



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-101

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

Appearances:

Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, by Gregory Cangiano, Esq., and Linda A. Goldman, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Churchill School (Churchill) for the 2019-20 school year. Respondent (the district) cross-appeals from the IHO's decision to proceed to make findings regarding the appropriateness of Churchill and from relief ordered by the IHO. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The evidence in the hearing record indicates that, during the 2018-19 school year, the student attended a district fifth grade general education classroom where he received integrated co-teaching (ICT) services (see Dist. Exs. 1 at p. 3; 2; Parent Exs. A at p. 2; C at pp. 1, 2; J at pp. 1-2). As a young child the student engaged in tantrums if he did not get what he wanted, although he could be comforted by his parents, and was absorbed by moving fans (Parent Ex. C at p. 1). As the student started preschool, his mother began to have concerns about his language development

(id.). In addition, the student presented with some obsessive-compulsive tendencies (id.). During kindergarten and first grade, the student displayed delays in the development of his academic skills, and as a result the student was retained for first grade (id. at pp. 1-2). During the student's repeated first grade year, he was evaluated by the district and classified as a student with a speech or language impairment (id. at p. 2). For second grade, the student was "placed in an ICT class" and received the related service of speech-language therapy to support articulation challenges as well as his broader receptive and expressive language skills (id.). The student remained in a district "ICT class" up through the fifth grade (id. at pp. 1, 2). During the third and fourth grades, the student "worked in play therapy with a child psychologist," "which helped him better manage his anxiety and worries, and his obsessive behavior seemed to decrease" (id. at p. 2).¹ Also in fourth grade, the parents secured private math tutoring to supplement the student's classroom instruction (Parent Ex. J at p. 2). The student has received diagnoses of a language disorder, an unspecified neurodevelopmental disorder, an attention deficit hyperactivity disorder-predominantly inattentive type, and specific learning disorders in reading, math, and written expression (Parent Ex. C at p. 19). Additionally, the student reportedly displayed symptoms of anxiety and obsessive-compulsive disorder (id.).

On May 10, 2019, the CSE convened to develop the student's 2019-20 (sixth grade) IEP to be implemented beginning on May 28, 2019 (during his fifth-grade year) (Dist. Ex. 1 at pp. 1-15). Having determined the student was eligible for special education as a student with a learning disability, the CSE recommended a general education classroom placement with ICT services in English Language Arts (ELA) for three periods per day, mathematics for one period per day, and social studies for one period per day (id. at pp. 1, 9).² In addition, the CSE recommended one 30-minute group session per week of speech-language therapy and testing accommodations including extended time, separate location/room, and on-task focusing prompts (id. at pp. 9-10). As supports for the student's management needs, the CSE recommended a structured classroom environment, small group work for math and writing, preferential seating, directions repeated and rephrased, frequent teacher check-ins and refocusing prompts, checklists for revising and editing writing, graphic organizer for writing, book club partnerships, and visuals to accompany lessons (id. at p. 5).

On May 28, 2019, the parents executed a contract for the student's attendance at Churchill for the 2019-20 school year (see Parent Ex. F).³ By letter dated August 21, 2019, the parents provided the district with 10-day notice that they disagreed with the May 2019 CSE's recommendations and were unilaterally placing the student at Churchill for the 2019-20 school year (Parent Ex. B).

¹ The student had difficulty regulating his emotions at home, which a psychologist who later evaluated the student suggested may have stemmed from the effort required to control his feelings at school (Parent Ex. C at p. 2).

² The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

³ Churchill has been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

A. Due Process Complaint Notice

In a due process complaint notice, dated October 7, 2019, the parents requested an impartial hearing and asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (Parent Ex. A). The parents asserted that the district failed to properly respond to their request to evaluate the student, did not evaluate the student in all areas of his suspected disability, that the May 2019 CSE failed to adequately consider the use of assistive technology to enable the student to access his individual educational curriculum, and the CSE made its placement decision based upon the availability of programs in the district rather than the student's needs (id. at pp. 1-3, 5).

With respect to the May 2019 IEP, the parents asserted that the student's present level of academic performance in reading incorrectly stated that the student was "approaching grade level" (Parent Ex. A at p. 4 n.6). The parents asserted that the annual goals lacked a "grade level baseline," were vague, generic, unmeasurable, and were "not supported by the evidence of [the student's] documented disability" (id. at pp. 3-4). The parents further asserted that the IEP was "devoid of any meaningful academic and social/emotional management needs" and that those management needs that were listed were "too general to be useful," repetitive, and failed to indicate how educators would implement them (id. at pp. 4-5). Further, the parents argued that the IEP failed to address the student's social/emotional needs, specifically his anxiety and obsessive tendencies (id. at p. 5).

