



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-183

Application of the BOARD OF EDUCATION OF THE HEWLETT-WOODMERE UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Ingerman Smith, LLP, attorneys for petitioner, by S. Fahad Qamer, Esq.

Law Offices of Brad H. Rosken, PLLC, attorneys for respondents, by Brad H. Rosken, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Winston Preparatory School (Winston Prep) for the 2018-19 and 2019-20 school years. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student has received diagnoses of an attention deficit hyperactivity disorder (ADHD), obsessive compulsive disorder (OCD), separation anxiety disorder, generalized anxiety disorder (GAD), Tourette's disorder, and learning disorders in reading, written expression and mathematics (see Dist. Ex. 20 at pp. 1, 14). The student attended a district elementary school and received special education through IEPs, which included integrated co-teaching (ICT) services, as well as speech-language therapy, occupational therapy (OT), and/or counseling services, for the 2015-16 (second grade) through 2017-18 (fourth grade) school years (see Dist. Exs. 3 at p. 1; 4 at p. 1; 5 at

p. 1; 6 at pp. 1, 12; 12 at pp. 1, 11).¹ During this time, the student was evaluated several times. In February and April 2016, respectively, the district conducted an OT re-evaluation and an educational evaluation of the student (Dist. Exs. 3-4). In August 2016, the parents obtained a neuropsychological evaluation of the student conducted by a licensed psychologist (Dist. Ex. 5).² In December 2017, a pediatric neuropsychologist conducted a neuropsychological evaluation of the student, which was summarized in a report dated February 1, 2018, and supplemented in an addendum dated June 12, 2018 (Parent Ex. L; Dist. Ex. 20). In March 2018, the parents obtained an auditory processing evaluation of the student conducted by a private speech-language pathologist (Dist. Ex. 21). Finally, an assistive technology evaluation was conducted in March 2018, resulting in a report dated April 18, 2018 (Dist. Ex. 22).

A CSE convened on May 8, 2018 to conduct the student's annual review and develop an IEP for the student for the 2018-19 school year (fifth grade) (Dist. Ex. 28 at p. 1).^{3, 4} According to the meeting information summary, the May 2018 CSE "discussed a Neuropsychological evaluation, parent reports, teacher reports, and current levels of school functioning" (*id.*). The May 2018 meeting "was tabled due to time limitations" and the CSE reconvened on June 13, 2018 (*id.*). The June 2018 CSE additionally discussed results from assistive technology and auditory processing evaluations (*id.*). Having found that the student continued to be eligible for special education as a student with an other health-impairment (compare Dist. Ex. 28 at p. 1, with Dist. Ex. 12 at p. 1), the June 2018 CSE recommended that the student receive ICT services (for three hours and fifteen minutes per day), along with related services on a six-day cycle as follows: one 30-minute session of individual speech-language therapy, one 30-minute session of small group speech-language therapy, one 30-minute session of individual counseling (in a flexible setting), and 30-minute one session of small group counseling (Dist. Ex. 28 at p. 13).⁵ In addition, the June 2018 CSE recommended assistive technology (FM unit, laptop, use of a headset, access to documents in electronic format and writing/reading tools), as well as several supports and accommodations (including advanced warnings of transitions, refocusing and redirection, use of verbal and visual prompts, motor breaks, special seating, unlimited access to the bathroom, copy of class notes, repetition of information and directions, wait time, extra white space on page, use of masks/markers to maintain place, multi-sensory reading instruction, use of graphic organizers, information broken down, checks for understanding, pre-teaching, use of graph paper) and testing

¹ Prior to the 2015-16 school year, the student attended a different district elementary school, "where he was in a co-teaching setting" (Dist. Ex. 4 at p. 1).

² According to the August 2016 report, the same psychologist evaluated the student in May/June 2013 and March 2014 (Dist. Ex. 5 at p. 1).

³ According to the district's exhibit list, district exhibit 24 was an IEP dated May 8, 2018, and district exhibit 28 was an IEP dated June 13, 2018; however, the IEPs appear to be identical (compare Dist. Ex. 24, with Dist. Ex. 28). For purposes of this decision, district exhibit 28 is cited.

⁴ Despite references in the meeting information summaries in this matter to subcommittees on special education (see Dist. Exs. 6 at p. 1; 12 at p. 1; 28 at p. 1; 31 at p. 1), this decision shall refer to the committees as the CSE(s) (see 8 NYCRR 200.3[a][1]; [c]).

⁵ The student's eligibility for special education instruction and related services as a student with an other health-impairment is not in dispute (see 8 NYCRR 200.1[zz][11]).

accommodations (*id.* at pp. 10-11, 14-17). The CSE further recommended supports for school personnel, including OT consultation services (six times per year), counseling consultation services (ten times per year), and assistive technology support (for 20 hours per year), with the lattermost available as support for the student, parent, and school staff (*id.* at pp. 15-16). For special transportation, the CSE recommended curb-to-curb transportation and adult supervision on the bus (*id.* at p. 17). The June 2018 IEP reflected that the student needed "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede the student's learning or that of others" but did not need a behavioral intervention plan (BIP) (*id.* at p. 11).

On August 5, 2018, the parents executed a contract for the student's attendance at Winston Prep for the 2018-19 school year (Parent Ex. W).⁶

In a letter to the district dated August 20, 2018, the parents notified the district of their disagreement with the June 2018 IEP (Parent Ex. I). The parents indicated that, over the years while the student attended the district, they "continually expressed their concerns to the district as to the appropriateness of the program being recommended by the district, because of [the student's] lack of meaningful progress" (*id.* at p. 2). The parents expressed that the June 2018 CSE's recommendations for ICT, speech-language therapy, and counseling services for the student were "insufficient and inappropriate to meet [the student's] growing academic as well as social/emotional needs" (*id.*). The parents argued that recommendations were counter to the recommendations of the private evaluators for "placement in a small, structured full time special education class in a specialized school" (*id.*). The parents indicated that, although the CSE considered the private evaluations, the rationale for rejecting the private evaluators' recommendations was not reflected on the IEP (*id.*). In addition, the parents asserted that the district had denied them the opportunity to meaningfully participate in the development of the student's IEP (*id.* at p. 3). Accordingly, the parents notified the district of their intent to unilaterally place the student at Winston Prep for the 2018-19 school year and seek tuition reimbursement from the district (*id.*).

