



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-109

**Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

**Appearances:**

Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Nathaniel R. Luken, Esq.

Law Office of Deborah Ezbitski, attorneys for respondent, by Deborah Ezbitski, Esq.

### DECISION

#### I. Introduction

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

#### II. Overview—Administrative Procedures

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

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

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

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

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

The student was reportedly born with spina bifida, "severely crossed eyes" and hydrocephalus and underwent multiple surgeries to address issues with her eyes, ears, skull and spina bifida (Parent Exs. B at p. 1; DD at p. 1). Although the student was "very late" in achieving motor milestones, by age five she was able to walk without support (Parent Ex. B at p. 1). Beginning in kindergarten, and continuing through fifth grade, the student attended an integrated

co-taught class of 32 students as one of eight students with an IEP (Parent Ex. B at pp. 2, 14).<sup>1</sup> In addition to integrated co-teaching (ICT) services, the student has received related services of OT, PT, and speech-language therapy, and adapted physical education; she has also received the support of a full-time individual paraprofessional (Parent Exs. N at pp. 10-13, 15-16; P at p. 1; Q at pp. 6-7, 10; T at p. 1; B at pp. 2, 14).

In January 2019, the parent signed consent for new testing and assessments as part of a requested reevaluation (Dist. Ex. 1). The consent form indicated that the process may include a psychoeducational evaluation, a classroom observation, and other appropriate assessments or evaluations as necessary to determine the student's educational needs (Dist. Ex. 1). The district conducted an educational evaluation in January 2019 as part of the student's triennial evaluation (Dist. Ex. 4 at pp. 1-2).

A CSE convened on February 8, 2019, to conduct a triennial review and develop the student's IEP (Dist. Exs. 6; 8; 9 at p. 1).<sup>2</sup> According to a prior written notice dated February 14, 2019, the CSE found that the student continued to be eligible for special education and related services as a student with an other health impairment and recommended ICT services in a district school, an individual health paraprofessional, and related services of group OT, group PT, group speech-language therapy, and individual speech-language therapy for the 10-month school year (Dist. Ex. 9 at p. 1).<sup>3</sup>

Following the meeting, the parent sent the district a letter dated February 14, 2019 in which he shared his concerns regarding the student's progress in reading, writing, and math and regarding the recommended ICT services (Parent Ex. CC; Dist. Ex. 8). The parent opined that the student had not been successful in this setting and it was clear that she was not in an environment where she could thrive academically, that the meeting did not result in any meaningful changes to the student's IEP, and that he did not feel his concerns were addressed (Parent Ex. CC; Dist. Ex. 8). Additionally, the parent shared that he disagreed with the January 2019 educational evaluation performed by the school psychologist as it failed to capture the student's difficulties or assist in her educational planning and requested an independent educational evaluation (IEE) at the district's expense (Parent Ex. CC; Dist. Ex. 8).

On or about March 9, 2019, the parent obtained a private psychoeducational evaluation to assess the student's then-current level of functioning and to assist in future planning (Parent Ex. B at pp. 1-18).

On March 20, 2019, the CSE reconvened to conduct a requested review of the student's IEP (Dist. Ex. 10 at p. 1; 12; 13 at pp. 1-24). Finding the student remained eligible for special education and related services as a student with an other health impairment, the CSE recommended

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<sup>1</sup> The student repeated first grade (see Parent Ex. A at p. 7; N at p. 1).

<sup>2</sup> The school psychologist explained that the CSE meeting was originally scheduled for January 31, 2019 but was changed to February 8, 2019 to accommodate the parent and that the attendance page incorrectly included the original meeting date (Tr. pp. 86-87).

<sup>3</sup> The February 2019 IEP was not entered into evidence.

ICT services in the student's core academic classes, a full-time individual health/ambulation paraprofessional, special transportation, and related services of two 30-minute sessions per week of OT in a group of three, one 30-minute session per week of PT in a group of three, one 30-minute session of individual speech language therapy in the classroom, two 30-minute sessions per week of individual speech language therapy in a separate location, and one 30-minute session per week of speech language therapy in a group of three (Dist. Ex. 13 at pp. 1, 16-18, 21-23; 14 at p. 1). In addition, the March 2019 CSE added five periods of special education teacher support services (SETSS) for ELA and transitioned the student into regular physical education from adapted physical education (Dist. Ex. 13 at pp. 4, 6).<sup>4</sup>

In a May 21, 2019 prior written notice, the district informed the parent of the recommendations of the March 2019 CSE (Dist. Ex. 14 at pp. 1-3).

On May 26, 2019 the parent executed an enrollment contract for the Aaron School for the 2019-20 school year (Parent Ex. J at pp. 1-4).

In a June 17, 2019 letter to the district, the parent stated that he had not received a copy of the student's IEP nor had he received an appropriate placement recommendation for the 2019-20 school year (Parent Ex. BB). The parent also informed the district that he had signed a contract with the Aaron School for the 2019-2020 school year to ensure a place for the student in case the district did not offer an appropriate program/placement (*id.*). The parent advised the district that he would enroll the student in an appropriate district program if one was offered, but if one was not it was his intention to send the student to the Aaron School and seek tuition reimbursement at public expense (*id.*).

In an August 2019 letter to the district, the parent reiterated his concerns from his June 2019 letter and stated that he had not received a copy of the student's IEP, a prior written notice, a placement recommendation, nor the final report card for the student and therefore he was left with no alternative but to unilaterally place the student at the Aaron School for the 2019-2020 school year and seek reimbursement for the placement from the district (Parent Ex. I at pp. 1-2).

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

By due process complaint notice dated November 1, 2019, the parent alleged that the district denied the student a FAPE for the 2019-20 school year (Parent Ex. A). According to the parent, the CSE failed to collect data using a variety of sources and strategies and neglected to review or discuss any evaluative data at the meeting to assist in determining appropriate IEP content for the 2019-20 school year; failed to conduct evaluations for all known and/or suspected disabilities; failed to conduct assessments to identify specific learning disabilities; and failed to conduct a complete educational evaluation, complete psychological evaluation, occupational therapy assessment, physical therapy assessment, speech-language assessment, assistive technology assessment, auditory processing evaluation, and social history, as well as failed to evaluate and identify disabilities as required to discuss promotion criteria (Parent Ex. A at p. 5).

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<sup>4</sup> In this case, SETSS was described as direct instruction of the student by a special education teacher in a group not to exceed eight students (Tr. pp. 101, 122, 365, 424).

Next, the parent argued that the CSE failed to address, discuss, or articulate the New York State grade-level general education curriculum requirements and standards for fifth and sixth grades; did not appear to have any knowledge of the New York State sixth-grade level general education curriculum requirements or standards; and did not appear to have knowledge of other district programs and/or resources, and that these were not discussed or considered (Parent Ex. A at p. 2). The parent alleged that the district representative at the CSE meeting did not meet the necessary criteria as defined by applicable federal and State education law and that the CSE failed to interpret or discuss the educational evaluation performed by the school psychologist and failed to interpret, discuss, consider, or apply the private psychological evaluation data to the IEP development and showed no comprehension of the psychological qualitative or quantitative evaluative data (id. at pp. 2-3).<sup>5</sup> In addition, the parent argued that CSE members left the meeting early and did not fully participate in the IEP development and that while the CSE agreed to reconvene in May 2019 to assess progress, the CSE was not reconvened before the school year ended (id. at p. 3). The parent argued that the CSE denied the parent equal, meaningful participation in the IEP development and failed to provide the parent with a copy of the procedural safeguards notice (id. at p. 6).

The parent argued that the district failed to provide the parent with a prior written notice and a copy of the IEP, failed to provide an IEP to the appropriate parties at the beginning of the 2019-20 school year, failed to provide program and placement recommendations for the 2019-20 school year, and failed to provide a copy of the attendance sheet with signatures (Parent Ex. A at p. 2).

In addition, the parent argued that the IEP was not developed in a way that was reasonably calculated to confer educational benefit, enable measured and meaningful progress or meet all the student's unique needs, was not appropriately ambitious in light of the student's circumstances, and that the annual goals and measures reflected low expectations and were not within the context of New York State grade-level standards (Parent Ex. A at p. 3). The parent argued that the annual goals were generic, inadequate and were not written to enable meaningful progress towards New York State grade-level curriculum and academic standards; that the accompanying criteria and methods were vague, generic, and were not reasonably calculated to confer educational benefit; and that the schedules were inadequate and not reasonably calculated to confer educational benefit (id. at p. 4). In addition, the parent argued that the CSE failed to address how to close any grade-level or functional gaps (id.).