With respect to the proposed general education classroom with ICT services, the parents asserted that ICT services could not "provide the constellation of support and individualized instruction that [the student] require[d]" (Parent Ex. A at p. 3). The parents also asserted that the recommended ICT services were inappropriate because the student required "additional supports within the framework of a smaller and more supportive, specialized educational environment to address his documented educational, speech/language, and social/emotional needs" (id. at p. 2). The parents asserted that, since the student failed to make progress during the prior years in a general education class with ICT services, and was in fact well below grade level, recommending the same placement for the 2019-20 school year was not consistent with the student's needs (id. at pp. 2, 3). The parents also asserted that the IEP was inappropriate because it failed to recommend any supports to address the student's needs during science class (id. at p. 3).

Finally, the parents alleged that the assigned public school site could not implement the IEP and would not provide the student with "a suitable and functional peer grouping" (Parent Ex. A at p. 5).

For relief, the parents sought reimbursement for the costs of the student's 2019-20 school year tuition at Churchill (Parent Ex. A at pp. 5-6). The parents also requested door-to-door transportation for the student (id. at p. 6).

B. Impartial Hearing Officer Decision

A two-day impartial hearing convened on April 3, 2020 and concluded on April 15, 2020 (Tr. pp. 1-250). In a decision dated May 2, 2020, the IHO determined that the district offered the

student a FAPE for the 2019-20 school year (IHO Decision at pp. 5, 45).⁴ The IHO also noted that the parents met their burden of showing that Churchill was appropriate for the student (*id.* at p. 5). Finally, the IHO found that the equitable consideration did "no[]t favor district placement at or accountability for the unilateral placement undertaken by the family" (*id.*).

In determining that the district offered the student a FAPE, the IHO found the CSE adequately took the parent's privately-obtained assessment into account, developed an "acceptable IEP," and offered an assigned public school site that, based on the hearing record, would have been able to provide the services defined by the student's IEP (IHO Decision at p. 5). The IHO acknowledged that the district held a "slightly more optimistic assessment of the student's academic capacity" compared to the parents' "somewhat less optimistic" view but found that, even assuming the Churchill assessment was correct and the student presented at the start of sixth grade with performance at or around mid- to late-fourth grade, the student's delay was "barely more than a year" (*id.* at p. 44). In addition, with respect to the student's social/emotional needs, the IHO found that the "student's manifestation of anxiety presented far more clearly and impactfully, at home [rather] than at school" (*id.*).

With respect to the recommended ICT services, the IHO found that the student presented with "precisely the profile that an ICT class should be designed to address if it is to be appropriate for any student at all," and that contrary to any assertions otherwise, the hearing record did not provide any "reason to believe, prospectively and speculatively, that the special education staff could not take . . . information" from the neuropsychological evaluation about the sort of curriculum from which the student would receive benefit "into account and teach the student accordingly" (IHO Decision at p. 44). In response to the parents' assertion that ICT services did not guarantee small group instruction, the IHO held that "[s]uch instruction [wa]s a methodology in the discretion of the classroom teacher" that should appear on the IEP if a student needed it to receive a FAPE but need not "be built into the definition of the student's program on the district continuum" of special education (*id.*).

The IHO agreed with the parents that the district should have included ICT services for the student's science class on the IEP (IHO Decision at p. 44). However, the IHO held that, notwithstanding the parents' testimony that they believed they were told otherwise, the district's witness "explicitly confirmed" that the [assigned public] school "would have made an ICT class available in whatever subjects were called for on their students' IEPs" (*id.*) On one hand, the IHO concluded that the CSE's failure to include ICT services for science on the IEP did not deny the student a FAPE; however, on the other hand the IHO concluded that the lack of ICT services "lead[] merely to an Order that the IEP be modified to modify that one class in his program" (*id.*). The IHO did not rule on the parent's claims with regard to the adequacy of the annual goals on the

⁴ Although the IHO's decision is 45 pages long (IHO Decision at pp. 1-45), only 4 pages are devoted to an analysis of the facts related to the parents' claims in this matter and the decision is devoid of any citation to the testimonial or documentary evidence in the hearing record (*id.* at pp. 4-5, 44-45). State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). While not defined by regulation, page citations to the transcripts and documentary evidence in the hearing record are the norm in "appropriate standard legal practice" and should be included in any IHO decision.

student's IEP and instead stated that "[t]he family argue as well that the goals and objective leave some areas that they deem important without an articulated goal. To the extent that they feel this way, when the CSE reconvenes to add Science ICT they should as well go through the goals and objectives carefully with the family (*id.* at p. 45).

With respect to the parents' assertion that the assigned public school site could not implement the student's IEP, the IHO found that, "at worst, the record reflect[ed] confusion that went undiscovered prior to the hearing between the two distinct programs available at the proposed school" (IHO Decision at p. 45). The IHO held that "the program recommended for the student was the monolingual program, not the language immersion program," and that the evidence in the hearing record supported the conclusion that the monolingual program could implement the student's IEP (*id.*).

