



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 18-079

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

### **Appearances:**

Law Office of Erika L. Hartley, attorneys for petitioner, by Erika L. Hartley, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail M. Eckstein, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the Summit School (Summit) for the 2017-18 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for that year. The appeal must be sustained in part. The cross-appeal must be sustained in part.

### **II. Overview—Administrative Procedures**

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

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

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

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

### **III. Facts and Procedural History**

The student has been the subject of a prior State-level appeal which concerned the 2013-14, 2014-15, and 2015-16 school years (see Application of a Student with a Disability, Appeal No. 16-048). The parties' familiarity with the facts and procedural history are presumed and will not be repeated here in detail, except as is relevant herein. The SRO in Application of a Student with a Disability, Appeal No. 16-048 determined that there was no basis to disturb the IHO's conclusion that the student was not eligible for special education and related services under the IDEA during much of the 2013-14 and 2014-15 school years, but that the parties did not appeal from the IHO's

determination that the district should have found the student eligible at the conclusion of the 2014-15 school year and consequent failure to offer the student a FAPE for the 2015-16 school year. The parent challenged the IHO's orders directing further evaluation of the student and compensatory education, which challenges were found insufficient to reverse the IHO's conclusions (Application of a Student with a Disability, Appeal No. 16-048).

The student has attended Summit, a State-approved nonpublic school since the 2016-17 school year (Parent Exs. A at p. 2; G at p. 2; L at p. 1; Dist. Exs. 1 at p. 2; 8 at p. 1). After the SRO dismissed the prior State-level appeal in September 2016, on February 22, 2017, entries were made in the district's computerized Special Education Student Information System (SEIS) to indicate that the district had sent a "request for reevaluation," and a "notice of IEP meeting" (Dist. Ex. 12 at p. 8; see Tr. pp. 62-63). The remaining entries in the SEIS event log appear to document attempts to schedule a reevaluation of the student, attempts to obtain consent for reevaluation, attempts to schedule a CSE meeting to conduct the student's annual review for the 2017-18 school year, and attempts to contact the parent from February 27, 2017 through June 20, 2017 (Dist. Ex. 12 at pp. 1-8).<sup>1</sup>

On June 20, 2017 a CSE convened to develop an IEP for the student for the 2017-18 school year with a district school psychologist, who also served as the district representative, a district teacher that served as a special education teacher, and the clinic director at Summit in attendance; however, the student's parent and direct service providers from Summit did not participate (Tr. pp. 54-55; Parent Exs. N; O; Dist. Exs. 1 at pp. 1, 19; 3 at p. 1; 12 at p. 3). The June 2017 CSE recommended the student attend a general education classroom and receive ten periods of integrated co-teaching (ICT) services for English language arts (ELA) per week, five periods of ICT services in math, social studies and sciences per week; one 30-minute session of individual counseling services per week; one 30-minute session of individual occupational therapy (OT) per week; and two 30-minute sessions of individual speech-language therapy per week (Dist. Ex. 1 at pp. 11-12). To further support the student's identified needs, the CSE recommended the following testing accommodations: separate location, revised test directions, extended time, breaks, and on-task focusing prompts (id. at p. 13).

In the management needs section of the June 2017 IEP, the CSE indicated that the student would benefit from multisensory instruction, sufficient opportunity for practice and review, small group instruction, use of graphic organizers, proximity control, and praise and encouragement (Dist. Ex. 1 at p. 6). The CSE also recommended cues and prompts, movement breaks, and fidgets to help the student regain focus, and further noted that the student benefitted from strong adult relationships to help her feel confident enough to seek support and ask for help (id.).

In a prior written notice dated June 26, 2017, the district notified the parent that the CSE determined the student continued to remain eligible for special education and related services as a student with an other health impairment (Dist. Ex. 4 at p. 1).<sup>2</sup> According to the prior written notice,

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<sup>1</sup> According to the parent, she never received any of the requests for reevaluation, notices of a CSE meeting or requests for consent to reevaluate (Parent Ex. S pp. 1-6; see also Tr. pp. 404-06, 408-10, 411-12).

<sup>2</sup> The student's eligibility for special education and related services as a student with an other health impairment is not in dispute in this proceeding (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

the CSE considered "School Documents/Progress Reports" as a basis for recommending 10-month services at a district non-specialized school in an ICT classroom with the related services of individual counseling, individual OT, and individual speech-language therapy (*id.*). The CSE reportedly considered and rejected other placement options of general education only, related services only, special education teacher support services, a 12:1 special class in a community school, a 12:1+1 special class in a community school and a State-approved nonpublic day school (*id.* at p. 2). The prior written notice also indicated that each option was "considered and determined not appropriate" with a nonpublic day school specifically "deemed too restrictive" (*id.*).

By letter dated August 22, 2017, the parent notified the district of her intention to unilaterally enroll the student at Summit for the 2017-18 school year (Parent Ex. G at p. 2). The parent stated that the district's recommended placement for the 2017-18 school year was inappropriate and that the 2017-18 IEP failed to address the student's challenges, did not take into consideration all of the current evaluative data and school reports, recommended an inappropriate program in the district setting and overall denied the student a FAPE (*id.* at p. 2). The parent also gave notice of her intention to seek full tuition funding, tuition reimbursement, transportation costs, busing, tutoring and related services for the student (*id.* at p. 3).

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

By due process complaint dated November 9, 2017, the parent alleged that the district's CSE convened without notice to the parent and without her participation on June 20, 2017 (Parent Ex. A at p. 1). As a result, the parent claimed that she was denied meaningful participation in the development of the June 20, 2017 IEP (*id.*). The parent contended that she gave timely notice to the district that she was rejecting the recommended program and unilaterally placing the student at Summit (*id.* at pp. 1-2). The parent also alleged that the CSE predetermined the student's recommended placement and failed to timely provide the IEP and prior written notice to the parent (*id.* at p. 2). The parent also requested busing to and from Summit (*id.*). The parent also argued that Summit was an appropriate unilateral placement for the student and that equitable considerations were in her favor (*id.*). As relief, the parent requested an interim order for busing, an award of transportation costs for the period of time that busing was not provided, and funding of tuition for the student's attendance at Summit for the 2017-18 school year (*id.* at pp. 2-3).

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

Pre-hearing conferences were held on December 14, 2017 and January 17, 2018 (Tr. pp. 1-19). During the December 14, 2017 conference, the parent requested that the IHO issue an order for the student's transportation (Tr. pp 2-5). By interim decision dated December 14, 2017, the IHO directed the district to provide bus transportation "to the Summit school" (IHO Interim Decision at p. 2). The impartial hearing convened on February 2, 2018, and concluded on April 30, 2018, after six hearing dates (Tr. pp. 20-454). In a decision dated June 7, 2018, the IHO found that the program recommended by the CSE in June 2017 was not appropriate because "[t]here was no recommendation that the [s]tudent be grouped with other students of similar cognitive abilities" in the recommended ICT classroom and "there [wa]s no evidence that [the student] would receive sufficient support in the class" (IHO Decision at p. 10). The IHO determined that [t]here was no

recommendation that the [s]tudent be provided services in a gifted and talented program" and the ICT classroom was not appropriate because the other students were not "gifted students" (id.).

With regard to the parent's unilateral placement of the student, the IHO stated that it was unclear whether the program at Summit was meeting the student's needs (id.). The IHO further noted that the student received a great deal of support in all areas to address her distractibility, speech-language and emotional difficulties (id.). The IHO expressed concern that the student was "distracted internally" and that the hearing record failed to sufficiently explain the student's functioning (id.). Similar to her conclusion about the public programming, the IHO found that with respect to Summit "there is no evidence that the students in the [s]tudent's class are gifted or that she is grouped with gifted students" (id.) The IHO determined that the student "performed inconsistently at the Summit School during the 2016-2017 school year, and continues to struggle with the same issues during the current school year" and noted that, without any explanation, the student did not perform well according to mid-year reports (id. at pp. 10-11). The IHO tentatively opined that the student was insufficiently challenged at Summit (id. at p. 11). The IHO found that Summit was not an appropriate unilateral placement and further determined that equitable considerations did not support the parent's requested relief because the parent failed to cooperate with the CSE and her 10-day notice of unilateral placement was deficient (id. at p. 12). The IHO denied the parent's request for tuition reimbursement (id.).

As a remedial measure, the IHO found that additional evaluation was necessary and ordered the district to conduct a neuropsychological evaluation, a speech-language evaluation, an OT evaluation, a classroom observation, an observation by a school psychologist, and a functional behavioral assessment (FBA) (id. at pp. 12-13). The IHO ordered the district's CSE to convene within two weeks of completion of the evaluations and observations to determine whether the student required a behavioral intervention plan (BIP) and to make an appropriate recommendation (id. at p. 13). The IHO further ordered that the student be grouped with students with similar cognitive ability (id.).

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

The parent appeals and argues that the IHO erred by finding the parent's unilateral placement at Summit inappropriate. The parent contends that the IHO should have found the student was denied a FAPE and ordered direct funding of the student's tuition at Summit. Additionally, the parent alleges that the IHO incorrectly found the parent did not cooperate with the district's CSE, and erred by ordering a neuropsychological evaluation, an OT evaluation, a speech-language evaluation, observations of the student and an FBA.

The parent also challenges the IHO's finding that the hearing record was unclear as to the student's functional grouping at Summit. According to the parent, the hearing record reflects that the student was functionally grouped with peers based on cognitive ability and that the student demonstrated progress during the 2016-17 and 2017-18 school years.

The parent next argues that the IHO improperly determined that she did not cooperate with the CSE. The parent contends that the student was not due for a triennial review until the 2017-18 school year, and therefore she did not hamper development of the IEP for the 2017-18 school

year.<sup>3</sup> The parent also argues that she did not receive notice of the June 2017 CSE meeting. For these reasons, the parent contends that the IHO erred by finding that equitable considerations favored the district.

The parent further alleges that the IHO erred by ordering new evaluations, observations and an FBA for the student. The parent contends that the evaluations were less than three years old, and that there was no evidence in the record to support the IHO's order. As relief, the parent requests a determination that Summit is an appropriate unilateral placement for the student, that the student was denied a FAPE, and that equitable considerations favor the parent. The parent also requests an award of direct funding of tuition, and for the IHO's order for evaluations, observations and an FBA be reversed. The parent further requests that those findings of fact that are inconsistent with the hearing record be stricken.

In an answer with cross-appeal, the district generally responds to the parent's claims with admissions and denials. Specifically, the district cross-appeals from that part of the IHO's decision that found the district denied the student a FAPE. The district requests that the IHO's determinations as to the appropriateness of the parent's unilateral placement and regarding equitable considerations be affirmed. The district also alleges that the parent failed to comply with the form requirements for pleading. As relief, the district requests that the parent's appeal be dismissed because the district offered the student a FAPE for the 2017-18 school year.