The psychologist who evaluated the student in August 2016 conducted another neuropsychological evaluation of the student in September and October 2018, which was supplemented with a classroom observation of the student at Winston Prep in March 2019 (Parent Ex. O; Dist. Ex. 30; *see* Dist. Ex. 5).

In March 2019, the parents executed a contract for the student's attendance at Winston Prep for the 2019-20 school year (Parent Ex. X).

A CSE convened on June 12, 2019 to conduct the student's annual review and develop the student's IEP for the 2019-20 school year (sixth grade) (Dist. Ex. 31; *see* Dist. Exs. 32; 33).⁷ The June 2019 CSE again recommended ICT services but specified that the student would receive one

⁶ The Commissioner of Education has not approved Winston Prep as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

⁷ Although the IEP reflects the date of the CSE meeting as May 20, 2019 (Dist. Ex. 31 at p. 1), it appears that this date was an error and the CSE actually met on June 12, 2019 (*see, e.g.*, Dist. Exs. 32; 33).

40-minute session of ICT services daily in each of the following subjects: English language arts (ELA), mathematics, social studies, and science (compare Dist. Ex. 31 at p. 10, with Dist. Ex. 28 at p. 13). Compared to the June 2018 IEP, the June 2019 CSE added a recommendation for a small reading group for 40-minutes every other day, increased the duration of the speech-language therapy sessions to 40-minutes, and modified the student's counseling services so that both sessions would be individual (compare Dist. Ex. 31 at p. 10, with Dist. Ex. 28 at p. 13). In addition to carrying over the special transportation, assistive technology, testing accommodations, and most of the supports and accommodations included in the June 2018 IEP, the June 2019 CSE also recommended modified homework assignments for the student (less items per page and assignments spread out over the week) and provided that the student would have access to the "support class" (replacing the provision that the student have unlimited access to the bathroom) (compare Dist. Ex. 31 at pp. 8-15, with Dist. Ex. 28 at pp. 10-11, 14-17). The June 2019 CSE also maintained the counseling consultation services and assistive technology support but did not continue the recommendation for OT consultation services (compare Dist. Ex. 31 at p. 13, with Dist. Ex. 28 at pp. 15-16). The June 2019 IEP again reflected that the student needed "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede the student's learning or that of others" but did not need a BIP (Dist. Ex. 31 at p. 8).

In a letter to the district dated July 22, 2019, the parents notified the district that they disagreed with the "educational placement of [the student] in the in-district program" set forth in the June 2019 IEP and intended to unilaterally place the student at Winston Prep for the 2019-20 school year and seek tuition reimbursement for the costs thereof (Parent Ex. J).

The psychologist who evaluated the student in August 2016 and September/October 2018 conducted another neuropsychological evaluation of the student in September 2019 (Parent Ex. K).

A. Due Process Complaint Notice

In a due process complaint notice dated November 11, 2019, the parents alleged that the district denied the student a FAPE for the 2018-19 and 2019-20 school years (see Dist. Ex. 1). For the 2018-19 school year, the parents alleged that the district failed to conduct an appropriate functional behavioral assessment (FBA) or develop a BIP and "failed to appropriately manage [the student's] behaviors," including his frustration and anxiety," or recommend programs and services to address the student's emotional needs or his school refusal (id. at pp. 2, 3). Next, the parents asserted that the district "failed to appropriately address the student's dyslexia and other learning disabilities" (id. at p. 2). The parents alleged that the CSE's recommendations for ICT services and "limited additional reading services" were insufficiently supportive (id. at pp. 2-3). The parents argued that the student had "failed to make meaningful progress in the area of reading and math" while attending the district and that the IEP for the 2018-19 school year also failed to address these areas of need (id. at pp. 2, 3). Specific to reading, the parents argued that the CSE failed to recommend "appropriate and targeted" instruction to address the student's needs "caused by his diagnosed severe dyslexia," such as 1:1 or small group reading instruction services (id. at pp. 5-6). The parents alleged that the district also "failed to appropriately address the student's language issues," treating them instead as "behavioral issues" (id. at p. 3). The parents further argued that the classroom to which the student would have been assigned had he attended the recommended

program did not offer "an appropriate cohort of students" in that no other student had a diagnosis of dyslexia (id. at pp. 2-3).

For the 2019-20 school year, the parents asserted that the district failed to "appropriately, properly and timely evaluate the student" (Dist. Ex. 1 at p. 8). In addition, the parents stated similar allegations as set forth for the 2018-19 school year regarding the district's failure to conduct an appropriate FBA, develop a BIP, or address the student's behaviors or emotional needs (id. at pp. 4-5). The parents again asserted that the district failed to address the student's dyslexia and other learning disabilities and that the recommendations for ICT and reading services were insufficient (id. at pp. 4, 5, 6, 7). The parents alleged that the district "failed to appropriately place the student" for the 2019-20 school year (id. at p. 7). Finally, the parents argued that the proposed classroom did not offer an appropriate peer grouping (id. at p. 4).

Regarding the unilateral placement, the parents alleged that Winston Prep addressed the student's needs for "an academically rigorous program . . . in a small, school environment with small nurturing, structure classroom[s] for similarly grouped students" (Dist. Ex. 1 at pp. 3, 5).