Turning to the unilateral placement, the IHO found, notwithstanding that the student's teacher opined on cross-examination that the student's "reading and comprehension levels ha[d] remained roughly static and that he continue[d] to have executive functioning and attentional needs," Churchill was appropriate for the student (IHO Decision at p. 5).⁵ The IHO opined that Churchill appeared "to be a superior mesh to the student's needs, and to be designed in a manner more likely to aid him in making progress than would the large, departmentalized program the district recommend[ed], but [that] the modest nature of the student's disability, combined with the provision of meaningful special education intervention, and viewed in light of the district's obligation to offer placement in the least restrictive environment," supported the finding that the district offered the student a FAPE (*id.*).

Although concluding that the district offered the student a FAPE, the IHO nevertheless ordered the district to modify the student's IEP to add science to the list of ICT classes, and to address with the parents their concerns about the student's annual goals and short-term objectives (IHO Decision at p. 45).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in determining that the district offered the student a FAPE for the 2019-20 school year. First, the parents assert that the annual goals contained in the May 2019 IEP did not appropriately address the student's specific challenges with sustained attention, cognitive inhibition, multi-tasking, shifting, and planning. In addition, the parents allege that the IHO erred in finding the IEP appropriate despite the absence of supports to address the student's social/emotional needs. In particular, the parents allege that, despite the IHO's finding that the student's anxiety presented in the home more so than at school, this should not have absolved the district of its responsibility to address the student's social/emotional needs as identified in the neuropsychological evaluation considered by the CSE.

With respect to the general education class with ICT services, the parents assert that the IHO erred in determining, contrary to the weight of the evidence, that the placement recommendation was appropriate. The parents assert that the student needed a small class with

⁵ The IHO also noted that the student had "not as yet made substantial progress either on academic performance or with respect to executive functioning" at Churchill (IHO Decision at p. 44).

more intensive supports and that the student had failed to make progress in prior school years despite his receipt of ICT services. With respect to ICT services in science, the parents assert that the IHO erred by improperly relying on retrospective testimony to rehabilitate the defective IEP. Further the parents argue that, after explicitly finding that the district should have offered the student ICT services in science and despite there being no recommendation for that service on the IEP, the IHO erred by concluding that this did not amount to a denial of a FAPE and then ordering the district CSE to amend the IEP to include ICT services for science and to draft appropriate goals.

The parents assert that the IHO properly determined that Churchill was an appropriate unilateral placement for the 2019-20 school year. Finally, the parents assert that equitable considerations support an award of tuition reimbursement.

In its answer, the district generally responds to the parent's allegations and argues that the IHO's determination that the district offered the student a FAPE for the 2019-20 school year should be upheld. In its cross-appeal, the district asserts that the IHO erred in considering the appropriateness of the unilateral placement after finding the district provided the student a FAPE. The district also cross-appeals the IHO's order that the CSE amend the student's programming by adding ICT services in science to the student's IEP because he found that the district offered a FAPE.

In their answer to the district's cross-appeal, the parents generally respond to the district's allegations and argue that the IHO's determination that Churchill was an appropriate unilateral placement should be upheld. With respect to IHO's order that the CSE amend the student's IEP, the parents agree with the district that it was error for the IHO to attempt to cure the deficiency in the IEP by any prospective amendment that was not requested or sought by them.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]).

The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁶

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

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

VI. Discussion

A. Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "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 further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Here, neither party has appealed the IHO's determination that the assigned public school site offered the monolingual program and was capable of implementing the student's IEP (see IHO Decision at p. 45). Further, although the district asserts in its cross-appeal that the IHO erred in continuing his analysis after determining that the district offered the student a FAPE, provides no authority whatsoever that it is error for an IHO alternative findings regarding whether a unilateral placement is appropriate (which findings could potentially prove useful during administrative or judicial review) and, more importantly, the district does not assert that the IHO made any factual or legal error in his analysis of appropriateness of Churchill (Answer & Cross-Appeal ¶ 20; see

⁶ 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).

also IHO Decision at p. 5). Likewise, although the district alleges in its cross-appeal that the IHO erred in ordering the CSE to reconvene to add ICT services for science to the student's IEP, it does not otherwise challenge the IHO's determination that the May 2019 CSE should include such services on the student's IEP (Answer & Cross-Appeal ¶ 21; see also IHO Decision at pp. 44-45). In other words, the district does not assert that the student did not require ICT services in science on the student's IEP, but argues only that the IHO should not go so far as to order the amendment of the student's IEP. Therefore, these findings of the IHO with respect to the assigned public school site, the unilateral placement at Churchill, and the student's need for ICT services in science have become final and binding upon the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

In addition, the parents' request for review reveals that the parents have not pursued the following issues identified in their due process complaint notice: the sufficiency of the student's evaluative information, consideration of his need for assistive technology, placement of the student based upon program availability in the district instead the student's needs, sufficiency of supports for his management needs, and peer/functional grouping at the assigned public school site (compare Parent Ex. A at pp. 1-5, with Req. for Rev.). Therefore, these issues are deemed abandoned pursuant to State regulation and will not be further addressed below (8 NYCRR 279.8[c][4]).