The district argues that the IHO incorrectly found that it failed to offer the student a FAPE because the recommended program was appropriate. The district further argues that the IHO erred by considering functional grouping because the issue of grouping was not raised in the parent's due process complaint notice. Additionally, the district argues that any functional grouping claims are impermissibly speculative because the student was never enrolled in the proposed placement and there is no evidence in the hearing record to support the IHO's determination. The district next argues that the remaining allegations in the parent's due process complaint notice are without merit even though they were not addressed in the IHO's decision. The district contends that the CSE considered sufficient evaluative data given that the parent refused to consent to additional evaluations. The district also argues that the parent failed to respond to attempts to schedule a CSE meeting and therefore the CSE had no choice but to proceed without the parent's presence. The district contends that the IHO correctly found Summit inappropriate because the student continued to struggle both academically and behaviorally during the 2017-18 school year. The district further alleges that the IHO's determination that equitable considerations favor the district be affirmed. The district argues that the CSE meeting was rescheduled four times in order to secure the parent's attendance and that the parent did not complain of her absence from the CSE meeting in her 10-day notice to the district, thereby preventing the district from reconvening the CSE to cure the alleged defects in the IEP.

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<sup>3</sup> The parent's request for review correctly states that the events leading up to the unilateral placement for the 2017-18 school year occurred during the 2016-17 school year. Nevertheless, the 2016-17 school year is not at issue in this matter. For the sake of clarity these events are described herein as having occurred in preparation for the 2017-18 school year.

In an answer to the cross-appeal, the parent argues that the district failed to conduct a classroom observation and the CSE failed to consider neuropsychological, speech-language, OT and visual skills evaluations that were available to the district. that resulted in an inappropriate program recommendation. The parent alleges arguments that were also set forth in her request for review,<sup>4</sup> namely that the CSE convened without the parent's participation or with the participation of the student's providers at Summit and as a result the student was denied a FAPE. The IEP that was developed at that CSE meeting did not reflect the full range of the student's strengths and weaknesses and according to the parent denied the student a FAPE. Based on these allegations the parent contends that the IHO properly determined that the district's programing was inappropriate for the student.<sup>5</sup> The parent denies the district's allegations in the answer with cross-appeal and requests that the matters above be found as additional bases for a denial of FAPE and the IHO's determinations that the unilateral placement was not appropriate and that equitable considerations favored the district be reversed.

## 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.

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<sup>4</sup> Although parent's pleading was captioned as a "Verified Petition," the practice regulations were modified by the Board of Regents nearly two years ago to align with federal terminology and the revised State regulations provide for a "Request for review" (8 NYCRR 279.4[1]; see 34 CFR 300.515[b]). Additionally, I note that counsel attempts to incorporate by reference into the request for review her 19-page closing brief; however such incorporation by reference is explicitly prohibited by the practice regulations (8 NYCRR 279.8[b]). Counsel for the parent appears regularly in this forum and should ensure that she reviews the Part 279, as amended and effective January 1, 2017, and conforms her practice accordingly, as nonconforming pleadings may be rejected at the discretion of an SRO.

<sup>5</sup> The parent alleged in her request for review that the IHO failed to find a denial of a FAPE. The IHO did not use that phrase, but it is reasonably clear from the IHO's decision as a whole that the parent prevailed on the FAPE dispute, not the district.

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]).<sup>6</sup>

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

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). A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale

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<sup>6</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65). The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C.

§ 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Compliance with Practice Regulations**

The district contends in a footnote that the request for review fails to comply with State regulations governing the form requirements for pleadings (see 8 NYCRR 279.8[c]). State regulations provide that a request for review<sup>7</sup> "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). Specifically, the district contends that the parent failed to set forth a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review (8 NYCRR 279.8[c][2]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at \*4-\*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

As described above, I have noted several deviations from the form requirements of Part 279 in the parent's pleadings; however, the district's specific objection is without merit as the parent largely complied with the requirements of 8 NYCRR 279.8[c][2] in that it is actually fairly easy

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<sup>7</sup> The Regulations of the Commissioner of Education were amended effective January 1, 2017. Among the changes to the practice regulations was the renaming of the pleading to initiate a review from "petition" to "request for review" (8 NYCRR 279.4[a]). The parent's attorney has served a "verified petition" that further fails to comply with the regulatory page limits (8 NYCRR 279.8[b]). However, the district did not object to this deviation from the form requirements in its answer.

to identify the specific rulings of the IHO that the parent is challenging. Moreover, I directed counsel for the parent to review the requirements of Part 279 as amended and effective January 1, 2017. Consequently, I decline to dismiss the request for review on these grounds given that the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that the district suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 18-053; Application of a Student with a Disability, Appeal No. 17-101).

## 2. Scope of Impartial Hearing

The district argues that the due process complaint notice does not contain any allegations related to functional grouping at the recommended placement and that the IHO erred by addressing this claim. Relying on Application of a Student with a Disability, Appeal No. 18-042, and on Application of a Student with a Disability, Appeal No. 18-033, the district further argues that it was not required to demonstrate how the student might have been grouped at the recommended ICT class because the student was never enrolled and therefore such a claim is impermissibly speculative. The district also contends that the hearing record is "devoid of any information concerning the functional grouping of the proposed class" and requests that the IHO's holding be annulled (Answer with cross-appeal ¶ 12 fn 2).

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]; see, e.g., N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y. 2013]; see B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 2014 WL 2748756, at \*1-\*2 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at \*7-\*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

With regard to FAPE, the IHO first noted that the CSE did not recommend that the student be grouped with other students of similar cognitive abilities, nor did the CSE recommend that the student be provided services in a gifted and talented program (IHO Decision at p. 10). The IHO next stated that she did not agree that the student required a small class, but found the student required

a class in which she can be grouped with student[s] with similar cognitive levels and provided with a substantial amount of attention to help her maintain focus, pay attention to instructions, have instructions and language broken down as necessary and receive therapeutic support as needed in addition to her related services. It is unclear that the ICT class could provide all that.

(IHO Decision at p. 10).

The IHO then found that "the program recommended by the [district] was not appropriate in that the students in the ICT class were not gifted students, and there is no evidence that she would receive sufficient support in the class" (IHO Decision at p. 10).

The parent's due process complaint notice does not include any allegations related to grouping (see Parent Ex. A). Upon review of the hearing record, the district did not subsequently agree to add issues related to gifted and talented programming, or functional grouping and the parents did not attempt to amend the due process complaint notice to include these issues. Accordingly, this issue was raised for the first time on appeal and is outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]").

Nevertheless, the IHO drew conclusions on this issue notwithstanding the fact that the parent's due process complaint notice did not include this claim, and the next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education, (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [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, \*9 [S.D.N.Y. Aug. 5, 2013]). In this case, the only mention of functional grouping occurred when counsel for the parent questioned staff members of Summit—the parent's unilateral placement—regarding their grouping practices (Tr. pp. 197-98, 200-01, 206, 216, 221-22, 322). The hearing record indicates that no district witnesses testified about the issue, it arose during the parent's case in chief and the district did not open the door to the parent's challenges (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at \*9). I agree with the district that the IHO's findings regarding functional grouping were beyond the scope of the hearing, nevertheless, the IHO's inartful use of "gifted and talented programming" and the extent to which it informed her other determinations in the matter must be reviewed (IHO Decision at p. 10).

### **3. Scope of Review**

The parent's allegations that the CSE predetermined the student's recommended placement and failed to timely provide the IEP and prior written notice have not been raised on appeal. To the extent the parents do not raise arguments on appeal regarding claims which were alleged in the due process complaint notice and were not reached by the IHO, these claims are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).

## **B. CSE Process**

### **1. Parental Notice, Consent and CSE Participation**

Turning to the parent's arguments that there was a lack of notice of the June 2017 CSE meeting and that the meeting was convened without the participation of the parent and the student's providers at Summit, the IHO credited the district's documentary evidence and testimony regarding its attempts to contact the parent, obtain consent to reevaluate the student, schedule a CSE meeting, and to accommodate the parent in order to obtain her participation (IHO Decision at pp. 8, 11-12; see also Tr. pp. 444-46, 447-48; Dist. Ex. 12 at pp. 1-8).

A school district is required to notify a parent of a CSE meeting on a form prescribed by the Commissioner of Education that, among other things, "(i) [i]ndicate[s] the purpose, time, and location of the meeting and who will be in attendance; and (ii) [i]nform[s] the parents of the provisions in § 300.321(a)(6) and (c) (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child) (34 CFR. § 300.322[b][1][i]-[ii]; see 8 NYCRR 200.5[c][2][1]-[2]).

The district psychologist testified that she documented earlier attempts to contact the parent and inform her of CSE meetings in the SESIS events log (Tr. p. 56). In particular, the district psychologist testified that a CSE meeting notice and request for reevaluation of the student was sent in February 2017 for a late-March meeting, however, the student did not "show" for the March 25, 2017 evaluation appointment (Tr. pp. 61-63; Parent Ex. 12 at pp. 7-8). Consequently, an April 21, 2017 CSE meeting had to be rescheduled when the evaluation was rescheduled to May 13, 2017, and the district psychologist testified that she tried to inform the parent of the change in the meeting date, however, a message could not be left on the mother's number but messages were left on both of the father's numbers, an e-mail was sent, and "[t]he school was also informed" that the April 2017 meeting would be rescheduled (Tr. pp. 63-65; Parent Ex. 12 at pp. 6-7). The district psychologist testified that she did not get a response to her voicemail messages by telephone, however, the parent responded by e-mail that she would "not be able to attend the evaluation testing on 5/13/17" and to "[p]lease reschedule [the student's] evaluation to another day"; further "in regards to the IEP meeting [the parent] will be available any day during the week of June 19th-23rd" and that she could be reached by cell (at the number that the district psychologist was not able to leave a message on previously) or e-mail (Tr. p. 66; Parent Ex. 12 at p. 6). The district psychologist testified that in response to this communication, she sent a letter to the parent requesting that she "simply sign and return the consent" so that "we may schedule [the student] for testing as soon as possible" and that she would follow-up with a new meeting notice "during the week of June 19-23" when the parent had indicated she would be available (Tr. pp. 66-67; Parent Ex. 12 at p. 5). The parent then sent an e-mail stating that her initial e-mail was sent in error and that upon review "it became evident that the evaluations are all current" and the parent had "requested the reasons why new evaluations were needed, when current evaluations exist," concluding that "I hope this clarifies my concerns regarding testing at this time" (Tr. p. 67; Parent Ex. 12 at p. 4). The district psychologist testified that after reviewing the documents that the parent was referring to, she responded by saying that it was "a psychoed[ucational evaluation] from 2014, when [the student] was in kindergarten, [and] as she is now in the 3rd grade[.]" [the district psychologist] was indicating that particularly[,] academic skills[] can be different, and that was our interest in knowing [] what her skills are at this point in time" (Tr. p. 68; Parent Ex. 12 at p.