The parent alleged that the CSE fail to consider or implement specially designed instruction and that the CSE representatives did not appear to know of any specially designed methods of instruction to meet the student's unique needs (Parent Ex. A at p. 6). In addition, the parent alleged that the CSE failed to provide the student with a continuum of services wherein she would be placed with students grouped by similarity of individual needs (id. at p. 5).

The parent argued that the student's placement at the Aaron School was appropriate (Parent Ex. A at pp. 6-9). As relief, the parent requested reimbursement of tuition for the Aaron School

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<sup>5</sup> Although referenced as a "neuropsychological" assessment at times, the IEE obtained by the parent was not a neuropsychological evaluation.

from September 2019 through June 2020, door-to-door special transportation for the 12-month school year and reimbursement of any costs of transportation that were incurred during the 2019-20 school year, reimbursement for the cost of the independent educational evaluation (IEE) conducted in March 2019, and payment, compensatory education and related service authorizations (RSAs) for related services from the 2019-20 school year (id. at p. 9).

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

An impartial hearing convened for status conferences on four days commencing on January 7, 2020 and concluding on April 27, 2020, and the parties thereafter proceeded to the evidentiary portion of the impartial hearing on May 22, 2020 which concluded on July 15, 2020 after 10 additional days of hearings (Tr. pp. 1-454).<sup>6</sup> In a decision dated April 6, 2021, the IHO found that the district failed to meet its burden to prove that it provided the student with a FAPE for the 2019-20 school year and that the "big picture" fault was the district's dismissal of the recommendations of the clinical psychologist to shift the classroom environment away from the ICT setting (IHO Decision at pp. 17-18). The IHO disagreed with district's argument that its evaluation of the student was comprehensive and that it had sufficient evaluative materials to make the recommendation for an ICT setting, which he found was at odds with the strong opinions of the parent's private clinical psychologist and whose opinions he gave "controlling weight" (id. at p. 18). The IHO noted the parent's concerns regarding the student's progress and evidence that the student was below grade level and "below standards," and stated that given the ongoing nature of the student's difficulties and the precise recommendations of the clinical psychologist, the district was in error in "not considering a smaller setting with specialized instruction" (id. at pp. 19-20). The IHO cited the clinical psychologist's IEE and reasoned that if a student's placement was not providing meaningful benefits and a more restrictive placement was likely to do so, the district should place the student in the more restrictive setting (id. at p. 20).

With regard to the parent's unilateral placement, the IHO found that the Aaron School provided suitable educational instruction specially designed to meet the unique needs of the student, supported by the services as were necessary to permit her to benefit from instruction and that there were no issues with the equities in this case (IHO Decision at pp. 26, 28).

The IHO also found that the record showed that, contrary to the district's assertion, the parent disagreed with the district's educational evaluation and argued that a new evaluation was essential (IHO Decision at p. 29). The IHO noted that, in response, the district neither paid for the independent educational evaluation (IEE) nor commenced an impartial hearing to contest it and therefore the parent was entitled to an IEE at public expense (IHO Decision at p. 29).

As relief, the IHO ordered the district to provide reimbursement or direct funding for tuition at the Aaron School for the 2019-20 school year and the cost of the IEE (IHO Decision at p. 30).

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

The district appeals and argues that the IHO erred by finding that the district failed to recommend an appropriate program for the student for the 2019-20 school year. The district

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<sup>6</sup> May 28, 2020 was a status meeting without witness testimony (see Tr. pp. 133-140).

maintains that it had sufficient evaluative material and that the February 2019 CSE had a classroom teacher report, an updated educational evaluation, an OT progress report, and a speech-language progress report. In addition, the district contends that the CSE reconvened for the purpose of considering a private evaluation obtained by the parent and thus, it followed that the CSE had evaluative information in all necessary areas and the IHO erred in finding that it was insufficient. The district argued that it recommended the student receive ICT services, with a full-time individual paraprofessional, where the student could maintain contact with appropriate and positive peer models and access "the general education" and also access small group instruction. The district argues that the student continued to make progress in all academic areas, and that even if the IHO correctly noted "diminishing" progress, the district sufficiently addressed this concern by adding SETSS in ELA five times per week to address the student's reading challenges. The district asserts its view that the parent was "quite pleased" that the SETSS services were added. The district noted that the school psychologist testified that the team would have reconvened a CSE meeting if the addition of SETSS was not working and that the team saw no reason to do so.

The district argues that the IHO erred by finding that the student's placement at the Aaron School was appropriate. The district argues that the student required a substantial amount of OT, PT, and speech-language therapy and that the Aaron School was not providing the student with the amount of those services and paraprofessional support that the student required. In addition, the district contends that the program at the Aaron School was overly restrictive.

In an answer, the parent asserts that the district did not conduct a complete triennial evaluation as required and significantly impeded the parent's ability to participate in the decision-making process by failing to provide the parent with the February 2019 IEP and prior written notice, and the IEP and the prior written from the March 2019 CSE meeting.

The parent argues that the IHO correctly found that the district failed to recommend an appropriate placement for the student for the 2019-20 school year. The parent argues that the IEP prepared by the CSE was substantively inappropriate because it was not written to enable the student to make academic progress in the areas of her greatest need: reading, writing, and mathematics. The parent argues that, at the March 2019 CSE meeting, the CSE did not reconsider the recommendation of placing the student in a 32-student ICT classroom despite the recommendation of the clinical psychologist. The parent argues that the March IEP did not provide any annual goals designed to close the growing, two-year gap in the student's academic achievement.

Further, the parent argues that the IHO correctly found that the student's placement at the Aaron School for the 2019-20 school year was appropriate. With regard to restrictiveness, the parent noted the IHO's finding that "if a child's placement does not confer a 'meaningful benefit' to the student and a more restrictive program is likely to provide such a benefit, the child is entitled to be placed in that more restrictive program." Additionally, the parent noted that the IHO acknowledged that the student did not receive PT and small group OT and only had 30 minutes of individual speech-language therapy at the Aaron School, but found that the school was appropriate because it changed the learning environment and aligned it with the recommendations of the clinical psychologist.

## V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations



omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>7</sup>

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. Preliminary Matters**

Initially, the admissibility of evidence in this proceeding requires some clarification because there is no indication that the IHO complied with State regulations, which provide that "the impartial hearing officer shall attach to the decision a list identifying each exhibit admitted into evidence. Such list shall identify each exhibit by date, number of pages and exhibit number or letter. In addition, the decision shall include an identification of all other items the impartial hearing officer has entered into the record" (8 NYCRR 200.5[j][5][v]). Although acknowledging during the impartial hearing that "until I do a thorough review of the record, I won't be able to really assess the relevance" the IHO was not clear whether exhibits vaguely referenced as Parent Exhibits V, W, X, Y, Z, and AA were entered into evidence (see Tr. pp. 44-45, 414). Instead, they were briefly mentioned en masse to the extent that the district did not object to Parent Exhibits V,

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<sup>7</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

W, X, Y, and Z (Tr. pp. 191-92). Parent Exhibit V was the student's first semester grades from the Aaron School dated February, 2020, 1 page; Parent Exhibit W was the student's spring progress report from the Aaron School dated May 2020, 16 pages; Parent Exhibit X was student's math progress report dated May 15, 2020, 4 pages; Parent Exhibit Y was the student's second semester grades at the Aaron School dated June 2020, 3 pages; and Parent Exhibit Z was direct testimony of Beth Fried by affidavit, dated June 8, 2020, 5 pages. Some of these exhibits were referenced in the parties' closing briefs, and relied upon by the IHO, and, as they are relevant to the parent's case and offered during the impartial hearing, I find them admissible. Similarly, a document marked as Parent Exhibit AA was discussed during the impartial hearing, appears to have been the direct testimony by affidavit of Leore Riven dated June 10, 2020, 5 pages, which was discussed during the impartial hearing and the IHO had the witness swear an oath with respect to the contents of the document (Tr. pp. 219, 226-29). I similarly find this document admissible as it was referenced by the parties in their closing briefs and relied upon by the IHO in his decision and should have been marked as admitted into evidence in a list attached to the IHO's decision.

## **B. FAPE – March 2019 IEP**

### **1. Parent Participation**

Turning to the parent's claim that the district significantly impeded his ability to participate in the decision-making process by failing to provide him with the February 2019 IEP and prior written notice, and the IEP and prior written notice from the March 2019 CSE meeting, as described below, the hearing record does not support the parent's position in this case.