B. May 2019 IEP

1. Supports for Attention, Executive Functioning, and Social/Emotional Needs

Before turning to the parents' allegations on appeal regarding the sufficiency of supports in the IEP to address for the student's attention, executive functioning, and social/emotional needs, including the sufficiency of annual goals, a review of the student's needs as known to the May 2019 CSE is necessary as backdrop for the disputed issues to be resolved.

The evidence shows that on May 10, 2019, the CSE convened to develop the student's 2019-20 (sixth grade) IEP to be implemented on May 28, 2019, near the end of his fifth-grade year (Dist. Ex. 1 at pp. 1-15). In order to determine the student's needs, the May 2019 CSE considered a parentally-obtained December 2018 psychological evaluation with neuropsychological assessment report (neuropsychological report), a March 2019 social history update, an April 2019 teacher report, and an April 2019 classroom observation (Dist. Exs. 1 at pp. 1-6; 5 at p. 2; 7 at p. 2; see Parent Ex. C at pp. 1-23; Dist. Exs. 2 at pp. 1-2; 3 at pp. 1-2; 4 at pp. 1-3).

According to the December 2018 neuropsychological report completed by a private psychologist, the student demonstrated cognitive skills within the average range (full-scale IQ of 91, at the 27th percentile) with "relative challenges" displayed with working memory (low average range overall) and variability in his visual attention (Parent Ex. C at pp. 4-5). The psychologist noted that the student's "struggles" in his ability to process and reason with visual spatial information, as well as engage in fluid reasoning on novel tasks, could impact his ability to "find in roads with abstract material as well as to integrate material; as a result multiple academic areas may be affected" (id. at p. 5). In addition, the psychologist opined that the student's vulnerability

in his working memory "could interfere with fluid thinking, learning and producing, especially when he ha[d] more information to juggle" (*id.*). The psychologist noted that the student "certainly ha[d] some good core thinking skills and growing academic abilities" and further that, by all accounts, the student was more capable and self-sufficient when he was involved in structured and familiar learning and production and when he was working with literal fact-based material (*id.* at pp. 14-15).

With respect to academic skills, the neuropsychological report indicated that the student's "language-based academic skills were variably developed and sometimes weaker than his verbal reasoning potential" (Parent Ex. C at p. 5). With the exception of sentence building (which fell in the low average range), the student's performance on the Wechsler Individual Achievement Test, Third Edition (WIAT-III) reading and writing subtests fell in the average range, while all but one of his mathematics subtests (numerical operations was in the average range) fell in the low average range (*id.* at pp. 5-8, 20-21). With respect to the student's attention skills and executive functions, the psychologist indicated that the student's ability to regulate his attention and broader executive function skills varied and impacted his academic functioning (*id.* at p. 12). Given the variability in the student's attention and executive function controls, the psychologist recommended on-going support and scaffolding built into the learning process in his educational environment (*id.* at pp. 12-13).

With respect to social/emotional functioning, the December 2018 neuropsychological evaluation report indicated that while the student demonstrated anxiety and obsessive trends, he also seemed to feel good about many aspects of himself and in many ways he seemed to feel grounded in his home and school life (Parent Ex. C at p. 14). The psychologist noted that the student's presentation indicated average range thinking potential alongside language-based and nonverbal learning challenges and diagnosed the student with a language disorder, an unspecified neurodevelopmental disorder, an attention deficit hyperactivity disorder-predominantly inattentive type, and specific learning disorders with impairments in reading, written expression, and mathematics (*id.* at p.19).

Next, the student's special education teacher's April 2019 report (teacher report) indicated, and it was reflected in the May 2019 IEP, that based on a February running record assessment of the student's reading comprehension, accuracy, and fluency, the student was approaching the fifth-grade level in reading (Dist. Ex. 4 at p. 1). With respect to math, the teacher reported that the student's performance on the end of fourth grade/early fifth grade pre-assessment was below grade level, and the teacher indicated that the student's writing was also below grade-level standards (*id.*).⁷ Generally, the teacher reported that the student was always willing to hear feedback from a teacher or try new strategies; that he appeared to enjoy school and showed a love of drawing, art, and reading; and that he preferred to work collaboratively and to use verbal expression over written expression during book club (*id.* at p. 2). With respect to reading, the teacher noted that in the classroom the student was a strong reader and had improved his spelling and vocabulary over the past year and that the student read fluently and with expression but that his reading became choppy with slightly higher level text (*id.* at pp. 1-2). With respect to writing, the teacher noted that the

