



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-089

**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 Board of Education of the Wappingers Central School District**

### **Appearances:**

Michael Gilberg, Esq., attorney for petitioners

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, by Neelanjan Choudhury, 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 Otto Specht School (Otto Specht) for the 2018-19 school year and the Longview School (Longview) for the 2019-20 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered an appropriate educational program to the student for those school years. The appeal must be sustained in part. 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 parties' familiarity with the detailed facts and procedural history of this matter is presumed and will not be recited here. Briefly, the CSE convened on June 15, 2018, to formulate the student's IEP for the 2018-19 school year (see generally Dist. Ex. 13). The CSE recommended a special education program consisting of five hours of integrated co-teaching (ICT) services daily, along with related services of individual occupational therapy (OT), small group speech/language therapy, small group and individual psychological counseling services, and individual behavior intervention services (id. at p. 16). The CSE also recommended a full-time one-to-one teaching

assistant and one 30-minute session of individual multisensory reading daily as supplementary aids and services, along with other program modifications and accommodations (id. at pp. 16-17). The parents disagreed with the recommendations contained in the June 2018 IEP, and, as a result, notified the district of their intent to unilaterally place the student at Otto Specht (see Req. for Rev. ¶ 2; Req. for Rev. Ex. B; Answer ¶8).

The CSE convened multiple times to formulate the student's IEP for the 2019-20 school year (see Dist. Exs. 24; 27; 30). The IEP resulting from the CSE's August 20, 2019 meeting recommended a special education program consisting of five hours of ICT services daily, along with related services of individual OT, small group speech-language therapy, small group and individual psychological counseling services, and individual behavior intervention services (Dist. Ex. 30 at pp. 1, 12). The CSE also recommended a full-time one-to-one teaching assistant as a supplementary aid and service, among other program modifications and accommodations (id. at pp. 12-13). In the comments section of the IEP, it was explained that the student would be provided with reading instruction via a general education service not listed on the student's IEP in the form of the "academic intervention services (AIS) / Response To Intervention (RTi) model" in an unspecified amount and ratio setting (Dist. Ex. 30).<sup>1</sup> The parents disagreed with the recommendations contained in the August 2019 IEP as well as the prior IEPs developed for the student's 2019-20 school year and, as a result, notified the district of their intent to unilaterally place the student at Longview (see Dist. Ex. 31 at p. 1).

In a due process complaint notice, dated January 7, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18, 2018-19, and 2019-20 school years (see Parent Ex. H). The district moved to dismiss the parents' claims related to the 2017-18 school year, including claims related to allegations of retaliation and abuse, which the IHO granted in a decision dated March 9, 2020 (IHO Exs. II-VI). With respect to the 2018-19 and 2019-20 school year, the parents highlighted the recommendations from an independent neuropsychological evaluation conducted in November 2018 and raised allegations related to the district's evaluations of the student and program recommendations, specifically as to the district's refusal to consider placing the student in an out-of-district placement, noting that the district did not have "the teaching methodology, class size, or supports" the student required (Parent Ex. H at pp. 2-4).

Following prehearing conferences on March 27, 2020 and May 8, 2020, an impartial hearing convened on May 27, 2020 and concluded on November 6, 2020 after 9 days of hearings (Tr. pp. 1-1957; IHO Exs. VII-VIII). In an undated decision, the IHO determined that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years, that neither Otto Specht nor Longview were appropriate unilateral placements, and that equitable considerations did not weigh fully in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 1-86).<sup>2</sup>

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<sup>1</sup> The exhibit in the hearing record contains inconsistent and missing page numbers. The citation above refers to the first two pages of District Exhibit 30, which are not numbered.

<sup>2</sup> Although the IHO's decision is not dated, there is no dispute concerning the timeliness of the decision, and the cover page of the decision lists the "Record Close Date" as March 5, 2021 (IHO Decision).

In reviewing the 2018-19 school year, the IHO assessed the evaluative information available to the June 2018 CSE, with particular attention paid to the implementation of the student's behavioral intervention plan (BIP) and tracking of the student's behaviors during the portion of the 2017-18 school year that the student was attending a district school (IHO Decision at pp. 17-45). The IHO then noted that the plan developed for the student had "[a] fatal mistake," in that it was premised on the idea that the student's behaviors were influencing his academics, which was opposite from the IHO's determination that the student's "learning disability was influencing his behavior" (*id.* at pp. 46-47). The IHO referenced data showing that the student's behaviors occurred predominantly during academics, specifically during reading instruction, and that the behaviors had been getting worse during the portion of the 2017-18 school year that the student was in a district school (*id.* at p. 47). The IHO further noted that despite the student's lack of progress in the district, the June 2018 CSE recommended the same program as the student had received during the 2017-18 school year; the IHO then rejected the district assistant superintendent for support services' rationale for continuing the same program and found that the failure to recommend specific reading supports on the student's IEP—rather than reference to a building level service—and the failure to consider a change in program for the student resulted in a denial of FAPE for the 2018-19 school year (*id.* at pp. 47-53). Turning to the 2019-20 school year, the IHO determined that the district did not offer the student a FAPE for many of the same reasons as for the 2018-19 school year (*id.* at p. 53). The IHO went on to review the results and recommendations from the independent neuropsychological evaluation, specifically with respect to the area of reading (*id.* at pp. 53-55). The IHO then found that the district's offer of a building level service to address the student's needs in the area of reading was insufficient and further determined that the CSE's failure to consider a different program for the student denied the parent of the opportunity to participate in the development of the student's program, resulting in a denial of FAPE for the 2019-20 school year (*id.* at pp. 55-59).

The IHO next turned to the parents' burden of proving the appropriateness of the unilateral placements for the student (IHO Decision at pp. 59-78). With respect to the placement of the student at Otto Specht for the 2018-19 school year, the IHO found that the evidence in the hearing record did not support finding that the school sufficiently addressed the student's reading needs or the student's behavioral needs, specifically noting the lack of objective testing, proof of the use of a specific reading methodology, the lack of counseling, the lack of a behavior plan, an inappropriate peer grouping for the student, and the need for an individual assistant provided by the district of location (*id.* at pp. 62-70). Regarding Longview, the IHO determined that the parents did not meet their burden of proving it was appropriate because there was no evidence of counseling or behavioral supports being provided to the student and the school did not provide reading instruction as recommended in the independent neuropsychological evaluation report (*id.* at pp. 70-78). The IHO noted that although the student's participation in the school's "judicial committee" may have been effective, the student's behaviors continued throughout the 2019-20 school year (*id.* at p. 78).

Regarding equitable considerations, the IHO noted several factors that would limit any award of tuition reimbursement (IHO Decision at pp. 78-81). More specifically, the IHO listed the parents' lack of evidence of notice that the parents were placing the student at Otto Specht for the 2018-19 school year, referral of the student for an individualized education services program (IESP) with the district of location for the 2018-19 school year, refusal to consider placing the student in a district public school due to safety concerns, denial of consent for the district to observe

the student, withholding of an evaluation conducted by the district of location, and the lack of evidence regarding the cost of the unilateral placements, such as contracts or invoices (id.).

For the above reasons, the IHO did not order any of the relief requested by the parents in this matter (IHO Decision at p. 81).

The parent appeals, the district answers and cross-appeals portions of the IHO's decision, and the parents answer the district's cross-appeal.<sup>3</sup>

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

The following issues presented on appeal must be resolved in order to render a decision in this matter:

1. Whether the IHO erred in determining that the district failed to offer the student a FAPE for the 2018-19 school year by failing to recommend a specific reading program on the June 2018 IEP and by failing to appropriately address the student's behaviors;
2. Whether the IHO erred in determining that the district failed to offer the student a FAPE during the 2019-20 school year by failing to recommend a specific reading program on the August 2019 IEP;
3. Whether the IHO erred in determining that the parents did not meet their burden of proving that the unilateral placement of the student at Otto Specht for the 2018-19 school year met the student's special education needs;
4. Whether the IHO erred in determining that the parents did not meet their burden of proving that the unilateral placement of the student at Longview for the 2019-20 school year met the student's special education needs; and
5. Whether the IHO erred in determining that equitable considerations would limit any relief afforded to the parents.

#### **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

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<sup>3</sup> I will briefly address an argument brought by the district with respect to the pleadings (see Letter from Neelanjan Choudhury to the Office of State Review dated May 20, 2021). The district contends, and I agree, that the parent has included inappropriate arguments in her answer to the district's cross-appeal. Specifically, the district contends that its cross-appeal of the IHO decision claimed the IHO erred in finding that the district's recommended programs for the 2018-19 and 2019-20 school years did not offer the student a FAPE, yet the parent also brought arguments concerning equitable considerations and the appropriateness of the parent's unilateral placement in the answer to the cross appeal. State regulation limits the scope of the parent's reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). Accordingly, the portions of the parent's "Verified Answer to Cross-Appeal with Reply to Answer" that are not properly part of an answer to cross-appeal or reply will be disregarded.

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 Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>4</sup>

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

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

## **VI. Discussion**

### **A. 2018-19 School Year**

The IHO found that the district failed to offer the student a FAPE for the 2018-19 school year, and further found that the parent's unilateral placement of the student at Otto Specht was not an appropriate placement. The district cross-appeals the IHO's finding with respect to its

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<sup>4</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

recommended program for the 2018-19 school year, and the parent appeals the IHO's determination that Otto Specht was not an appropriate unilateral placement.

### **1. Evaluative Information and Student Needs**

A review of the arguments on appeal with respect to the 2018-19 school year first requires a review of the evaluative information available to the June 2018 CSE concerning the student's needs and abilities.

The CSE convened on June 15, 2018 (see Dist. Ex. 13 at p. 1). The resultant June 2018 IEP included evaluative information generally consistent with a May 26, 2018 psychoeducational reevaluation report conducted by a district school psychologist (compare Parent Ex. R with Dist. Ex. 13 at pp. 1-5). The June 2018 IEP included lists of scores from a variety of formal testing tools, informal assessments and observed in-school performance from the 2017-18 school year and prior, such as an independent August 2016 psychological evaluation (compare Parent Ex. R with Dist. Ex. 11 and Dist. Ex. 13 at pp. 4-16).

Turning to the consideration of the August 2016 psychological evaluation report, other than the inclusion of test scores, the June 2018 IEP did not reflect the overall summary and recommendations reached by the clinical psychologist who conducted the evaluation (Dist. Ex. 13; see Parent Ex. R). The August 2016 psychological evaluation report indicated, in part, that educational interventions had a poor prospect of success for the student unless they were intensified, coordinated, and addressed the student's needs (Parent Ex. R at p. 19). The report indicated that the student was very young for his grade, was very immature and that he had multiple diagnoses resulting in behavioral immaturity and learning delay/disorder (id.). The evaluator was concerned that if the student was placed in a second grade general education program with special education services, he would feel extremely frustrated that he was not at the same level of the other children in his class (id.). The clinical psychologist noted in the report that frustration and impulsivity were hallmarks of attention deficit disorder (ADD) and that even with an aide and a behavioral plan, the student might be set up for failure (id.). At the time of the psychological evaluation, the psychologist was concerned that the student could be "programmed for failure" and that the opportunity for future learning and success and reintegration into a traditional school environment could be delayed or forever lost (id.). Maladaptive behaviors might also increase (id.). With this rationale in mind, the August 2016 psychological evaluation report recommended that the student needed small class one-to-one instruction that minimized the number of pull-outs and fostered a sense of belonging for him (id. at p. 20). He required an educational program with a homogenous group of students with similar learning profiles so that instruction would target specific needs and so the student would feel part of the group (id.). Additional recommendations were for reading instruction that used a multisensory approach such as Orton-Gillingham, Preventing Academic Failure (PAF), or Wilson (id.). The report defined multisensory (reading) instruction as a structured, intensive, sequential, phonics-based system, which teaches the basics of word formation (id.).