4). The parent wrote back, stating "[p]lease find that a [n]europsychological evaluation has been conducted ... in December of 2014" and "has been provided to the CSE several times," however the district psychologist testified that while she confirmed that the CSE had this document, "again, it's from 2014 and that [the student's] skill developments have likely changed since then" (*id.*). The school psychologist further testified that while cognitive testing can be done every three years, academically, "best practice" is "to have an updated profile within six months" (Tr. p. 69). The district psychologist also testified that in her May 13, 2017 communication, the parent, in responding to the district's e-mail that she did not bring in her daughter for testing, states that "[she] do[es] not give permission for the CSE to communicate with [her] by email" and to "[p]lease send all communications regarding meetings and other requests in writing to my home address"; furthermore, the parent stated that she was never notified of the request for testing on March 25, 2017 but if she had she would have informed the district that her daughter's evaluations were current and further requested the reason for seeking new evaluations (Tr. pp. 70-71; *see* Parent Ex. 12 at p. 3). The district psychologist testified that as she had previously responded to this, she mailed a [CSE] meeting notice for June 20, 2017 which was "in the range of that period of time [the parent] indicated she would be available," stating that she "tried to "accommodate [the] [p]arent's request" but "was surprised that she wasn't available—or she didn't come here [] nor [] did she participate by phone" (Tr. p. 71).

As evidence, the district also produced a meeting notice for the June 20, 2017 CSE that is dated May 12, 2017 (District Ex. 2), and the school psychologist testified that she mailed one meeting notice to the parent (Tr. pp. 62, 71).<sup>8</sup> While the school psychologist testified that she placed a meeting notice in the envelope and put it in the district's mail bin, the testimony may refer to an earlier notice and does not exhaustively detail the mailing of every communication sent to the parent (Tr. p. 62). I infer from her testimony that the psychologist follows a process for mailing documents, and there is no evidence that the district was using an incorrect mailing address, e-mail address or phone number for communicating with the parent. It is likely that the district was using proper modes of communication because at times the parent had little trouble communicating the desire to reschedule evaluations or indicate that she did not want the student further evaluated (Dist. Ex. 12 at pp. 4-6), which is what prompted the district to keep communicating with the parent. The district's contemporaneous documentation also shows that the June 2017 CSE made repeated attempts to call the parent during the meeting, and that the district had previously informed the parent that the telephone number left for the student's mother was not allowing messages (*id.* at pp. 3, 6-7). The parent's testimonial assertions that she did not receive the notice for the June 20, 2017 CSE meeting or any telephone calls from the CSE do not outweigh the district's evidence that there were multiple attempts to schedule a CSE meeting, that the district notified the parent of the June 20, 2017 CSE meeting when the parent indicated she would be available, and the parent did not respond to telephone calls made to obtain her participation during

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<sup>8</sup> The notice also stated to the parent that "[y]ou have the right to invite other individuals who you determine to have knowledge or special expertise about your child. Please notify us in advance of the names and titles of any individuals you have invited to the meeting" (Dist. Ex. 1), and it would be up to the parent to let the district know if she had invited particular individuals from Summit. If and when this occurred is unknown and district's school psychologist only indicated that she always invites Summit providers "through Outlook" (presumably the ubiquitous e-mail communication system) because "there are so many kids" that the psychologist attended to at Summit (Tr. p. 132).

the meeting (Tr. pp. 55-56, 61-73, 404-05; Dist. Exs 2; 12 at pp. 3-6).<sup>9</sup> Thus, while it is undisputed that the June 2017 CSE convened without the parent, under the circumstances described above, it was not a procedural violation that was chargeable against the district and I reject the parent's argument that it was the district that significantly impeded the parent's participation in developing the student's IEP.

As for any remaining aspects of the parent's claim that the IEP was developed "without a proper team" (Parent Ex. A at p. 2) or in the absence of stakeholders,<sup>10</sup> the IDEA requires a CSE to include, among others, one special education teacher of the student or, where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][iii]; see 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]; see also 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person, . . . , certified or licensed to teach students with disabilities"]). In addition, the IDEA also requires a CSE to include not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]).<sup>11</sup> As previously noted, however, under the IDEA an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). The hearing record indicates that in this case the remaining June 2017 CSE meeting participants included a district school psychologist, who also served as the district representative, a district teacher that served as a special education teacher, and the clinic director at Summit (Tr. pp. 54-55; Parent Ex. N; Dist. Ex. 1 at p. 19).<sup>12</sup> The district's school psychologist testified that the student's providers at Summit were invited to participate (Tr. p. 132). She further testified that Summit had provided documents in advance of the meeting, which meant to her that Summit must have known about the CSE meeting (id.). However, the clinic director at Summit testified that the student's teachers and

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<sup>9</sup> The IHO alludes to factual inconsistencies with the parents 10-day notice (IHO Decision at p. 11). While I do not view the inconsistencies in exactly the same way as the IHO, it is accurate to state that the parent did not express concern regarding lack of participation at the June 20, 2017 CSE meeting in her 10-day notice, and she testified that she did not receive the IEP until October 2017 (Tr. p. 406), but the 10-day notice that complains about the substance of the IEP was sent by August 2017 (Parent Ex. G). It suffices to say that I do not find the parent's recollection of events convincing.

<sup>10</sup> Other than the allegations regarding the lack of participation of Summit personnel and herself, the parent did not argue that any other specific members of the IEP team were missing (see e.g., Parent Ex. A; IHO Ex. III).

<sup>11</sup> The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; see 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d][1]-[2]).

<sup>12</sup> The district teacher was identified by the school psychologist and signed at the CSE meeting as a related service provider/special education teacher, but she did not testify at the hearing (Tr. pp. 54-55; Dist. Ex. 1 at p. 19).



service providers did not participate in the CSE meeting because Summit did not receive any notice of the meeting (Tr. pp. 201-05). According to her testimony, the clinic director at Summit supervised the counseling program, as well as the clinicians on staff, but did not provide any direct services to students (Tr. pp. 192-93). However, the clinic director also testified that she was familiar with the student (*id.* at 192). The clinic director testified that she requested that the CSE meeting be rescheduled so that Summit staff, as well as the parent, could participate (Tr. p. 203).<sup>13</sup> The district psychologist testified that she didn't know why the parent did not attend the CSE meeting and explained that she attempted to call the parent multiple times during the meeting and sent the parent an e-mail during the meeting as well (Tr. pp. 55-56, 61-73; *see also* Parent Exs. N, O; Dist. Exs. 3 at pp. 1-2; 12 at p. 3).

Upon review, it is clear from the evidence in the hearing record that a regular education teacher of the student did not attend the June 2017 CSE meeting. Nevertheless, the parent's claim that she did not participate in the meeting because the district failed to notify her was unconvincing. The parent's failure to provide consent to evaluate or to respond to the attempts to gain her participation in the CSE weighs against finding that the failure to conduct the June 2017 CSE meeting with a properly composed CSE—as a procedural inadequacy—significantly impeded the parent's opportunity to participate in the decision-making process (*see* 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). I consider the potential effect of the missing regular education teacher on the student's programming in further detail below.

## **2. Adequacy and Consideration of Evaluative Information**

In her answer to the district's cross-appeal, the parent advances a claim from her due process complaint notice that the CSE failed to consider sufficient evaluative information, specifying that the district failed to conduct a classroom observation or consider neuropsychological, speech and language, OT and visual skills evaluations.<sup>14</sup> The parent also alleges that the "an IEP was developed that did not consider the full range of [the student's] strengths and weaknesses." The district contends that the CSE considered sufficient evaluative data given that the parent refused to consent to additional evaluations. Although the IHO determined that the parent did not cooperate with the district's attempts to evaluate the student "which hampered the development of an appropriate IEP" (IHO Decision at p. 11), the IHO did not otherwise address the parent's claims that the CSE failed to consider the available information.

The discordant communications between the parties that occurred during the events underlying Application of a Student with a Disability, Appeal No. 16-048 appear to have improved little since then. The need for updated evaluations was an issue in the prior appeal, with the parties entering into a written resolution agreement in which the district agreed to fund a speech-language evaluation, an occupational therapy (OT) evaluation, an audiological evaluation, a central auditory processing evaluation, and a visual perceptual processing evaluation (Application of a Student

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<sup>13</sup> The record contains what appears to be an e-mail sent to parent's counsel in February 2018 during the impartial hearing after the district had presented its witness (Parent Ex. N). Although the exhibit was briefly identified and appears to have been admitted into evidence, there is no further testimony about when or why this document was created (Tr. pp. 145, 171).

<sup>14</sup> The parents concern over a lack of a classroom observation appears to be stated for the first time on appeal.

with a Disability, Appeal No. 16-048). The IHO determined in the prior due process proceedings that additional evaluation was required, including a classroom observation and an updated neuropsychological evaluation (*id.*). The hearing record reflects that the district sought consent to reevaluate the student, but the parent responded that the student's evaluations were current (Parent Ex. S at pp. 1-4, Dist. Ex. 12 at pp. 3-4, 8). The parent points the finger back at the district, specifying for the first time in this appeal that the district failed to conduct a classroom observation. The hearing record does not indicate whether a current classroom observation of this student has been conducted by any evaluator. The parent also continues to press the argument that the district did not need to further reevaluate the student because the student was not due for a triennial reevaluation; however, that argument is unavailing because the parent has misread the reevaluation procedures which provide that

- [a] reevaluation conducted under paragraph (a) of this section—
  - (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and
  - (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary

(34 CFR 300.303[b]; see 8 NYCRR 200.4[b][4]).<sup>15</sup> In this case, it had been more than one year since the student had been evaluated and, consequently, was well within the district's prerogative to seek further evaluation of the student, especially after the IHO in the prior proceeding determined that further evaluation of the student was needed.

As explained in one district court case, "[a]lthough a parent always retains the right to withhold consent for further evaluations, after consent is withheld, the school district cannot be held liable for denying a FAPE" (V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 118 [N.D.N.Y. 2013]). In some circumstances, a district may seek to override a parent's lack of consent to evaluate a student, but such consent override procedures are permissive, not mandatory (see id.). As relevant to this case, however, the district could not have relied upon the consent override procedures because federal regulations further provide that

- (i)[i]f a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures (described in paragraphs (a)(3) and (c)(1) of this section); and
- (ii) [t]he public agency is not required to consider the child as eligible for services under §§ 300.132 through 300.144.