For relief, the parents requested that the district be required to fund the costs of the student's attendance at Winston Prep for the 2018-19 and 2019-20 school years, including tuition and transportation (Dist. Ex. 1 at pp. 4, 5, 7-8). The parents also sought compensatory education in the form of 1:1 reading instruction to remedy the district's failure to "provide [the student] with the appropriate reading instruction program" for both school years (id. at pp. 6, 7). Finally, the parents requested reimbursement for the costs of the private evaluation that they obtained and which the CSE relied upon in developing the student's IEP for the 2019-20 school year (id. at p. 8).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 27, 2020 and concluded on July 13, 2020, after seven days of proceedings (see Tr. pp. 1-1493).⁸ In a decision dated October 30, 2020, the IHO found that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years (see IHO Decision).

Regarding the 2018-19 school year, the IHO found that the May and June 2018 IEPs referenced results from "extensive evaluations and assessments" conducted in 2018 and "accurately reflected the student's present levels of performance, both strengths and weaknesses, giving a global view of [the student's] ability to function within the classroom" (IHO Decision at p. 36). However, the IHO held that the CSE gave "inadequate weight" to the content of the evaluative information before it and "selectively adopted" the recommendations contained in the private neuropsychological evaluation "based on what the [d]istrict could reasonably furnish short of recommending a non-public school placement" (id. at pp. 41, 46). Regarding the CSEs' recommendations, the IHO found that "[t]he extensive accommodations and modifications required by [the student] could not be furnished within the ICT setting without transmuting the

⁸ In addition, according to the IHO's decision, the IHO held a prehearing conference with the parties on January 18, 2020 (see IHO Decision at p. 1); however, a transcript or written summary of the prehearing conference was not made a part of the hearing record as required by State regulation (see 8 NYCRR 200.5[j][3][xi]).

very nature of an integrated classroom" (*id.* at p. 46). Instead, the IHO found that the student needed "a more intimate pupil [to] personnel ratio along with instructors knowledgeable in the area of emotional dysfunction" (*id.* at pp. 47, 50). As for reading instruction, the IHO held that the building-level pull-out reading services that the student received during the 2017-18 school year, as well as the informal use of the morning period to support the student, could not be considered in assessing the sufficiency of the May and June 2018 IEPs since the services were not included thereon (*id.* at pp. 47-48). The IHO also found that the reading instruction provided to the student was not individualized to his needs, as the independent educational evaluations recommended (*id.* at pp. 44-48, 50). Notwithstanding the benchmark levels the student achieved as determined by the Teachers College curriculum, the IHO found that the student "was making minimal if any progress" (*id.* at pp. 49, 50). Turning to related services, the IHO found that the speech-language therapy recommended in the May and June 2018 IEPs was inadequate and that the program recommendations as a whole did not address the student's social/emotional needs (*id.* at pp. 51-53).

Regarding the 2019-20 school year, the IHO examined the new evaluative information before the June 2019 CSE (*see* IHO Decision at pp. 53-56) and found that, the June 2019 CSE continued to recommend "the best program" given the "fixed programming offered by the [d]istrict" (*id.* at pp. 56-57) but that, for reasons similar to those outlined for the 2018-19 school year, the district failed to offer the student a FAPE for the 2019-20 school year (*id.* at pp. 58-59).

The IHO found that Winston Prep was an appropriate unilateral placement for the student for the 2018-19 and 2019-20 school years (IHO Decision at pp. 59-62) and that equitable considerations weighed in favor of the parents' requested relief (*id.* at pp. 62-63). Based on the foregoing, the IHO ordered the district to fund the costs of the student's tuition at Winston Prep for the 2018-19 and 2019-20 school years (*id.* at p. 63).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that it failed to offer the student a FAPE for the 2018-19 and 2019-20 school years and in awarding the parents tuition reimbursement for the student's attendance at Winston Prep. First, the district argues that the IHO erred in finding that the CSEs failed to adequately consider private evaluations or the recommendations found therein in preparing the student's IEPs for the 2018-19 school year. The district posits that the testimony of the district's witnesses, which offered a different view of the student's needs than that set forth in the private evaluations, should have been afforded greater weight since district staff spent more time with the student. Further, the district notes that the CSEs recommended several accommodations and modifications to address the student's needs. The district also contends that the IHO's determination regarding the student's lack of progress in the district during the prior school years was against the weight of the evidence. The district alleges that the IHO erred in finding that the recommended program, including ICT, speech-language therapy, and counseling services, as well as supplementary aides and accommodations, was not appropriate.

Regarding the 2019-20 school year, the district alleges that the IHO erred in finding that the June 2019 CSE failed to sufficiently consider evaluative information about the student. The district contends that the recommended ICT services, along with speech-language therapy and

counseling services and supplementary aides and accommodations, were appropriate and that the IHO's findings to the contrary were error.

As for the unilateral placement, the district argues that the IHO erred in finding that Winston Prep was appropriate notwithstanding the "restrictive nature" of the school and the lack of related services. The district also argues that the IHO erred in finding that the student made significant progress at Winston Prep and, instead, alleges that the student regressed, particularly during the 2018-19 school year. Finally, the district asserts that the IHO erred in finding that equitable considerations weighed in favor of the parents' request for relief. The district argues that the district "did everything that could possibly be done to provide appropriate services for [the student]."

In an answer, the parents respond to the district's allegations with admissions and denials and argue that the IHO's decision should be upheld in its entirety.

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]).⁹

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

⁹ 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).

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

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years, that Winston Prep was an appropriate unilateral placement for the student for both school years, and that equitable considerations weighed in favor of the parents' request for tuition reimbursement (see IHO Decision at pp. 35-63). The IHO accurately recounted the facts of the case, addressed the issues identified in the parent's due process complaint notice, and set forth the proper legal standard to determine whether the district offered the student a FAPE and whether the parents were entitled to tuition reimbursement for the 2018-19 and 2019-20 school years (*id.* at pp. 1-63). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence and properly supported her conclusions (*id.* at pp. 35-63). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the IHO's ultimate conclusions (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO are hereby adopted.