Further, the clinical psychologist recommended that the student be educated with an emphasis on the total individual; that he required a caring but predictable and structured learning environment with an emphasis on self-development and personal best and sense of unity; that sequence of instruction alternate between core curriculum courses with sessions of enrichment or



physical exercise to promote mental endurance, and that the student's attention and concentration be carefully monitored, along with continued consultation with the student's doctors (Parent Ex. R at p. 20). The August 2016 psychological evaluation report also included approximately 19 additional recommendations regarding instructional and management strategies in school (*id.* at pp. 21-22). Those recommendations included active listening/preview, instructions repeated and clarified, alternatives when problem-solving, liberal use of pictures, schematics, graphs and simple sketches, show films, provide demonstrations, hands-on activities and modeling, avoid overloading by presenting too much information at once, break multi-step processes into workable units, memory strategies, monitor amount of information presented, pace of instruction, and the complexity of language, and provide praise and encouragement) (*id.*).

The May 2018 psycho-educational reevaluation report included a review of the student's social and developmental history, background information, psychological file, medical records, and summarized his IEP recommendations for the 2017-18 school year, as well as his performance in his related services areas while he attended school in a district placement between September 2017 and November 2017 (*id.* at pp. 2-5; *see* Tr. p. 394).<sup>5</sup>

According to the May 2018 psychoeducational reevaluation report, the student repeated second grade for the 2017-18 school year and according to his IEP, he attended an ICT classroom at one of the district's elementary schools, prior to the time he left the school in November 2017 (Dist. Ex. 11 at pp. 3, 4). The student's annual goals focused on study skills, reading, writing, mathematics, speech, motor skills, and social/emotional well-being (*id.* at p. 4). The student had related services of speech-language therapy, OT, behavior intervention services, one-to-one special class reading, and counseling as part of his educational program (*id.*). Modifications included access to sensory equipment, a one-to-one teaching assistant, breaks, checks for understanding, refocusing and redirection, preferential seating, modified class work, modified homework assignments, and raised line paper (*id.* at pp. 4-5). Then-current supports for school personnel included behavior intervention consultation for the team and a team meeting one time per month (*id.* at p. 5). Testing accommodations were for flexibility in setting and tests read (*id.*).

The May 2018 psychoeducational reevaluation report described what the student did and needed in his related services sessions (Dist. Ex. 11 at pp. 5-6). For speech-language therapy, the student was entitled to small group sessions 20 times yearly for 30 minutes in a flexible setting (*id.* at p. 5). The student presented with appropriate receptive and expressive language abilities, and he was able to identify his own feelings and the feelings of others (*id.*). At the start of the 2017-18 school year, the student was able to use appropriate pragmatic skills in a small group setting with adult intervention (*id.*). He responded appropriately to the structure of the small group and was aware of the rules governing the group (*id.*). The student made and maintained eye contact and was able to take turns (*id.*). As the school year progressed, the student started to exhibit inappropriate language and had trouble following the rules within the group whereupon he needed to be placed in a smaller group to continue working on his speech goals (*id.*). The student's speech-

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<sup>5</sup> The psychoeducational reevaluation report revealed that the reevaluation occurred over two days dates in February 2018; however, the report was signed by the school psychologist and dated May 26, 2018 (Dist. Ex. 11 at pp. 1, 21). Accordingly, the report will be referenced as the May 2018 psychoeducational reevaluation report.

language goal during the 2017-18 school year addressed adhering to conversational rules, such as initiating a conversation, responding, and maintaining pauses (id.).

The May 2018 psychoeducational reevaluation report indicated that the student was entitled to 40 sessions of OT per year for 30 minutes per session (Dist. Ex. 11 at p. 5). All individual and group OT sessions occurred in a flexible setting (id.). The student started out in a group of five students but was unable to be successful in the group (id.). The student made inappropriate comments and was easily distracted in a group that size (id.). OT annual goals addressed the student's ability to identify his sensory alert levels and sensory integration strategies to demonstrate an increased sensory self-awareness throughout his educational settings (id.). Another OT annual goal addressed the student's ability to sit and complete written work after being given a sensory break (id.). The student also worked on printing with correct size, spacing, and orientation to the line in a variety of classroom activities (id.).

With regard to behavior intervention services, the May 2018 psychoeducational reevaluation report indicated the student was entitled to 15 individual sessions yearly, in the classroom, for 30 minutes per session (Dist. Ex. 11 at p. 5). The psychoeducational reevaluation report indicated that the behavior specialist was able to meet with the student five times and consulted with the team two times while the student still attended school in the district during the 2017-18 school year (id. at pp. 5-6). According to the report the behavior specialist—while meeting with a student and the team—reviewed progress monitoring data from the student's BIP and worked on rewards or consequences to assist with positive behavior changes (id. at p. 6). The behavior specialist also worked with staff to address the student's "check system" and earning time with the iPad (id.).

The May 2018 psychoeducational reevaluation report indicated that, according to the school social worker, the student was entitled to 15 small group counseling sessions per year for 30 minutes per session (Dist. Ex. 11 at p. 6). During the 2017–18 school year, while the student attended school in the district, the student attended four group sessions (id.). During that time, the student worked on building social skills with peers whereupon he repeatedly attempted to engage students in inappropriate conversations and was defiant to staff when redirection was attempted (id.). The student was able to take turns with peers during gameplay, but had difficulty reading social cues and respecting others' requests (id.). He could be friendly and engaging and enjoyed talking about track and playing marble run with peers (id.). The student needed to build social skills and learn how to interact with others in an appropriate manner and his counseling goal addressed his ability to communicate and interact in a positive manner with peers (id.).

With regard to multi-sensory reading instruction, the May 2018 psychoeducational reevaluation report included that, according to the district reading specialist, the student's special class reading support consisted of one-to-one daily multi-sensory reading for 30 minutes per session conducted by a special education itinerant teacher (Dist. Exs. 11 at p. 6). The student's one-to-one teaching assistant accompanied him to reading sessions, sometimes sitting outside the door (id.). The student practiced reading high frequency sight words in isolation and phrases daily (id.). He demonstrated snapshots of effort and appropriate work habits at times, yet continued to display resistance that vacillated during and throughout sessions (id.). The student presented as interested in reading (id.). According to the report, the student demonstrated progress in decoding (reading) and encoding (spelling) controlled text (id.). Focus of instruction included "f, l, m, n, s

(initial) and d, g, p, t (final), a, i, o (blending of 2 and 3 sounds), b, sh, u, h, j, c, k, ck, e, v, w, x, y, z, eh, th, qu, wh, practice with the above named sounds (with, chop, wet); double consonants (all, bill, miss, buff); and welded/nasal sounds -am, -an, (ham, fan)" (id.). Additional skills presented included adding suffix -s to unchanging, closed syllable, reading and spelling words with three sounds (id.). The student read 14/15 real words and 15/15 real words respectively on the "WRS Level 1 Post Test," and 15/15 nonsense words correctly on the same post test (id.). Further, "Closed syllables of 4-6 sounds were introduced, and included welded sounds of ang, ing, ong, ung, ank, onk, and unk (rang, pink)" (id.).

Among other things, the psychoeducational reevaluation report included the student's report card for the first quarter of the 2017-18 school year (Dist. Ex. 11 at p. 7). While the student demonstrated performance "proficient for grade level standards" specific to comprehension of text, he performed either "far below proficient for grade level standards" or "partial success for 2.0 content" in his foundational skills (decoding, reading), and writing (id.). For math, the student performed "far below proficient for grade level standards" for "fluently adds/subtracts numbers to 20," but he exhibited either proficiency in grade level standards for adding and subtracting with regrouping and above being proficient in grade level standards for measuring and estimating length (id.). Similar strengths were noted for science, social studies, and for speaking and listening standards (id. at pp. 7-8). With regard to the student's habits that support learning, he performed "far below proficient for grade level standards" for follows directions, works cooperatively, works independently, organized and prepared, and demonstrates self-control (id. at p. 8). He performed "partially proficient in grade level standards" for demonstrates respect for others and was proficient in grade level standards for respects responsibility for his/her behavior (id.).

The May 2018 psychoeducational reevaluation report also noted that for math, review of the student's performance on one "iReady" assessment completed in October 2017, prior to him leaving the district school, revealed a score which was "Less than One Level Below (Level 1)" (33rd percentile) (Dist. Ex. 11 at p. 8). He also scored at this level on the iReady assessment for geometry, algebra, algebraic thinking, measurement and data, and numbers and operations (id. at pp. 8-9). For English-language arts (ELA), the student also completed one iReady assessment in October 2017 prior to leaving the district school and scored "Less than One Level Below (Level 1)" (26th percentile) (id. at p. 9). The student "tested out" for phonological awareness and was "On Level (Early 2) for phonics" (id.). He scored "Less than One Level Below (Level 1)" for vocabulary and "Greater than One Level Below (Level K)" for high frequency words and comprehension of literature and informational text (id.).

The May 2018 psychoeducational reevaluation report indicated a functional behavioral assessment (FBA) was completed for the student in October 2015 and updated data was completed in April 2016 (Dist. Ex. 11 at p. 8). Based on the FBA, a BIP was generated to address the student's target behaviors (id.). Daily data was taken using a progress monitoring sheet (id.). The FBA/BIP was put in place until the student left the district in November 2017 (id.). According to the psychoeducational reevaluation report, when the student entered the district school for the 2017-18 school year, his BIP addressed behaviors as follows: (1) physical aggression towards himself or others: defined as running into others, pushing others, using playground equipment inappropriately, or grabbing things from others; (2) inappropriate actions or words: defined as aggressive statements, inappropriate comments to adults and peers (about their looks, intelligence, or any/weaknesses), pretending his hands were guns, and inappropriate bathroom talk; and (3)

excessive talking: defined as engaging in inappropriate conversations during instruction time or independent work and needing prompting back to the task at hand (id.).

With regard to cognitive testing which occurred in February 2018, the May 2018 psychoeducational reevaluation report indicated the Woodcock-Johnson-IV-Tests of Cognitive Ability (WJ-IV-COG) yielded a General Intellectual Ability standard score (SS) of 97, placing the student in the average range of cognitive ability, consistent with his Full Scale IQ score (SS 102) obtained via administration of on the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) in June 2016 (Dist. Ex. 11 at pp. 12, 20). Academic achievement per administration in February 2018 of the Woodcock-Johnson IV- Tests of Achievement (WJ-IV ACH) yielded a SS 71 for Broad Reading in the "Low Range, a SS 80 for Broad Mathematics in the Low Average Range," and a Broad Written Language SS 87 in the "Low Average Range" (id. at pp. 14-15, 20). The student obtained a Broad Achievement SS 75 in the "Low Average Range" (id. at pp. 14-15, 20). Further review of the results of the WJ-IV ACH indicated the student performed on the "Very Low Range" for reading fluency (SS 65), in the "Low Range" for reading (SS 72), basic reading skills (SS 78), math calculation skills (SS 77), academic skills (SS 76), academic fluency (SS 73), and brief achievement (SS 78) (id. at pp. 14-15, 20). He obtained scores in the "Low Average Range" for mathematics (SS 84), written language (SS 89), and academic applications (SS 85), and a score in the "Average Range" for written expression (SS 92) (id. at pp. 14-15, 20).

The May 2018 psychoeducational reevaluation report indicated the Behavior Assessment System for Children-Third Edition-Child (BASC-3-C) was completed by the student's mother in January 2018 (BASC-3 Parent Form) and by the student's teacher at Otto Specht (BASC-3 Teacher Form) in February 2018 (Dist. Ex. 11 at p. 18). According to the parent's responses on the BASC-3 Parent Form, the student scored within the "Clinically Significant" range for hyperactivity, aggression, conduct, depression, atypicality, attention, adaptability, activities of daily living, and social skills (id. at pp 18-19). "At-risk" responses were noted for the areas of somatization, leadership, and functional communication (id.). On the BASC-3 Teacher form, the student scored in the "Clinically Significant" range for the scales of hyperactivity, conduct, and aggression (id.). "At-risk" responses were noted for the areas of attention, study skills, and social skills (id.). The psychoeducational reevaluation report noted that when comparing the parent and teacher rating scales for the BASC-3-C, there were consistent concerns noted in the areas of hyperactivity, aggression, conduct, attention, and social skills, noting behaviors exhibited in the home and school environments (id. at pp. 18-20).