(34 CFR 300.300[d][4]; see 8 NYCRR 200.5[b][7]). Consequently, the parent's failure to provide consent to reevaluate the student after the student began attending Summit at the parent's

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<sup>15</sup> The parent's contention that the district failed to conduct an observation also flies in the face of her position that no further evaluation was necessary.

expense beginning in the 2016-17 school year could have provided the district with the opportunity to consider the student ineligible for special education.

The problem with that outcome in the circumstances of this case is that the district did not avail itself of the option to no longer treat the student as eligible and, the evidence shows that the CSE instead proceeded with its meeting on June 20, 2017 and continued to treat the student as eligible for special education, reviewed the available information as discussed further below, and offered the student an IEP (Tr. pp. 74-78, 110-16; Dist. Ex. 1 at pp. 1-5; 4; see Parent Exs. B; F; Dist. Exs. 5; 6; 7). For example, according to the district's computerized SESIS entry, the district responded to the parent's reluctance to provide consent on May 25, 2017, reiterating the need for a reevaluation because the student's academic skill development had likely changed since 2014 (Dist. Ex. 12 at pp. 3-4). The SESIS event log indicates that the district continued to contact the parent via e-mail and regular mail from February 22, 2017 through October 4, 2017 (id. at pp. 1-8). According to the SESIS event log, the parent stopped responding on May 25, 2017 (id. at pp. 3-4). Thus while the parent claims that it was the failure of the district to sufficiently evaluate the student by conducting a classroom observation and that the CSE did not consider the full range of the student's strengths and weaknesses, any deficiency in the evaluations before the CSE are due to the parent having withheld consent and failing to produce the student for an evaluation, even after the IHO in the prior proceeding ordered further evaluations (Tr. pp. 61-73, 408-12; Parent Ex. S; Dist. Ex. 12 at pp 3).

As a consequence of the district's de facto decision to continue to treat the student as eligible for special education and to continue to develop an IEP for the 2017-18, it was left to the CSE to consider the remaining information that was available to the CSE and determine how to proceed with the remainder of IEP planning. According to the hearing record, the June 2017 CSE considered information from a June 2014 psychoeducational evaluation, a December 2014 neuropsychological consultation report, a March 2016 OT evaluation, and the September 2016 IEP, and from Summit the CSE considered a 2016-17 midyear evaluation report, a December 2016 speech-language progress report, a January 2017 counseling progress report and results from school-wide assessments (Tr. pp. 74-78, 110-16; Dist. Ex. 1 at pp. 1-5; 4; see Parent Exs. B; F; Dist. Exs. 5; 6; 7).<sup>16</sup>

The December 2014 neuropsychological consultation was conducted at the request of the parent (Parent Ex. B at p. 1). The resultant report included information regarding the student's birth and developmental history, educational history, and social and medical histories (Parent Ex. B at pp. 1-2). In addition, the report included behavioral observations of the student and the results of intellectual, academic, language, and memory testing, along with an assessment of the student's attention and visual motor skills (Parent Ex. B at pp. 2-5). With respect to the student's educational history, the evaluator reported that the student's prekindergarten and kindergarten teachers had reported that the student was "excessively talkative during instruction time, had difficulty focusing, transitioning between tasks and did not comply with directions as often as expected" (Parent Ex. B at p. 1). With respect to the social history, the evaluator reported that "[b]ehavioral difficulties described in school [we]re not see in the home" and that the student complied with parent directives

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<sup>16</sup> The June 2014 psychoeducational evaluation and September 2016 IEP were not entered into evidence.

(Parent Ex. B at p. 2). The medical history noted that the student complained about not being able to see the board in school and losing track when copying off the board (Parent Ex. B at p. 2).

The evaluator observed that the student's "social presentation was age appropriate," noting that the student was warm and engaging and initiated and reciprocated conversation and that she displayed good eye contact (Parent Ex. B at p. 2). The evaluator noted that during testing, the student "took an interest in performing well, worked purposefully with minimal breaks across sessions and quickly learned new tasks" (Parent Ex. B at p. 2). However, she also noted that as the student became increasingly comfortable, she became more active and engaged in "fidgeting, swinging her feet, moving in her seat, tapping her feet and looking for objects to occupy her hands" (Parent Ex. B at p. 2).

Administration of the Wechsler Preschool and Primary Scale of Intelligence, Third Edition (WPPSI-III) yielded a full-scale IQ of 134, which fell in the "[v]ery [s]uperior" range of intellectual functioning (Parent Ex. B at pp. 3, 7-8). However, the evaluator reported "marked variability" across subscales and across the indices that contributed the full scale IQ (Parent Ex. B at p. 3). The student's performance on the verbal domain indicated that she had "well developed verbal skills but her ability [wa]s not always demonstrated when [a] task ha[d] a large listening component" (Parent Ex. B at pp. 3, 7-8). The evaluator indicated that because the student's attention while listening was so variable, the student often responded to what she thought she heard or to a portion of presented information (Parent Ex. B at p. 3). According to the evaluator, the student's performance in the performance domain "reflected exceptionally well developed reasoning and analytical skills" (Parent Ex. B at pp. 3, 7-8). In addition, the student's performance in the processing speed domain suggested that she had the capacity to rapidly process new information (Parent Ex. B at pp. 3, 7-8). Thus, the evaluator concluded that the student was operating within the very superior range of intellectual functioning with strengths in nonverbal, analytical reasoning skills, general knowledge, and speed of information processing (Parent Ex. B at pp. 3, 7-8).

To assess the student's academic skills in mathematics, reading and spelling, the evaluator used the Wechsler Individual Achievement Test, Third Edition (WIAT-III). According to the evaluator, the student's performance on the test reflected "a great deal of variability or inter-test scatter" with scores ranging from the average to superior range (Parent Ex. B at pp. 4, 8). The evaluator reported that the student's word reading and phonological awareness fell in the "[s]uperior" range and the student was able to read single words and fake words at a second grade level, evidenced an above average ability to segment and blend sounds, demonstrated fluent reading at the paragraph level, and was able to extract meaning from written material at a level that was consistent with her decoding skills (Parent Ex. B at p. 4). With respect to spelling, the evaluator reported that the student's ability to spell dictated words was in the "[s]uperior" range, her handwriting was clear with letters well-formed and evenly spaced, and her sentence construction was "well above age level" (Parent Ex. B at p. 4). In math, the student demonstrated an "[a]verage" ability to add single digit numbers and count and subtract when presented with functional problems but confused operation signs in print (Parent Ex. B at p. 4).

According to the evaluator, the student presented with well-developed language skills in that her ability to communicate her thoughts and feelings was fluid with no verbal fillers (Parent Ex. B at p. 4). However, the evaluator noted that the student had consistent difficulty on tasks

requiring listening skills and attending aurally to presented stories, and answering questions was one of the most difficult tasks for her (Parent ex. B at p. 4). Although the evaluator acknowledged that the student's score on a comprehension of oral discourse task was in the lower limits of the average range, he noted that it was well below most of her other abilities, as were other tasks that involved the ability to attend to, register, and act on information (Parent Ex. B at pp. 4, 8). The evaluator reported that the student was fidgety during such tasks and based on the student's performance concluded that she often missed information due to inattention and would benefit from a smaller class size where there were resources available to monitor the student's attention and language processing (Parent Ex. B at p. 4).

Informal assessment of the student's attention by the evaluator revealed that the student demonstrated "a very good capacity for engagement during the assessment session," that she transitioned smoothly between tasks with the need for occasional prompting or redirection, and that the student did not display internal distractibility "nor was she easily pulled off task by ambient environmental noises" (Parent Ex. B at p. 5). The evaluator described the student as "performance driven" throughout each session, however, also reported that the student demonstrated increased motor activity and initiated conversations as a means of delaying a task (Parent Ex. B at p. 5). A parent rating scale, completed by the student's mother, suggested that the student had difficulty with attention span, concentration, distractibility, leaving her seat at the wrong times and fidgetiness" (Parent Ex. B at p. 5). According to the evaluator, on formal testing, the student's immediate span of attention was in the lower limits of the "[a]verage" range and lower than expected based on the student's intellect (Parent Ex. B at p. 5). Additionally, the evaluator observed that the student had marked difficulty attending to information she heard, as indicated by her performance placing her in the "[b]orderline to [l]ow [a]verage range" (Parent Ex. B at pp. 5, 8) The evaluator opined that the student's inattention and increased motor activity during presented tasks suggested a "disorder of attention" (*id.* at p. 5). The evaluator further opined that the "functional manifestations may be difficulty transitioning between tasks, a tendency to miss auditory instructions and completing tasks slower than peers" (*id.*).

The evaluator deemed the student's visual motor/visual construction skills to be a "clear strength" (Parent Ex. B at pp. 5, 8). With respect to memory, the evaluator reported that the student displayed an advantage for remembering information she heard over information she saw, however, noted that the student's performance was "quite variable" across and within measures of visual and verbal memory and appeared to be influenced by the student's level of attention (Parent Ex. B at pp. 5, 8-9). The evaluator opined that the student's ability to learn and recall information was strongly affected by her motivation (Parent Ex. B at p. 5).

The evaluator offered a diagnosis of attention deficit hyperactivity disorder, combined type and recommended, among other things, that the student would benefit from "a more interactive teaching environment, with a low student to teacher ratio, in a non-public school with similarly gifted children" (Parent Ex. B at pp. 6-7).<sup>17</sup> The evaluator suggested that the student's class size should not exceed 12 students and should include extra support (Parent Ex. B at p. 5). The evaluator further suggested that the student be provided numerous classroom accommodations and

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<sup>17</sup> In a letter dated November 27, 2018, the Office of State Review directed that a complete copy of Parent Exhibit B (Neuropsychological Consultation), as page 6 of the report was missing from the hearing record, which was subsequently submitted by the district.

counseling to address the student increasing anxiety related to negative feedback from teachers (Parent Ex. B at p. 7).

The March 2016 OT evaluation included a general history and general impressions of the student, as well as the results of standardized testing and observations of the student's ability to perform activities of daily living (ADLs) (Parent Ex. F at pp. 1-4). In addition, the evaluation included an assessment of the student's fine motor and handwriting skills, neuromuscular status/motor coordination skills, visual perceptual and ocular motor skills, and sensory processing skills (Parent Ex. F at p. 5). The stated reason for the referral for evaluation was the parent's concern over the student's ability to participate in a typical school setting based on reports from the student's school that she had difficulty remaining in her seat during instruction, talked frequently, had difficulty following multi-step tasks, and did not understand what was going on during class instruction (Parent Ex. F at p. 1). The evaluating occupational therapist described the student as sweet and friendly and noted that despite her initial shyness the student was able to fully engage with the therapist, appropriately answer interview questions, and follow verbal prompts (Parent Ex. F at p. 1). According to the evaluator, the student demonstrated minimal to moderate difficulty following evaluation procedures of the Beery-Buktenica Development Test of Visual Motor Integration - Sixth Edition (Berry VMI-6), and as the evaluation progressed she demonstrated intermittent periods of fidgety behavior (Parent Ex. F at p. 1). The evaluating therapist reported that during table top activities, writing, and reading-based tasks the student tilted her head and body to complete visual perception-based tasks (Parent Ex. F at pp. 1-2, 4).<sup>18</sup> She reported that the student needed minimal to occasionally moderate cues to follow directives throughout the evaluation process and indicated that the student could be self-directed and curious, which affected her ability to remain on task (Parent Ex. F at p. 2).

