



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-171

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 Thomas W. MacLeod, Esq.

The Law Office of Andrew Weisfeld, PLLC, attorneys for respondents, by Andrew Weisfeld, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Bay Ridge Preparatory School (Bay Ridge) for the 2020-21 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 parties' familiarity with the student's educational history is presumed, and the details thereof will not be recited here.¹ Briefly, in fall 2019, while the student was attending fifth grade

¹ The student was the subject of a prior impartial hearing; the IHO in that matter, in a February 5, 2021 decision, noted the district's concession that it failed to provide the student with a free appropriate public education (FAPE) for the 2017-18, 2018-19 and 2019-20 school years and its acknowledgement of the student's need for additional support (Parent Ex. F at pp. 2, 4). The IHO in that matter also determined that the district failed to evaluate the

in a general education classroom in a district public school, the student's parents became concerned with the student "reading at a low level," "struggling with writing," and having "difficulty with spelling"; these concerns were noticed by the student's teacher as well (see Tr. pp. 203, 335-36; Parent Ex. C at p. 2; Dist. Ex. 2 at pp. 1, 2). The parents obtained a private neuropsychological evaluation in March 2020 (Parent Ex. C). In May 2020, the parents shared the neuropsychological evaluation report with the district and requested an "immediate" CSE meeting to develop an "appropriate educational program" for the student (Dist. Ex. 1 at p. 1; see Parent Ex. D). A CSE convened on June 18, 2020, to conduct an initial review and consider the student's eligibility for special education (see generally Parent Ex. B). The June 2020 CSE found the student eligible for special education as a student with a learning disability and recommended special education teacher support services (SETSS) in English language arts (ELA) four times per week in a group (see *id.* at pp. 3, 12). The parents disagreed with the recommendations contained in the June 2020 IEP and, as a result, notified the district of their intent to unilaterally place the student at Bay Ridge (Parent Ex. E).

A. Due Process Complaint Notice

In a due process complaint notice dated September 8, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year on procedural and substantive grounds (Parent Ex. A at p. 5). The parents asserted that the district failed to conduct timely and comprehensive evaluations by failing to evaluate the student in any area of need throughout the student's educational career and in particular by failing to conduct appropriate evaluations in preparation for the June 2020 CSE meeting (*id.* at p. 6). The parents further asserted that the district denied them their right to meaningfully participate in the development of the student's educational program by "conduct[ing] the [s]tudent's psychoeducational evaluation and classroom observation the day prior to" the June 2020 CSE meeting so the parents could not appropriately review the data in preparation for the CSE meeting and by failing to consider the parents' concerns at the CSE meeting (*id.*). The parents argued that the district failed to hold a timely and compliant CSE meeting, despite the parents' March 13, 2020 request and completion of the student's private neuropsychological evaluation, by failing to convene for over 90 days (*id.*). The parents further argued that the district failed to recommend and provide appropriate related services such as "Orton-Gillingham reading remediation," develop appropriate, measurable annual goals tailored to meet the student's needs, provide the student with an appropriate small classroom placement with similarly functioning peers without behavioral concerns, provide services and supports to meet the student's academic needs, and develop an appropriate IEP to allow the student to progress in areas of need (*id.* at pp. 7-8). The parents contended that equitable considerations weighed in favor of an award of tuition reimbursement (*id.* at p. 8). As relief, the parents requested that the district be required to reimburse tuition, costs, and expenses of the student's attendance at Bay Ridge for the 2020-21 school year, as well as an order directing the district to fund door-to-door transportation (*id.* at pp. 8-9).

student and ordered the district to reimburse the parents for the cost of the private neuropsychological evaluation they obtained (*id.* at p. 4). In addition, the IHO ordered the district to reimburse the parents for the costs of the tutoring services they obtained for the 2019-20 school year, as well as to fund the cost of 600 hours of multi-sensory tutoring by providers chosen by the parents at the providers' customary and usual rates (*id.* at p. 5).