In addition to all of the above, the May 2018 psychoeducational reevaluation report included information provided by the student's teacher from Otto Specht in February 2018 (Dist. Ex. 11 at pp. 19-20). The reevaluation report noted that the student's teacher reported with regard to the student's strengths and academic progress and that the student was almost always eager and willing to try new things (id. at p. 19). Socially-emotionally, he sought attention of peers and adults, which often manifested in inappropriate behaviors (id.). For example, it was noted that one time the student kicked a classmate, and that he directed language towards children the student saw as "weaker" than himself (id.). The student's educational interventions at Otto Specht included one-to-one support for most of the day (id.). The student was in a small classroom setting consisting of four students and three teachers who used a "multidimensional" approach to teaching (id.). As Otto Specht had many remedial and therapeutic supports built into the curriculum, as well as during the school day in the small setting, the student was able to be redirected to the task

at hand (id.). The student's teacher reported that the student's attention span was short and he required a lot of visual and auditory support to be able to process the class materials (id.). With regard to the student's management needs, his teacher reported the student was often impulsive (i.e., he would suddenly run into the parking lot) and required one-to-one support (id. at p. 20). The student moved around every ten minutes or so during a lesson at his desk and needed reminders to stay focused (id.). At times, the student injured himself while playing and he continued to play without noticing (id.). The student's teacher reported that the student enjoyed everything at Otto Specht that was physical, and he expressed interest in gardening, ice skating, gross motor handwork, hiking, and running (id.).

The May 2018 psychoeducational reevaluation report indicated that results of the evaluation could be shared with the student's parents, and that the CSE would need to convene about the student's eligibility, modifications, designation, instructional modifications, and IEP goals (Dist. Ex. 11 at p. 20).

Review of the June 2018 IEP revealed that the student's present levels of performance indicated that academically, the student required one-to-one or small group support to maintain focus and to manage behavior, frequent redirection and intervention to limit off-task behavior so that he could successfully complete classroom tasks, daily reteaching and practice to maintain skills in all academic areas, to improve decoding skills and sight word recognition, to improve spelling skills, both phonics words and sight words, a small group multisensory reading group to support acquisition of new phonics skills, as well as to maintain previously taught skills, and sitting near an adult during large, small group instruction to maintain attention and encourage participation, and frequent, short breaks to improve on-task behavior (Dist. Ex. 13 at p. 12).

Socially, the June 2018 IEP indicated the student needed to improve attention to task, develop strategies to limit impulsive behavior, more positively accept redirection from adults and consequences for inappropriate behavior, limit inappropriate, aggressive, and violent language and understand how it may affect others, speak kindly to and about others, adult support to navigate challenging social interactions, continue to receive behavioral support from a behaviorist through consultations with his teachers and his FBA/BIP team in order to address his needs of positively following adult directions, using appropriate language, limiting excessive talking and impulsive behavior, building appropriate social skills with peers and adults, and building adaptive coping strategies when faced with negative emotions (Dist. Ex. 13 at p. 13).

The IEP also states that physically, the student needed to improve his handwriting, typing, and sensory processing skills (Dist. Ex. 13 at p. 15).

With regard to management needs, and consistent with the May 2018 psychoeducational reevaluation report previously discussed, the June 2018 IEP indicated that as reported by his teacher from Otto Specht, the student had one-to-one support for most of the day (Dist. Ex. 13 at p. 16). He was in a small (four children) classroom setting with three teachers (id.). They utilized a multidimensional approach to teaching (id.). The school had many remedial and therapeutic supports built into the curriculum and day (id.). In the school's small setting, the student was able to be redirected to the task at hand (id.). As reported by his teacher from Otto Specht, the student was often impulsive—for example, he would suddenly run into the parking lot—and required one-

to-one support (id.). He moved around every ten minutes or so during a lesson at this desk and needed reminders to stay focused, including while eating his lunch (id.).

## 2. June 2018 IEP and CSE Process

With regard to the issue of whether the June 2018 IEP was appropriate, the IHO determined that the district failed to meet its burden to prove that it offered the student a FAPE for the 2018-19 school year (see IHO Decision at pp. 17-53). The district cross-appeals from the IHO's finding, arguing that the IHO elevated form over substance in finding that the June 2018 IEP did not address the student's need for multisensory reading instruction, asserting that the comments to the IEP explained that the student would receive academic intervention services (AIS) to address reading rather than as a special education service. Further, the district alleges that the IHO erred in finding the ICT placement and recommendation for a BIP would not sufficiently manage the student's behaviors and further erred in finding that the IEP did not link the student's behaviors to academic issues, as work avoidance was identified as a trigger and a study skills goal was included in the IEP.

However, the district's cross-appeal of the IHO's 2018-19 FAPE determination takes a rather narrow view of the IHO's basis for her determination—and fails to grapple with a primary underpinning of the IHO's finding, that the district denied the student a FAPE by denying the parents participation in the development of the student's program.

Initially, the IHO found that the 2018-19 IEP services were insufficient to address the student's needs with respect to academics generally and reading specifically, noting that the "recommendations being made at the CSE meeting were based predominantly upon a view of [the student] having behavioral problems unrelated to his academic struggles (IHO Decision at p. 46). The IHO noted that to address the student's reading disability, the student was offered only a "building level" general education support, in the form of "academic intervention services . . . AIS" reading services, rather than a specific program listed on the student's IEP (id. at pp. 46, 50). The IHO noted that the parent's special education advocate testified that at the June 2018 CSE meeting it was discussed that when the student arrived at school in the fall there would be an assessment conducted to determine if the student would be eligible for AIS, and the IHO therefore wondered that there was "no guarantee" the student would receive individual reading services under the recommended program (id.; see Tr. p. 1114). To the district's credit, the June 2018 IEP includes a recommendation for one 30-minute session per day of individual multi-sensory reading instruction and the comments to the June 2018 IEP indicate that the CSE discussed that the student would receive individual reading instruction during the 2018-19 school year (Dist. Ex. 13 at pp. 1-3, 20). Accordingly, to the extent that the IHO's decision was based on the June 2018 CSE not including reading instruction, that determination omitted a crucial fact as to the student's recommended programming. However, as discussed below, the remainder of the IHO's determinations are supported by the hearing record and the IHO's error on this point does not alter the validity of the IHO's overall finding that the recommended program was not appropriate.

Turning to the student's behavior needs, the IHO noted that the district's assistant superintendent who testified for the district concerning the June 2018 IEP asserted that many of the student's behavior needs described in the IEP would be addressed by the BIP developed for the student during the previous school year (IHO Decision at pp. 46-47; see Tr. pp. 133-73). However,

the IHO noted that if "history is any indication," the BIP would not address the student's behavior successfully (IHO Decision at pp. 46, 51).

To the extent that the district attacks the IHO's finding as being impermissibly speculative, asserting that the finding would require a determination that the district would not adhere to the program recommended in the June 2018 IEP—noting that the IEP included a recommendation for a BIP, direct and consultant behavior intervention services, and a one-to-one teaching assistant—I disagree, as an analysis of the IHO's decision shows that the IHO considered the progress that the student was making in the district under a similar program and determined that a continuation of that program was not appropriate (IHO Decision at p. 49). A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 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, \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "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 the subsequent year's 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. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]).

Turning to the evidence relied on in finding that the student did not make progress related to behaviors, the IHO pointed to data collection sheets produced during the two months of the 2017-18 school year, from September 11, 2017 through November 21, 2017, which showed that the student's behaviors had not improved under the BIP in question, rather it had steadily worsened, and that the student's behaviors occurred predominantly during academic activities (IHO Decision at pp. 46-49; see Dist. Ex. 4). Additionally, as noted by the IHO, at the November 2017 CSE meeting, the district behaviorist, the student's teachers, and the parent all reported that the student's behaviors had increased from the beginning of the school year (IHO Decision at p. 47; see Dist. Ex. 3 at pp. 1-2). During that meeting, "[t]he principal report[ed] that we are not necessarily getting to the behavior and that it needs to be addressed" (Dist. Ex. 3 at p. 2). As noted by the district, the district behaviorist testified that she believed the student could benefit from placement in a class with the support of ICT services because the BIP had only been implemented with the student in the district for a few months and she did not expect to see results from implementation of the BIP until November or December 2017 (Tr. p. 504). However, even if this portion of the district behaviorist's testimony were sufficient to alter the IHO's findings as to the student's progress, the

district has not cross-appealed from a crucial portion of the IHO's determination that the district denied the student a FAPE for the 2018-19 school year, specifically, that the parents were denied the opportunity to participate in the development of the student's program.

The IHO discussed the recommended class placement in the June 2018 IEP, an ICT class as the core of the student's program and described the hearing record evidence comparing a general education setting with the support of ICT services to a potential special class placement (IHO Decision at pp. 49-50). The district assistant superintendent testified that a typical special class placement available in the district was provided for students with "some significant intellectual limitations" or students who may have social or behavioral dysregulation (IHO Decision at p. 50; see Tr. pp. 170-71). The IHO also noted the assistant superintendent's testimony describing that a special class placement would likely not be offered to a student with average or above average intelligence—which the student possessed—and stated that although he was not certain if it was discussed at the CSE meeting, it was likely that the June 2018 CSE did not consider a special class placement for the student for that reason (IHO Decision at pp. 50-51; see Tr. pp. 170-72, 192).

Also concerning the CSE's consideration of an appropriate class placement for the student, the IHO asked the district's assistant superintendent whether there was "any small class program for students who are cognitively capable, cognitively average or above?" (IHO Decision at p. 51; see Tr. pp. 192-93). The witness responded, "[y]es, we have a self-contained, what we call language-based class at one of our buildings, it's a 3:4 and 5:6, it's for students with reading disabilities. Primarily once again the ICT program just wasn't able to be strong enough, they need much more differentiated instruction" (id.). Upon further questioning of the witness, it was established that the parents were not made aware of this program by the witness, that the program was not discussed at any CSE meeting the witness was aware of, and that the placement was never offered to the student because he "wouldn't qualify for it. I wouldn't put a student in there without trying to support them as much as possible as a general ed. setting" (IHO Decision at p. 51; see Tr. pp. 251-54).

In summary, the IHO based her determination that the recommended program in the June 2018 IEP failed to offer the student a FAPE based on a number of reasons, only some of which have been appealed by the district; for example the IHO found the district did not offer a FAPE because the CSE had recommended a similar program to the program the student previously received in the district under which the student was not making progress; the CSE should have considered a smaller class placement for the student; the CSE minimized the student's language based learning disability and relied upon an inadequate BIP to address behavior needs; and the CSE deprived the parents of an opportunity to participate in the development of the student's IEP by failing to discuss the language-based small class placement that the district had available and which would have met the recommendations contained in the August 2016 psychological evaluation report (IHO Decision at pp. 17-53).

In light of the above, I find that there is insufficient basis to depart from the IHO's determination that the district denied the student a FAPE for the 2018-19 school year, particularly regarding the IHO's finding that the parents were denied the opportunity to participate in the development of the student's IEP, which was not appealed. The district's failure to appeal from the IHO's determination that the district denied the parents the opportunity to participate in the development of the student's IEP makes the IHO's determination final and binding on the parties



(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]). Accordingly, the student was denied a FAPE for the 2018-19 school year.