Among the procedural requirements in State and federal regulations is the requirement that a district provide parents of a student with a disability with prior written notice "a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a free appropriate public education to the student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1]). Pursuant to State and federal regulation, prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposed or refused the action; a description of the other options that the CSE considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action; and a description of the other factors relevant to the CSE's proposal or refusal (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]). Federal and State authorities do not specify how soon a school district must provide an IEP to a parent after a CSE meeting has occurred, and instead specify that at the beginning of each school year, a school district is required to have an IEP in effect "for each child with a disability in [its] jurisdiction" (20 U.S.C. § 1414[d][2][A]; see also 34 CFR 300.323[a]; Cerra, 427 F.3d at 194 ("the District fulfilled its legal obligations by providing the IEP before the first day of school"). Federal regulations specifically direct that a school district must have an IEP in place at the beginning of the school year (34 CFR 300.323[a]; see also Letter to Reyes, 59 IDELR 49 [OSEP 2012]). However, as noted previously, an administrative officer may find the procedural inadequacies were a denial of a FAPE only if they (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]).

The evidence on these alleged procedural violations is mixed. In his direct testimony by affidavit, the parent stated that he did not receive an IEP or prior written after the February 2019 CSE meeting (Parent Ex. DD at p. 6). However, the school psychologist testified that at the February 2019 meeting, the CSE officially finalized the IEP and that the district sent the parent the IEP from February along with the prior written notice (Tr. pp. 371-72). The hearing record includes the February 14, 2019 prior written notice which identified the CSE's recommendations but, as noted above, does not include a copy of the February 2019 IEP (Dist. Ex. 9 at p. 1).

The CSE reconvened in March 2019 to discuss the parent's concerns and the results of the parent-obtained March 2019 psychoeducational evaluation (Tr. p. 373; Dist. Ex. 13 at pp. 4-6; see Parent Ex. B). The school psychologist explained that the March 2019 IEP was a revision of the February 2019 IEP which was why there was only one IEP for the two meetings (see Tr. pp. 373-74). She testified that in March the CSE added SETSS as a program and information from the parent-provided psychoeducational evaluation and then finalized the IEP again and then "sent that" (Tr. p. 374). The school psychologist reported that there should have been another prior written notice as she believed it was automatically generated every time a document was finalized (Tr. p. 374). The record includes a May 21, 2019 prior written notice which includes the recommendations of the March 2019 CSE (Dist. Ex. 14 at pp. 1-3).

The school psychologist was asked if she recalled providing the March 2019 IEP and corresponding prior written notice to the parent and she responded that that it was the "next step" and stated that "[y]ou finalize an IEP, you print out the prior written notice and the IEP, and you send it home via the mail" (Tr. pp. 164-65, 384, 391-92). The school psychologist further explained that she worked with a family worker in her office and that as soon as she finished an IEP she would cross the child off her list, print the IEP, and hand it to the family worker who would put the postage on it and put it in the mail (Tr. pp. 165, 382-83). She noted that there was a box in the main office for "outgoing regular mail" (Tr. p. 165). The school psychologist testified that in the student's case she believed that staff did what was standard, which included the school psychologist printing out the IEP and prior written notice and handing them to the family worker, or paper clipping the documents, stapling them and putting them in a file folder for outgoing mail for the family worker to send out (Tr. pp. 382-83). The psychologist reported that the family worker would have "gotten the postage and all that" (Tr. p. 383). The school psychologist testified that if the prior written notice was not completed or finalized, the case was still open and so it was standard that the prior written notice and the IEP "always go out" (Tr. pp. 165-66).

New York law provides a presumption of mailing and receipt by the addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at \*9 [S.D.N.Y. Mar. 30, 2016]; Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]; see News Syndicate Co. v. Gatti Paper Stock Corp., 256 N.Y. 211, 214 [1931] [stating that the presumption is founded on the probability that the officers of the government will do their duty and the usual course of business]). As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing (T.C., 2016 WL 1261137, at \*9; Nassau Ins. Co., 46 N.Y.2d at 829-30; In re Lumbermens Mutual Casualty Co. v. Collins, 135 A.D.2d 373, 374 [1st Dep't 1987]; Gardam & Son v. Batterson, 198 N.Y. 175, 178-79 [1910] [stating that "the rule upon the subject requires . . . in the absence of any evidence as to its being deposited with the post office authorities, that the

proof shall establish the existence of a course of business, or of office practice, according to which it naturally would have been done"]; but see Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., 106 A.D.2d 725, 726 [3d Dep't 1984] ["It is necessary to prove by testimony of the person who mails them that letters are customarily placed in a certain receptacle and are invariably collected and placed in a mailbox."]). In order to rebut the presumption of mailing and receipt, the addressee must show more than the mere denial of receipt and must demonstrate that the sender's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (T.C., 2016 WL 1261137, at \*9; Nassau Ins. Co., 46 N.Y.2d at 829-30). The parent argues that while the school psychologist testified that she believed the IEPs and prior written notices were mailed to the parent in the normal course of business, she could not explain the two-month gap between the March 20, 2019 meeting date when the IEP was finalized and the May 21, 2019 date on the prior written notice package of placement suggesting that a mailing, if any, was not done in the normal course of business.

When questioned about the two-month delay in sending out the IEP and prior written notice, the school psychologist acknowledged that it "d[id] seem like [] quite a long time" but explained that she was the only school psychologist in a K-8 school and was "beyond inundated" and that there had been times when it had taken that long (Tr. p. 393). Additionally, the school psychologist acknowledged that the family worker was out on leave in June, although she could not recall the date, and she testified that "what would've happened then" was either the school psychologist herself or her social worker would have mailed it out (Tr. p. 394). Here, while the school psychologist identified a change from the usual course of action, she did explain how the "change" was handled in the normal course of business.

Under questioning by the IHO, the school psychologist testified that she was not familiar with the August 2019 parent letter that articulated the parent's concern that he had not received a copy of the student's IEP or a prior written notice and stated that it appeared the letter was sent to a "different" CSE office (Tr. pp. 395-97). The school psychologist stated that "just as we got the parent's emails prior, if a parent reaches out... we could email it to them or we could get it right over" (Tr. p. 396). With respect to the June 2019 parent letter addressed to the school principal, in which the parent stated that he had never received a copy of the March 2019 IEP, the school psychologist stated that she did not work in the summer and did not remember speaking with the principal about that letter (Tr. p. 400). She further testified that it was "unfortunate" if the principal had not told her about the letter because it was "something so simple" as to email an IEP (Tr. pp. 400-01).

Lastly, the school psychologist testified that the parent was given the right to fully participate in the CSE meeting and explained that the parent provided the CSE with documents of testing and attended the March 2019 CSE meeting with his advocate, who also was able to participate at the meeting (Tr. pp. 110-11). The IHO erroneously failed to make procedural findings in this case, but it does not necessitate reversal because the school district presented presumptive evidence of its procedures for mailing that the parent did not clearly rebut. There is no evidence that the district failed to have an IEP in place at the beginning of the school year as required by the statute, and the IEP itself reflected the parent's desire for a psychological (or neuropsychological) IEE and concerns that the ICT setting was insufficiently supportive in the academic area (Dist. Ex. 13 at pp. 4-6). While the parent and district did not ultimately reach

consensus, the evidence does not lead to the conclusion that the district significantly impeded the parent's opportunity to participate in the decision-making process.

## 2. Sufficiency of Evaluative Information

Next, the district argues that the IHO erred in concluding that the district lacked sufficient evaluative information, that the CSE reconvened for the purpose of considering the private evaluation obtained by the parent, and thus it follows that the CSE had evaluative information in all necessary areas. The parent asserts that the reevaluation of the student was insufficient.

With regard to the reevaluation of a student with a disability, Federal and State regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at \*12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The district sought consent to reevaluate the student on January 2, 2019 (Dist. Ex. 1). During the impartial hearing, the school psychologist testified that the February 2019 CSE review meeting was a "triennial" reevaluation and that in preparation for such a meeting the CSE always did a review of records, went through all of the student's special education documents in its "SEGIS" computer system, and gathered teacher reports; also, the providers did some updated informal testing (Tr. pp. 87-88). The school psychologist stated that she did not always do testing for all triennial evaluations but that in the case of this student she did do some brief academic testing in the areas of reading, writing and math (Tr. pp. 88-89). The school psychologist testified that the February 2019 CSE had available for consideration a January 2019 teacher report, a January 2019 PT clinical guide, a January 2019 educational evaluation, a January 2019 OT progress report, and a February 2019 speech-language progress report (Tr. pp. 93-99; see Dist. Exs. 2; 3; 4; 5; 7).