A. The Student's Needs

The challenge in this matter is that the district had a different view of the student's needs than that held by the parent and the private evaluators/providers. The IHO ultimately afforded more weight to the view of the student's needs put forth by the parent and the private evaluators/providers but carefully explained her rationale in doing so. And, in light of the IHO's careful articulation of her rationale, the district has not pointed to a compelling basis to disturb the IHO's determinations.

Demonstrating the conflicting view of the student's needs is the question of the student's progress, particularly in the area of reading. The student's special education teacher for the 2017-18 school year (teacher) and the reading specialist who provided Leveled Literacy Instruction (LLI) shared information with the CSE and/or testified that the student showed improvement in his abilities with reading, particularly that the student had progressed from a Fountas & Pinnell level N in September 2017 to a level Q in May 2018, noting that level Q was the January

benchmark for fourth grade and it showed that the student had made "steady progress" and advanced three reading levels over the course of the 2017-18 school year (Dist. Ex. 28 at p. 7; see Tr. pp. 149, 154-55, 599-600, 606-07, 616-17, 626, 629-30; see also Tr. pp. 607-08, 624-25; Dist. Exs. 15; 18). In addition, both the teacher and the reading specialist highlighted that in September 2017 the student read 67 words per minute at level N which then increased to 87 words per minute at level Q by May 2018, reflecting progress in decoding (Dist. Ex. 28 at p. 7; see Tr. pp. 605, 612, 622-23; see also Dist. Ex. 18). Overall, the June 2018 IEP reflected reports of progress in reading, as well as some areas of inconsistent performance (see Dist. Ex. 28 at p. 7). In addition, the student's 2017-18 IEP progress report indicated that by June 2018 the student had achieved both of his goals in reading and writing; he made progress toward achieving his study skills goal and continued to work toward demonstrating the skills more consistently; he achieved all of his social/emotional and behavioral goals; and he achieved one speech and language goal and was progressing satisfactorily on the other two goals (Dist. Ex. 35). The student's fourth grade report card indicated that the student was meeting standards and expectations or approaching standards/working towards expectations in reading (Dist. Ex. 17 at p. 1).

On the other hand, the neuropsychologist who completed the February 2018 neuropsychological evaluation report concluded that, in reading, the student continued to demonstrate "variable and relatively weak foundational reading skills" specifically noting that the student's sight word reading remained "generally behind" when compared to prior testing but that his phonetic decoding skills had improved and his ability to segment sounds to break down words and synthesize sounds fell in the average range and remained an area of relative strength (Dist. Ex. 20 at p. 8). The neuropsychologist further indicated that the student's comprehension skills were assessed below grade level and noted minimal gains since last testing in August 2016 (id.). According to the neuropsychologist, results of the Gray Oral Reading Tests - Fifth Edition (GORT-5) indicated that the student's reading pace and accuracy continued to develop slower than expected, and he noted that his performance declined when asked to read aloud (id. at p. 8). The neuropsychologist opined that overall, the student's reading skills were developing but that his comprehension skills fell below his average verbal reasoning skills and his grade and age levels (id. at p. 9).

According to the June 2018 IEP, the parent reported concerns regarding the student's progress and expressed that she felt that he had not made sufficient progress over several years (Dist. Ex. 28 at p. 9). The parent further reported that the progress the student had made towards his IEP goals did not reflect meaningful improvement with regard to skill deficits (id.). The parent stated that the student was capable of making appropriate gains if he was given the proper resources and opined that he needed a more supportive out-of-district placement that could address his needs more appropriately (id.). According to the teacher, during the June 2018 CSE meeting, the parent expressed that the information about the student's progress in reading was not consistent with the outside testing (see Tr. p. 190).

The IHO acknowledged and weighed evidence of different views of the student's progress in reading and other areas and concluded that the evidence in the hearing record demonstrated that the student "was making minimal if any progress" (see IHO Decision at p. 48).

Another area in which the views of the district versus the parent and private evaluators/providers diverged is in the area of the student's anxiety and social/emotional needs, and on this point I will set forth in more detail the evidence in the hearing record.

Although district staff acknowledged the student's anxiety and social/emotional difficulties, they did not believe that they interfered with the student's academic performance and ability to develop peer relationships to the extent that the parent and private evaluators/providers alleged.

The student's special education teacher testified that the student had some difficulty transitioning at the beginning of the school year but that the difficulty was remedied by meeting with the student at the beginning of the school day to pre-teach him academic concepts and address any emotional concerns (Tr. pp. 164-68). According to the teacher, after the transition, the student's anxiety subsided but there were times during the year when he experienced "flare-ups" (Tr. p. 168, see Tr. pp. 171-72, 294-95, 359-60, 1150). The teacher explained that when the student felt comfortable his anxiety subsided but that it could be exacerbated in response to a specific event (Tr. p. 169). She reported that classroom staff would address the student's anxiety and, if they could not, she would reach out to the social worker, which did not occur often until spring (Tr. pp. 169-70). The teacher explained that in spring 2018 "there was a transitional piece going on for [the student], and his anxiety was heightened, and he was reacting in a more aggressive way" (Tr. p. 173). The teacher indicated that in response to the student's heightened anxiety the social worker developed a positive problem-solving chart and pass system to help the student (Tr. pp. 171-76; Dist. Ex. 23). The student's speech-language pathologist for the 2017-18 school year testified she was aware of the student's anxiety because she heard about it from the parent during parent-teacher conferences, but she never saw it (Tr. p. 431).