The evaluating therapist concluded that the student's performance on standardized testing did not suggest "any major difficulties in regard to her visual perceptual skills or sensory processing abilities" (Parent Ex. F at pp. 2-3, 6). The student's performance on motor coordination skills fell within the average to below average range, however, she did not demonstrate significant motor coordination difficulties other than fatigue when performing fine motor tasks, such as writing (Parent Ex. F at pp. 2, 4, 6).<sup>19</sup> The student's ADL skills did not impact her performance in school or at home (Parent Ex. F at p. 4). According to the evaluating therapist, results of the Sensory Profile did not indicate any significant findings other than a "definite difference" in the area of inattention/distractibility (Parent Ex. F at p. 6). Consistent with this finding, the evaluating therapist noted that the student had difficulty remaining seated during the evaluation and a desire to touch items in her immediate environment, behaviors that became more pronounced as the evaluation process wore on and the student became more comfortable with the evaluator (Parent Ex. F at p. 6).

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<sup>18</sup> In the "General History" section of her report the evaluating therapist stated that, according to parent report, the student wore glasses for vision and tracking and that she had been recommended for vision therapy (Parent Ex. F at p. 1).

<sup>19</sup> The evaluating therapist reported that the student demonstrated a fluctuating hand grasp when using a pencil and that while the student's handwriting was legible, there were issues with the student undershooting writing lines and writing letters in a large size (Parent Ex. F at p. 4).

The evaluating therapist recommended that the student receive OT for one 30-minute period per week to help improve her occupational performance in a school setting (Parent Ex. F at p. 6). She reported that the areas of difficulty that most impacted the student's school performance related to the student's visual motor skills and executive functioning, as well as behavior (Parent Ex. F at p. 6). The evaluating therapist explained that the student demonstrated difficulty with ocular motor skills, which impacted her posture for near point tasks and her ability to endure visual perceptual tasks, such as copying from the board and keyboarding (Parent Ex. F at p. 6). The evaluating therapist described the student's posture and stamina for completing table top tasks as "poor" and opined that the student needed to improve her ability to maintain attention and balance and coordination to complete school tasks efficiently (Parent Ex. F at p. 6). The evaluating therapist noted the student's decreased hand strength and her need to improve ergonomic functioning at school work stations (Parent Ex. F at p. 6). She further noted that the student had difficulty dividing her attention and initiating, enduring, and completing a task without redirection (Parent Ex. F at p. 6). The evaluating therapist outlined the student's need for movement breaks and breaks to stretch her hands and endorsed previous recommendations for vision therapy and counseling (Parent Ex. F at p. 7). Additional recommendations offered by the evaluating therapist included a small structured environment with extra support from the teacher, the breaking down of multi-step tasks, use of visual reminders and electronic applications to assist with organization, goal setting to increase motivation, and the use of set routines (Parent Ex. F at p. 7).

The Summit mid-year evaluation report for the 2016-17 school year provided an overview of the student's courses (literature, ELA, mathematics, science and social studies) and a review of her academic and behavioral performance in those courses (Dist. Ex. 7). In literature (reading), the report indicated that the student was making inconsistent progress; she was able to complete her class work and often met expectations, but also had difficulty correcting her mistakes (Dist. Ex. 7 at p. 1). The report stated that the student read with accuracy and demonstrated sufficient comprehension but did not use the text to determine the meaning of unknown words (Dist. Ex. 7 at p. 1). The mid-year evaluation report also indicated that the student struggled to be prepared for class, was easily distracted, and struggled to follow teacher directions (Dist. Ex. 7 at p. 1). The report noted the student's need for support in order to receive constructive feedback and to work collaboratively with peers (Dist. Ex. 7 at p. 1). In ELA, the mid-year evaluation report indicated that the student's performance was inconsistent and that she required support in order to master course content (Dist. Ex. 7 at p. 1). The student was able to complete her class work, however, required a structured environment with clear and predictable expectations to do so (Dist. Ex. 7 at p. 1). According to the mid-year evaluation report, the student's print was legible, and her writing skills had improved; however, she required support while writing paragraphs in order to ensure that her thoughts flowed from one sentence to another (Dist. Ex. 7 at p. 1). The report described several writing strategies the student had learned and noted that she was aided by the use of a semantic map, and that keyboarding had been introduced, but the student required more practice (Dist. Ex. 7 at p. 1). The report further noted that in ELA the student required support to prepare for class and that the student struggled with transitions which impacted her readiness and ability to understand the lesson (Dist. Ex. 7 at pp. 1-2). The mid-year evaluation report indicated that the student had difficulty maintaining appropriate behavior independently and required reminders to in order to remain positive, respond appropriately, and increase frustration tolerance (Dist. Ex. 7 at p. 2). According to the report, the student did not follow teacher directions consistently and required support in order to manage conflict situations with peers (Dist. Ex. 7 at p. 1).

Next, the mid-year evaluation report indicated that the student's performance and effort in mathematics were inconsistent (Dist. Ex. 7 at p. 1). The report explained that while the student was able to master new concepts, she struggled to maintain previously learned skills and required frequent reteaching in order to progress (Dist. Ex. 7 at p. 1). The report noted that the student often showed understanding of a topic during whole class instruction but later struggled to complete work independently (Dist. Ex. 7 at p. 2). Furthermore, the student was able to perform basic computational skills in addition and subtraction with fluency but struggled to apply these skills to multi-step questions or word problems (Dist. Ex. 7 at p. 2). The report stated that the student displayed a high level of distractibility and difficulty focusing that interfered with her ability to complete classwork (Dist. Ex. 7 at p. 2). According to the report, the student benefitted from small group and one to one instruction in math and noted that while the student was able to work collaboratively, at times she struggled to recover from disagreements and was reluctant to accept constructive feedback (Dist. Ex. 7 at p. 2).

The mid-year evaluation report offered similar observations of the student in science and social studies with regard to distractibility, difficulty transitioning, inconsistent classroom performance, difficulty understanding expectations and difficulty accepting constructive feedback (Dist. Ex. 7 at pp. 2-3). In science, the student was making gradual progress; however, she required support to master course content (Dist. Ex. 7 at p. 2). The report indicated that the student could complete her class work but had difficulty initiating assignments independently, had difficulty asking for help independently and relied on the teacher to help her understand the assignment when she was confused by a direction or expectation (Dist. Ex. 7 at p. 2). The report indicated that the student performed well on class assessments, but occasionally required teacher support to understand expectations, and opined that the student benefitted from informal assessments because formal assessments created too much pressure for her (Dist. Ex. 7 at pp. 2-3). The report stated that the student was able to understand most content related vocabulary but occasionally required help organizing her thoughts while writing (Dist. Ex. 7 at p. 2). With respect to social studies, the report noted that the student was having difficulty mastering course content; and that she was able to complete class work but struggled to remain motivated during longer assignments in class (Dist. Ex. 7 at p. 3). The report indicated that the student understood new vocabulary taught during class but required support in order to apply the words during assignments; she had difficulty taking notes independently; and benefitted from one-to-one support to organize her writing (Dist. Ex. 7 at p. 3).

In addition to the narrative description of the student's performance at Summit during the 2016-17 school year, the mid-year evaluation report included the results of Terra Nova testing, reported as follows: reading 4.8, math 2.3 (Dist. Ex. 7 at p. 4). Results of the Wide Range Achievement Test (WRAT) were also reported as follows: reading 7.5, spelling 4.5, math 3.5 (Dist. Ex. 7 at p. 4).<sup>20</sup>

The December 2016 speech-language progress report, prepared by Summit, described the student as exhibiting deficits in receptive and expressive language, with difficulties in attention, auditory processing, verbal memory, word retrieval and language organization, and noted that the student's social pragmatics skills were a relative strength (Dist. Ex. 5 at pp. 1-2). Additionally, the

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<sup>20</sup> According to the June 2017 IEP, the scores on both the Terra Nova and the WRAT (Wide Range Achievement Test) are grade equivalents (Tr. p. 103; Dist. Ex. 1 at p. 1).



progress report reflected the student's reduced processing speed; variable attention leading to loss of focus and concentration as comprehension expectations increased; and difficulty with processing language beyond a concrete level of interpretation (Dist. Ex. 5 at p. 1). According to the report, the student was able to expressively demonstrate skill in her ability to use a range of grammatically correct, structurally sound, meaningful sentence types (Dist. Ex. 5 at p. 1). The report noted, however, that the student could struggle with putting her thoughts into words when asked to elaborate on given content (Dist. Ex. 5 at p. 1). In addition, the report indicated that tasks that required paraphrasing, defining, explaining, and providing personal examples presented the student with great challenge (Dist. 5 at p. 1). According to the report, the student's pragmatic language profile was characterized by adequate use of eye contact, awareness of personal space, and the necessity of turn taking (Dist. Ex. 5 at p. 1). However, the report indicated that due to processing constraints, the student could misinterpret verbal and nonverbal social cues and she failed to adjust her language relative to listener perspective (Dist. Ex. 5 at p. 1). The report recommended that the student continue to receive speech-language therapy twice, in a maximum group size of three, to address receptive and expressive language deficits (Dist. Ex. 5 at p. 2).