The January 2019 teacher report indicated that the student's estimated reading level was still at level Q, a fourth-grade equivalence, and that the student had not passed to the next reading level yet that year (Dist. Ex. 2 at pp. 1-2; see Parent Ex. R at p. 1).<sup>8</sup> The January 2019 report stated the student read slowly and carefully in two-to-three-word phrases and overall was fluent although her words per minute "could be higher" (Dist. Ex. 2 at p. 1). The teacher report indicated that literal and inferential comprehension questions were tough for the student, and that when reading independently the student appeared to read quickly and it was often unclear whether she understood what she had read (*id.*). According to the January 2019 report, then-current interventions and strategies included small group instruction, who/what/where practice, vocabulary previewing, chunking, and "retells" after a chapter (*id.*). The report also indicated the "want" for more partner reading (*id.*). Regarding mathematics, the January 2019 teacher report indicated the student was at a third to fourth grade equivalence and that she benefited from repetition with math concepts, needed reminders with problems involving larger numbers and multiple steps, needed word problems broken down, and benefitted from models and real-life contexts (*id.* at p. 2). The report also noted that due to the student's memory difficulty, recalling multiplication facts was challenging and that she had difficulty connecting concepts across days and when all math concepts for a unit appeared together (*id.*). With respect to written expression, the January 2019 report stated that the student was working on stretching out her narrative writing to include a clear beginning/middle/end, organizing her information in a cohesive way, and editing her writing for appropriate paragraphing, punctuation, syntax, and spelling (*id.*) The report also stated that it was hard to understand the student when she was speaking aloud as she spoke in a soft voice and did not enunciate her words (*id.*). In the area of classroom behavior, the student reportedly was hard working, participated and followed directions, and had a desire to please (*id.* at p. 3). In addition, the report stated the student was polite and listened to her teachers, got along with peers but did not seem to have close friends, and that her peers could sometimes be mean to her behind her back (*id.*). According to the teacher report, the student tried her best but had difficulty keeping up academically and her paraprofessional worked with her one-on-one which was described as "super helpful," (*id.*). However, the report also indicated that the student did not always like getting help from her paraprofessional and would want to try on her own and could be resistant to the help (*id.*). In summary, staff reported that with the support of her paraprofessional and other related services the student benefited from the ICT services and continued to make progress (*id.*).

The January 2019 PT clinical guide indicated that the student had shown improvement in her overall safety and standing balance; had progressed from adapted physical education to general education physical education; had shown more independence in managing her school materials, participating in classroom activities, and self-care; and although she still performed at a gross motor level lower than her peers, the student had shown significant improvement in safety during classroom transitions and overall independence by taking up less academic time to retrieve classroom materials (Dist. Ex. 3 at p. 1). The January 2019 PT clinical guide identified as areas of concern stair safety and higher-level coordination deficits and stated that intervention helped the student improve safety and gain efficiency during physically-related school activities (*id.*). Lastly the reporting therapist indicated that she had been able to meet with the student's classroom

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<sup>8</sup> The student's term 1 progress report for the 2017-18 school year indicated that the student was reading at a level Q, which was slightly below grade level at that time (Parent Ex. R at p. 1).

teachers, adapted physical education teacher, other related service providers, and the parent when needed to ensure carryover of skills and gains made with school-based PT (id. at p. 2).

According to the January 2019 educational evaluation report, in one-to-one testing, the student demonstrated she was able to read and decode grade level passages but struggled when given higher order reading comprehension questions (Dist. Ex. 4 at p. 1). With regard to mathematics, the evaluation report stated that on math fluency tasks the student correctly answered almost all items she attempted but she did not complete many items due to slower processing, yielding a composite score of 78 (low range) (id. at pp. 1-2). The evaluator noted that the student was likely to have performed better on tasks of fluency if given extended time (id. at p. 2). Reportedly, on mathematical operations, the student performed in the high end of the below average range (id.). In the area of written language, the January 2019 evaluation report stated that the student was able to spell grade level and above grade level words, persevered as tasks became harder, and demonstrated that her spelling ability was in the high end of the average range, an area of significant strength for the student (id.).<sup>9</sup>

The January 2019 OT progress report stated that the student was smart, sociable, and willing to learn new strategies that would facilitate her performance within the school environment (Dist. Ex. 5 at p 1). It noted that the student had made improvements in most areas of deficit (id.). The OT progress report stated that the student still required assistance and prompts to attend, prioritize, organize, and execute tasks given, and on occasion, when overwhelmed with certain tasks, she would elicit head movements or swirling, possibly as a method to self soothe (id.). In those instances, the student required reminders to be attentive to the head movements which impacted her ability to use visual skills such as scanning and fixating (id. at pp. 1-2). According to the progress report, the student required increased focus when attending to her movement; had trouble with depth perception, judging distances, and body awareness at times and bumped into things and tripped; she tended to be unaware of her surroundings causing her to display difficulties with executive functioning such as time management, working memory, organizing, planning, planning, and prioritizing (id.). The OT progress report indicated that the student demonstrated improvement with her balance and great improvement in managing to avoid frequent falls, demonstrated improvement when completing fine motor activities requiring minimal prompts to attend to tasks and minimal verbal prompts to refrain from head movements, and demonstrated improvement when completing perceptual activities such as visual scanning to locate objects (id.). The January 2019 report also included a recommendation for the continuation of OT two times per week and new annual goals (id. at p. 2).

According to the February 2019 speech-language progress report, the Core Language subtests of the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF – 5) were administered to descriptively assess the student's receptive and expressive language skills and the word classes, formulated sentences, recalling sentences, semantic relationships, and understanding

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<sup>9</sup> The student attained the following scores on the Wechsler Individual Achievement Test – Second Edition (WIAT-II): reading comprehension 81 (below average), numerical operations 86 (below average), oral reading fluency 83 (below average), spelling 105 (average), math fluency addition 85 (below average), math fluency subtraction 70 (low), and math fluency multiplication 85 (below average) (Dist. Ex. 4 at p. 2). Composite score summaries were reported as follows: reading comprehension and fluency 78 (low) and math fluency 78 (low) (id.).

spoken paragraphs subtests were utilized to determine the student's language and communication strengths and weaknesses (Dist. Ex. 7 at p. 1). With regard to the student's receptive language, the evaluating therapist found the student was able to identify word relationships and answer "wh" questions based on concrete information, and had developed her vocabulary knowledge and ability to use context clues to understand word meaning (id. at p. 2). The therapist indicated that the student struggled to identify the main idea, draw conclusions, formulate inferences, and solve problems based on a text and when presented with information struggled to recall, process, and understand the information (id.). The therapist noted that repetition, chunking, breaking down language, redirection, and scaffolded lessons were essential to help the student comprehend and remember the information (id.). Expressively, the therapist found the student was able to formulate personal verbal narratives about familiar events, could generate basic written narratives, and improved her ability to preplan and include story grammar components (Dist. Ex. 7 at p. 2). According to the therapist, the student had trouble using conjunctions, prepositions, transitional phrases, and adverbs, and struggled to create more complex sentences that used appropriate grammar and syntax (id.). The therapist reported that the student benefitted from support to organize, expand, and elaborate upon her ideas and would benefit from the continuation of speech-language therapy (Dist. Ex. 7 at p. 2). The February 2019 speech language progress report included annual goals targeting sentence grammar and syntax, the ability to identify the main idea and details, and the ability to make predictions about stories (Dist. Ex. 7 at pp. 2-3).

Even if not specifically discussed during a meeting, a CSE is responsible to know a student's grades, especially if the student attends public school programming (or State-approved nonpublic school programming recommended by the district). According to the testimony of a district witness, she would have had the student's January 2019 report card (see Tr. pp. 88, 349-50; Parent Ex. U at pp. 3-4). The January 2019 report card revealed that the student was performing "[w]ell below standards" in reading, writing, and mathematics (Parent Ex. U at p. 3). With respect to reading, the report card stated that the grade for the quarter was largely determined by the Teacher's College Assessment for Independent Reading and that the student was reading, comprehending, and analyzing informational/narrative texts at level Q which meant that she was then-currently reading at the below grade level benchmarks (Parent Ex. U at p. 3). The January 2019 report card further indicated that developing word solving strategies, determining accurate intonation, and employing comprehension strategies for oral/silent reading would improve the ways in which the student was accessing grade-level texts (Parent Ex. U at p. 3). The report card also noted that the student was working on slowing her reading for better understanding, deepening strategies for reading successfully in informational texts, identifying the main idea and selecting details to support it, and identifying unknown vocabulary by using context clues (Parent Ex. U at p. 3). According to the report card, the student benefited from breaking the whole text into more manageable parts and rewriting those parts in her own words (Parent Ex. U at p. 3). Regarding writing, the January 2019 report card stated the student was working on writing informational research reports; developing a topic through facts, definitions, concrete details, and other information related to a topic; paraphrasing information and organizing her facts in a cohesive way; using transition words to connect similar or contrasting ideas; and practicing editing for appropriate paragraphs, punctuation, syntax, and spelling (Parent Ex. U at p. 3). In the area of mathematics, the January 2019 report card stated that the student was working on multiplying and dividing multi-digit whole numbers and decimals using concrete models, solving single and multi-step story problems using a variety of strategies (area model, tape diagram, partial



products/quotients, standard algorithm), writing clear and accurate explanations using math vocabulary, and practicing multiplication facts for automaticity (Parent Ex. U at p. 3).