The student's social worker testified that fourth grade was a really positive year for the student up until early spring, and that "[the student] did really well" and became a leader within his social group, which was a "big source of self-esteem for the student and something he expressed that made him feel really good" (Tr. p. 483). The social worker noted that, although the last two months of school were more challenging for the student, they were able to work through it (Tr. p. 499). She explained that the student was much more independent in his social interactions for the majority of the year stating, "approximately 95 percent of the year he was socially more confident, more comfortable" and the student relied on her less to mediate issues (Tr. p. 582). She noted that she intervened with the student more frequently in the spring when his anxiety increased (Tr. p. 582; see Tr. p. 490). The social worker testified that in order to address the student's increase in anxiety she created a positive reinforcement chart, instituted a pass system, and provided the student with a strategy card that listed the coping skills he had been practicing (Tr. pp. 490-95, 514-15). Neither the social worker nor the student's special education teacher believed that the student needed an FBA or BIP (Tr. pp. 170, 308-09, 362-63, 491-92, 559-63). The social worker opined that the student did not require a BIP because "his behaviors just weren't at that level" and noted that staff was able to quickly remedy a lot of his situations (Tr. p. 492). She opined that the student's social/emotional functioning was not impacting his academics "to that degree" and he was appropriately functioning in the classroom most of the time (id.). She explained that due to the student's anxiety he sometimes perceived situations as more intense than they actually were (Tr. p. 495).

The parties agreed that the student behaved differently at school than he did outside of school (Tr. pp. 431-32, 501-03, 568, 882-83; see Tr. p. 1149).

With regard to the student's social development, the June 2018 IEP indicted that the student presented as happy in class and had established friendships over the course of the year but that he occasionally exhibited difficulty independently navigating social interactions that were more challenging for him (Dist. Ex. 28 at p. 9). The June 2018 IEP also reflected information from the student's counseling progress summary that indicated that the majority of the time the student was in school he presented as a happy and pleasant student who enjoyed interacting with his classmates (id.). The student worked on improving his ability to problem solve when faced with challenging social situations, and while he was able to identify appropriate solutions when presented with hypothetical situations, he continued to work on applying this knowledge in context (id.). In addition, the student also worked on understanding the proportionality of his reactions in challenging situations and noted that his reaction to challenges that arose continued to be disproportionate, particularly when he felt someone was upset with him, and often exacerbated the situation (id.).

In contrast to district staff, the student's mother testified that the student's social/emotional issues were pervasive throughout the 2017-18 school year. She reported that the student exhibited school refusal and that every morning was a "huge scene in [her] house," and to get the student on the bus was a big fight but she did not allow that to stop her from being consistent (Tr. pp. 1147-49, 1245-46). The student's mother and the student's treating psychologist reported that the student exhibited psychosomatic manifestations of school-related anxiety including increased blood pressure and heart rate, headaches, and stomachaches (Tr. pp. 818-19, 1153-57, 1271-75).

In contrast to the observations made by the student's teacher and social worker, the treating psychologist testified that the student struggled throughout the 2017-18 school year, specifically noting that in the beginning of fourth grade he was open to problem-solving suggestions and learning new social skills in her office setting but that by June 2018 he was no longer able to work on those skills in her office and her primary objective became "to help him survive" until the end of the school year (Tr. pp. 812-13). According to the treating psychologist, the student struggled with his limited ability to understand social cues and articulate himself and reverted to things that a younger child would do (Tr. p. 801). She opined that the student was not receiving what he needed in order to develop at the pace that was expected of him, which led to his decline (Tr. p. 817).

The treating psychologist opined that there were two problems with the counseling skills the student was being taught by the school social worker, the first being that the student was taught skills outside of social settings, in an office, and the second being that the skills taught were reactive skills that focused on how the student should respond once there was a problem at lunch or recess (Tr. pp. 830-31; see Tr. p. 804). The treating psychologist further opined that the student was not receiving the instruction he needed in order to be successful in social arenas at school, and that he needed a teacher who could teach him how to read social cues more specifically and a social environment with less children so he could practice those cues (Tr. pp. 826-27).

The treating psychologist recounted an incident that occurred at school in April 2018 that left the student "very, very distraught"; she testified that the student felt like no one understood

him and "he was being thrown into a situation every day that was way beyond his ability to comprehend or interact with" (Tr. p. 807). The treating psychologist indicated that in their sessions following the incident the student came to her office "tearful and distraught and feeling like he had failed and he had no hope" (Tr. p. 808). She recalled that after the incident the student was feeling unsafe at school, that it had reached a peak of what he could handle on his own, and that by June 2018 she was trying to help him "cope day by day until school was over because he had reached that point where he was defeated" (Tr. pp. 811-12).

The June 2018 IEP reflected the parent's concern that the last months of school had been particularly challenging for the student and that he was "falling apart" (Dist. Ex. 28 at p. 10). It noted that the parent expressed concern that the student's school-based providers did not understand the impact that his difficulties had on him, specifically that he tried hard to please others and that he kept feelings inside so that he did not show weakness or vulnerability (*id.*). The IEP further reflected the parent's concern that the student's resiliency was fading, and her assertion that the student's private therapist felt he needed more support (*id.*).

In addition to the parent's and treating psychologist's testimony, the February 2018 neuropsychological evaluation also presented a picture of the student that was at odds with reports by district staff. The evaluation contained the results of the parents' ratings on the Behavior Assessment System for Children-Third Edition (BASC-3) which indicated that the student had weaknesses in executive functioning and that these findings were consistent with prior testing conducted in 2014 (Dist. Ex. 20 at p. 7). Additionally, the results of the parent ratings on the BASC-3 and Conners Comprehensive Behavior Rating Scales – Parent Report (CBRS-P) indicated that the student had significant levels of emotional distress and subsequent anxiety, and he may have been exhibiting persistent sadness and irritability as well as excessive worries and fears, which may have manifested through somatic complaints and affected sleep habits, concentration, social interactions, and academic performance (*id.* at p. 12).¹⁰ According to the neuropsychologist, the student also endorsed significantly elevated depressive and anxiety symptoms (*id.* at p. 10). The neuropsychologist opined that the student required "additional support services and interventions to support his attentional capacity, executive functioning, executive functioning problems, and anxiety-related behaviors in order for him to make proper academic gains, as well as function appropriately at home and in the classroom" (*id.* at p. 7).