### 3. Unilateral Placement at Otto Specht

The parents appeal the IHO's determination that Otto Specht was not an appropriate unilateral placement for the student during the 2018-19 school year, arguing that the IHO erred because the hearing record contained sufficient evidence that the school provided for the student's educational, reading, and behavioral needs and that the student made progress while attending the school.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in

determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

The IHO based her determination that Otto Specht was not an appropriate unilateral placement during the 2018-19 school year on a number of factors, including her determination that the student did not have an appropriate "cohort of similar students" to interact and attend classes with during the year and was therefore instructed on a one-to-one basis for all academics, and that there was insufficient evidence of progress in the placement because there were few formal evaluations and no objective grades (IHO Decision at pp. 62-70). Further, the IHO found that although Orton-Gillingham specialized reading instruction was available at the school, there was little evidence about what the student actually received (id.). Lastly, the IHO found that the school provided inadequate social/emotional and behavioral support for the student because although there was full-time one-to-one support for the student, there was no formal counseling and the behavioral interventions used for addressing problem behaviors and circumstances for the student was to physically remove the student from the problematic circumstance (id.).<sup>6</sup>

The hearing record reflects that Otto Specht, an independent school, was part of Green Meadow Waldorf School, and worked with students with alternative learning styles (Tr. pp. 1791-92).

#### **a. Reading Instruction**

Turning first to the IHO's finding that the parents failed to demonstrate that Otto Specht was an appropriate placement because there was no evidence presented to support finding that the student received academic instruction that was language based, such as Orton-Gillingham instruction, after review of the hearing record, I disagree (IHO Decision p. 69). For the reasons set forth below, although there is a lack of detail and specificity with respect to the amount and content of the specialized reading instruction provided for the student during the 2018-19 school year, a review of the hearing record demonstrates that the student's program at Otto Specht met the student's special education needs to address his reading disability.

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<sup>6</sup> To the extent that the IHO found fault with the parent's placement of the student at Otto Specht because the student received one-to-one support from the district where the private school is located (see IHO Decision at pp. 69-70), I do not find that this arrangement renders the program at Otto Specht inappropriate (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 838-39 [2d Cir. 2014] [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "private placement furnishes every special service necessary" and the parents had privately secured the required related services that the unilateral placement did not provide]; M.F. v. New York City Bd. of Educ., 2013 WL 2435081, at \*10 [S.D.N.Y. June 4, 2013][finding unilateral placement appropriate where district was required to provide some of the student's related services]).

Although the 2017-18 school year is not on appeal in this matter, for background purposes, I note that the hearing record includes a May 28, 2018 reading progress note written by a speech-language pathologist at Otto Specht who served as a reading specialist at the school (Parent Ex. C). According to the reading specialist, she provided reading instruction to the student during the 2017-18 school year beginning in March 2018, and she and the student had worked together two times per week (minus school holidays) for a total of 11 "additional" sessions since that time (id.). The reading specialist reported that an initial assessment showed the student had relatively strong phonological awareness skills, reading comprehension, and ability to read and write closed syllables (id.). However, he needed to work on the other five syllable types, sight words, and reading fluency (id.). The reading specialist indicated that the provider and student worked primarily on silent-e syllables, r-controlled syllables, and reading fluency (id.). She noted they used "structured, systematic, multisensory, phonics-based approaches" (id.). She further noted that the student was an active participant in each session, and he did his best during all activities (id.). With regard to progress, the reading specialist indicated the student made excellent progress with reading and spelling silent-e syllables and with the reading and spelling of r-controlled syllables containing "or" and "er" (id.). R-controlled syllables containing "ar," "ir," and "ur" were still challenging for him at the time of the progress note (id.). The reading specialist noted that the student continued to progress in reading fluency (id.). She reported that she enjoyed working with the student, was pleased with his effort and success, and looked forward to continuing working with him through the end of the school year (id.). The reading specialist concluded, "[s]hould [the student] remain in the program, we would implement a more intensive reading program providing him with one on one reading daily" (id.).

Moving to the 2018-19 school year (third grade), a fall 2018 semester report from Otto Specht included an update on the student's reading instruction, written by the same reading specialist who worked with the student at Otto Specht the previous school year (compare Parent Ex. C with Dist. Ex. 21 at p. 6). Although the previous report anticipated implementation of one-to-one daily reading instruction during the 2018-19 school year, the fall 2018 reading report indicated the student attended one-to-one reading classes with the provider two times per week that semester (Parent Ex. C; Dist. Ex. 21 at p. 6). However, the reading update revealed that the student's reading instruction was not static from the previous school year, and that he made progress (compare Parent Ex. C, with Dist. Ex. 21 at p. 6). The fall 2018 reading update indicated that the student's instruction included oral book reading, text comprehension discussions, and phonics/spelling practice (Dist. Ex. 21 at p. 6). The reading specialist indicated, among other things, that when school started in September 2018, an informal spelling assessment showed that the student had remembered the short vowels "pretty well" (e.g., log) but had forgotten about silent-e syllables (e.g., bake) and r-controlled syllables (e.g., car), and therefore those concepts were reviewed (id.).

The fall 2018 reading update indicated that the reading specialist also worked with the student on the "FLSZ doubling rule" (e.g., floss or cuff), the -ind word family (e.g., mind), the two sounds of oo (e.g., book and food), the -ight word family (e.g., light), the vowel combination oi (e.g., join), and the suffix -ed (Dist. Ex. 21 at p. 6). The update indicated that during the next term, the reading specialist and student would continue to review everything they had covered so far, and would work on more vowel combinations, consonant + le syllables (e.g., little) and more basic prefixes and suffixes (id.). The fall 2018 reading update further noted that the student loved stories and that a good story was an easy way to motivate him to do his best in reading (id.). According

to the reading update, the student's oral reading fluency (i.e., speed plus accuracy) steadily improved during the term and the student fully participated in all activities (id.). The reading specialist noted that while the student's text comprehension was excellent when someone else read to him, when he read aloud, he was still a little too slow to fully grasp the meaning of what he was reading (id.). The fall 2018 reading update suggested to the parents that they should continue to read aloud to the student at home, or have him listen to audiobooks for pleasure for 30 minutes each day, at grade level (id.).

A spring 2019 report from Otto Specht indicated that in addition to the one-to-one remedial reading instruction two times per week, the student also attended a small group phonics class two times per week (Dist. Exs. 28 at pp. 6-7; 29 at pp. 6-7). Like the previous reading update from fall 2018, a review of the spring 2019 update reveals that the student's reading instruction was not static and, although difficult for him, he was presented with the added challenge of small group instruction (see id.). The spring 2018 reading update indicated that the remedial reading classes focused primarily on oral reading fluency, reading comprehension, spelling, narrative writing skills, and grammar instruction (Dist. Exs. 28 at p. 5; 29 at p. 5). Phonics sessions included spelling instruction, spelling practice, sound awareness games, phonics stories, and writing practice (id.). The reading specialist indicated that she and the student reviewed the six syllable types and the difference between short i and short e (id.). They also covered the vowel combinations aw/au & ow/ou, hard vs. soft c, syllabication of two and three-syllable words, and prefixes and suffixes of Anglo-Saxon origin (especially -ed) (id.).

The reading update indicated that the student's big improvement during the spring term was in the area of reading fluency (Dist. Exs. 28 at p. 6; 29 at p. 6). According to the reading update, the student's accuracy and speed of reading, as well as his stamina for reading, all improved dramatically (id.). By the end of May 2019, the student was able to independently read lengthy picture books, at approximately a second-grade level, from start to finish, in about 20 minutes (id.). Prior to May 2019, the student was only able to read one short page at a time and would need frequent mini-breaks even within that one page (id.). The student was most successful with books that had a 14pt to 18pt font size (id.). The reading update indicated that the student's reading comprehension continued to be excellent (id.). The student was able to answer verbal comprehension questions about details of the plot and he was able to make inferences and predictions about the characters (id.). The student sometimes asked insightful questions about the text in order to further his knowledge (id.). The reading update indicated that, unfortunately, the student also frequently made rude, attention seeking remarks about the characters, and about other people or topics (id.). According to the reading update, the student's narrative writing skills developed gradually and consistently (id.). The student was then-able to compose concise summaries of the books he read, though sometimes he needed reminders to use school-appropriate wording (id.). The student greatly enjoyed the phonics stories, and always gave them his complete attention (id.). Subsequent spelling practice without embedding the spelling words in stories was less successful (id.). The student had difficulty maintaining joint attention during spelling practice, and therefore, tended to forget new concepts as soon as they were introduced, and frequent repetition and practice continued to be needed (id.).

According to the spring 2019 reading update, two behavioral interventions were introduced in the middle of the term and were successful in reducing rude remarks during the one-to-one reading classes (Dist. Exs. 28 at p. 6; 29 at p. 6). First, Mad Libs were introduced as a reward for

completing the rest of the lesson in a timely fashion (id.). Mad Libs satisfied the student's craving for stories and for funny verbal outbursts (id.). The Mad Libs also helped to teach the student the parts of speech (id.). Second, a daily maximum for rude remarks was introduced whereby each day that the student made fewer rude remarks than the maximum he would get a reward, and each day that maximum would be one fewer than the day before (id.). If the student exceeded the maximum, he and the reading specialist would have to do push-ups instead (id.). The spring 2019 reading update indicated that they only had to do push-ups one day (id.). The reading update indicated that the student's remarks remained difficult to curtail during the small-group sessions (id.). However, it noted that overall, the reading specialist was pleased with the student's reading progress during the spring term of the 2018-19 school year (id.).

The student's reading specialist for the 2018-19 school year was no longer employed at Otto Specht at the time of the impartial hearing, and did not testify at the hearing, leaving a gap in evidence the parents may have benefitted from entering into the hearing record (Tr. p. 1579). The student's academic teacher at Otto Specht for the 2018-19 school year testified that she knew the student's reading specialist and had conversations with her about the student's reading skills (Tr. pp. 1512-13, 1579-80).

According to testimony by the director of Otto Specht, the reading specialist who worked with the student was trained in Orton-Gillingham, and Lindamood Bell, as well as other reading methodologies, and worked intensely with the student (Tr. p. 1750). In addition, other teachers worked with the student with the same methodology that the reading specialist "brought out," helping the student to read and to stay focused (Tr. pp. 1750-51). She described Otto Specht as providing a movement-based education, a "multi-sensory, multi-modality program meaning that it's not just a regular school that just does Orton-Gillingham" (Tr. p. 1753). She explained that the school was a place where the multi-sensory foundation was laid out for the student throughout the day (Tr. pp. 1753-54). The student was able to learn in different ways, had time to move, and had his "academic stamina" built (Tr. 1754). The director opined that this was important and noted that the reading specialist provided movement opportunities for the student after he sustained his attention for ten minutes (id.). After the student engaged in "movement with intention" he would return to his work (id.). She reported that staff worked with the student in that way "to build his capacity to pay attention, and his capacity to build on those foundations" (id.). The director's testimony is consistent with the previously discussed reading update completed in spring 2019 where the reading specialist indicated her approach to the student's behavior difficulties included taking breaks and sustaining attention for manageable periods of time (id.; see Dist. Exs. 28 at p. 7; 29 at p. 7).

The district's June 15, 2018 IEP indicated that the student scored in the low average range on a word attack subtest; low range on letter-word identification, passage comprehension, and spelling subtests; and the very low range on an oral reading subtest (Dist. Ex. 13 at p. 6). In addition, the IEP stated that the student's reading skills were below grade level and he needed to improve his decoding skills (Dist. Ex. 13 at pp. 10, 12). Here the hearing record shows that at Otto Specht the student was provided individualized reading instruction that targeted his deficits in decoding and reading fluency (Parent Ex. C; Dist. Exs. 28 at pp. 6-7; 29 at pp. 6-7). The student's teacher was a speech-language pathologist who was also trained in multisensory reading instruction (Tr. p. 1750; Parent Ex. C). The student also participated in a twice weekly phonics group that included spelling and writing practice (Dist. Exs. 28 at pp. 6-7; 29 at pp. 6-7). Based

on the above, the hearing record shows that the private school appropriately addressed the student's reading needs.