The January 2019 report card stated that the student was performing at the proficient level in the areas of science, social studies and history, physical education, visual art, and in academic and personal behaviors such as managing time and consistently demonstrating effort to independently achieve goals, working in an organized manner, and persisting through challenges to complete a task by trying different strategies (Parent Ex. U at pp. 3-4). The report card indicated that the student was performing at the below standards level in the area of asking for help when needed and at the "[e]xceeds in standards" level in the area of respecting school rules and working well in the school community (Parent Ex. U at p. 4).

While the district did not perform new, formal reevaluations in all areas in which the student was known to have a history of marked impediments and in which she was behind NYS age- and grade-level performance during January 2019, the hearing record demonstrates, as detailed above, that the district personnel decided to conduct some new assessments and gathered evaluative information regarding the student's abilities and needs in the areas of reading, writing, and math (see Parent Exs. A at p. 5; U at p. 1; Dist. Exs. 2 at pp. 1-3; 4 at pp. 1-2; 7 at pp. 1-3). Furthermore, the March 2019 CSE considered the parentally-obtained IEE (Parent Ex. B at pp. 1-18). Based on her assessment during that IEE, the evaluating clinical psychologist found the student exhibited strengths in inductive and deductive reasoning in the nonverbal sphere and noted that those skills, along with verbal reasoning and conceptual skills, were all found to be within age level expectations (*id.* at p. 13). The clinical psychologist found the student's visual memory was very good but that she had difficulty processing and working with information that she heard and that while she was very slow in processing and working with information that she saw, writing information helped her to retain and retrieve the information (*id.*). Reportedly, while the student's intellectual potential was within average range, formal testing could not capture her true intelligence because of her pronounced problems with expressive and receptive language (*id.*). The clinical psychologist found that the student demonstrated a language disorder and a specific learning disability with impairment in reading decoding and pronounced impairment in reading comprehension (*id.*). According to the clinical psychologist, the student's math calculation and problem-solving skills were also far below age in grade level expectations and found she exhibited a profound impairment in mathematics (*id.*). The student's spelling skills were found to be age appropriate and she was able to write very simple sentences with adequate sentence structure but was unable to organize her thoughts in order to write a short story revealing impairment in written expression (*id.* at pp. 13-14). The student was also found to demonstrate problems with executive functioning skills (*id.* at p. 14).

The clinical psychologist opined that the student had been inappropriately placed throughout her educational experience and that her pronounced language disorder and learning disabilities had not been properly addressed in a large classroom setting (Parent Ex. B at p. 14). According to the clinical psychologist, the student required a "very specific, small, structured special education school setting for children with average intellectual potential who ha[d] language disorders and learning disabilities"; intensive language therapy individually and daily in the classroom, and a program where the class size was small (*id.*). The clinical psychologist believed that the student could only learn age and grade appropriate curriculum in a multi-sensory fashion

in a small special education school program and stated the student required a great deal of repetition and practice as well as OT and PT (id.).

As noted earlier, the CSE reconvened in March 2019 to discuss parent concerns and the parent-obtained March 2019 psychoeducational evaluation (Tr. p. 373; Dist. Ex. 13 at pp. 4-6; see Parent Ex. B). In his direct testimony by affidavit, the parent stated that the private evaluation was "not really discussed" during the March 2019 CSE meeting (Parent Ex. DD at p. 6). However, during the impartial hearing, the school psychologist testified to the contrary and stated that the private evaluation was the focus of the March 2019 CSE meeting, that the CSE went through the evaluation so the whole team could hear the results of the testing, and that the CSE made a recommendation based on the data provided (Tr. p. 99).

The March 2019 IEP stated that, based on the March 2019 psychoeducational testing, the student presented as a "very complex youngster" (Dist. Ex. 13 at p. 4). The IEP included the findings of the parent's private psychoeducational evaluation and the present levels of performance stated that according to the most recent (March 2019) psychoeducational evaluation, the student had met the criterion for the following diagnoses: language disorder; specific learning disability with impairment in reading, decoding, and a pronounced impairment in reading comprehension; and an impairment in written expression (id. at pp. 4-6). The March 2019 IEP indicated that the CSE team reviewed the parent-provided psychoeducational evaluation and added more support to the student's program, in the form of SETSS, to help her academically (id. at p. 4).

The school psychologist testified that the private evaluation was incorporated into the CSE's final recommendation and that five periods per week of SETSS for ELA was added to the student's IEP to address concerns regarding the student's reading level, which was "a year behind," and her inability to understand what she was reading (Tr. p. 100). The school psychologist testified that the March 2019 CSE also developed some additional annual goals which would "hone in" on the specific areas of weakness that the student struggled with in terms of processing of information, reading comprehension, executive functioning and organization (Tr. p. 102). The parent acknowledged that the March 2019 CSE added another session of speech and added SETSS to the March 2019 IEP (Tr. p. 424; Parent Ex. DD at p. 6).

The March 2019 IEP stated that the CSE team and parent were in agreement to add five periods of SETSS for ELA to the student's IEP (Dist. Ex. 13 at p. 4). The IEP noted that in light of the information from the March 2019 psychoeducational evaluation, the school team felt that ICT services and related supports, as well as the addition of SETSS support, was an appropriate recommendation for the student at that time (Dist. Ex. 13 at pp. 4-5, 6).

Additionally, while the parent contends that the February 2019 CSE failed to conduct a "complete" evaluation, any potential shortcomings in the district's evaluation of the student were remedied shortly thereafter by the March 2019 CSE's consideration of the parentally-obtained private psychoeducational evaluation, as the March 2019 evaluation included assessments for and the identification of specific learning disabilities (see Parent Ex. B at pp. 13-14). Both federal and State regulations specify that IEEs provided to a CSE, whether they are obtained at public expense or not, are part of the information that a CSE considers as part of any initial evaluation or reevaluation of a student, provided the IEE meets agency criteria (34 CFR 300.502; 8 NYCRR200.1[zz]).

While State regulations define that certain assessments must be performed as part of an initial evaluation of a student to determine initial eligibility (8 NYCRR 200.4[b][i]-[v]), it is left to the collaborative process of the CSE to determine what additional data is needed during a reevaluation of a student (8 NYCRR 200.4[b][5]).<sup>10</sup> Despite the disagreement over evaluations and the student's programming at the time of the February 2019 CSE meeting, by the March 2019 CSE meeting the evidence in the hearing record does not show that the CSE lacked appropriate evaluative information to understand the student's needs. As such, the hearing record supports the district's position that the student was appropriately assessed in all areas related to her suspected disability and that the evaluative material it had gathered was sufficiently comprehensive to identify all of the student's special education and related service needs.<sup>11</sup> When making findings against the district on this issue, the IHO erred by improperly conflating the adequacy of evaluative information before the CSE and the substantive adequacy of the resulting IEP programing in the IEP. Both the parent and the district members of the CSE were equally entitled to consider and rely on the testing conducted by the independent clinical psychologist, but draw their own independent conclusions regarding the appropriate programing in the student's IEP.<sup>12</sup> It is just part of the compromise and, whenever possible, consensus building process envisioned by the IDEA.

### 3. Annual Goals

The parent argues that the March 2019 IEP did not provide any annual goals designed to close the growing, two-year gap in the student's academic achievement.

An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and

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<sup>10</sup> State regulations provide that "[t]he reevaluation shall be conducted by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of the student's disability" and that "the reevaluation shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]).

<sup>11</sup> The issue of whether the IEE should have been at public expense is also distinct from the issue of whether the CSE had adequate information about the student, and the former issue is discussed further below.

<sup>12</sup> The existing data and new testing conducted by district personnel did not differ dramatically regarding a description of the student's deficit areas, and instead the real dispute in this area is whether the programing selected by the CSE was appropriate. The experts had sharply different opinions on that topic as more fully described below. In this case, it is not necessary to further split hairs on the adequacy of the testing during the one month period between the two CSE meetings, as the student was not placed at the Aaron School until months after the second meeting and the March 2019 IEP, which was developed with the input of the IEE, was the operative IEP at the time of that placement.

ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The March 2019 IEP included 13 annual goals (Dist. Ex. 13 at pp. 9-16). To address the student's weaknesses in motor development, the IEP included four annual goals that targeted improving the student's body awareness in navigating the school environment without displaying falls, tripping, and bumping into environmental objects; improving eye hand coordination by performing measurements when using protractors, compasses, and rulers with precision; improving exercise tolerance and gross motor skills to enable the student to participate in class wide physical activities; and navigating school steps with a handrail and distant supervision in an unpredictable environment (id. at pp. 8-10).