Lastly, the January 2017 counseling progress report, prepared by Summit, indicated that the student had made a nice transition to the school and with the supports in place had adapted well to the demands and routines of the new academic environment (Dist. Ex. 6 at p. 1). According to the report, the student enthusiastically attended her counseling sessions and with the support of the therapist, readily discussed her thoughts and feelings, as well as challenging situations (Dist. Ex. 6 at p. 1). The report indicated that at times the student could be distracted, have difficulty remaining focused on the task or topic at hand, be restless, fidgety, and interrupt or call out (Dist. Ex. 6 at p. 1). The student was described as being aware of her difficulties and the report indicated that she worked hard on using learned techniques to better regulate her activity level, focus and impulsivity (Dist. Ex. 6 at p. 1). The report stated that the student responded well to close proximity control, cues, prompts, movement breaks and fidgets when in need of redirection and, when provided, could usually regain her focus, comply with what was expected of her, and participate (Dist. Ex. 6 at p. 1). According to the report, the student benefited from strong adult relationships to help her feel confident and to seek support when needed (Dist. Ex. 6 at p. 1). The report indicated that as the student successfully worked on her self-regulation and problem-solving skills her ability to successfully participate in social and academic activities improved (Dist. Ex. 6 at p. 1). In addition, the report indicated that the positive feedback that the student received for her effort was important as it reinforced more adaptive behavior and improved her self-esteem and confidence (Dist. Ex. 6 at p. 1). According to the report, the student's ability to accept feedback from adults or follow directions that were different from what she wants to do had improved and the student had shown more flexibility in her thinking and was better able to accept responsibility for her behavior and adapt to new rules (Dist. Ex. 6 at p. 1). The report stated that the student had formed relationships within the classroom and when conflicts with peers arose she worked with the therapist to consider a range of solutions to the problem, increase awareness of how her behavior effected other people, and anticipate the likely outcome of her actions (Dist. Ex. 6 at p. 2). Lastly, the counseling progress report recommended that the student receive individual counseling one time per week and counseling in a group three one time per week (Dist. Ex. 6 at pp. 1-2). The report further recommended that the student remain in her then-current academic setting at Summit in order to provide her with continued structure and academic support (Dist. Ex. 6 at p. 2).

The CSE meeting minutes appear to be incomplete, noting only that the June 2017 CSE reviewed "school doc" when developing the student's IEP, similarly the prior written notice for the June 2017 CSE meeting indicates that the CSE reviewed "school documents/progress reports" (Dist. Exs. 3; 4). However, the district representative testified that the CSE based its recommendation on the school data and standardized testing results included in the student's IEP (Tr. pp. 74-79; see Tr. pp. 101-104). In addition, a review of the June 2017 IEP shows that, contrary to the parent's claim, the CSE considered information gleaned from the neuropsychological evaluation, speech- language progress report, and OT evaluation of the student (compare Dist. Ex. 1 pp. 1-6 with Parent Exs. B; F; Dist. Ex. 5; see Tr. pp. 75-78, 110-16). To the extent that the parent claims that the CSE failed to review the (2015) vision evaluation, the hearing record shows that the CSE considered the student's visual needs as detailed by the occupational therapist in her March 2016 evaluation report (Parent Ex. F). Specifically, the physical development section of the present levels of performance indicate that the student "tilted her head and body to complete visual perception based tasks" and that the student "demonstrated difficulties with ocular motor (eye movement skills), which impacted her posture for near point tasks, as well as her ability to endure visual perceptual tasks such as copying from a board, writing down school notes and keyboarding skills" (Parent Ex. 1 at p. 5).<sup>21</sup> In light of the specific factual circumstances of this case, the hearing record supports a finding that the June 2017 CSE sufficiently considered the available functional, developmental, and academic information about the student and her individual needs.

### **C. June 2017 IEP**

#### **1. Appropriateness of the ICT Recommendation**

Turning next to the challenged aspect of the student's IEP, the IHO found that there was no evidence that the student would receive sufficient support with ICT services in a general education classroom.

In order to be determined substantively appropriate, the ICT services, together with the other services in the student's IEP, must sufficiently address the student's needs. The present levels of performance of the June 2017 IEP reflect information regarding the student's strengths and needs as identified in the June 2014 psychoeducational evaluation, December 2014 neuropsychological consultation report, March 2016 OT evaluation, and Summit 2016-17 mid-year evaluation report, December 2016 speech-language progress report, and January 2017 counseling progress report (Tr. pp. 74-78; Dist. Ex. 1 at pp. 1-5; 4; see Parent Exs. B; F; Dist. Exs. 5; 6; 7). In order to address the student's attending difficulties, sensory processing and motor weaknesses, language difficulties and social/emotional challenges the June 2017 CSE recommended she attend a general education classroom and receive ten periods per week of ICT services for ELA, five periods per week of ICT services in math, social studies and sciences; one 30-minute session per week of individual counseling; one 30-minute session per week of individual OT; and two 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 1 at pp. 11-12). To further support the student's identified needs, the June 2017 CSE

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<sup>21</sup> The March 2015 vision skills report indicated that, based on an exam, the student demonstrated binocular dysfunction manifested in motilities, tracking and accommodative tasks. The report noted that these likely contributed to the student's difficulty with schoolwork and near activities (Parent Ex. E at p. 3).

recommended the following testing accommodations: separate location, revised test directions, extended time, breaks, and on-task focusing prompts (id.). As support for the student's management needs, the June 2017 CSE determined that the student would benefit from multisensory instruction; sufficient opportunity for practice and review; small group instruction; projects and class assignments broken down into smaller, more manageable units; use of graphic organizers; proximity control; as well as praise and encouragement (id. at p. 6). The CSE also recommended cues and prompts, movement breaks, fidgets to help the student regain her focus and noted that the student benefitted from strong adult relationships to help her feel confident enough to seek support and ask for help (id.).

The ICT services must also be reasonably calculated to enable the student to achieve her annual goals on the IEP. The annual goals contained in the June 2017 IEP addressed the student's areas of need related to academics, classroom performance, language development, self-regulation, fine and gross motor skills, and problem-solving skills (Dist. Ex. 1 at pp. 7-11). More specifically, academic goals targeted the student's ability to define vocabulary words and solve multi-step word problems using all four operations; classroom performance goals targeted the student's ability to listen and attend to staff/students speaking, initiate/attend to tasks to completion, and improve organizational skills and materials management; OT goals related to the student's ability to attend to a teacher directed task and maintain an upright posture during lessons/classwork; counseling goals related to the student's ability to demonstrate problem solving skills, independently respond to environmental cues and choose appropriate behavior to respond; and speech-language goals related to using precise language to state an opinion, formulating linguistically appropriate constructions to provide a set of directions, answering content related questions, and understanding inferences and making predictions (Dist. Ex. 1 at pp. 7-11).

For the purpose of assessing the student's progress under the proposed IEP, a review of the June 2017 IEP reflects that in accordance with the State and federal regulations, the annual goals included evaluative criteria (e.g., 4 out of 5 trials, 85 percent), evaluation procedures (e.g., teacher/provider observations, performance assessment tasks, verbal explanation) and schedules to measure progress toward meeting the annual goals (id.).

The district school psychologist, who served as the district representative, testified that the CSE felt the general education classroom with ICT services would meet the student's needs (Tr. pp. 89-90). She further explained that the student would benefit from "all the advantages of a general education setting" and that she agreed with the recommendation of ICT services (Tr. pp. 90-92).

In contrast, the Summit clinic director who participated in the June 2017 CSE meeting, testified that a general education classroom with ICT services would be inappropriate for the student because in the 12:1+1.5 special class at Summit the student needed a "tremendous amount of individualized professional level instruction, modifications, accommodations, checking in, monitoring, checking for understanding, modifying work, helping herself advocate, identify areas of weakness and concern, keeping her on task" (Tr. p. 206). She further testified that the student's difficulties with attending and focusing were "still very problematic for her" and these impeded "her ability to meet her intellectual potential" (Tr. p. 212). The Summit speech-language pathologist opined in testimony at the time of the impartial hearing that she was concerned about the number of students in the recommended ICT class and indicated that the student needed the

services that she was getting at Summit, specifically a small class ratio and consistent use of instructional techniques (Tr. p. 272).<sup>22</sup> She further explained that a large class size would impact the student's language-based learning deficits, and with an increase in the number of students came increased distractions and noise, which would impact her language processing as well (id.).

With regard to the student's level of distractibility, the hearing record indicates that the student exhibited significant levels of distractibility across all settings. The 2016-17 mid-year evaluation report from Summit indicated that in her academic classes, the student struggled with being prepared for class, struggled with following teachers' directions, needed frequent reteaching due to distractibility, struggled to maintain appropriate behavior independently, and exhibited difficulty with transitions (Dist. Ex. 7 at pp. 1-3). The report further indicated that the student benefitted from proximity control, a structured environment, positive reinforcement, redirection and prompting, teacher support, and priming (id.). The 2016-17 counseling progress report indicated that the student was developing strategies to help her improve her focus, attention, impulse control, activity level, problem solving, social skills and self-esteem (Dist. Ex. 6 at p. 2). The report further indicated that the student benefitted from close proximity control, cues, prompts, movement breaks and fidgets to help her regain focus and to comply with what was expected of her (id. at p. 1). The 2016-17 speech-language progress report indicated that the student exhibited difficulties with attention, described her attention as variable, and noted that she would lose focus and concentration as comprehension expectations increased (Dist. Ex. 5 at p. 1). The report further stated that the student was often distracted and required structure and consistent routines (id.).

In addition, the March 2016 OT evaluation report indicated that during the evaluation the student engaged in intermittent periods of fidgety behavior (Parent Ex. F at p. 1). The report highlighted the reasons for referral, namely that the parent was concerned about the student's ability to participate in a typical school setting based on her history of getting in trouble in school due to difficulties staying in her seat during instruction, frequent talking, difficulty following multi-step instructions and her inability to understand class instruction (Parent Ex. F at p. 1). The June 2017 IEP described the student as struggling with distractibility and hyperactivity as well as experiencing difficulties with focusing and executive functioning (Dist. Ex. 1 at p. 2). The IEP further described the student's distractibility and lack of focus as interfering with her ability to complete work in class and to understand the material (id. at p. 3).

For the reasons described above and for most similarly situated students, ICT services that include both a full-time special education teacher and a full-time regular education teacher would provide a high level of support and a significant degree of individualized attention from which a student with average to superior cognitive abilities should be able receive considerable educational benefits without the downside of segregating the student in a special class setting away from her nondisabled peers, thus satisfying the IDEA's LRE mandate while providing a potentially appropriate setting. However, in this case it is difficult to overlook the description of the student's progress during the 2016-17 school year, as described in Summit evaluations and progress reports, which indicate that even with the individualized support and a low student-to-teacher ratio, the

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<sup>22</sup> According to the hearing record, the speech-language pathologist has been working with the student since she began attending Summit (see Tr. p. 257; Parent Ex. R at p. 1; Dist. Ex. 5 at p. 1), but her testimony was not before the CSE as only the Summit clinic director attended the meeting. I note her testimony only insofar as it is not inconsistent with information from Summit that was provided the CSE.

student continued to make gradual or inconsistent progress (Dist. Exs. 5, 6, 7). Moreover, the hearing record indicates that the student's difficulties with attention and distractibility had a significant impact on her ability to learn (Tr. pp. 200-01, 206, 258; Parent Ex. B; Dist. Exs. 1 at pp. 2-6; 5; 6; 7). One factor that might have allayed my concerns would have been the input of a regular education teacher at the CSE meeting who was familiar with how a student with this level of distractibility could or could not make progress toward her annual goals in an ICT setting, but as noted above, no regular education teacher participated in the development of the IEP. Moreover, the input of the special education teacher at the CSE meeting on the same topic is unclear because she was not called as a witness at the impartial hearing and no documentation regarding her viewpoints was offered as evidence. On this record, I cannot conclude that the district convincingly established that a general education class with ICT services would be appropriate given available evidence of the student's level of distractibility and the impact on her learning and the district has not established that it offered the student a FAPE for the 2017-18 school year.<sup>23</sup>

As noted above IHO erred in reaching the issue of grouping and determining that an ICT classroom was not appropriate on that basis.<sup>24</sup> However, as the hearing record does not contain sufficient evidence that the district offered the student a FAPE for the 2017-18 school year, I will turn next to the parent's unilateral placement of the student.