### **b. Social-Emotional and Behavioral Needs**

The IHO found that the student was not provided with a cohort of similar-needs students to interact with and that Otto Specht did not appropriately address his other social-emotional and behavior needs during the 2018-19 school year. Upon review, overall, the hearing record supports the parents' position that Otto Specht offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129).

Testimony by the director of Otto Specht indicated that Otto Specht was a special education school that was on the same campus and part of Green Meadow, a Waldorf school for typically developing students (Tr. pp. 1672; 1679-80). According to the student's mother, Green Meadow and Otto Specht offered integrated programming with some of their classes (Tr. p. 670). Testimony by the student's academic teacher at Otto Specht indicated that the philosophy of a "Waldorf" education addressed the "whole child, head, heart and hands" (Tr. p. 1509). She noted this meant a child was looked at from an emotional level, from a thinking level, academically and also a "doing" level (Tr. p. 1509). The teacher reported that Otto Specht was specifically for students with special education needs, sensory concerns, and developmental delays of all kinds (Tr. p. 1512). The director indicated that Otto Specht was located on a larger campus that had a farm and an elder care facility located on it, with lots of opportunities for multi-disciplinary and multi-sensory learning experiences including forestry (Tr. p. 1675; see Tr. p. 1631). In addition, the Otto Specht school was next door to the Green Meadow School (Tr. p. 1680).

Review of the hearing record reflects that, consistent with the previously discussed evaluation of the student in the August 2016 psychological evaluation report, Otto Specht acknowledged the student's behaviors that interfered with his learning and that of others, and the school addressed those behaviors in an empathetic manner (see Parent Ex. R at pp.17-20). In her testimony, the director of Otto Specht described the student as very bright and eager to learn, eager to be in the world, to make friends, and to be perfect at everything (Tr. pp. 1694, 1741-42). She further described the student as very observant, one who did not miss anything, and that he was very intuitive, and quite capable in certain areas (Tr. p. 1694). The director also indicated that the student struggled with profound attentional difficulties, impulse control, sensory dysregulation, and that he had a difficult time being able to achieve the goals he wanted, such as trying to make friends (Tr. pp. 1694-95, 1705). The student's difficulties with attention, impulsivity, and a tendency to say whatever was on his mind, often resulted in inadvertently alienating other students; something that would be painful for the student (Tr. pp. 1694-695, 1741-42).

The district behaviorist, who worked with the student while he still attended an ICT class in the district during fall 2017, indicated that the function of the student's inappropriate behaviors was to avoid tasks (Tr. pp. 403, 506, 538). However, the director of Otto Specht reported the student was a child that needed quite a specialized program so that he could begin to integrate successfully into academic and nonacademic "practical" classes (Tr. p. 1695). The director reported that when the student first arrived at Otto Specht he was "not very open to anything" (Tr. p. 1697). However, he did respond much more successfully to one-to-one instruction and the support of a one-to-one aide in group situations (Tr. pp. 1697, 1806). On arrival at the school the

student was "very stressed," a term used at the private school if a student exhibited difficult behavior because they were uncomfortable and stressed at the moment (Tr. p. 1697). The director indicated that the student had been unable to remain at an assembly with other students, demonstrated by his tendency to yell things out, make fun of kids, and stand up and down; she noted there was a behavior component to the student acting out but it was "secondary to his lack of self-esteem and his really feeling like he was just a failure all around" (Tr. pp. 1697-98, 1742-43). She described the student as being "in survival mode" (Tr. p. 1743). The director noted the student was "complicated," meaning he had a mixed profile of capacities, in that in addition to the attention difficulties already described, the student had learning difficulties, especially with reading and decoding (Tr. p. 1699). She explained, "when you have a child that is aware that they are not able to do what they want to do," such as trying to be friends and "somehow everything i[s] coming out the wrong way," it could create difficult behaviors and stress the student, who then really could not attend (Tr. p. 1699). The director reported that in order to be able to learn, the student needed to get a handle on how to self-regulate and learn how to pay attention (Tr. p. 1698).

According to the director, by the time the student left Otto Specht, behaviorally, he was more able to be in a classroom, participate in his learning for longer periods of time, and follow rules and limits (Tr. pp. 1762-63). When the student attended Otto Specht, he started out receiving intensive one-to-one instruction and slowly over time, moved into smaller group situations with more success, participating with the students at Green Meadow in some activities (Tr. p. 1700-01). He made progress in his academic studies, was proud of his work, and showed more skills in his fine motor ability (Tr. p. 1762-63). The director indicated that overall, the student made progress academically, socially-emotionally, and behaviorally (Tr. p. 1763). The director reported that globally, the student responded to the structure of the amount of support he received during the day, and to the format of his education at Otto Specht in the classroom, in practical situations, and through real practical activities, whereby his attention developed, as did his relationship to letters so that for the first time he could be successful at reading (Tr. pp. 1763-64). The director indicated that the student's improvement with reading was huge for him, because being as smart and bright as he was and not being able to read was difficult for him (Tr. p. 1764). She noted that although the student was initially removed from school assemblies, which consisted of about 50 people, as time went on he became more comfortable and was able to sit and spend time there; eventually he was able to get up in front of everyone at an assembly and read something (Tr. pp. 1769-71, 1800-01).

The student's third grade teacher at Otto Specht indicated that the student "definitely progressed in the reading, writing realm" (Tr. p. 1526). The teacher noted that as the student was strong in drawing, she taught him cursive writing, which was more of a flow for him (*id.*). The teacher noted that around that time, the student was not misspelling as much, and he was reading more fluently (*id.*). The teacher testified that she also saw academic progress in reading and in math (Tr. p. 1528). His memory of multiplication tables improved (Tr. p. 1527-28). Behaviorally, he displayed more compassion towards another student that he had previously bullied (Tr. pp. 1526-27). The teacher testified that when she connected the student to a neurotypical cohort that was a grade ahead of him during recess and lunch, the student progressed from trying to "push [the other student's] buttons" and getting angry or defensive, to softening in a way that his reactions were more appropriate (Tr. pp. 1529-30). Instead of lashing out, he spoke with the teacher (about conflicts) and gained empathy to the point where the one-to-one aide did not need to interfere during recess because the student resolved his conflicts on his own (Tr. pp. 1530-31).

While the IHO found that Otto Specht lacked behavioral supports for the student, such as counseling or a behavior plan (IHO Decision p. 69), the student's teacher at Otto Specht reported that discipline was handled in a preventive way (Tr. p. 1531). The school tried to see the problem a student presented with—whether it was sensory or social—and then prompted the student ahead of time with regard to expectations (Tr. pp. 1531, 1533). In the student's case, the student loved being with peers (Tr. p. 1532). When he was not behaving appropriately with peers, he knew he would be removed from the situation and that he and the teacher would do something else, which the student wanted to avoid (*id.*). Although the teacher did not keep data, she noted that when the student first came to Otto Specht, they had to break up major altercations seven to eight times per week (Tr. pp. 1532-33, 1535, 1578). By the time the student left Otto Specht this happened only one time per week (Tr. pp. 1532-33). The teacher testified that the major difference was that at Otto Specht, the student was prompted before he got into situations (Tr. p. 1533). The teacher reported that the longer she knew the student, the more she knew about his behavioral triggers, which included spatial awareness and too much noise, so she could be proactive with him (Tr. pp. 1533-34, 1651-52). The teacher testified that socially and emotionally, Otto Specht changed the student for the better, as he improved his ability to self-regulate, improved his academic ability in reading, writing, and in math, and improved his ability to deal with authority figures and other adults as demonstrated by less confrontation (Tr. pp. 1535-36). Also, although the student did not work directly with a school counselor at Otto Specht, the school had a school counselor that observed the student and who worked with his teachers (Tr. p. 1775).

Further, the hearing record does not support the IHO's description of the student's behavior plan at Otto Specht as being one of isolation and removal. As noted earlier, the student worked one-to-one on his academics with his teacher at Otto Specht but slowly over time, moved into smaller group situations with more success (Tr. p. 1702). He also had a one-to-one aide provided by the public school district where Otto Specht was located (*see* Tr. pp. 1772-73). Further, the spring 2019 report from Otto Specht indicated that in addition to the one-to-one reading instruction two times per week with the reading specialist, the student attended a small group phonics class two times per week (Dist. Exs. 28 at pp. 6-7; 29 at pp. 6-7).

With regard to the student needing a one-to-one aide on the Otto Specht campus, testimony by the director indicated the school was an open campus (Tr. p. 1773). She noted it was important for the student to walk between different parts of the school, and when doing this, he needed to have somebody with him (Tr. pp. 1773-74). When the student had adaptive physical education or when he integrated into other classes, it was hard for him (Tr. p. 1774). He needed the one-to-one aide to be with him when he took breaks and during transitions which were difficult for him, because he was more excited and stimulated during these times (Tr. pp. 1594, 1774).

With respect to the IHO's finding that Otto Specht lacked an appropriate student cohort for the student during the 2018-19 school year, I note that the IHO appears to have rested this finding on an LRE concept and that the parents had not anticipated this change in the student body at the school, and that this was one of the reasons they chose to place the student at Longview the following school year (*see* Tr. pp. 697-98). Initially, 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]). Additionally, it is not always possible to know what students will show up to attend a school program. For example, taking into account LRE requirements, the Fourth Circuit has noted that a district could not "be said to have denied [a student] a FAPE merely because fewer students with disabilities enrolled at [the student's] school than [the district] anticipated" (R.F. v. Cecil County Pub. Schs., 919 F.3d 237, 247 [4th Cir. 2019]; see also Application of the Dep't of Educ., Appeal No. 11-050). Under these circumstances, it would be unjust to hold the parents to a higher standard than that applied to school districts (see C.L., 744 F.3d at 836-37).

Reviewing the evidence of the student's placement at Otto Specht, overall, the hearing record demonstrates that Otto Specht understood the student's needs and provided specialized instruction to address those needs. In light of all of the above, the parents' appeal of the IHO's finding with respect to the unilateral placement of the student at Otto Specht during the 2018-19 school year is sustained.

## **B. 2019-20 School Year**

The IHO found that the district failed to offer the student a FAPE during the 2019-20 school year, and further found that the parent's unilateral placement of the student at Longview was not an appropriate placement (IHO Decision at pp. 53-59, 70-78). The district cross-appeals from the IHO's finding with respect to its recommended program for the 2019-20 school year, and the parent appeals from the IHO's determination that Longview was not an appropriate unilateral placement.

### **1. Evaluative Information and Student Needs**

Initially, turning to the evaluative information available to the June 2019 and August 2019 CSEs, updated educational and psychological testing conducted during the 2018-19 school year reveals that the student's needs and abilities had remained consistent with the results of previous evaluations. Review of a January 7, 2019 neuropsychological evaluation report conducted by the same clinical psychologist who conducted the student's previous neuropsychological evaluation in 2016, summarized that the student was a boy of superior intelligence as assessed by the WISC-V General Ability Index (GAI) (compare Parent Ex. R at pp. 1, 22 with Dist. Ex. 22 at pp. 1, 19, 23). According to the report, the student presented with a learning disability, consistent with dyslexia (Dist. Ex. 22 at p. 19). The report noted, "[r]eading is a combined mental process of connecting visual stimuli (abstract symbols) and sounds (phonemes) and ultimately to derive meaning (morphemes)" (id.). The student always tried his best, but he struggled in many different areas (id.). It seemed that the root of the problem was the student's difficulty in the integration of phonemic and visual representations (id.). The report indicated the student had significant difficulty in breaking the symbol code of reading and writing (id.). Graphomotor difficulties were

noted as well (id.). The student's academic skills were not on par with his high intelligence (id.). The report indicated, "[w]e need to close this gap so that [the student] can realize his full potential. Unfortunately, the gap seem[ed] to be widening" (id.). The student presented with significant impulsivity, low frustration tolerance, distractibility, and variability in attention. (id.).