The school psychologist explained that one writing annual goal, involving brainstorming and generating a plan for structured writing using different planning tools and graphic organizers, helped the student with the organizational component of structured writing (Tr. p. 149; see Dist. Ex. 13 at p. 11). The school psychologist stated that the next annual goal correlated with the "visual motor piece" and was an OT annual goal that targeted developing the student's visual scanning skills for improved editing with the use of grade level checklists to ensure correct spelling, paragraphs, punctuation, syntax, and capitalization (Tr. pp. 149-50, 344; see Dist. Ex. 13 at pp. 11-12). The March 2019 IEP included a speech and language annual goal that targeted the student's ability to identify sentences that contained inappropriate grammar and syntax and a math annual goal to address the student's ability to solve two-digit and three-digit whole number multiplication and division problems using different strategies, which the school psychologist identified as a grade-level expectation (Tr. pp. 150-52; Dist. Ex. 13 at pp. 12, 14).

The March 2019 IEP included four reading annual goals (Dist. Ex. 13 at pp. 13-15). One of the reading annual goals involved retelling or summarizing part of a text including the problem/resolution, main ideas, and important details at the student's independent reading level and the school psychologist explained that this annual goal combined reading and writing with the use of repetition, modeling and sentence starters (Tr. pp. 150-51; Dist. Ex. 13 at p. 13). Another reading annual goal, addressing recalling and describing characters including character traits, feelings, actions, and relationships across chapters was described by the school psychologist as "delving more" into a fifth-grade expectation (Tr. p. 151; Dist. Ex. 13 at p. 13). In addition, the March 2019 IEP included two reading annual goals that targeted the student's ability to identify the main idea and three details of a passage and making predictions with a story or situation, which the school psychologist identified as a grade-level expectation (Tr. p. 151; Dist. Ex. 13 at pp. 14-15).<sup>13</sup>

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<sup>13</sup> The school psychologist testified that the March 2019 CSE added annual goals which could "hone in" on the specific areas that the student struggled with in terms of processing information, reading comprehension, and some executive functioning aspects of organization (Tr. p. 102). Specifically, the school psychologist testified that the March 2019 CSE tried to put a "really heavy hand" on the student's reading annual goals after the initiation of the SETSS support for ELA and that these were annual goals which could be worked on during SETSS or in the classroom (Tr. p. 152).

Lastly, the March 2019 IEP included an annual goal addressing time management skills and the student's control of her head movements in order to improve her focus and academic performance (Tr. p. 153; Dist. Ex. 13 at p. 16).

The school psychologist testified that the annual goals were drafted before the CSE meeting, "sort of prep" for what they wanted to work on and that then within the CSE meeting the annual goals were "really drafted" in combination with the team where providers and the teacher spoke about what the student was doing, areas that the student "could benefit from," and the annual goals to work on (Tr. p. 154; see Tr. pp. 281-83).

The parent argues that the annual goals included in the March 2019 IEP did not have a reading level specified and since the instructional grade level for the IEP was a fourth grade level, that the annual goals as written would have kept the student at a fourth grade reading level throughout sixth grade.

While understanding the parent's concerns that the student was falling "further and further behind" her grade-level peers, I note that annual goals must be designed to meet the student's needs to enable her to be involved in and make progress in the general education curriculum and not necessarily to bring a student up to grade-level expectations. Including annual goals in the March 2019 IEP that targeted the student's needs with respect to her then-current academic performance levels was appropriate and although the IEP indicated that the student was working at a fourth grade instructional at the time it was written, it does not follow that the IEP was intended to keep the student at that level.

Next, the parent argues that the March 2019 CSE added only two goals to the IEP, both for the SETSS teacher to work on with the student, and changed none of the other annual goals they had created in preparation for the February 2019 CSE meeting. In this case, since the annual goals included on the March 2019 CSE, including the two new ones, addressed the student's identified needs, the CSE was not required to make any additional changes.

Lastly, a review of the March 2019 IEP shows that each annual goal identified the criteria by which the student's success toward achieving the goal was to be measured (e.g., 85% accuracy, 2 out of 3 trials, 80% accuracy over 8 therapeutic sessions), the procedures that would be utilized to evaluate the student's success (teacher/provider observations, written student work samples, recorded verbal explanation), and how frequently the student's progress toward meeting the annual goal would be measured (e.g., 1 time per quarter, 1 time per 6 weeks, 1 time per month) (Dist. Ex. 13 at pp. 8-16).

The hearing record shows that while the student was not making the progress the parent desired, the annual goals included in the March 2019 IEP were designed to enable the student to be involved in and make progress in the general education curriculum. Instead, the more critical question in this case is whether the services selected by the CSE were sufficiently supportive to address the student's needs, and I will turn to that issue next.

#### **4. ICT Services**

The parent argues that the IEP prepared by the March 2019 CSE was substantively inappropriate, as it would not enable the student to make academic progress in the areas of her

greatest need: reading, writing, and mathematics. The district argues that the student continued to make progress in all academic areas and that even assuming the student's progress was "diminishing," the district sufficiently addressed this with the addition of SETSS in ELA five times per week to address the student's reading challenges.

The March 2019 CSE recommended the student receive ICT services, a full-time individual health/ambulation paraprofessional, special transportation, and related services of two 30-minute sessions per week of OT in a group of three, one 30-minute session per week of PT in a group of three, one 30-minute session of individual speech-language therapy in the classroom, two 30-minute sessions per week of individual speech-language therapy in a separate location, and one 30-minute session per week of speech-language therapy in a group of three (Dist. Ex. 13 at pp. 16-18, 21-23; 14 at p. 1). In addition, the March 2019 CSE added five periods of SETSS for ELA and transitioned the student into regular physical education from adapted physical education (Dist. Ex. 13 at pp. 4, 6).

As detailed above, the March 2019 IEP included 13 annual goals to address the student's identified needs (Dist. Ex. 13 at pp. 9-16). The March 2019 IEP also identified the classroom support needed to address the student's management needs including small group instruction, verbal conferencing or planning ideas before writing, visual editing checklists, reminders to chunk the text, extended time to complete work, model problems and work examples, repeated and rephrased questions or directions, reminders to double check and revise work, periodic breaks during longer assignments, preferential seating, multiple check-ins, graphic organizers and sentence starters, index card for tracking words when reading, and memory strategies (*id.* at p. 7).

The parent argues that at the March 2019 CSE meeting, the CSE did not reconsider the recommendation of placing the student in a 32-student ICT classroom despite the recommendation of the evaluating clinical psychologist. The district argues that it recommended the student receive ICT services, with a full-time individual paraprofessional, where the student could maintain contact with appropriate and positive peer models and access "the general education" and that the recommended placement allowed for the student to access small group instruction.

As noted above, the clinical psychologist who conducted the March 2019 private psychoeducational evaluation opined that the student had been improperly placed throughout her educational experience and that her pronounced language disorder and learning disabilities had not been properly addressed in a large classroom setting (Parent Ex. B at p. 14). The clinical psychologist further opined that the student required a very specific, small, structured special education school setting for children with average intellectual potential who had language disorders and learning disabilities; intensive language therapy individually and daily in the classroom: and a program where the class size was small (*id.*). The clinical psychologist found the student could only learn age and grade appropriate curriculum in a multi-sensory fashion in a small, special-education school program and stated the student required a great deal of repetition and practice employing hands-on multi-sensory teaching as well as OT and PT (Parent Ex. B at p. 14).

In this case the IHO found that the "big picture" fault was the dismissal by the district of the recommendations of the clinical psychologist to shift the classroom environment away from ICT services (IHO Decision at p. 18). The IHO stated that given the ongoing nature of the student's

difficulties and the precise recommendations of the clinical psychologist, the district was in error by not considering a smaller setting with specialized instruction (IHO Decision at p. 19).

The IHO's determination does not go far enough in its analysis because he seemed to adopt every recommendation of the clinical psychologist with the reasoning that her opinions were "strong" (IHO Decision at p. 18). However, experts routinely have strong opinions and the opinions of the district's staff seem no less ardently held. Although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (*see, e.g., Mr. P. v. W. Hartford Bd. of Educ.*, 885 F.3d 735, 753 [2d Cir. 2018]; *G.W. v. Rye City Sch. Dist.*, 2013 WL 1286154, at \*19 [S.D.N.Y. Mar. 29, 2013]; *C.H. v. Goshen Cent. Sch. Dist.*, 2013 WL 1285387, at \*15 [S.D.N.Y. Mar. 28, 2013]; *T.B. v. Haverstraw-Stony Point Cent. Sch. Dist.*, 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; *Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], *aff'd*, 142 Fed. App'x 9 [2d Cir. July 25, 2005]). Thus, the CSE was required to consider the parent provided evaluation report but not required to adopt the "precise" recommendations from clinical psychologist.