The neuropsychologist acknowledged that the teachers' reports were in sharp contrast to the student's and parent's observations and reports, and neither teacher report revealed significant concerns (Dist. Ex. 20 at p. 14). The student's special education teacher only noted that the student was sometimes fearful and nervous, worried about making mistakes, and had panic attacks (*id.*). The student's reading teacher reported that the student's greatest difficulties related to remaining on task for sustained periods of time, distractibility, forgetfulness, and trouble with problem solving, planning, and organization (*id.*). The neuropsychologist opined that these could result in poor academic performance and poorly developed study habits but noted that, overall, the

¹⁰ The neuropsychologist indicated that the parent's responses on the CBRS should be interpreted with caution due to variability in her responses to certain similar items; however, he also indicated that her report was consistent with the student's psychiatric history (Dist. Ex. 20 at p. 12).

educators did not see elevated emotional difficulties and they described the student as well-liked by others and happy in class (id.).

The IHO acknowledged the divergent views regarding the student's anxiety and social/emotional needs, noting:

Indeed, there are two narratives in the case at bar. In one scenario, District personnel and special educator . . . described the child as "thriving . . . happy, friendly and easygoing." Tr. at 168. In the other, . . . Parents, therapists, psychiatrist and psychologist portrayed a child whose anxiety and depression had become crippling. Indeed, while the documentation set forth in the child's IEP describes an individual with a plethora of emotional challenges, District witnesses testified to the contrary.

(IHO Decision at p. 41). The IHO weighed the evidence in the hearing record, including the evidence summarized above, and concluded that "[t]he Parent and her team were credible and candid reporters of the child's struggles" and that if district staff " did not know that [the student] was deteriorating, they should have known. Their views of [the student] were based upon their own perceptions of the child, absent a sensitivity to the child's perceptions, his medical/psychiatric needs and due deference to the opinions of other professionals" (id. at pp. 45-46).

B. June 2018 IEP

After weighing the different views of the student's needs, the IHO went on to consider the views of the district and the parent and private evaluators/providers regarding an appropriate program to address the student's needs. As noted above, the June 2018 CSE recommended the student receive ICT services in a general education classroom for three hours and 15 minutes daily along with the related services of speech-language therapy one time in a six-day cycle individually for 30 minutes and one time in a six-day cycle in a small group 30 minutes, and counseling one time in a six-day cycle individually for 30 minutes and one time in a six-day cycle in a small group for 30 minutes (Dist. Ex. 28 at p. 13).

The student's special education teacher for the 2017-18 school year opined that a special class would have not been appropriate for the student because he was "thriving" in the district setting and the data clearly showed that he was making progress (Tr. p. 198). The teacher stated that she was "not going to go backwards and place the student in a self-contained classroom and jeopardize the growth [the student] was already making" (id.). She indicated that at the end of fourth grade the student was "one hundred percent capable of working in an ICT classroom" (Tr. pp. 198-99). Additionally, the teacher explained that for the student the benefits of being in a classroom with typically developing peers included social interaction, noting that the student was an "extremely social being" and that "being able to forge those relationships and have that peer modeling and have that growth with that is very important to a human-being's emotional well-being" (Tr. p. 199). The teacher further explained that having two teachers who were able to provide independent instruction, regardless of the academic area the class was working on, and having the adult support to provide necessary groupings, was also beneficial (id.). Similar to the student's special education teacher, the social worker who provided the student's counseling

services testified that the student was able to function socially and emotionally in an ICT setting and opined that "it really benefitted [the student] to be around his peers" (Tr. p. 505). She reported that the social aspect of school was a very positive part of the student's day (*id.*). The social worker stated that she felt strongly that the student needed to be in a classroom setting where there were general education students present (Tr. p. 506). She explained that the student had many positive relationships with peers and was very happy at lunch and recess because of those peer relationships (*id.*). The social worker stated that part of the reason the ICT classroom was a good fit for the student "was because of the social aspect of it, because of his peers, because of the peer models that are integrated into the classroom" (Tr. p. 513). The social worker testified that in order to address the student's social/emotional needs, the June 2018 CSE recommended the continuation of small group counseling because of the success the student had experienced with it (Tr. p. 501). Additionally, she explained that the CSE recommended adding individual counseling based on the parent's concerns and because the spring had been a difficult time for the student, and he might need additional support in the fall (*id.*).

On the other hand, the parent and private evaluators/providers had a different view of the type of placement that the student required in order to receive educational benefit. To address the student's language deficits and issues he was having with other students, the treating psychologist testified that she felt the student needed a specialized school setting with staff specifically trained, and a smaller class size and more staff available to help him (Tr. p. 806). She opined that in a "school environment that would have supported his social and emotional needs, he would not have required that much counseling" but that "the way the system was and his class that he had, the problems he was having, he needed as much counseling as he could get" (Tr. p. 822). Likewise, within the February 2018 evaluation report considered by the June 2018 CSE, the neuropsychologist indicated that the student would benefit from a small, full-time special education class within a small, therapeutic school, along with several accommodations and modifications (Dist. Ex. 20 at pp. 16-20). In addition, in terms of an appropriate class size, the treating psychologist testified that the student would benefit from a smaller class size and that the size would depend on the number of staff members that were in the classroom at a given time (Tr. p. 824).