B. Impartial Hearing Officer Decision

An impartial hearing convened on February 18, 2021 and concluded on May 21, 2021 after four days of proceedings (Tr. pp. 1-458). In a decision dated July 7, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2020-21 school year (IHO Decision at p. 16). Specifically, the IHO determined that the evidence in the hearing record indicated the student's need "for a much different program" than that recommended by the CSE (*id.* at 15). The IHO found that the district did not conduct new evaluations prior to the development of the IEP for the 2020-21 school year, "relied upon the social history interview dated June 5, 2020, the psychoeducational evaluation of June 17, 2020, and the classroom observation of June 17, 2020 . . . and placed [the student] in the same general education classroom setting where she could not progress in her reading, spelling, writing, and other educational abilities in years prior to the 20/21 school year" (*id.*). The IHO further found that despite testimony regarding the "usefulness and appropriateness of neuropsychological testing and data in developing a [s]tudent's educational program" as it is "more in depth" and provides a diagnosis, and testimony that the district did not need to conduct any other evaluations of the student because of the comprehensiveness of the private neuropsychological evaluation, the "CSE failed to consider the neuropsychological evaluation in the development of [the student's] IEP and failed to include any of [the evaluating psychologist's] recommendations" (*id.* at 16). The IHO went on to state that the only placement option considered by the CSE was a general education setting and that the CSE did not consider a private placement or special education setting with reading and writing-based classes, placement with similar peers with no behavioral concerns, assistive technology, and daily access to an evidence-based multisensory and structured program and Orton-Gillingham supports and services, as recommended in the neuropsychological evaluation report (*id.*). The IHO concluded by stating that, as the CSE failed to recommend any of these supports and services, and the district did not offer any evidence to support such a failure, the district's position that its recommended program for the student was appropriate was no more than "wishful thinking" (*id.*).

The IHO went on to determine that the parents had met their burden to demonstrate that Bay Ridge was an appropriate unilateral placement for the student for the 2020-21 school year, as testimony showed that the program was for students with "significant special education needs in some areas but not all," "they ha[d] the ability to give daily Orton-Gillingham services, and to do it correctly" and the student received "individualized attention with a specialized teacher" due to small class sizes, a "high functioning" student body "with very specific learning disabilities like [the student]" and the provision of "Orton-Gillingham instruction [that was] wrapped up into the curriculum throughout the day" (IHO Decision at p. 18). The IHO found that there was an "abundance of evidence" that Bay Ridge provided a "supportive environment that correlated well with [the student], the curriculum was specifically tailored to meet [the student's] needs" and that she received "highly individualized instruction" that enabled her to make appropriate and meaningful progress "academically, socially, and emotionally" (*id.*). With respect to the district's challenge that Bay Ridge was too restrictive, the IHO found that based on the totality of the circumstances, least restrictive environment (LRE) considerations did not outweigh other indications in the record that Bay Ridge was an appropriate placement (*id.* at p. 19).

In addition, the IHO found that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement, as the parents cooperated with the district and did not interfere in any way with the district's responsibility to provide the student with a FAPE, and

there was nothing contrary in the record (IHO Decision at p. 18). Further, the IHO noted that the district did not present any evidence or testimony regarding equitable considerations (id.).

As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Bay Ridge for the 2020-21 school year (IHO Decision at p. 21). However, the IHO denied the parent's request for door-to-door transportation, finding that this accommodation was not warranted as the record included testimony that the student was able to navigate the outside environment, the student either walked or took public transportation with her mother while attending public school and did not display any behavioral, physical, or cognitive concerns while engaged in their commute, and no documentary evidence supported the need for special education transportation (id. at p. 20).

IV. Appeal for State-Level Review

On appeal, the district alleges that the IHO erred in finding that it failed to offer the student a FAPE for the 2020-21 school year, initially stating that the IHO focused "almost exclusively" on the deviations in the IEP from the recommendations in the private neuropsychological evaluation and "downplayed" the extent to which the IEP reflected the district's responsibility to place students in the LRE, and further asserting that, based on the totality of the evidence, the district offered the student a FAPE.

The district further asserts that the record establishes that the IEP developed by the district satisfied both procedural and substantive elements of the IDEA. First, the district argues that it conducted timely and comprehensive evaluations and held a timely and compliant CSE meeting, as: despite being asked on two occasions by district personnel whether they wanted to begin the CSE evaluation process, the parents "wanted to have [the student] privately evaluated rather than making her available for evaluation" by the district; the CSE reviewed the private neuropsychological evaluation soon after receiving it in May 2020, along with reports from the student's teachers, and "incorporated numerous aspects" from each source into the June 2020 IEP; and the district did not conduct a psychoeducational evaluation because "it would not have been appropriate to conduct another evaluation so soon after the private evaluation" and did not conduct a classroom observation "due to the COVID-19 pandemic" but that the student's "teachers provided sufficient information concerning [the student's] functioning in class.". Second, the district asserts that the parents meaningfully participated in the CSE process as, despite the parents' allegation that the district prevented their meaningful participation when it conducted a psychoeducational evaluation and classroom observation the day before the June 2020 CSE meeting, no such evaluation materials were created and, although the parents further alleged that the district did not consider their concerns, the June 2020 IEP indicated otherwise. Third, the district argues that it recommended appropriate related and/or other services that could meet the student's academic needs because, although the parent argued that the district should have specifically recommended the Orton-Gillingham method of reading instruction, the SETSS recommended in the June 2020 IEP provided this instruction by other means. Fourth, the district further argues that it developed appropriate and measurable annual goals, which were narrowly tailored to address the student's difficulty with fundamental reading skills including decoding, phonological awareness, phonological memory, phonological processing, and spelling. Fifth, the district asserts that it provided an appropriate placement in that the addition of SETSS to the student's general education program would have been the LRE that could appropriately address the student's needs related to