The district argues that the main conclusions of the clinical psychologist was that the student required a placement in a small class and a small special education school. The school psychologist testified regarding her view that the general education class with ICT services was similar to a 12:1 (or 12:1+1 special class) in that when the ICT class was taught an academic subject, especially new materials, it was broken up into smaller groups of 12 and 12 or 15 and 15 (Tr. p. 125). She noted that a difference between the two classes was that in the general education class with ICT services, the student would be surrounded by appropriate peer models and continue to be able to access the general education program as opposed to a special class where she would not (Tr. pp. 125-26). Additionally, the IEP showed that the student was recommended for a number of related services in a small group or individual setting and small group SETSS and was assigned an individual paraprofessional for health and ambulation (*see* Dist. Ex. 13 at p.17). Moreover, the district argues the record demonstrated that the student was able to focus and remain on task within the ICT setting, was extremely hard working, show dedication and focused on all tasks she was given, worked diligently on her assignments alongside her paraprofessional, and was an active participant during the whole class and small group lessons (*see* Dist. Ex. 13 at p. 3).

The hearing record reveals that the March 2019 IEP identified and addressed other recommendations made by the clinical psychologist. With respect to her recommendation that the student required intensive language therapy individually and daily in the classroom, the March 2019 IEP recommended one 30-minute session of individual speech-language therapy in the classroom, two 30-minute sessions per week of individual speech-language therapy in a separate location, and one 30-minute session per week of speech-language therapy in a group of three (Dist. Ex. 13 at p. 17). Also, the March 2019 CSE recognized the clinical psychologist's assertion that the student required repetition and practice and hands-on multi-sensory instruction by recommending supports such as verbal conferencing, visual editing checklists, model problems and work examples, repeated/rephrased questions and directions, graphic organizers and sentence starters, and index cards for tracking words line by line (*id.*).

With regard to the other program options considered by the CSE, the March 2019 IEP stated that the student benefitted from the support of special education services to address academic learning needs and therefore general education or a related services only program were rejected (Dist. Ex. 13 at p. 23). In addition, more restrictive program recommendations were also rejected considering the least restrictive environment (LRE) necessary to meet the student's needs at the time (*id.*). Specifically, the school psychologist testified that the CSE felt that some of the pieces that go along with a more restrictive recommendation would not necessarily be appropriate for the student and noted as an example that the CSE wanted appropriate peer models in terms of emotional regulation for the student (Tr. pp. 103, 126-27). With respect to emotional functioning, the clinical psychologist noted several strengths, including that the student had intellectual potential in the average range, that the student had a "maturity beyond her years," and that she "very much enjoys friends and friendships" (Parent Ex. B at pp. 13-14). But the clinical psychologist's evaluation report also makes overbroad, critical statements such as the student has been "inappropriately placed throughout her educational experience" (*id.* at p. 14). That is not a valid conclusion based on a single evaluation of the student, as there is no evidence whatsoever that suggests that the student should never have been in an ICT setting. The evaluation report suggests moving in one stroke from a general education environment with ICT services, which is a supportive setting in a general education environment, to a special class placement in a specialized school,<sup>14</sup> which is essentially an opinion that the district should abandon the notion that the student would have any access to nondisabled peers at all in the educational environment. Unlike the clinical psychologist, the IHO recognized that the CSE was mandated to consider lesser restrictive environments, but without explanation, he adopted the vague opinion of the clinical psychologist with little comment. I have no quarrel with the accuracy or validity of the March 2019 testing administration or the scoring reports given by the clinical psychologist, but I do not find her recommendations as authoritative or persuasive as the IHO did, as she seemed to make no effort to balance the need to support the student academically with the need to maximize the student's access to nondisabled peers opting instead for one of the most restrictive settings possible. The CSE on the other hand, at least attempted to strike that balance by modifying the student's programming toward a somewhat more restrictive program.<sup>15</sup>

That does not mean, however, that the district established that March 2019 IEP was substantively appropriate. In its request for review, the district asserts that the student made progress in the ICT class, although most of the progress it cites to pertains to school years prior to 2018-19. While the student's March 2019 IEP stated that the student had not made progress in reading since the beginning of the fifth-grade year, the hearing record shows that the student's lack of progress in reading actually extended back to the prior school year (Dist. Ex. 13 at p. 3; *see* Tr. p. 390; Parent Ex. R at p. 1). As noted by the parent, the student's reading level in January 2019 (level Q) was the same as it was at the end of the first term of the 2017-18 school year and during this time the student's performance level declined from "below standards" to "well below standards" (compare Parent Ex. R at p. 1, with Parent Ex. U; *see* Dist. Ex. 2 at p. 1). In addition,

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<sup>14</sup> Her major criticism appears to be that the student is or could be in a class of 32 students total, but the evaluator does not offer a figure herself regarding an appropriate maximum class size for the student (Parent Ex. B at p. 14).

<sup>15</sup> The clinical psychologist did not participate in the CSE meeting, nor was she called as a witness during the impartial hearing.



the student's performance level in writing and math also declined from "below standards" for during the 2017-28 school year to "well below standards" during the 2018-19 school year (compare Parent Ex. R at p. 1 with Parent Ex. U at p. 1). While the district recommended the addition of SETSS to the student's IEP for the 2019-20 school year to address the student's deficit in ELA, it did not recommend additional services to address the student's math skills, which were equally delayed.<sup>16</sup> In her January 2019 report, the student's teacher estimated the student's math skills to be at a third to fourth grade level and noted that the student's math deficits were due to limited reading ability, lack of understanding of concepts, memory/retention and poor test scores (Dist. Ex. 2 at p. 1). Testing conducted by the district psychologist showed that the student performed below average in numerical operations and low on math fluency (Dist. Ex. 4 at p. 2). Similarly, the private psychologist reported that the student lacked automaticity of basic math facts and did not appear to understand "long division, multiplication or more than very basic fractions" (Dist. Ex. B at p. 11). In addition, the private psychologist noted that the student did not know the value of money and her ability to figure time was inconsistent (id.). The March 2019 IEP noted that the student often forgot previously learned math concepts when a new one was introduced and that the volume of math material made it challenging for the student to absorb and retain ideas (Dist. Ex. 13 at pp. 3-4). Thus while I am not convinced that the student should have been completely removed from her nondisabled peers for all educational programming as the clinical psychologist recommended, I am also not convinced that the addition of SETSS in the area of ELA alone to the other services already in the student's IEP was a sufficient response to the less than expected progress that the student experienced. In particular, the CSE's failure to recommend additional support for the student in mathematics is sufficient to find that the district substantively denied the student a FAPE.

### **C. Unilateral Placement – Aaron School**

Turning to unilateral placement selected by the parent, the district argues that the IHO erred by finding that the student's placement at the Aaron School was appropriate. The district argues that the student required a substantial amount of OT, PT, and speech-language therapy and that the Aaron School was not providing the student with an amount of those related services or the paraprofessional support the student required. In addition, the district contends that the program at the Aaron School was overly restrictive.

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

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<sup>16</sup> According to the parent, the district representative at the March 2019 CSE meeting (Dist. Ex. 12) commented that the district had an inclusion coach from Teacher's College who was already doing informal pull-out sessions with the student for extra support in reading and that the district wanted to formalize that (Parent Ex. DD at p. 6). He noted that the district decided to formalize the informal help by adding SETSS to the student's IEP (id.).

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 parent argues that the IHO correctly found that the student's placement at the Aaron School for the 2019-20 school year was appropriate. The parent noted that the IHO acknowledged the student did not receive PT and small group OT and only had 30 minutes of individual speech-language therapy at the Aaron School, but found that the school changed the learning environment and aligned it with the recommendations of the clinical psychologist. The parent also argues that a more restrictive placement should not preclude reimbursement.

According to its brochure, the Aaron School is described generally as a private K-12 special education school that serves students with language, learning, attention, and social differences (Parent Exs. H at p. 1; Z at p. 1). Student learning at the school is "focused on real world

application of mastered concepts with the goal of independence, post-secondary options, and adult success" (*id.* at p. 3). Instruction at the school is individualized and each student's progress is consistently assessed both formally and informally (*id.*). According to the Aaron School principal, for the 2019-20 school year, the student attended a sixth-grade class of 12 students staffed by a head teacher and assistant teacher (Parent Ex. Z at p. 4). The student participated in three "whole group" therapeutic classes once per week including a 45-minute writing lab taught by a speech-language pathologist, a 30-minute study skills/tools for executive function class taught by an occupational therapist and a 45-minute peer group/social skills class taught a school psychologist (Parent Ex. Z at p. 4). The student also participated in a 30-minute 1:1 connection time session with a speech-language pathologist one time per week and a 30-minute alliance class co-taught by a speech-language pathologist/school psychologist one time per week (*id.*). The principal reported that the purpose of the connection time session was to "build upon areas of strength as well as areas of challenge" and the purpose of the alliance class was to address short-term project management and civic responsibility (*id.*).