The January 2019 neuropsychological reevaluation report indicated that personality and projective testing showed that, while the student was well-grounded in the interpersonal world of family, the world of school had been a great challenge (Dist. Ex. 22 at p. 17). The report indicated the student developed negative feelings towards academic work because it was difficult for him, and he did not yet have the sense that he had the ability to do well (id.). Personality testing indicated a degree of negative feeling including anxiety (id. at p. 18). The student appeared to be emotionally reactive and emotionally sensitive (id.). Self-doubt and underlying feelings of inadequacy tended to become apparent to the point where the student might become despondent (id.). In moments of heightened anxiety, the student was more likely to misperceive events to form mistaken impressions of himself and others, and to misinterpret the actions and intentions of others (id.). The student's emotionality had a negative impact on his academic performance (id.). When academic demands increased, requiring greater independence in the learning environment, the student's anxiety also increased whereupon he tended to shut down (id.). His work could not reflect the full measure of his ability (id.). Time pressure caused the student to complete tasks in a state of anxiety and dissatisfaction whereby he felt overwhelmed, something that also affected his self-esteem (id.). Further, the January 2019 neuropsychological reevaluation report indicated that all the recommendations offered in the August 2016 psychological evaluation report, which were previously discussed herein, remained applicable (see Parent Ex. R at pp. 19-22; Dist. Ex. 22 at pp. 19-23).

## **2. June 2019 and August 2019 IEPs and CSE Process**

The CSE convened on June 24, 2019 for the student's annual review, and again on August 20, 2019, after it learned that the parent would enroll the student at Longview during the 2019-20 school year (see Dist. Exs. 27; 30; see also Parent Ex V).<sup>7</sup>

Review of the June 2019 and August 2019 IEPs revealed a listing of the updated test scores, but similar to the 2018-19 school year, as previously discussed, the IEPs for the 2019-20 school year did not include information explaining the connection between the student's disability to his behavior and coping style (see Dist. Exs. 27 at pp. 3-5; 30 at pp. 4-7). Both IEPs for 2019-20 indicated that academically, the student had needs in the areas of reading, writing, mathematics, speech-language skills, attention, fine motor skills, and emotional skills (Dist. Exs. 27 at p. 9; 30 at p. 11). With regard to management needs, the IEPs indicated the student needed the additional support of special education services to be successful in the regular education classroom, support with organization skills and attention skills, and a one-to-one teaching assistant to help monitor modifications and provide direct supports throughout the day (Dist. Ex. 27 at p. 10; 30 at p. 12).

The IHO reviewed this updated evaluative information and drew the conclusion that the district had failed to meet its burden to prove that the IEPs recommended for the 2019-20 school

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<sup>7</sup> The CSE had also convened for a requested review in March 2019 to review the results of the January 2019 neuropsychological evaluation report (Dist. Ex. 24).

year offered the student a FAPE, finding that for the 2019-20 school year the CSE had recommended the same program that the IHO had determined did not offer the student a FAPE for the 2018-19 school year and that the district again denied the parents participation in the development of the student's program (IHO Decision at pp. 53-59).

The IHO again discussed the CSE's recommendation in the "comments" section of the IEP for a building level general education AIS reading service in a small group setting that the IHO reasoned "was simply not a guarantee that the student's needs would be met" (*id.* at pp. 57-58). While the district appeals from the IHO's finding on this point, unlike the June 2018 IEP, neither the June 2019 IEP nor the August 2019 IEP included a recommendation for reading instruction (compare Dist. Ex. 13 at p. 20, with Dist. Exs. 27 at pp. 13-15; 30 at pp. 15-16). In reviewing the IHO's finding on this issue, it must be noted that certain additional instructional or supportive services may be available to special education students and non-disabled students alike (e.g., AIS or "building level services"), and according to the State Education Department, such general services should not be listed on a student's IEP (see "Academic Intervention Services: Questions and Answers," at pp. 5, 20, Office of P-12 Mem. [Jan. 2000], available at <http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf>). However, if a component of the AIS is provided to a student with a disability and that aspect of the service meets the definition of "specially designed instruction" under IDEA, the United States Department of Education's Office of Special Education Programs has clarified that services that clearly fall into the realm of special education are required to be listed on an IEP, stating in particular that "[t]he IEP Team is responsible for determining what special education and related services are needed to address the unique needs of the individual child with a disability. The fact that some of those services may also be considered 'best teaching practices' or 'part of the district's regular education program' does not preclude those services from meeting the definition of 'special education' or 'related services' and being included in the child's IEP" (Letter to Chambers, 59 IDELR 170 [OSEP 2012]; see Bd. of Educ. of Uniondale Union Free Sch. Dist. v. J.P., 2019 WL 4315975, at \*12 (E.D.N.Y. Aug. 23, 2019), report and recommendation adopted, 2019 WL 4933576 [E.D.N.Y. Oct. 7, 2019]; Urbandale Community Sch. Dist., 70 IDELR 243 [SEA Iowa 2017] [noting that "[i]nstruction becomes special education when it is designed or selected to meet the disability-related needs of an individual student and is necessary for that student to maintain or improve educational performance"]). In this instance, the district does not contend that the student did not require specialized reading instruction, or that the AIS services the student would have received was "specially designed instruction," which is defined in part, "as adapting the content, methodology, or delivery of instruction to address the unique needs of a student with a disability that result from the student's disability" (34 C.F.R. 300.39[b][3]), rather, the district asserts that in not considering the AIS services as a part of the student's recommended program, the IHO was "unnecessarily elevating form over substance" (Req. for Rev. ¶29). Accordingly, the district has not provided sufficient basis to depart from the IHO's determination that the failure to include specialized reading instruction as a recommendation on either of the student's IEPs for the 2019-20 school year denied the student a FAPE.

Additionally, the IHO reiterated that the clinical psychologist had recommended a small class with one-to-one instruction minimizing pull-outs with a homogeneous population of students, and that the district's assistant superintendent had agreed that the district's self-contained setting for students with language-based learning disabilities—which was never offered to the parents—fit the psychologist's recommendation (*id.* at p. 59). Among the reasons that the IHO found the

recommended IEP placements to be inappropriate was because in her view the district and the CSE, by "carving the parents out of the discussion" had deprived the parents of full participation in developing a program for the student (*id.*). Again, the district has not appealed from this portion of the IHO's decision and, therefore, it is final and binding on the parties (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]).

Accordingly, with regard to the 2019-20 school year the IHO's finding that the district did not offer the student a FAPE must be upheld.

### **3. Unilateral Placement at Longview**

The IHO found that the parents failed to demonstrate that the unilateral placement of the student at Longview for the 2019-20 school year was an appropriate program for the student (IHO Decision at pp. 70-78). The IHO summarized her basis for this finding as including a holding that there was insufficient evidence the student was provided with formal counseling or behavioral interventions while at the school, that the "judicial committee" participation may have been effective for the student but that it was insufficient to show progress with behaviors that continued throughout the school year, and most importantly that the parents had not shown that the school provided the "daily language based instruction" that had been recommended by the private clinical psychologist (*id.*).

Upon an independent review of the impartial hearing record, I find that the hearing record supports a finding that Longview was an appropriate unilateral placement for the student, in part because the student's special education needs with respect to his language-based learning disability as well as his social-emotional and behavioral needs, were addressed as set forth below.

#### **a. Reading Instruction**

A review of the hearing record reveals that Longview addressed the student's reading, spelling, writing, and language arts needs appropriately.

The assistant director of Longview, who also served as the head of the elementary portion of the school, testified that Longview offered multisensory instruction that included writing, verbal instruction provided by the assistant director and rephrased by peers (Tr. pp. 932, 938). The school used a lot of movement with students so that they were not sitting for a long period of time (Tr. pp. 938-39). In addition, specific to reading instruction, Longview had a special education instructor who came to the school once a week who used Orton-Gillingham and Wilson as well as a teacher who was trained in the Orton Gillingham method (Tr. p. 939). In addition to attending four language arts classes per week taught by the assistant director, the student had four language arts classes per week with a teacher trained in Orton Gillingham in a 2:1 setting (Tr. pp. 947-48, 1012). The student also received the assistance of the special education instructor trained in Orton-Gillingham who came to the school once a week (Tr. p. 1012). The student attended one special class in reading and one in math per week (Tr. p. 947-48).

A Longview report card for the first trimester of the 2019-20 school year indicated that the student passed all his classes (Parent Ex. F). Specific to reading skills, the student and reading skills instructor worked mostly from the "Barbara Wilson Orton-Gillingham" program, a

"multisensory program which involved the auditory (listening), visual (seeing) and kinesthetic (feeling or writing) senses for a student to better retain what he was learning (phonics applied to reading and writing)" (id. at p. 5).<sup>8</sup> During the fall trimester, the student worked on both one- and two-syllable words that ended with a vowel (hope, postpone, homesick) (id.). The report card indicated the student was a wonderful worker and had completed the entire multi-sensory program each class period (id.). The reading instructor reported being pleased with the student's progress, and advised that it was important that the student continue doing his homework which provided the practice and reinforcement of the weekly lessons (id.). The same section for reading skills instruction indicated that for the next trimester, the student would be working on suffixes in one- and two-syllable words, the "-ed" suffix which had three different sounds and words that had two suffixes (id.). The reading skills instructor looked forward to continuing working with the student (id.).

With regard to a class titled "Wilson Reading and Writing," the same first trimester report card indicated that using the techniques and materials from the Wilson Language Program, the class supported students in further developing their reading, writing, and spelling skills (Parent Ex. F at p. 6). The report indicated that the student was a creative and prolific writer with an outstanding vocabulary (id.). He could be easily distracted in class, but with guidance the student redirected his focus to the task at hand (id.). According to the report, the student was obviously more interested in writing than reading, but when a drawing component was added to the reading practice (time-limited sketches to describe the events of what happened in the story), the student became less resistant (id.). The report indicated that since the student was naturally playful, incorporating some element of fun had been the key to keeping his interest on some of the drier subject matter presented in class (id.).

The first trimester report card included a detailed description of the language arts skills the student worked on during the trimester as well as progress the student made and the learning strategies employed in the student's language arts classes (Parent Ex. F at pp. 2-3). The Longview trimester 1 report indicated that students read and used an identified book to study four main areas: spoken language, comprehension, word decoding, and grammar (id. at p. 2). According to the report, once each week, students were asked to read a certain number of chapters and prepare a role for the "Literacy Circle," which was a collaborative discussion based on the work students had done outside of class (id.). This part of language arts covered spoken language and comprehension as well as word decoding (id. at pp. 2-3). The other language arts classes focused on teaching grammar and applying what the students had learned to writing assignments (id. at p. 3). The first trimester report indicated that the student could discuss his ideas in a group, giving reasons for his thoughts (id.). The report described the student's vocabulary as "amazing," and noted he could discuss the meanings of words and use different strategies to find them (id.). The report noted that the student found it easier to guess the meaning of a word using context rather

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<sup>8</sup> Testimony by the district's assistant superintendent indicated that Barbara Wilson was trained in Orton-Gillingham by the same person who trained the district's consultants, and that the Wilson reading system was based on the same principles as Orton-Gillingham (Tr. pp. 216-17). The assistant superintendent noted that Barbara Wilson codified her Orton-Gillingham training into a curriculum (scope and sequence) for ease of dissemination to educators (Tr. pp. 216-17; see Tr. pp. 1027-028). Presumably, the correct name of the reading program used with the student at Longview was the Wilson Reading System (Wilson) and not the "Barbara Wilson Orton-Gillingham" program. Testimony by the assistant director of Longview indicated the student received reading instruction in both Orton-Gillingham and Wilson (Tr. p. 1011; see Tr. pp. 1027-028).

than finding the correct definition in a dictionary (id.). According to the report, the student's inference skills were very well developed (id.). He could draw inferences such as a character's feelings, thoughts, and motives from their actions (id.). He could predict what might happen from the details which were stated as well as implied (id.). The first trimester progress note for language arts indicated the student had a great start to the year (id.).