fundamental reading skills, as described in the June 2020 IEP. Finally, the district asserts that it developed an IEP that would result in meaningful progress with the addition of SETSS to the student's general education program.

In addition, the district asserts that the IHO erred in finding that Bay Ridge was an appropriate unilateral placement for the student, primarily because it was a more restrictive environment than the student required during the 2020-21 school year. The district further asserts that evidence showed that a small classroom in a full-time special education program was not necessary to address the specific skills the student needed to develop, was not the LRE in which the student could make meaningful academic progress, and was likely to harm the student's emotional development, and that Bay Ridge did not follow the recommendations of the private evaluation when placing the student in a special education class for math but not for reading and writing based classes like social studies. As relief, the district requests that the appeal be sustained and the IHO's decision be reversed and the tuition award be vacated.

In an answer, the parents respond to the district's allegations and argue that the IHO's decision should be upheld in its entirety. The parents contend, among other things, that the district failed to conduct a classroom observation or psychoeducational evaluation and did not submit evidence of any lack of consent by the parents for district evaluations or of their refusal to make the student available. The parents argue that the district's failure to conduct appropriate evaluations prevented the parents from meaningfully participating in the CSE meeting as the CSE failed to consider the parents' concerns and the recommendations included in the private neuropsychological evaluation. The parents further argue that the CSE failed to recommend Orton-Gillingham instruction to address the student's dyslexia, failed to recommend a small class for the student with a special education teacher in certain subject areas, and failed to develop appropriate annual goals. The parents contend that the district's LRE argument has no basis, that the district failed to develop an appropriate educational program to allow for meaningful progress, and that Bay Ridge was an appropriate unilateral placement.

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 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]).²

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

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

VI. Discussion

A. June 2020 CSE Process and IEP

1. Consideration and Sufficiency of Evaluative Information

Regarding the IHO's findings that the district did not conduct new evaluations prior to the development of the IEP for the 2020-21 school year, and that the CSE failed to consider the neuropsychological evaluation in the development of the student's IEP, the district asserts that the CSE had and considered sufficient evaluative material. In addition, the parties' arguments related to the parent's participation in the CSE meeting largely relate to the evaluations or lack thereof conducted by the district and the CSE's consideration of the private neuropsychological evaluation. Therefore, the parents' ability to participate in the CSE process will be discussed herein.³

² 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).

³ The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student, and any other "appropriate assessments or evaluations" as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). 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], [B]; 34 CFR 300.304[b][1][ii]; 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]). Whether it is an initial evaluation or a reevaluation of a student, 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).

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

Initially, the district argues that the parents wanted to have the student privately evaluated despite being asked on more than one occasion by district personnel if they wanted to begin the evaluation process. By email dated March 13, 2020, the parents advised the district that the student had recently undergone a neuropsychological evaluation and the results indicated that she might

York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that "[a] professional disagreement is not an IDEA violation"]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]. When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

require an IEP (Dist. Ex. 1 at p. 2). A school psychologist for the district responded that same day and requested that the parents provide the district with a copy of the neuropsychological evaluation report (*id.* at pp. 1-2). The psychologist advised the parents that if they wanted an evaluation to proceed through the district that they could submit a request to her or the school (*id.* at p. 2). By email dated May 7, 2020, the parents provided the district with a copy of the neuropsychological evaluation report and indicated that it was "quite comprehensive" and that they "d[id] not see the need for [district] testing at that time" (*id.* at p. 1).⁴ The parent asked the school psychologist to advise them if she disagreed after reviewing the evaluation report (*id.*). On May 21, 2020, the parents provided consent for the district to evaluate the student, which could "include a social history, psycho-educational evaluation, a classroom observation, and other appropriate assessments" but noted that "it [wa]s important" that the district not conduct "duplicative testing" to that administered by the private evaluator (Parent Ex. D).⁵