The student's homeroom/social studies/writing teacher at the Aaron School reported that prior to shifting to distance learning in March 2020 due to the COVID-19 pandemic, the student received ELA and math instruction five times per week for 45 minutes, writing instruction two times per week for 45 minutes, and science and social studies three times per week for 45 minutes (Parent Ex. AA at p. 1). The student also received push-in therapy services (peer group, study skills, alliance and writing lab) one time per week for 45 minutes (*id.*). The student's Aaron School teacher noted that upon transitioning to distance learning, the student received the same amount of ELA, math, and writing instruction but received social studies and science instruction twice per week for 45 minutes (Parent Exs. Z at p. 4; AA at p. 1). He reported that the push-in therapy services included peer group, study skills, writing lab, study hall and social time one time per week for 45 minutes (Parent Exs. Z at p. 4; AA at p. 2).<sup>17</sup>

With respect to the student's speech and language needs, the hearing record shows that receptively the student struggled to recall, process, and understand presented information and expressively struggled to create more complex sentences using appropriate grammar and syntax (Dist. Ex. 7 at p. 2; *see* Parent Ex. B at pp. 3, 4, 8-9). The student had trouble using conjunctions, prepositions, transitional phrases, and adverbs (*id.*). In terms of motor development, the student presented with impairments in balance, coordination, proprioception and motor control that impaired her functional mobility (Dist. Exs. 3; 13 at pp. 5-6). The student's ataxic movements affected her general motor control and the way she managed her body in space (Dist. Ex. 13 at p. 5). She continued to be challenged by gross motor tasks that required coordination skills and balance which affected her ability to participate in recess and dance classes (Dist. Exs. 3 at p.1; 13 at p. 6). The hearing record shows that the student demonstrated deficits in body awareness, sustaining attention to task while performing table-top activities, eye-hand coordination, and visual perception (Dist. Ex. 5 at p. 2). She required increased focus when attending to her movement as she tended to be unaware of her surroundings which caused her to display difficulties with executive functioning such as time management and organizing and planning (*id.* at p.1). When

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<sup>17</sup> The Aaron School principal reported that the school switched to virtual learning at the end of the day on March 13, 2020 (Parent Ex. Z at p. 4). As a result, academic and specialty classes were delivered in 45-minute whole group instruction sessions on Google Meet and material was presented through multimedia resources such as videoconferencing, chat, SMART Notebook, PowerPoint, Google Docs, and Google Slides (Parent Ex. Z at p. 4).

overwhelmed the student elicited head movements that impacted her ability to use her motor skills (id. at pp. 1-2). Visual perceptual deficits impacted the completion of some tasks such as catching a ball or completing a puzzle (id. at p. 2).

Reports generated by the Aaron School during the 2019-20 school year suggest that the student did not receive "traditional" therapy services at the school but that some of her identified therapy needs were addressed through other means (see Parent Exs. C, E, W). For example, the some of the student's comprehension deficits were addressed in ELA, the student's use of grammar and syntax were addressed during writing lab, and her expressive and receptive language skills were addressed during "connections" (Parent Exs. C at pp. 8, 9; E at pp. 1-2, 7, 9; W at pp. 12, 15). Although a wobble stool and sensory tools were employed to assist the student with attending there is no testimony that they were used to address any of the student's motor needs.

While the services provided by the Aaron School speech therapist were configured differently than the district's related services, the hearing record shows that for speech-language therapy the student received roughly the equivalent of one 30-minute session per week individually ("connections"), which "happen[ed] organically"; one 45-minute session per week in a group of 12 (writing lab); and one 30-minute session per week in a group of 12 ("alliance" class) (Tr. p. 204, 241, Parent Ex. Z at p. 4). While the Aaron School spring progress report shows that the connections session and writing lab included instruction geared toward the student's identified speech-language needs, it is less clear how the alliance club addressed the student's needs (Parent Ex. W at pp. 11-12, 13-14). The speech-language pathologist who provided the services did not testify (see Tr. pp. 1-454).

In terms of the student's motor deficits, the hearing record shows that the student participated in one 30-minute study skills/tools for executive function class per week in a group of 12 (Parent Ex. Z at p. 4). The group was run by an occupational therapist; however, while it touched on time management and organization skills, from the description of the class it does not appear to have addressed the student's needs with regard to body awareness, balance, coordination, endurance, stair training, visual scanning or head control (see Parent Ex. W at pp. 10-11). The occupational therapist who ran the study skills group did not testify (see Tr. pp. 1-454). In his affidavit, the parent asserted that he was not concerned that the Aaron School did not have a physical therapist on staff (Parent Ex. DD at p. 7). He reported that the student had received so much OT and PT over the years that "now you could not tell there was a problem" (id.). He opined that having physical therapy at the school was not as important as the student learning to read, write and do math (id.). In addition, he indicated that the Aaron School had speech and language "specialists" and occupational therapists on staff, and he was confident the student would get the related services support she needed (id.). In testimony, the parent acknowledged that the student had some difficulty walking and noted that after a few steps it would appear that she was inebriated as she had "a little bit of balance issues" (Tr. p. 419). In addition, he indicated that the student's foot started to drag after a period of running (Tr. p. 419). He stated that, as a parent, he was aware of the nuances but suggested that a person unfamiliar with the student would not be (Tr. p. 419-20). It is somewhat troubling to me that the clinical psychologist, upon whom the IHO relied so heavily, opined that the student needed "intensive language therapy individually as well as in the daily classroom environment" and that the student "also requires occupational therapy and physical therapy in her very specialized school setting" (Parent Ex. B at p. 14). While the 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), the parent is straining the limit of that rule in this case, and it is clear that the district's proposal for a 1:1 paraprofessional and clear mandates for related services in speech language therapy, OT and PT were clearly more aligned with the student's needs than the evidence of the Aaron School's approach.

As for the district's argument that Aaron School was too restrictive, 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]). In this instance, when the district likely needed to offer a program that was somewhat more supportive (and in turn somewhat more restrictive in all likelihood) in order to address the student's math skills, this factor does not weigh so heavily as to require a finding that the unilateral placement is inappropriate for the student. Accordingly, the aspect of the district's argument related to the restrictiveness of Aaron School is without merit.

Although neither the public or private programming were designed to address all aspects of the student's needs, as noted above, the task is to consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. The Aaron School progress report shows some specific examples of progress in her core academic skills (as well as a fair number of vague statements that are subjective (see Parent Ex. W at pp. 2-7)).<sup>18</sup> A finding of progress with respect to a unilateral placement is a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). When considering the totality of the circumstances, on balance the evidence of progress tips the scale slightly in favor of finding that Aaron School

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<sup>18</sup> For example, in the ELA portion of the progress note, it states that "[the student] continues to work hard on enhancing her comprehension skills, fluency and expression while reading aloud, understanding of story elements, and expanding her vocabulary. With teacher support and strategies, [the student's] fluency and overall comprehension have improved over the course of the school year" (Parent Ex. W at p. 2). Such a statement provides no context and the same could be said of a student working on a first-grade curriculum or an eighth-grade curriculum. In contrast there are points in the progress report that objectively identify how the student was moving forward in the curriculum, to wit: "This semester, [the student] learned about food chains and food webs, with a focus on the vocabulary terms "consumer, producer, decomposer, carnivore, herbivore, and omnivore." She demonstrated her knowledge through a food chain art project where she drew a producer, herbivore, and carnivore in a specific environment then wrote a paragraph explaining all about the food chain. From here, [the student] discovered different aspects of biomes including location, climate, flora, and fauna (Parent Ex. W at p. 4).

was an appropriate unilateral placement for the 2019-20 school year and, consequently, I will not overturn the IHO's determination on this issue.

#### **D. Independent Educational Evaluation (IEE)**

The IHO found that the parent was entitled to the cost of the March 2019 IEE (psychological evaluation) upon presentation of proper invoice and as the district does not contest the IHO's determination on appeal, I find his decision on this matter final and binding.

#### **VII. Conclusion**

There are no challenges to the IHO's determination regarding equitable considerations. Having determined that the evidence in the hearing record supports the IHO's ultimate determinations that the district failed to offer the student a FAPE for the 2019-20 school year and that Aaron School was an appropriate unilateral placement for the student, the necessary inquiry is at an end.

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

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
June 16, 2021**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**