The hearing record also contains a Longview report card and progress report for trimester 2, which included a detailed description of the reading skills instruction the student worked on during the trimester as well as progress the student made and the learning strategies employed in the student's reading skills class (Parent Ex. G). For the second trimester, the student received a passing grade for all of his classes (id. at p. 1). The Longview second trimester progress report indicated that the student continued to use the "Barbara Wilson's Orton Gillingham Reading Program" (id. at p. 5). According to the progress report, the student's reading instruction consisted of working on words with different suffixes and included words with both one and two suffixes (id.). In addition to learning to read these words, emphasis had been on learning to spell them as well (id.). The progress report indicated that the student's reading instruction also addressed learning how to spell words that used to have a silent e in them, such as words with old, ost, olt, ild, ind in them (id.). At the time of the second trimester report, the student knew how to write all the capital letters in script, something that was incorporated into his writing (id.). The second trimester report indicated that it was anticipated for the next trimester that the student's reading instruction would address learning to both read and spell words ending with various consonants and le, i.e. dribble, staple (id.). This included knowing when the vowel was long or short so the student would know if the consonant was doubled or not (id.). The progress report indicated that if there was time, instruction would also address learning to read and spell words with both a hard and soft sound of c and g, for example: rice, calendar, gentle, gave (id.). According to the progress report, the reading skills instructor was pleased to see at the time that the student had taken responsibility to do his assignments on time, so that instruction could continue to move ahead more quickly (id.). The reading skills note suggested that the student should be proud of how hard he worked when in class with the reading skills instructor (id.).

The second trimester report also indicated that for the "Wilson Reading and Writing" class, techniques and materials from the Wilson Language Program were used to support students in further developing their reading, writing, and spelling skills (Parent Ex. G at p. 6). The progress report indicated that the student had been cooperative and engaged in class during the second trimester (id.). It noted that he was willing to work on his creative writing as he felt very confident in this area (id.). However, the report also noted that when asked to do something he felt less confident about (such as spelling), the student was less enthusiastic (id.). According to the report, despite some initial grumbling, most times he was able to sit and work diligently on what he was being asked to do (id.).

A Longview final report card reflected that the student passed all of his classes for the 2019-20 school year (Parent Ex. I). Report card comments indicated that, similar to the previous trimester reports, for reading skills instruction the student and instructor worked mostly from the "Barbara Wilson Orton-Gillingham" program which included learning through a multisensory approach (visual, auditory, and kinesthetic [writing]) (Parent Ex. J at p. 7). For the third trimester the student's reading instruction covered the following phonetic skills in both 1, 2, and 3 syllable words: words ending in silent e, words with common 1 and 2 suffixes, and knowing when words

have a short or long vowel sound that ends with a consonant followed by -le, (as in dribble and staple) (id.). Instruction addressed starting to learn when a "c" sounded like a "k" or an "s," and also when a "g" sounded like a "g" or a "j" (id.).

The Longview final report card comments indicated that that for the Wilson Reading and Writing class most of the student's lessons encompassed steps five and six in the Wilson Reading System including discussions on syllables, antonyms/synonyms, and y as a vowel at the end of a two-syllable word (Parent Ex. J at p. 8). Class instruction included a combination of spelling rules, high-frequency words that did not follow the rules, dictation, creative writing, and reading for fluency and comprehension (id.). Final report comments noted that the student had a very successful year in the class (id.). The comments indicated the student was "a wonderful writer possessed of a vivid imagination with an endless stamina for storytelling" (id.). In addition, the report card comments indicated that the student's reading fluency had improved greatly over the course of the year (id.). According to the comments, the student's least favorite aspect of class was spelling; however, with recurring practice, he had been able to make some strides in this area as well (id.).

With regard to the student's language arts class, the final report card comments indicated that the student was an active participant during language arts and especially liked to discuss what he had read (id.). He formulated his own ideas about or conclusions from texts in a very concrete manner (id.). He was able to identify the motivations of characters and could draw inferences in a fictional story (id.). He could read simple unfamiliar texts largely without errors (id.). According to the report card comments, the student read longer words somewhat hesitantly and often required the help of the teacher to decode them (id.). Even though the student's reading skills improved throughout the year, he still needed constant practice to become more fluent and expressive when reading out loud (id.). However, the report card comments indicated that the student's overall reading skills had improved (id.). After reading texts, the student could summarize important details and share his thoughts about them with others (id.). During discussions in the Literacy Circle, the student was able to participate appropriately when working with an aide (id.). Still, he could get distracted and made off-topic comments when he was not being redirected to the discussion (id.). According to the report card comments, during creative writing classes the student worked one-on-one with an aide to help him with his spelling and overall set up of the story (id.). He had good sentence structure, imagination, and creativity (id.). Throughout the year, the student had been diligently practicing spelling and his attempts at writing words correctly were becoming more successful (id.). However, his spelling had not yet been consolidated (id.). The report card comments indicated that since he had a hard time applying the rules he had learned independently, the student needed help writing down his thoughts (id.). The comments indicated that overall, the student had a successful year in language arts and had shown a real talent for imaginative writing (id.).

Overall, the hearing record shows that Longview provided the student with specialized reading instruction in a small group four days per week, in addition to his language arts class (Tr. pp. 947-48, 1012). The reading instruction was provided by a teacher who was Orton Gillingham trained and employed the Wilson Reading System (Tr. 947; see Parent Exs. F at pp. 5,6; G at pp. 5, 6; J at pp. 6, 7). In addition, the teacher specifically targeted the student's deficits in decoding (Parent Exs. F at pp. 5,6; G at pp. 5, 6; J at pp. 6, 7). Based on the above I cannot agree with the

IHO that the parents did not show that the student received the language based instruction that he required.

### **b. Social-Emotional and Behavior Needs**

Turning to the IHO's determination that Longview did not provide the student with required behavioral interventions and that the student did not make behavioral progress at Longview, reviewing the program as a whole, the hearing record supports a finding that the student's social/emotional and behavioral needs were sufficiently addressed during the 2019-20 school year for the reasons set forth below.

The assistant director of Longview reported that she did not recall if Longview established any type of BIP for the student (Tr. p. 1034). She confirmed that at the elementary level Longview did not have a social worker, psychologist, or guidance counselor on staff (Tr. p. 1052). The hearing record also did not include data with regard to tracking or monitoring the student's behaviors at Longview. However, review of the testimony of the assistant director at Longview revealed that Longview addressed the student's behavior with an awareness of his disabilities and his needs.

Consistent with the summary of the student included in the January 2019 neuropsychological reevaluation report, previously discussed, the assistant director of Longview described the student as very enthusiastic, knowledgeable about a lot of different things, and interested in the world around him (Tr. p. 933). The assistant director testified that the student had a "thick wall" that did not let a lot of people in, but he was "really caring" once he let his guard down (Tr. pp. 933-34). Academically, the assistant director described the student as an artist and a writer (Tr. p. 933).

In describing Longview, the assistant director indicated that the school was a democratically run school whereby teachers, adults, and children were equal and followed the same rules within the school community (Tr. p. 934). The school functioned "on the base of a one room system," meaning there was a school meeting once a week that was run democratically where all members of the community voted on a variety of issues, for example the rules of the school, proposed trips, and the curriculum (Tr. pp. 943-35). The assistant director reported that Longview was a small school of approximately 30 students ranging from "K to 12," and classes were very small, comprised of two to eight students (Tr. p. 935). Classes were chosen based on student interests, so that students had a "high say" in the topics being taught within the confines of the curriculum (Tr. p. 935; see Tr. 941-42, 944-45, 983-84). Every student took core classes in English, math, social studies, science, art, physical education, and a foreign language (Tr. p. 942-43). The assistant director indicated that as a teacher, she incorporated skills into the topics about which students wanted to learn (Tr. p. 942).

The assistant director testified that Longview had a very strong focus on the whole child (Tr. p. 935). She indicated that although academics were important to the school, there were other skills Longview focused on, such as self-regulation, knowing oneself, how each student learned best as a person, how to regulate social relationships, and how a student could best organize themselves (id.). The assistant director reported that Longview tried to help students reflect on their learning process and be part of their education through its mentoring system, a system in which each teacher at Longview had four student mentees (Tr. p. 936). A mentee met with their mentor



once a week or once every other week, depending on the mentee's needs (Tr. pp. 936-37, 955-56). According to the assistant director, the mentor meetings were run collaboratively (Tr. p. 937). For example, a mentor might observe a student encountering an obstacle, convey their observation to the student, and inquire as to "What's up?" (Tr. p. 937). The mentee would be given the opportunity to collaborate with the mentor to solve their personal and interpersonal problems both at school and in their day-to-day life (Tr. pp. 937, 955-56).

Testimony by the assistant director also indicated that the student was in the upper elementary group of Longview students within an age range of at least two years (Tr. p. 990). One of the student's "biggest developments" throughout the 2019-20 school year was in his social-emotional progress (Tr. pp. 948, 951). The assistant director reported that when the student first started at Longview, it was obvious to her that the student was "hiding behind a really thick wall," compensating for something that happened in his past by trying to be funny and making fun of other people (Tr. p. 948). Yet, his tendency at that time to make jokes at the expense of others in his effort to connect with peers backfired, because his peers were hurt by things he said that he thought were funny (Tr. pp. 948-49). The student worked on those skills with his mentor, learning that Longview was able to give him a community he could trust (Tr. p. 949). According to the assistant director, rather than blame the student if he lied, did things, or tried to blame another student for something that she observed the student do, the student learned as the year progressed that the systems and teachers in the school were on his side and were trying to help him (*id.*). The assistant director explained that Longview also attempted to help the student shift his personal narrative that he was a "bad person" to one where he could recognize he was not bad, that he was struggling and frustrated and it was difficult and that the school would help him make connections with others and hone skills he lacked (Tr. p. 950). The assistant director reported the student's peer interactions progressed, particularly with a student of similar level who the student initially tried to establish that he was better than (Tr. p. 952). Toward the end of the school year, the two students became friends that worked together (Tr. p. 950). The student had grown to see the other student as "an expert" in some areas and had taken his friend's advice (*id.*).

With regard to how discipline was handled at Longview, the assistant director testified that in addition to the mentoring system noted above, the school had a judicial committee that dealt with rule breaking and a mediation system that dealt with interpersonal conflict (Tr. pp. 953-54). As Longview was run democratically, students were part of the mentoring system which was staff driven, and also part of the judicial and mediation systems (Tr. pp. 953-55). The judicial committee consisted of four students and one rotating staff member (Tr. p. 960). Two of the student members—one who ran the meeting and the other who made sure consequences were followed—were selected for a two-month term through a voting system by the Longview community (Tr. p. 960). The other two student members of the judicial committee were randomly assigned by the school's director and changed every month, so that each student in the school had an opportunity to be on the committee throughout the year, functioning as if they were on jury duty (Tr. pp. 960-61). Since Longview was a democratic, egalitarian community, staff members could be written up if they broke a community rule, because when rules were passed through a school meeting, the entire school community had to adhere to the rules (Tr. p. 961).<sup>9</sup> Rather than

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<sup>9</sup> Testimony by the assistant director indicated a student wrote her up for the judicial committee for not cleaning up her lunch containers on the lunch table, as there was a "clean up immediately rule" (Tr. p. 994).

punishment, consequences were tied into the rule breaking while trying to figure out what a student was lacking (Tr. p. 967).