⁷ The May 2019 IEP indicated that based on the report of the student's teachers he was performing at an early fifth-grade level in reading and an end of fourth grade level in math and writing (Dist. Ex. 1 at p. 1).

student generated ideas independently, was able to write a five-paragraph essay, and used evidence from an article to support his ideas (id. at p. 1). In addition, the teacher indicated that the student required teacher support to elaborate on his ideas, that the student tended to shy away from re-reading his draft and rather wanted to be "done" with it, and that, with explicit instruction, the student went back and reworked areas that needed to be revised (id.). Further, the teacher noted that the student felt comfortable using internal thinking/dialogue to move his story forward but did not provide much setting, emotion, or action and that with teacher support the student was learning how to revise his stories in stages (id.). With respect to mathematics, the student required reminders and re-teaching in a small group to subtract with regrouping using the algorithm, had not mastered his times tables, and, at times, sped through his math work without pausing to check if he was following what the directions stated (id.). Further, multi-step problems and complicated language posed a challenge for the student, and he was working on underlining the important information and problem, drawing a tape diagram, and estimating before solving the problem (id. at p. 2). The teacher indicated that the student required small-group instruction for re-teaching concepts, to help him organize his work, and to re-read his work (id. at p. 3).

With respect to social development, the teacher noted that the student followed the class expectations, but that he struggled with following directions and transitioning, and often appeared to be daydreaming and was not sure about the direction that had been given (Dist. Ex. 4 at p. 2). The teacher indicated that this occurred during transitions between activities within a lesson and during transitions between subjects (id.). In addition, the report indicated and that the student appeared distracted and unfocused during lessons (id.). When describing the student's transitions (for example when the class was asked to take out their belongings for the next subject then to come over to the rug), his teacher testified that the student seemed to be thinking about something else or not paying attention to the direction or was not overly concerned with doing it right away, which she opined was just his personality but that "he was never . . . way off task" and that it was "just minor little late to the rug type of thing" (Tr. pp. 58-59). The teacher testified that she did not "think transitioning was a huge enough problem for [the student]" that she would have written "about it in the IEP" (Tr. p. 72). In addition, the teacher reported that the student was inclusive and tried to make his peers feel welcome and a part of the group, that he helped others without being asked, and was viewed by his peers as a positive presence in the classroom (Dist. Ex. 4 at p. 2). Included in the teacher report was a "Speech" note and it indicated that the push-in model had worked very well for the student and that he made consistent and steady gains in his receptive and expressive language (id.). Further, the speech note indicated that the student should continue working on improving his organization, structure, and story development when writing (id.).

The April 2019 classroom observation was conducted by a district school psychologist during the student's math class and indicated that the student was one of 26 students, two teachers, and one paraprofessional in the classroom that day (Dist. Ex. 2 at p. 1). The school psychologist noted that the student complied with the teacher directions without additional instruction or prompting and, over the course of about 30 minutes, the student worked quietly and diligently on a math worksheet (id.).⁸ The school psychologist also noted that the student worked independently

⁸ There is no evidence regarding whether the observer looked at the student's responses on the worksheet.

and did not require prompts or cues to remain on task and that the student was actively engaged in the class activity without distraction or inattention (*id.*).

Having determined the student continued to be eligible for special education services as a student with a learning disability, the CSE recommended a general education class placement with ICT services in ELA for three periods per day, in mathematics for one period per day, and in social studies for one period per day (Dist. Ex. 1 at pp. 1, 9). In addition, the CSE recommended one 30-minute group session per week of speech-language therapy, and testing accommodations including extended time, separate location/room, and on-task focusing prompts (*id.* at pp. 9, 10). The CSE recommended several annual goals including speech-language, reading, writing, problem-solving, and attention/focus goals to address the student's needs as he presented in school (*id.* at pp. 7-9). Further, the May 2019 CSE recommended several strategies to address the student's management needs related to daydreaming, lack of attention, and transitions, such as a structured classroom environment, small group work for math and writing, preferential seating, directions repeated and rephrased, frequent check-ins with teacher and refocusing prompts, checklists for revising and editing writing, graphic organizers for writing, book club partnerships, and visuals to accompany lessons (Tr. pp. 70-71; Dist. Ex. 1 at p. 5).

Overall, it appears that the IEP included supports that were designed to address the student's attention and executive functioning needs to the extent those needs are described in the hearing record and that the student did not exhibit anxiety in the classroom.