#### **D. Appropriateness of the Unilateral Placement**

With regard to the appropriateness of Summit, the IHO found that the record was unclear as to whether the program at Summit was meeting the student's needs (IHO Decision at p. 10). The IHO noted the student's inconsistent performance at Summit during the 2016-17 school year as well as the 2017-18 school year at issue herein (*id.*). The IHO also noted that there was no evidence that the student was grouped with gifted students (*id.*). The parent appeals and argues that the IHO erred by finding the parent's unilateral placement at Summit inappropriate. The parent further contends that there is ample evidence in the hearing record of the student's functional

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<sup>23</sup> If the burden of proof was reversed and not governed by state law, I am not convinced that the parent could have established that the student should have been placed in a more restrictive setting based on the same evidence. This is one of those very few cases that I believe that the burden actually has an effect on the outcome of the case, specifically, on the question of whether ICT services are substantively appropriate for the student (Schaffer v. Weast, 546 U.S. 49, 68 [2005]).

<sup>24</sup> Guidance regarding what are sometimes referred to a "twice exceptional" or gifted students from the United States Department of Education's Office of Special Education Programs (OSEP) reiterates that the IDEA is silent on the topic of gifted students, and "gifted" is not a qualifying disability requiring special education and related services (see Letter to Anonymous, 55 IDELR 172 [OSEP 2010]). Thus, intellectually gifted students are not considered disabled solely on the basis of intellectual giftedness. In this case, while I would venture that the district likely offered a gifted and talented program of instruction to qualified students that attend the district's schools as noted in decisions of the Commissioner of Education (see *e.g.*, Appeal of I.L., 52 Ed Dept, Decision No. 16496 [2013]), the hearing record in this case is devoid of any evidence that the student was been screened, referred to, tested for, or accepted into gifted and talented programming under the district's procedures, whatever they may be (see *generally*, Educ Law § 4452; 8 NYCRR Parts 117, 142). The IHO was free to note the student's superior cognitive scoring on assessments contained in the hearing record, but she should not have thereafter ventured into broad statements that it was the responsibility of the CSE to place the student into a program with "gifted" students in this proceeding, especially when the matter was not in even in the due process complaint notice.

grouping at Summit. In its answer with cross-appeal, the district argues that the IHO's decision relative to the appropriateness of Summit should be affirmed.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]).

"Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d at 364 [2d Cir. 2006], quoting Rowley, 458 U.S. at 207 [identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115, citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; see also Stevens v. New York City Dept't of Educ., 2010 WL 1005165, \*9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational

instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

### **1. Specially Designed Instruction**

According to the hearing record, Summit is a New York State approved nonpublic school that provides a therapeutic educational environment to students with average to above average cognitive abilities, and has a student-to-teacher ratio of 12:1+1.5 (Tr. pp. 195-96; Parent Ex. I at p. 1).<sup>25</sup> The clinic director testified that Summit uses multisensory approach to education incorporating auditory, visual and kinesthetic modes into instruction, as well as teaching each student within their own learning style (Tr. pp. 196-97). The clinic director further testified that the Summit teachers are certified in special education and provide small group instruction to the student in reading and math, as well as accommodations including individualized support, breaking down information and providing a less distracting situation when needed (Tr. pp. 200-01). The hearing record indicates that Summit provided the student with speech-language therapy, counseling (group and individual) and OT during the 2017-18 school year (Tr. p. 241, 246-47, 257, 277, 279, 357-58; Parent Exs. P, Q; R:). Additionally, the clinic director testified that there was access to providers throughout the school day (Tr. p. 199; see Tr. p. 225).

According to the clinic director, returning students are assessed at the end of the school year using teacher provided testing information, portfolios, and teacher progress notes and then grouped according to their abilities for the following school year (Tr. pp. 201, 215-16). She explained that the student was evaluated by the teachers in math and literacy and placed in a reading and math group that would best meet her functional abilities in these subject areas (Tr. p. 201). Specifically, for the 2017-18 school year, the student was placed in a 7:1+1.5 special class for reading and a 10:1+1.5 special class for math because the smaller groups allowed for more individualized supports (Tr. pp. 199-201, 215-21). The clinic director explained that even in a 12:1+1.5 special class the student required a "tremendous amount of individualized professional level instruction" (Tr. p. 206). The clinic director testified that the reading and math groups consisted of students at a similar functional level as the student (Tr. p. 221). Additionally, she explained that the decision to place the student in the smaller groups for reading and math was based on the student's need for refocusing, prompting, monitoring for effort, one-to-one explanation and because she required a teacher or assistant teacher sitting with her to make sure she was staying with the material and to check for understanding (Tr. p. 217, 221). The student's special education teacher for 2017-18 testified that in the classroom the student had access to sensory items, fidget toys, flexible seating, a weighted vest, fidget putty and could sit on a large ball or cushion (Tr. p. 315). She further explained that the student had access to a sensory gym for a 5-to-10-minute movement break when needed (Tr. pp. 315-16).

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<sup>25</sup> The clinic director explained that the 12:1:1.5 ratio meant that there "[we]re 12 students to one special education teacher to one assistant teacher, and half the day two assistant teachers" (Tr. p. 196).

An undated Summit counseling report from the 2017-18 school year indicated that the student participated in both individual and group counseling on a weekly basis, and that sessions included cognitive behavioral therapy, discussion, activity therapy, supportive therapy, social skills training, coping skills, problem solving skills and self-esteem enhancement (Parent Ex. Q at p. 2)<sup>26</sup>. The counseling report further indicated that the student participated in a school wide behavior management program and weekly character education classes (Parent Ex. Q at p. 2). According to the clinic director, the school wide behavior management system consisted of a point card system, where students earned points throughout the day for things such as being in their area, being on time, homework effort and behavior production (Tr. pp. 212-13). She further described it as a way to teach students coping strategies and replacement behaviors in a nurturing and accepting environment (Tr. p. 213). Next, the counseling report indicated that the student was working on self-regulation techniques such as keeping her eyes on the speaker, using a fidget, doing chair push-ups and taking movement breaks; developing a better understanding of her strengths and strategies to cope with her weaknesses; and practicing problem solving by brainstorming and evaluating options (Parent Ex. Q at p. 2). The Summit social worker testified that the student worked on strategies to improve her self-esteem, coping skills and self-doubt and she opined that Summit was an appropriate placement for the student because it provided her with a small class size in a therapeutic setting along with intensive support, as well as counseling, OT and speech-language therapy (Tr. pp. 237, 247).

During the 2017-18 school year, the student received speech -language services individually twice per week and attended a communication skills class once per week while attending Summit (Tr. pp. 277-79; Parent Ex. R at p. 3). In an undated report from the 2017-18 school year, the student's speech-language pathologist described the procedures she used to address the student's language deficits (Parent Ex. R at pp. 2-3). Among these were the use of discourse devices to clearly mark explanations ("Get ready to listen. . ."); presentation of important content at a slower rate, with major points highlighted with contrastive stress; simplification of syntax when giving instructions; repetition of new, unfamiliar ideas so the student could process them a second time; overview of any new topic and comparison of how content was similar to the student's previous experiences; use of visual input (story graphs, plot diagrams, attribute guides) to assist with the student with the production of narratives or explanations; identification and diagramming of sequential steps prior to a speaking task; use of an active conversational setting to teach pragmatic language skills; and the use of chained turn taking and progressively contingent utterances to teach conversational skills (Parent Ex. R at pp. 2-3). The speech-language pathologist testified that therapy sessions focused on comprehension and processing information and noted that information needed to be presented clearly (Tr. pp. 259-60). She reported that she "emphasize[d] meaningful aspects of texts, pause[d] between meaningful units of information so the student could process gradually" (Tr. p. 260). The speech-language pathologist reported that she always had written outlines accompanying instructions and that the outlines sometimes included pictures (Tr. p. 260). In addition, the speech-language pathologist explained that she tried to "activate the student's background knowledge to kind of bridge the old with the new to strengthen her connections to material" (Tr. p. 260). The speech-language pathologist reported that she incorporated a question time into her sessions so that the student could

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<sup>26</sup> The Summit social worker testified that she provided the student with individual counseling, and that group counseling was provided by another clinician (Tr. p. 241).



ask for clarification rather than be expected to comprehend immediately (Tr. p. 260). Additional instructional strategies included the use of chunking, teaching the student a self-monitoring strategy for reading texts, use of graphic organizers, and teaching the student to use self-talk to navigate tasks (Tr. p. 261). The speech-language pathologist testified that every classroom at Summit had an FM system that increased the signal-to-noise ratio which provided more clarity in understanding and identifying speech in noisy situations, regardless of where the teacher was in the classroom (Tr. p. 273). The speech language pathologist opined that Summit was appropriate because of the small class ratio and the attention the student received from the teacher and assistant teacher in the classroom (Tr. p. 276).

An undated Summit occupational therapy (OT) report indicated that the student received individual OT services once per week for 30 minutes during the 2017-18 school year to address the student's weaknesses in sensory processing and postural alignment (Parent Ex. P at p. 1). The OT report detailed strategies that were used to improve the student's attention to task including the use of deep proprioceptive input, linear movements on suspended equipment or jumping on a trampoline prior to engaging in activities that required prolonged attention (Parent Ex. P at p. 1). According to the OT report, the student was instructed non the benefits of selecting and using sensory based activities while experiencing dysregulation throughout her day (Parent Ex. P at p. 1). The report further indicated that the student participated in trunk and upper extremity strengthening exercises to improve her core strength (Parent Ex. P at p 2). The Summit occupational therapist testified that OT sessions focused on addressing the student's sensory needs to help her attend, be able to focus and attempt a task in a classroom setting and specified that the student benefited from sensory modulation which consisted of providing her with auditory, visual, vestibular and proprioceptive types of input (Tr. p. 358-360). The occupational therapist further testified that Summit had a sensory gym which consisted of suspended equipment used to provide sensory input (Tr. p. 361). She further testified that Summit was appropriate for the student because students who are "sensory seeking tend to get over stimulated by the overwhelming size or number of people around them" and they benefit from a smaller environment such as the one at the Summit School (Tr. p. 363). The student's classroom teacher testified that the student had access to sensory items within the classroom including fidget toys and fidget putty, a large ball or cushion for her seat and a weighted vest (Tr. p. 315). Th teacher further testified that if need the student was able to take short break and go to the sensory gym (Tr. p. 316).