The assistant director indicated the student was brought into a mediation and positively resolved an issue with another student (Tr. p. 962). The student was also brought before the judicial committee about 30 times for rule infractions related to calling out and/or interrupting in classes, participation in classes such as not doing homework, and teasing (Tr. p. 963). The assistant director reported she saw a positive change in the student's behavior after receiving consequences from the judicial committee (Tr. pp. 969, 999). For example, one consequence the student received for asking attention-seeking questions at a weekly school meeting was that for a short period of time he was not allowed to ask any questions at the school meeting without running it by the assistant director first (Tr. pp. 969). As the school year progressed the student's questions became better questions, that the assistant director described as relevant and on point (id.). As a result of sitting on the judicial committee jury a couple of times, the student became adept at trying to understand what a person who had broken the rule was going through (Tr. p. 970). He asked good questions and tried to help students, especially those that were similar to him (id.). The student also proposed good consequences (id.). According to the assistant director, the student grew as a result of his participation on the jury and the student seemed to make the connection that the experience was about helping people take responsibility for themselves rather than being about punishment (Tr. pp. 970-71).

With regard to the student's overall behavioral progress at Longview, the assistant director testified that the student progressed in his ability to redirect his attention in classes by raising his hand in discussions and waiting his turn rather than shouting out answers (Tr. pp. 971-72). He was more focused, and his work was more detail oriented, particularly once the student and his aide established a strong connection (Tr. p. 972). According to the assistant director's testimony, at the beginning of the school year in the classes she taught the student he needed to be redirected to the topic about five or six times during a class (Tr. pp. 972-73).<sup>10</sup> By the end of the school year he needed to be redirected only twice per class (Tr. p. 973). Emotionally, the student made connections with teachers and students in the Longview community, and he appeared to feel more secure and confident about himself and his abilities (Tr. p. 975). The student's participation in classes and his work ethic increased, as did his stamina for staying on task and on a topic over a longer period of time (id.).

While the above analysis of how Longview addressed the student's social-emotional and behavioral needs focuses mainly on the testimony of the assistant director, the comments to the student's final report card also indicated that the student was making progress with respect to his behaviors (Parent Ex. J). For example, in arts/creativity, the comments indicated the student learned that "he always has something to learn and new ways to approach things," was working on changing his behavior, and had made some steps forward in his interactions with others (id. at p. 1). In geography-map skills, the student was described as having difficult dealing appropriately with peers as he tried to get attention from the class in inappropriate ways and he was also described as being unsuccessful working in groups due to distractibility (id. at pp. 1-2). In history, it was noted that at the beginning of the year, the student's enthusiasm had led to him talking over

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<sup>10</sup> The assistant director's testimony indicated she taught the student's classes in language arts, math, geography, and biology (Tr. pp. 933, 973).

peers but he had become more respectful of his classmates, learning to take turns and to raise his hand (id. at p. 2). In addition, consistent with the assistant director's testimony, the report indicated that the student had developed a friendship with another student with whom he had shared some animosity (id.; see Tr. p. 950). In math, the student began the year "unable to control himself"; however, the student and teacher formulated a warning system that reduced the number of the student's outbursts to a couple of times per class and afterwards the student excelled academically (Parent Exs. J at p. 5; F at p. 3). However, while the student's had strengthened his friendships during the course of the year, the student continued to struggle to engage appropriately with others so that he could work in a group (Parent Ex. J at p. 6). In physical education, the teacher worked with the student on controlling his frustrations and expressing his feelings in more positive and constructive ways, noting that the student made progress in this area (id. at p. 7).

In addition to the above, the hearing record indicates that the student received the support of a one-to-one aide during a portion of the 2019-20 school year. For the 2019-20 school year, the district had recommended that the student receive the support of a one-to-one teaching assistant "to help monitor his modifications and provide direct supports throughout the day" (Dist. Ex. 30 at pp. 12, 15). The parents sought to obtain services from the district where Longview was located, specifically a one-to-one aide; however, they were unable to obtain services because they missed the deadline for requesting services (Tr. pp. 211, 756, 926-27). The parents testified that the student's classes at Longview consisted of four or five students, with one and sometimes two teachers, as well as the student's one-to-one aide (Tr. pp. 716-17). The hearing record further indicates that a one-to-one aide began working with the student in December 2019 helping the student stay focused, with redirection, and as a support in classes (Tr. pp. 947-48). The comments to the Longview final report card also indicated that the student worked with a one-to-one aide throughout the year, repeatedly noting the supports provided to the student by an aide (see Parent Ex. J).

In sum, while the hearing record does not include a lot of detail regarding the special education instruction that was specially designed for the student at Longview, and shows that much of the evidence of the student's progress at Longview was not objective; it appears that the student benefitted from the overall design of the program, addressing both the student's needs in the area of reading and writing and as to the student's behaviors and social-emotional needs, to the extent described above. Based on the foregoing, the totality of the circumstances presented in this case, supports finding that Longview sufficiently addressed the student's needs such that the parents met their burden to establish that Longview provided the student with instruction and services specially designed to meet his unique needs.

### **C. Equitable Considerations**

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect

to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The IHO determined that equitable considerations "would limit the relief requested by the parents" (IHO Decision at pp. 78-81). Beginning with considerations relevant to the 2018-19 school year, the IHO noted that there was no evidence in the hearing record that the parents provided the required ten business day notice prior to removing the student from the public school (id. at p. 80). However, as the parents correctly contend, there is evidence in the hearing record that shows that the written notice existed, was provided to the district, and was discussed by the parties during the impartial hearing—the failure to enter the notice into evidence appears to have been an oversight (see Tr. pp. 743-47; IHO Decision at p. 45). Moreover, a copy of the written 10-day notice was attached to the parents' request for review as additional evidence and in its answer with cross-appeal the district acknowledged receipt of the notice, which I will accept and consider as necessary to render a decision.<sup>11</sup> Accordingly, I find that there are no equitable

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<sup>11</sup> Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). It is clear from the hearing record that this evidence was available at the time of the impartial hearing, and that the parents attempted and intended to enter the document into the impartial hearing record at that time (see Tr. pp. 743-47). The parents have attached

considerations with respect to the parents' notice of their intention to unilaterally place the student at Otto Specht during the 2018-19 school year that would warrant a reduction or denial of tuition reimbursement.

Next, the IHO considered concerns she had with respect to the parents' cooperation and conduct during the development of the student's IEP for the 2018-19 school year (IHO Decision at p. 80). The IHO noted that the parents had made it clear that they would not consider any district placement for that school year due to their concerns for the student's safety and that this "rigid position made the parents less inclined to fully cooperate with the district" (*id.*). On appeal, the parents contend that their concerns for the student's safety were entirely warranted given events that had occurred in the district during the 2017-18 school year, which were not at issue during this proceeding. Nonetheless, a review of the hearing record overall does not otherwise support a finding that the parents were overly rigid or obstructive to the district's efforts to develop an IEP for the student, and I note that the parents' pursuit of a private placement to the exclusion of a district offer is not a basis to deny tuition reimbursement on equitable consideration (*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 IHO determined that the parents evidenced a lack of cooperation in that they denied the district consent to conduct an observation of the student while he attended Otto Specht and had withheld a contemporary evaluation that had been conducted by the school district in which Otto Specht was located (IHO Decision at p. 80).<sup>12</sup> With respect to consent for an evaluation and an observation of the student, it can be gleaned from the hearing record that the parents did not consent to an observation of the student by district personnel at Otto Specht, however a thorough psycho-educational re-evaluation of the student was conducted by the district at a district school in February 2018, while the student was attending Otto Specht (*see* Tr. pp. 400-05, 663-67; Dist. Ex. 11). In addition, while the lack of an observation limited the district in obtaining information as to how the student was functioning in his class at Otto Specht, the June 2018 IEP indicates that the district was provided with progress reports from the student's teachers at Otto Specht (Dist. Ex. 13 at p. 2).

In light of the above, I decline to overturn the IHO's finding that equitable considerations "would limit" the parents' requested relief; overall, the hearing record supports a 15% reduction in reimbursement for the cost of the student's attendance at Otto Specht for the 2018-19 school year.

The next equitable consideration addressed by the IHO concerned both the unilateral placement at Otto Specht during the 2018-19 school year and the unilateral placement at Longview

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a copy of the email from the student's mother to the district assistant superintendent dated August 13, 2018, stating that it constituted a 10-day notice of intention to unilaterally place the student as "SRO Appeal Exhibit B" to their request for review. I will accept and consider this additional evidence as necessary to render a decision.

<sup>12</sup> The IHO did not cite to any specific portion of the hearing record in making this finding, but I note that consent for an observation and evaluation of the student was discussed during the impartial hearing (*see* Tr. pp. 400-05, 663-67).

during the 2019-20 school year (IHO Decision at p. 81). The IHO found that the parents had not placed any evidence in the hearing record concerning the costs and payment arrangements for either of the private school placements, that there were no tuition contracts or invoices in the record, and that without evidence that the parents had incurred a financial obligation it would be inequitable to order the district to reimburse the parents for costs for which they had not demonstrated an obligation (id.).

Initially, I note that the parents' due process complaint notice initiating the impartial hearing set forth the specific amount of reimbursement sought for each school year. The parents requested tuition reimbursement in the amount of \$35,200 for the cost of the student's attendance at Otto Specht during the 2018-19 school year (Parent Ex. H at p. 8). The parents requested tuition reimbursement in the amount of \$9,300 for the cost of the student's attendance at Longview during the 2019-20 school year as well as a further \$12,918 for the cost of a one-to-one aide provided at parent expense (id. at p. 9).<sup>13</sup> This put the district on notice of the amount of reimbursement requested by the parents for the school years in question. As the parents note in their request for review, the district has not contested—either during the hearing or in its cross-appeal—the cost of either placement or whether the parents had paid tuition or were obligated to do so.

Nonetheless, the parents have submitted additional evidence attached to their request for review in the form of several documents that demonstrate the amounts paid by the parents to Otto Specht for tuition and costs, to Longview for tuition, and to an agency for the cost of the one-to-one aide (see Req. for Rev. Ex. C). For its part, the district contends that the parents should have submitted this information at the impartial hearing subject to cross-examination. However, the district does not now contend that the information is inaccurate or otherwise inadmissible, and the inclusion of the amounts requested in the parents' due process complaint notice removes any prejudice suffered by the district in admitting the evidence as offered at this time. Accordingly, I will accept and consider the parents' additional evidence submitted as "SRO Appeal Exhibit C" attached to their request for review as necessary to render a decision.

In light of the above, I find that any lack of evidence with respect to the amount of tuition reimbursement sought by the parents does not constitute an equitable consideration that would not favor an award of tuition reimbursement and reverse the IHO's decision to the extent required.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years and having found that the IHO erred in finding that Otto Specht, during the 2018-19 school year, and Longview, during the 2019-20 school year, did not address the student's special education needs, and finding that equitable considerations warrant a reduction only as to the relief awarded for the 2018-19 school year, the necessary inquiry is at an end.

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<sup>13</sup> The parents' post-hearing brief sets forth a different amount of reimbursement requested for the cost of the one-to-one aide during the 2019-20 school year: "\$22,218" (see Petitioner's Closing Brief at p. 17). This discrepancy will need to be remedied upon presentation to the district of proof of the actual amount paid by the parents.

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

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

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the undated decision at issue in this matter is modified by reversing that portion which found that Otto Specht was not an appropriate placement for the student for the 2018-19 school year and that Longview was not an appropriate placement for the 2019-20 school year; and

**IT IS FURTHER ORDERED** that the district reimburse the parents for 85% of the costs of the student's tuition at Otto Specht for the 2018-19 school year upon proof of payment; and

**IT IS FURTHER ORDERED** that the district reimburse the parents for the costs of the student's tuition at Longview and for the cost of a one-to-one aide for the student for the 2019-20 school year upon proof of payment.

**Dated:**            **Albany, New York**  
                         **June 18, 2021**

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**