2. Integrated Co-Teaching Services

One of the main substantive challenges that the parents made at the outset of the impartial hearing was that the district offered programming that consisted to a large extent of ICT services during the 2019-20 school year, but that the student had already failed to make appropriate academic progress during the prior years in a general education class with ICT services (Parent Ex. A at pp. 2, 3). The parents assert on appeal that the IHO erred in determining that the district's recommended general education classes with ICT services was appropriate to meet the educational needs of the student, and that contrary to the IHO's findings, the district "did not proffer any evidence to substantiate or otherwise quantify the purported progress it claims [the student] made" in prior ICT programming (Req. for Rev. at p. 8). Fundamentally there are gaps in the hearing record with respect to the student's progress in the district in the school years leading up to the 2019-20 school year. Accordingly, as further described below, it is not possible to assess the appropriateness of the April 2019 CSE's recommendations in light of the parents' allegations that the student was not making progress.

A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. Jun. 24, 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 13 [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). Furthermore, "if a student had failed to make any progress

under an IEP in one year," at least one court has been "hard pressed" to understand how a subsequent IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

As noted above, the May 2019 CSE recommended a general education class placement with ICT services for ELA for three periods per day, for mathematics for one period per day, and for social studies for one period per day (Dist. Ex. 1 at p. 9).⁹ According to the private neuropsychological evaluation, the student had attended a general education class placement with ICT services since at least second grade (Parent Ex. C at p. 2), and in their due process complaint notice, the parents specifically alleged that the student failed to make progress in such a setting and that, therefore, it was inappropriate for the May 2019 CSE to recommend a similar placement for the 2019-20 school year (Parent Ex. A at pp. 2, 3). Likewise, the parents shared their concern about the student's progress at the May 2019 CSE meeting (see Dist. Ex. 1 at pp. 4, 13). The IEP documents that the parents "continue[d] to have concerns about [the student's] academic delays" and that, despite his receiving ICT services from first through fifth grade, he was "still not performing on grade level" (Dist. Ex. 1 at pp. 4, 13). The parents also shared that the student "ha[d] been making slow progress in the development of his academic skills over the years" but that "grade delays remain[ed]" and they felt more concerned as demands "for more critical thinking and integrating information" had increased for the student (id.).¹⁰

Despite that the parents clearly expressed their concerns about the student's progress and raised the student's lack of progress as an issue for review at the impartial hearing, the district failed to introduce anything more than anecdotal evidence during the impartial hearing to demonstrate that the student made progress with ICT services in the school years leading up to the May 2019 CSE meeting. In reviewing a student's progress, a variety of measures may be considered and a student need not demonstrate consistent progress in all areas of functioning for a finding of overall progress to be made; further, it is acceptable to consider the totality of the record evidence—including both objective measures and subjective input of providers and teachers to determine whether, on the whole, a student has made some demonstrable progress pursuant to the district's recommendations (see E.S. v. Katonah-Lewisboro Sch. Dist., 487 Fed. App'x 619, 622 [2d Cir. July 6, 2012] [finding evidence of progress "despite . . . low test scores"]; C.S. v. Yorktown Cent. Sch. Dist., 2018 WL 1627262, at *19-*24 [S.D.N.Y. Mar. 30, 2018] [finding various sources of evidence about a student's progress—including testimony of the student's teacher, evidence of progress on annual goals, and other measures—sufficient despite standardized test scores]). However, the Second Circuit has held that, in determining whether a student made progress, the SRO must examine the hearing record for objective evidence (E.S., 487 Fed. App'x at 622).

⁹ State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities receiving ICT services within a class may not exceed 12 (8 NYCRR 200.6[g][1]). In addition, State regulations require that the class in which students receive ICT services must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]).

¹⁰ The IEP also continues to document that the student repeated first grade (Dist. Ex. 1 at p. 4).

In the present matter, the district offered no objective evidence regarding the student's progress. For example, the hearing record does not contain documentary or testimonial evidence that allows for comparisons of the student's previous and current present levels of performance in order to determine progress toward annual goals during the 2018-19 school year (see Tr. pp. 1-283; Parent Exs. A-J; Dist. Exs. 1-9). The district did not offer into evidence any of the student's prior IEP(s), annual goal progress reports, report cards, or results of standardized testing conducted by the district from more than one point in time so that a comparison could be achieved. The processes outlined under the IDEA, if followed, should result in adequate documentation of a student's progress (or any lack of expected progress) one purpose of which is to inform the CSE's decision making as it prepares a new IEP. Leading up to the relevant CSE review, the IDEA required the district to have provided the parents with periodic reporting regarding the student's progress towards achieving his annual goals while he was provided with ICT services during the 2018-19 school year (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3][ii]; 8 NYCRR 200.4[d][2][iii][c]). Further, when the CSE convened, it should have reviewed whether or not the student had achieved some or all his or her annual goals from his last IEP (see 20 U.S.C. § 1414[d][4][A][1]; 34 CFR 300.324[b][1][i]; 8 NYCRR 200.4[f]). However, the hearing record is devoid of any of these documents and contains only anecdotal references to the student's progress.