While the parents stated a belief that district evaluations were unnecessary, they also expressed openness to a different view from the district and did not refuse to consent to the district conducting evaluations of the student. So long as a parent has consented to the district conducting evaluations (or a parent's refusal to consent is overridden), it is the district's obligation to ensure that a student is evaluated in all areas of suspected disability (8 NYCRR 200.4[b][1]; *see* 34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). While the district may not rely solely on the parents' stated position about the need for district evaluations to support its determination not to conduct further evaluations, the evidence in the hearing record otherwise supports the district's position that it had sufficient evaluative information about the student to develop the IEP.

Regarding the parents' ability to participate in the CSE meeting given the timing of the district's "evaluations," the district acknowledges that it did not actually conduct a psychoeducational evaluation or a classroom observation. The evidence in the hearing record shows that the district's psychoeducational evaluation report is a one-page document dated June 17, 2020, which indicated that the parent provided a neuropsychological evaluation that would be used "as part of a flexible assessment along with teacher reports," and the classroom observation report dated the same day indicated that no observation was conducted "due to covid-19 school closures" (Dist. Exs. 7; 8). Therefore, the parents' argument that they could not have appropriately reviewed the data in these reports in preparation for the CSE meeting is unavailing since the reports did not contain data.

⁴ In addition, according to the student's teacher for the 2019-20 school year, during that school year she had asked the parents if they wanted her to explore an evaluation to determine the student's eligibility for special education but that the parents had responded that "they were going to figure some things out and do something on their own" and the teacher believed they were pursuing a private evaluation (Tr. pp. 165-66).

⁵ In their due process complaint notice, the parents had asserted that the district failed to hold a timely and compliant CSE meeting by failing to timely convene after their March 2020 communication to the district (*see* Parent Ex. A at p. 6); however, the evidence in the hearing record indicates that the parents requested a CSE meeting on May 7, 2020 when they sent a copy of the private neuropsychological evaluation to the district, and the CSE thereafter timely convened on June 18, 2020 (Dist. Ex. 1 *see* 8 NYCRR 200.4[a]; [e][1]; *see also* D.K. v. Abington Sch. Dist., 696 F.3d 233, 248 n.5 [3d Cir. 2012] [finding that "general expressions of concern" do not amount to "a 'parental request for evaluation' under the plain terms of the statute"], quoting 20 USC 1415[d][1][A][i]).

As for the district's decision not to conduct a psychoeducational evaluation, the district contends that it would not have been appropriate so soon after the March 2020 private neuropsychological evaluation. Indeed, during the impartial hearing, the district school psychologist testified that the district elected not to conduct a psychoeducational evaluation, in part, since the parents had indicated the private neuropsychological evaluation was comprehensive (Tr. p. 44). She elaborated that both a psychoeducational and a neuropsychological evaluation typically included administration of a cognitive and academic tests, but a neuropsychological evaluation went "more in depth" . . . with regards to executive functioning, memory, attention, phonological skill" and provided diagnoses (Tr. pp. 47-48). She testified that the March 2020 private neuropsychological evaluation was "encompassing of the cognitive and academic evaluations" that the district would have conducted and that it would not have been appropriate to evaluate the student so soon after the neuropsychological evaluation (Tr. p. 48). According to the district school psychologist, evaluations were not repeated until at least a year had passed and cognitive testing was typically done every three years since "[c]ognitive function doesn't typically change" (Tr. pp. 48-49). The psychologist who conducted the March 2020 private neuropsychological evaluation also testified that standardized tests could not be conducted until the passage of a certain amount of time, which would be specified in the particular test manual (Tr. p. 303).

As for the classroom observation, the district asserts that it was unable to conduct a classroom observation due to the COVID-19 pandemic. In a question and answer guidance regarding the provision of services to students with disabilities during school closures related to the COVID-19 pandemic, the State Education Department indicated that "if an evaluation . . . requires a face-to-face in-person assessment or observation, the evaluation would need to be delayed until school reopens" but that, on a case-by-case basis a remote observation of the student could be considered ("Supplement #1 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State," at pp. 3-4, Office of Special Educ. Mem. [Apr. 2020], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-1-covid-qa-memo-4-27-2020.pdf>). Here, while the district did not conduct a classroom observation, as discussed below, input from the student's teachers provided information about the student's academic performance in the classroom in her areas of difficulty (see 8 NYCRR 200.4[b][1][iv]).