Based on the above, the hearing record shows that Summit provided the student with educational instruction specially designed to meet her unique needs, support by such services as were necessary to permit the student to benefit from instruction.

## **2. Progress**

A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, [2d Cir. Dec. 26, 2012]; L.K., 932 F. Supp. 2d at 486-87; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at \*3 [S.D.N.Y. Aug.

7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at \*22-\*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).<sup>27</sup> However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

The hearing record reveals that the student made progress during the 2017-18 school year while attending Summit. According to the clinic director, although the student's anxiety continued to interfere with her education, she made progress with regard to her attention and anxiety during the 2017-18 school year (Tr. p. 224, 226). Specifically, the director reported that the student was earning more of her points on her point card independently as opposed to needing prompts, and that she was staying on task and focused once a prompt was given (Tr. pp. 224-25). Additionally, the director testified that the student was seeing her counselor less frequently outside of her mandated services, that she was better able to manage in the classroom with adult support and she was managing herself more effectively (Tr. p. 225). The student's teacher testified that since the beginning of the school year, the student was demonstrating "a bit" more maturity; was doing well in math; had shown progress in keyboarding, organizing her thoughts and writing in paragraphs; and was able to understand grade level vocabulary (Tr. pp. 321-23).

The Summit social worker testified that the student had made a lot of progress during the 2017-18 school year, specifying that she observed improvement in the student's self-esteem and in her confidence of her abilities (Tr. p. 247). The social worker reported that the student was very receptive to strategies and motivated to do well and was able to utilize the strategies in the classroom (Tr. p. 237). According to the 2017-18 counseling report, the student had made progress in her distractibility, problem-solving skills, self-esteem, coping skills, and social skills; however, these areas continued to impact her academic performance and social relationships (Parent Ex. Q at p. 3).

According to the Summit 2017-18 "speech report", the student benefited from information and directions presented "slowly, concisely, and in a step-by-step fashion," scaffolding, visual outlines, templates for organizing ideas, models, guided feedback, and increased rehearsal time (Parent Ex. R at pp. 1-2). The report indicated that the student had improved expressively in turn taking and topic maintenance with direct support, the student was beginning to show "greater sensitivity to the listener's confusion when she is imprecise;" and was showing emerging growth in her tendency to monopolize a conversation and "interject thoughts 'out of turn'" (id. at p. 3). The report further indicated that the student had become more aware of verbal and nonverbal cues (Parent Ex. R at p. 3). The Summit speech-language pathologist testified that compared to the beginning of 2017-18 school year, the student did not require as many cues for redirection and that she did not fatigue as easily (Tr. p. 261). She further reported that the student was reading more

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<sup>27</sup> Conversely, the Second Circuit has also noted that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at \*11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

with a purpose and she could stay on a task for approximately 15 minutes before needing a break compared to five minutes at the beginning of the school year (Tr. pp. 262-63). Additionally, the speech-language pathologist indicated that the student's ability to process multi-step directions, verbal memory and organization of language had improved (Tr. pp. 265-70).

The student's occupational therapist at Summit testified that the student had made progress on both of her goals, but had not yet achieved them; specifically stating that the student was able to maintain her attention for approximately 10 to 12 minutes (the goal was for 15 to 20 minutes) and was also making progress in maintaining an upright seated posture with two to three prompts and cues for approximately 12 to 13 minutes (goal was for 15 minutes) (Tr. pp. 373-78). The 2017-18 Summit occupational therapy report indicated that the student was able to complete sit-ups and modified push-ups with decreased reports of fatigue and that her ability to maintain an upright midline position had improved (Parent Ex. P at p. 2).

The student's performance during the 2017-18 school year at Summit was also detailed in a school progress report (Parent Ex. M). The progress report consisted of the annual goals developed by the June 2017 CSE as part of the student's IEP for the 2017-18 school year, along with a first marking period report of progress toward the annual goals and an explanation of the coding system (Parent Ex. M at pp. 1, 3-8). In addition, the progress report included a narrative report and a "report card," both of which assessed the student's academic and social-emotional progress for the first marking period (Parent Ex. M at pp. 2, 9). According to the student's teacher, the student showed improvement academically during the first marking period in writing, and benefitted from graphic organizers, outlines and checklists (Parent Ex. M at p. 2). The teacher reported that the student was kindhearted, friendly and polite, was respectful to peers and adults and was often seen taking on the role of leader and was always willing to offer assistance when needed (Parent Ex. M at p. 2). The annual goals progress report indicated that the student had made progress on seven of the 14 annual goals and was expected to meet those goals (Parent Ex. M at pp. 3-4). Additionally, the report indicated that the student was progressing slowly on the remaining seven goals; however, she was also expected to meet those goals (Parent Ex. M at pp. 3-4). Next, the "report card" indicated that the student was making satisfactory progress in mathematics with regard to applying previously learned strategies when solving problems and using a calculator and manipulatives effectively; however, she required additional support in understanding applied concepts, communicating math ideas orally and in writing, performing computations with accuracy and showing all required work (*id.* at p. 9). In reading, science, language arts, and social studies the report card indicated that the student was making satisfactory to good progress (*id.*). Finally, with regard to social emotional skills, the student was making good progress on all skills identified (*id.*). Review of the student's 2017-18 report card that was submitted by the parent indicates that the student maintained or made progress in all areas reported with the exception of applying previously learned strategies when solving math problems which indicated the student required additional support (compare Parent Ex. M at p. 9 with Attachment, Req. for Rev.).

The parent testified that the student made great progress at Summit; specifying that she was able to communicate with teachers, make friends, was learning to self-regulate and self-advocate (Tr. p. 400). She further testified that Summit offered yoga, swimming and music which helped the student self-regulate and to relieve her anxiety (Tr. p. 424).

Based on the foregoing, the student's inconsistent progress notwithstanding, Summit provided special instruction designed to address the student's identified needs. In the absence of additional evaluation to the contrary, the student's inconsistent progress at Summit appears to relate directly to the student's disability. I find that Summit has designed a program of support, accommodations and modifications to address the student's distractibility and inattentiveness, and to assist the student in the development of skills in these areas.

### **E. Equitable Considerations**

Having concluded that Summit was an appropriate unilateral placement for the student for the 2017-18 school year, I turn next to the parent's claim that the IHO improperly determined that reimbursement should be denied she did not cooperate with the CSE. With regard to equitable considerations, the hearing record supports the IHO's decision to deny tuition reimbursement.

It is well established that equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [indicating that "Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir.

2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

As for the parent's contention that the student was not due for a triennial reevaluation until the 2017-18 school year, as described earlier in this decision the parent's argument regarding the need for and the timing a reevaluation of the student are misplaced. With regard to the parent's argument that she did not receive notice of the June 2017 CSE meeting, the factual foundation of that argument is also addressed above and it has been determined that the district provided the requisite notice and was not otherwise chargeable with the parent's nonattendance at the CSE meeting on June 20, 2017. As described above, the district had rescheduled the meeting at a timeframe when the parent indicated she could attend and made significant efforts to secure the parent's participation, but was faced with unanswered telephone calls, and telephone numbers that the parent gave at which the district was unable to leave messages. It also appears from the district records that the parent went so far as to suggest that the district should stop communicating with the parent via e-mail and only through written communications to the parent's home address (Dist. Ex. 12 at p. 3). The IHO found that the parent did not cooperate with the district's attempts to reevaluate the student which prevented the June 2017 CSE from developing an appropriate IEP (IHO Decision at p. 11). The IHO further found that the parent continued to withhold consent to evaluate even after the district's school psychologist explained the need for current academic assessment (*id.*). While any one of the factors described above might not be sufficient, taken together they support the IHO's ultimate conclusion that the parent was uncooperative with the process of developing the student's IEP. Had the parent more fully cooperated, especially with the evaluation process, the CSE might have avoided some of the defects later found in the IEP. Although I do not weigh it as heavily, the IHO's finding was not inaccurate insofar as that the parent's argument regarding lack of notice of the CSE meeting was unpersuasive in light of the content of her 10-day notice letter (finding the parent's failure to claim in her 10-day notice that the CSE failed to convene an annual review in preparation for 2017-18 school year belied her lack of notice claim) (*id.*). On balance, the hearing record supports the IHO's determination that equitable considerations favor the district and weigh against reimbursement or direct funding of the student's cost of attendance at Summit for the 2017-18 school year.

#### **F. Remaining Claims**

The parent's remaining requests do not present any cognizable claims for relief, and it is therefore unnecessary to address them on the merits. The parent's claims that the IHO committed factual errors and that the hearing record should be amended—as in Application of a Student with a Disability, Appeal No. 16-048—misstate both the hearing record and the IHO's findings of fact and decision on the matter. The parent's claims regarding the alleged factual inaccuracies in the IHO's decision and order for evaluations did not result in any adverse findings. Therefore, those claims are also dismissed.

Additionally, it is not necessary to address the IHO's order for additional assessment of the student because as of the date of this decision, the statute itself mandates that CSE should have already convened to consider a triennial reevaluation of the student and revise the student's program and should have developed a new IEP for the student for the 2018-19 school year (see 20

U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]; see also IHO Decision at p. 10).<sup>28</sup>

## **VII. Conclusion**

In summary, having determined that the evidence in the hearing record did not establish that the district offered the student a FAPE for the 2017-18 school year, that the evidence in the hearing record establishes that Summit was appropriate to address the student's needs. I find no reason to disturb the IHO's determination that that the equitable considerations do not support an award of reimbursement and/or funding of the parent's unilateral placement for the 2017-18 school year.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated June 7, 2018, is modified, by reversing those portions which found that the district failed to offer the student appropriate grouping and further found that the parent's unilateral placement at the Summit School was not appropriate.

**Dated:**           **Albany, New York**  
                          **January 9, 2019**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**

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<sup>28</sup> As noted, numerous times in this decision, the parent's alleged basis for withholding consent for a reevaluation was that the student's evaluations were less than three years old. At this point, it is unequivocally clear that is no longer the case and the parent is reminded that any continued lack of cooperation may appear to be an attempt to circumvent the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Student X, 2008 WL 4890440, at \*16 [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). The district is permitted to conduct its own evaluations and develop an IEP in a model in which the parent is given the opportunity to participate, but it is unfair to allow the parent to both dictate the flow of information to the CSE about the student and then cry foul because the resulting program is unsatisfactory and demand public funding for a private school.