For example, the student's special education teacher noted in her April 9, 2019 teacher report that the student was approaching grade level standards in reading and that the student was a strong reader and had improved his spelling and vocabulary over the past year (Dist. Ex. 4 at pp. 1-2). The special education teacher opined that the student would "continue to make progress in an [ICT] classroom to address his needs in math, writing, reading comprehension, and with executive functioning skills"; however, the report did not provide quantifiable and/or measurable student progress data to substantiate the teacher's view (*id.* at pp. 1-3). In the teacher's affidavit, she likewise stated that the student "was making academic progress in an ICT setting" with no data to support the claim of progress (Dist. Ex. 8 at p. 2). Similar anecdotal comments were included on the student's May 2019 IEP (Dist. Ex. 1 at p. 13).

The district school psychologist who attended the student's May 10, 2019 IEP meeting indicated that she had conducted an education update of the student in October 2016 for his triennial evaluation; however, no such evaluation was included as evidence in the hearing record (Dist. Ex. 7 at p. 1). The psychologist reported that in her "professional opinion" the recommendation for ICT services was appropriate because the student presented with grade level reading skills and slightly below average writing and math skills and the teachers in the ICT setting were working with him in small groups to meet his IEP goals (*id.* at p. 2). She stated several times, anecdotally, that the student was making progress in the ICT classroom and even "making academic progress in all academic areas" (*id.*). According to the district psychologist's testimony, the student "had made progress in the classroom" (Tr. p. 45; Dist. Ex. 1 at p. 13). However, as with the opinions of the student's teacher, there is no objective evidence in the hearing record to substantiate the statements made by the school psychologist regarding the student's progress.

According to the IEP, the CSE discussed options other than the ICT services, including a 12:1+1 special class in a community school, as well as a State-approved nonpublic school (Dist. Ex. 1 at p. 13). The IEP reflects the CSE's view that the student "benefit[ed] from learning alongside his typically developing peers in an ICT classroom in a community school"; however,

the parents felt "strong that [the student] need[ed] a private school setting to meet his academic needs" (*id.* at pp. 4, 13). Had this been a situation like the initial evaluation and classification of the student and ICT services had not yet been attempted on the student's IEP, I would likely given the district the benefit of the doubt that ICT services were the appropriate balance between providing an appropriate program in which the student was likely to make progress and ensuring that the student was placed in the least restrictive environment rather than attempt a more restrictive setting in the first instance such as a special class setting or a State-approved nonpublic school. While it may be possible that the district has found the appropriate balance and that student was likely to benefit from attending a general education class setting and receiving ICT services, in these circumstances—in which the student has already been receiving ICT services and the parents explicitly claim that the student was failing to make appropriate progress in that setting during the preceding school years leading up to the 2019-20 school year parent—I find that the district simply failed to produce the kind of evidence necessary during an impartial hearing to meet its burden of production and persuasion regarding the continued appropriateness of ICT services for the student (*see* Parent Ex. A at pp. 2, 3).

In addition to the district's failure to produce objective evidence of the student's progress that would support the continuation of ICT services on the student's IEP, there is also the matter of the lack of ICT services for science class on the May 2019 IEP. On appeal, the parents allege that the IHO erred in finding that the CSE's failure to recommend ICT services for science did not amount to a denial of a FAPE. In its cross-appeal, the district also raises the issue of the ICT services for science, arguing that the IHO erred in ordering the CSE to add ICT services for science to the IEP but does not go so far as to challenge the IHO's underlying fact determination that the May 2019 CSE should have recommended the services on the student's IEP. Accordingly, as noted above, the IHO's determination that the student required ICT services for science is final and binding.

Indeed, although the parents raised the issue of the lack of supports in the May 2019 IEP to address the student's needs in science (*see* Parent Ex. A at p. 3), the district elected to specify in writing on the IEP each of the core academic areas in which student would receive ICT services except for science, but failed to produce any evidence that the student would be successful that area without additional support in science.¹¹ According to the student's mother, the student did not receive ICT services in science during elementary school and "struggled significantly in science to keep up with the pace of instruction" (Parent Ex. J at p. 2). The mother's affidavit testimony in this regard was un rebutted by the district during the impartial hearing.

Based on the foregoing, the evidence in the hearing record supports the parents' argument on appeal that the IHO erred in finding that the district met its burden to prove that the recommendation for ICT services offered the student a FAPE given the district's failure to offer objective evidence of the student's progress in a similar program in the school years leading up to

¹¹ In its answer and cross-appeal, the district, in a poor attempt to evade its evidentiary obligations during an impartial hearing, argues that there is no evidence that the student had academic deficits in that "subject"; however, there is no evidence in the hearing record that the student's deficits would not have carried into all of his academic areas, including, but not limited to the difficulty in regulating his attention and his executive functioning deficits that affect his academic functioning, and it is the district that fails to carry the burden of production and persuasion on this issue (Answer & Cross-Appeal ¶ 17).

the 2019-20 school year. This conclusion also effectively renders the district's cross-appeal immaterial, in which it argues that the IHO erred in ordering the CSE to reconvene to add ICT services in science to the student's IEP because of the IHO's determination that the district offered a FAPE. In this case, vacating the IHO's directive to amend the student's IEP to add ICT services at this point would not help the district establish that it offered the student a FAPE because the district has not shown that the continuation of ICT services overall continue to be appropriate for the student.