The IHO considered the differing views regarding the student's ability to receive benefit in a general education setting with ICT services and weighed, among other things, different views of the student's progress in a similar setting and the degree to which the significant number of accommodations and modifications impacted the effectiveness of the ICT services, particularly given the student's executive functioning delays, distractibility, noise sensitivity, and the student's need to develop foundational skills, as well as the social/emotional impact of the placement and accommodations given the student's "emotional fragility" (IHO Decision at pp. 46-52). In addition, the IHO noted the lack of "a social emotional curriculum" and the lack of specialized reading instruction on the IEP (*id.* at p. 27).¹¹ Accordingly, while the district correctly argues that

¹¹ The district argues that the student would have received building-level services and other supports that were not specifically identified on the IEP. However, in reviewing the program offered to the student, the focus of the inquiry is on the information that was available at the time the IEP was formulated (*see C.L.K. v Arlington Sch. Dist.*, 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; *D.A.B. v New York City Dept. of Educ.*, 2013 WL 5178267, at *12 [S.D.N.Y. Sept. 16, 2013]). The Second Circuit has held that a district cannot rely on after-the-fact testimony in order to "rehabilitate a deficient IEP"; however, testimony that "explains or justifies the services

the CSE was not required to adopt the recommendations of the private experts (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]), the IHO's reasoning weighed factors other than the recommendations and instead considered the totality of the student's underlying needs and of the supports recommended in the IEP or lack thereof.¹² And while I may agree with the district's view of the evidence on discrete issues, such as the sufficiency of the recommendation for speech-language therapy services in the IEP, overall the district's arguments are insufficient to warrant modifying the IHO's ultimate determination regarding the appropriateness of the program and services recommended in the June 2018 IEP.

C. June 2019 IEP

Similar to her conclusions regarding the June 2018 IEP, the IHO thoroughly described and weighed the evidence pertaining to the June 2019 CSE's recommendations for the student for the 2019-20 school year (see IHO Decision at pp. 53-59). The June 2019 CSE recommended one 40-minute session of ICT services daily in each ELA, mathematics, social studies, and science, and a small reading group for 40-minutes every other day, as well as one 40-minute session of individual speech-language therapy per six-day cycle, one 40-minute session of group speech-language

listed in the IEP" is permissible and may be considered (see R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'"] [internal citations omitted]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]). Accordingly, the IHO correctly determined that the building level services were not "mandated service[s] incorporated into the child's IEP" and, therefore, could not be considered in determining whether the district offered the student a FAPE (IHO Decision at pp. 47-48).

¹² On this point, the district argues that the IHO erred in noting that the neuropsychological evaluation she relied upon was "based upon standardized testing under appropriate conditions, extensive documentation, observations and consultations with provider and educator" and asserts, instead that the evaluation was based on a review of documents (Dist. Mem. of Law at pp. 13-14, quoting IHO Decision at p. 37). However, as summarized above in the facts and procedural history, several neuropsychological evaluations of the student were conducted over the school years. The district cites to an August 2016 neuropsychological evaluation (see Dist. Ex. 5), whereas the IHO appeared to be describing the February 2018 neuropsychological evaluation conducted by the neuropsychologist (see IHO Decision at p. 37; Dist. Ex. 20). The confusion is understandable since the IHO referred to testimony of the neuropsychologist whose evaluation she was describing, whereas the neuropsychologist did not testify; instead, the psychologist who evaluated the student in May/June 2013, March 2014, August 2016, October 2018, and September 2019 testified at the impartial hearing (see Tr. pp. 1320-1448; Parent Ex. K; Dist. Exs. 5; 30). The February 2018 neuropsychological evaluation of the student that was considered by the June 2018 CSE was based on a review of records, behavioral observations, interviews with the parent and student, consultations with educators and providers, and administration of several cognitive, academic achievement, and social/emotional assessments (see Dist. Ex. 20 at pp. 1-2). Accordingly, the district's argument in this respect is without merit.

therapy per six-day cycle, and two 30-minute sessions of individual counseling per six-day cycle (see Dist. Ex. 31 at p. 10).

The student's special education teacher from the 2017-18 school year, who attended the June 2019 CSE meeting (Tr. pp. 213-14; Dist. Ex. 32), testified that the CSE recommended the student receive ICT services because he had made "steady progress in that environment" (Tr. p. 215). She further explained that the CSE recommended reading as a related service because she felt he had regressed over the past school year and required additional support (Tr. pp. 239-40).

The evidence in the hearing record shows that the June 2019 CSE considered, among other things, an October 2018 neuropsychological evaluation and that the psychologist who conducted that evaluation attended the CSE meeting (see Parent Ex. C; Dist. Exs. 31; 32; 34 at p. 1). The psychologist postulated that there were three factors "most prominent" to the student's academic circumstances at the time: a significant language impairment, robust delays in spheres of academic performance, and significant anxiety (Dist. Ex. 30 at p. 13; see Tr. pp. 1330-31). The psychologist explained that the student's significant language impairment, combined with his recent diagnosis of a central auditory processing disorder, thwarted his assimilation of academic and other concepts and stood to be the most significant impact in a densely, more populated academic setting that had limited opportunity for individualized support (Dist. Ex. 30 at p. 13; see Tr. pp. 1330-31). In terms of academics, the psychologist noted that the student's delays in oral reading accuracy, reading fluency, math reasoning/problem solving, and written expression rendered education a frustrating and unrewarding experience and served to exploit the student's pre-existing anxiety and insecurity (Dist. Ex. 30 at p. 13; see Tr. p. 1331). The psychologist opined that "were more academic 'heat' applied in a larger, conventional academic setting, fewer provisions would be available to customize [the student's] experience and support him emotionally" (Dist. Ex. 30 at p. 13; see Tr. p. 1332). He further opined that based on the student's prior experiences, what he needed most was stability and support within and outside of the academic setting (Dist. Ex. 30 at p. 13). The psychologist recommended that the student remain in his then-current environment, with additional supports to bolster the student's language reception (id.).