Even if the district's failure to conduct a psychoeducational evaluation or a classroom observation of the student constituted a procedural violation of the IDEA, the evidence in the hearing record shows that the June 2020 CSE had sufficient information about the student in order to find the student eligible for special education and develop an IEP. The hearing record shows that the June 2020 CSE considered input provided by the student's then-current teachers, the concerns of the parents, as well as the March 2020 neuropsychological evaluation report (see Parent Exs. B; C; Dist. Exs. 3; 4). In addition, contrary to the IHO's determination and as described below, the June 2020 IEP reflected information contained within the March 2020 neuropsychological evaluation report, demonstrating that the CSE considered it (see Parent Exs. B; C).

The IEP documents the parents' concerns and input about the student's decoding, sight word knowledge, writing, and spelling, her use of "compensatory strategies to achieve academic success," and the potential usefulness of a laptop for spell checking, as well as their reports about

the student's ease in social settings, creativity, and confidence (Parent Ex. B at pp. 6-8, 17). The May 14, 2020 social history evaluation conducted by the district noted the parents' "began to have concerns 'a while ago' with [the student's] spelling" and that their concerns regarding the student's reading had begun during the then-current school year (Dist. Ex. 2 at p. 2).

According to the student's June 2020 school progress report, and as reflected in the June 2020 IEP, the student's then-current teacher reported that the student achieved 96 percent accuracy on running records at an estimated U/5 level (Parent Ex. B at p. 3; Dist. Ex. 3 at p. 1). In addition, the teacher reported that the student's decoding and comprehension skills were at level 3 (compare Parent Ex. B at p. 3, with Dist. Ex. 3 at p. 1).⁶ The student was able to read a text of 124 words within 3 minutes and 27 seconds, usually understood questions presented verbally, but could become confused when asked questions using complex sentences and required rephrasing (compare Parent Ex. B at p. 4, with Dist. Ex. 3 at p. 1).

According to the teacher, the student was able to read and sound out monosyllabic words and took the time to sound out multisyllabic words with phonemes that changed depending on placement in the word (Dist. Ex. 3 at p. 1). The teacher reported—and the IEP reflected—that when reading for understanding the student at times needed to return to a text to fully understand it (compare Parent Ex. B at p. 5, with Dist. Ex. 3 at p. 1). As the student had further improved her vocabulary in context, she was able to make inferences about what she was reading and retell clearly and accurately what she had read, and incorporate answers to three out of four comprehension questions (compare Parent Ex. B at p. 5, with Dist. Ex. 3 at p. 1). When the student decoded vocabulary in context, she sometimes had difficulty breaking down words and could lose the meaning of the text (compare Parent Ex. B at p. 6, with Dist. Ex. 3 at p. 1).

The teacher reported that the student had strong writing skills and was able to engage in high level analysis of text (compare Parent Ex. B at p. 6, with Dist. Ex. 3 at p. 1). However, the student experienced difficulty with spelling, punctuation, and capitalization (Parent Ex. B at p. 6). The student sometimes misspelled complex multisyllabic words or wrote words phonetically but, overall, her spelling difficulties did not deter from comprehension of her written work (compare Parent Ex. B at p. 5, with Dist. Ex. 3 at p. 3).

With regard to language comprehension and usage, the IEP indicated that, according to the student's teacher, the student required additional reinforcement after reading text to fully comprehend it, such as breaking down a question further and explaining vocabulary words (compare Parent Ex. B at p. 5, with Dist. Ex. 3 at p. 3). The student occasionally confused word order (compare Parent Ex. B at p. 5, with Dist. Ex. 3 at p. 3). With regard to oral language the teacher reported that the student was able to understand oral directions but sometimes needed redirection or rephrasing (compare Parent Ex. B at p. 5, with Dist. Ex. 3 at p. 3). The teacher indicated that the student sometimes required extra time to complete essays or book reports as she liked to plan her writing and fully flesh out her ideas before committing them to paper (compare Parent Ex. B at p. 5, with Dist. Ex. 3 at p. 3).

⁶ The teacher testified that "U [wa]s considered to be on grade level" (Tr. p. 172). In addition, she explained that elementary school report cards reflected levels 1-4 as grades (Tr. pp. 1723-74). She reported that level 3 was like a "B" and meant that the student was at grade level at this point (Tr. p. 174).