However, the parents' appeal with respect to the IHO's directive to amend the student's IEP has merit because the explicit absence of support for the student's science class tends support the parents' claim that the student was denied a FAPE. As noted previously, the IHO's determination that the May 2019 CSE should have recommended ICT services in science is final and binding and, as described above, it was supported by the parent's un rebutted testimony that the student had a history of struggling in this subject area without ICT services, and the parents are correct that the IHO failed to provide any reason for his conclusion that the lack of ICT services in the student's science class was not a denial of a FAPE. Once again, the hearing record was deficient with respect to objective evidence from the district regarding how student had been performing in this subject area.

In addition, it is unclear how this form of relief would be applicable in this tuition reimbursement case because any attempt to cure deficiencies by revising the student's IEP near the end of the 2019-20 school year would be of little benefit the student or the parents, who had already relied on the deficient IEP to make their placement decision in favor of Churchill at the beginning of the 2019-20 school year. Furthermore, nothing regarding the 2020-21 school year was raised by the parties to the IHO. Accordingly, the IHO's order requiring the same must be reversed, but for the reasons argued by the parent, rather than those argued by the district. However, to the extent it has not done so already, when it next convenes, the CSE should consider, based on information about the student's progress and his strengths and deficits, whether the student's needs can continue to be met in a general education class placement with ICT services and, if so, whether or not the student would benefit from ICT services in science in particular.

C. Equitable Considerations

As noted above, the IHO's determination that Churchill was an appropriate unilateral placement for the student is final and binding on the parties as the district did not raise any allegations of error with his reasoning. Accordingly, I turn to a review of whether the parents' claim is 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. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA").

While the IHO found that the district offered the student a FAPE, he did go on to make findings regarding the parents' unilateral placement and equitable considerations. Regarding the latter, the IHO simply found that "[b]ased on the district's having met [its] burden, . . . equities do no[t] favor district placement at or accountability for the unilateral placement" (IHO Decision at p. 5). As the IHO's determination that equitable considerations favored the district rested on the finding that the district offered the student a FAPE—which, as discussed above, the district did not meet its burden to prove—the IHO's finding on equitable considerations is likewise without support in the hearing record.

In its post-hearing brief, the district argued that equitable consideration did not support an award of tuition reimbursement since the parents did not have interest in a public school placement (Dist. Post-Hr'g Brief at p. 12).¹² The district pointed to the fact that the parents executed a contract with Churchill on May 30, 2019, only 20 days after the May 2019 CSE meeting (id.; see Parent Ex. F). However, even if the parents had no intention of placing the student in the district's recommended program, it is well-settled that it would not be a basis to deny their request for tuition reimbursement (see E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]). Further, the parents shared the December 2018 neuropsychological report with the district, attended the May 2019 CSE meeting, and gave the district timely notice of their intent to unilaterally place the student for the 2019-20 school year, and the hearing record presents no indication that the parents did not cooperate with the CSE (see Parent Ex. B; Dist. Ex. 1). Therefore, the evidence in the hearing record presents no equitable considerations that would warrant a reduction or denial of tuition reimbursement.

VII. Conclusion

Based on the foregoing, review of the evidence in the hearing record does not support the IHO's finding that the district met its burden to prove that it offered the student a FAPE for the 2019-20 school year. As discussed above, the IHO's determination that Churchill was an appropriate unilateral placement for the student for the 2019-20 school year has become final and binding on the parties. Lastly, review of the hearing record reveals no equitable considerations that would warrant a reduction or a denial of an award of tuition reimbursement. Accordingly, the district shall be required to reimburse the parents for the costs of the student's tuition at Churchill

¹² Likely due to the IHO's finding that equitable considerations weighed in favor of the district, the district did not raise any arguments about equitable considerations in its answer and cross-appeal.

for the 2019-20 school year. Finally, the hearing record does not support the IHO's order requiring the CSE to reconvene and revise the student's IEP to add ICT services in science to the student's IEP after the student had already been unilaterally placed.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated May 2, 2020, is modified by reversing those portions which found that the district offered the student a FAPE for the 2019-20 school year and ordered the CSE to reconvene to amend the student's IEP to include ICT services in science; and

IT IS FURTHER ORDERED that that the district shall reimburse the parents for the costs of the students' attendance at Churchill for the 2019-20 school year.

Dated: **Albany, New York**
 August 3, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER