district was mandated to consider placing the student with his nondisabled peers in light of the IDEA's LRE requirements.

Accordingly, given the student's needs as described in the October 2020 IEP, the hearing record supports a finding that the recommended 12:1 special class, in conjunction with SETSS and the related services of OT and counseling, as well as instructional supports, strategies and goals, offered the student an educational program in the LRE that was reasonably calculated to enable the student to make meaningful progress in light of his circumstances.

VII. Conclusion

Having found that the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2021-22 school year, the IHO's finding to the contrary must be reversed, and the necessary inquiry is at an end. Therefore, there is no need to reach the issue raised in the parent's cross-appeal pertaining to the IHO's reduction of the amount of tuition to be reimbursed based on the delivery of religious instruction at the unilateral placement.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated June 17, 2022, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2021-22 school

¹⁷ The parent attempts to distinguish this authority on the grounds that it predated Andrew F. (see Parent Mem. of Law at pp. 4-5); however, the Second Circuit has observed that the "Supreme Court's recent clarification of the FAPE standard buttressed [its] view that the preeminent requirement of the IDEA [was] that the District individually tailor a program that [was] sufficiently challenging for the unique needs of each child" (F.L. v. Bd. of Educ. of the Great Neck Union Free Sch. Dist., 735 Fed. App'x 38, 40 [2d Cir. Aug. 24, 2018] [summary order]; see Doe v. E. Lyme Bd. of Educ., 962 F.3d 649, 663 [2d Cir. 2020] [finding "'[p]rior decisions of th[e] Court . . . consistent with the Supreme Court's decision in Andrew F."] [first alteration in the original], quoting: Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 757 [2d Cir. 2018]). Moreover, since Andrew F. was issued, several district courts in have reiterated that a CSE need not adopt the recommendations set forth in a private evaluation (see, e.g., B.M. v. Pleasantville Union Free Sch. Dist., 2021 WL 4392281, at *13 [S.D.N.Y. Sept. 24, 2021]; Y.N. v. Bd. of Educ. of Harrison Cent. Sch. Dist., 2018 WL 4609117, at *20 [S.D.N.Y. Sept. 25, 2018]).

year and which ordered the district to fund a portion of the costs of the student's tuition costs at Shefa for the 2021-22 school year.

Dated: **Albany, New York**
 September 12, 2022

SARAH L. HARRINGTON
STATE REVIEW OFFICER