Among other things, the psychologist recommended that the student be found eligible for services under the IDEA as a student with a learning disability or a speech or language impairment and that he remain in a nurturing, multi-sensory educational setting with a small student to teacher ratio designed to meet the educational and social/emotional needs of students with language-based learning disorders (Dist. Ex. 30 at p. 14). The psychologist suggested that the student would benefit from individual counseling to address his anxiety related to academics and speech-language therapy to augment his language reception and auditory processing (id. at pp. 14-15). The psychologist recommended program and testing accommodations (id. at p. 15). With respect to reading, the psychologist recommended that the student be exposed to evidence-based reading remediation strategies such as Orton-Gillingham and outlined numerous strategies for reading instruction (id. at pp. 15-16). The psychologist also recommended specific teaching resources for spelling and sentence composition and strategies for addressing executive function skills including shift/flexibility, emotional control, and planning (id. at pp. 16-17).

The student's Focus teacher from Winston for the 2018-19 school year, who attended the June 2019 CSE meeting, also opined that the student would have difficulty functioning in a larger class of 23 students stating, "he would get lost" (Tr. p. 1031; see Dist. Ex. 32). She expressed

concern that the student would be pulled out frequently for related services because he would miss academic time and lunch time (Tr. p. 1027). The Focus teacher explained that her concerns were about the structure of services such as how they would be delivered and how much time the student would spend away from the actual class (Tr. p. 1092).

While the district correctly notes that the IHO may have relied, in part, on an improper comparison of the June 2019 IEP to the student's program at Winston Prep during the 2018-19 school year (see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at *8 [S.D. Cal. Feb. 14, 2013] [noting that "[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at *5 [S.D. Cal. Mar. 14, 2011]), as with the 2018-19 school year, the IHO also rested her determination on permissible areas of consideration. For example, the IHO again weighed the opinions of the private evaluators and providers that the student would receive educational benefit in a more supportive setting and that the student's "downward spiral" at the end of the 2017-18 school year was because the district program was not meeting the student's needs (IHO Decision at p. 57, citing Tr. p. 1352; Parent Ex. L).

Overall, as with the 2018-19 school year, the district's arguments are insufficient to warrant a modification of the IHO's finding that the district failed to offer the student a FAPE for the 2019-20 school year.

D. Unilateral Placement and Equitable Considerations

After a careful review of the hearing record, I also adopt the IHO's determinations that Winston Prep was an appropriate unilateral placement for the student for the 2018-19 and 2019-20 school years and that equitable considerations weighed in favor of the parents' requested relief (see IHO Decision at pp. 59-63). Briefly, the district's arguments regarding the appropriateness of Winston Prep due to its restrictiveness, the lack of related services, and evidence of the student's purported regression while attending are insufficient to warrant reversal of the IHO's findings.

First, as the district acknowledges it is well settled that although the restrictiveness of a parent's unilateral placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 105 [2d Cir. 2000]; Walczak, 142 F.3d at 122; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 830, 836-37 [2d Cir. 2014] [noting "while the restrictiveness of a private placement

is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]). Further, as for the related services, 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). Here, Winston Prep staff indicated that the school did not provide pull-out or push-in therapy, rather the services were embedded in the program (Tr. pp. 913-14, 949-50, 972). The student participated in a weekly social skills group that was co-taught by a guidance counselor and worked on speech and language skills during his Focus or language classes (Tr. pp. 929-31, 949-50, 954, 1035-36, 1055-56). The student's Focus teacher was both certified as an Orton-Gillingham practitioner and licensed as a speech-language pathologist (Tr. pp. 953, 972).

Finally, while 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 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; see also Frank G., 459 F.3d at 364),¹³ here the evidence reflects that made progress throughout the 2018-19 school year at Winston Prep (see Tr. pp. 919-21, 932, 934-36; Parent Exs. A; C; D; E; K at pp. 1-5, 9-10; O; S; Dist. Ex. 30 at pp. 2-3, 6, 12-13). Additionally, testimony from the student's outside providers (i.e., his treating therapist and psychologist) reflected their observations noting that the student made academic and social/emotional progress (see Tr. pp. 1340-42, 1351-52, 1357, 1365-66, 1457, 1459-63, 1468-72, 1475-76). Furthermore, the hearing record showed that the student made progress during the 2019-20 school year at Winston Prep (see Tr. pp. 921, 932, 1016, 1020-23, 1032, 1036-37, 1041, 1345-48; Parent Exs. F; G; H; P; Q; R; S). With regard to the district's claim that the student regressed during his time at Winston Prep, the hearing record does not support this claim. The student's teacher during the 2017-18 school year opined that the student had regressed in reading and writing base on the information provided by Winston Prep; however, there is no data in the record to support her opinion (Tr. pp. 220, 239).

In finding that Winston Prep provided the student with instruction specially designed to meet the student's unique needs, the IHO relied on the "totality of circumstances" (see Gagliardo, 489 F.3d at 112, Frank G., 459 F.3d at 364-65), and the evidence in the hearing record supports her conclusion.

¹³ The Second Circuit has found 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"]).

As for the district's argument about equitable considerations, while the district may have found that the parents' expectations exceeded the student's potential, there is no evidence in the hearing record that the parents acted unreasonably or were otherwise uncooperative in the school district's efforts to meet its obligations under the IDEA (see C.L., 744 F.3d at 840). Instead, as the IHO observed, both the district and the parents seemed to have good intentions, and all involved wanted the student to succeed but had fundamentally different views of how to accomplish this. As noted above, the IHO thoroughly considered these different views and the evidence supporting each and the district has not identified a sufficient basis to reverse her determinations.

VII. Conclusion

The evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years, that Winston Prep was an appropriate unilateral placement, and that equitable considerations weigh in favor of the parents' request for relief.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
January 25, 2021**

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**