In her written report, the teacher noted that the student preferred to work independently rather than in a group setting but that, when the student worked with peers, she did so in an appropriate manner (Dist. Ex. 3 at pp. 3, 5). She indicated, and the IEP reflected, that the student had lots of friends, got along with the majority of peers in her class, and was polite and respectful with adults (compare Parent Ex. B at p. 7, with Dist. Ex. 3 at pp. 3, 4). In terms of work habits, the teacher reported that the student did not have difficulty being motivated to complete assignments but preferred when technology was involved (compare Parent Ex. B at p. 7, with Dist. Ex. 3 at p. 3). Further, the student could concentrate and demonstrated self-control in the classroom (compare Parent Ex. B at p. 7, with Dist. Ex. 3 at p. 4). The teacher described the student as very mature for her age and able to disagree in a polite manner (compare Parent Ex. B at p. 7, with Dist. Ex. 3 at p. 4).

In terms of other classes, the student's teacher reported, and the IEP noted, that the student had done well in science lessons, enjoyed social studies and project-based learning, was very tech savvy, and enjoyed opportunities to create on her computer (compare Parent Ex. B at p. 6, with Dist. Ex. 3 at p. 4). The student's math teacher indicated that the student knew her math facts but needed to practice them constantly, so they were reinforced (compare Parent Ex. B at p. 5, with Dist. Ex. 4 at p. 2). The math teacher reported, and the IEP indicated, that the student could perform basic operations with multi-digit numbers and knew how to regroup and did so when necessary (compare Parent Ex. B at p. 5, with Dist. Ex. 4 at p. 2.). The math teacher noted that the student was comfortable problem solving, could work through problems with little guidance, and was often successful at solving multi-step word problems (compare Parent Ex. B at p. 6, with Dist. Ex. 4 at p. 2). With regard to the student's strengths, the math teacher reported that the student demonstrated a strong understanding of place value of whole numbers to the millions and decimals to the thousandths and also showed strength in rounding numbers (compare Parent Ex. B at p. 6, with Dist. Ex. 4 at p. 2). In addition, the student had mastered adding and subtracting fractions, including mixed numbers with unlike denominators (compare Parent Ex. B at p. 5, with Dist. Ex. 4 at p. 2). In terms of math weaknesses, the teacher reported, and the IEP noted, that the student needed to slow down in order to prevent mistakes and continue to work on articulating the reasonableness of her answers and flexibly applying efficient strategies when solving multi-step problems (compare Parent Ex. B at p. 5, with Dist. Ex. 4 at p. 2).

In addition to the social history and teacher reports, the CSE also had before it the March 2020 neuropsychological evaluation report. A CSE must consider independent educational evaluations obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

Here, the evidence in the hearing record shows that the private neuropsychological evaluation was discussed at the CSE meeting and the results were reflected in the June 2020 IEP's

present levels of performance; the appropriateness of the CSE's recommendations as compared to the recommendations set forth in the March 2020 neuropsychological evaluation are discussed further below.

According to the March 2020 neuropsychological evaluation report, the evaluation was comprised of clinical interviews with the parents and student, a review of the student's educational records, behavioral observations, standardized testing of the student's general intelligence and overall cognitive functioning, assessment of the student academic achievement, and assessment of the student's emotional functioning (Parent Ex. C at pp. 1-7, 11-14). Quantitative measures used to evaluate the student included the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V); the Wechsler Individual Achievement Test, Third Edition (WIAT-III); the Beery Buktenica Test of Visual Motor Integration (VMI); the Gray Oral Reading Tests, Fifth Edition (GORT V); the Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2); the Vanderbilt ADHD Diagnostic Parent Ratings Scales (VADPRS); and the Behavior Assessment System for Children, Third Edition (BASC-3), Parent Edition (*id.* at p. 3). Qualitative measures used to evaluate the student included the aforementioned behavioral observations and clinical interview, as well as a sentence completion task (*id.*).⁷

The neuropsychological evaluation report stated that the student was referred for an evaluation due to parent concerns regarding her academic progress and reading skills, and to determine appropriate interventions (Parent Ex. C at p. 1). At the time the evaluation took place, the student was in fifth grade (*id.* at pp. 1, 2). Background information obtained from the parents indicated that the student was struggling in reading, as she was unable to "decode effectively" and her sight word abilities were delayed (*id.* at p. 2). The parents indicated that at a November 2019 school conference the student's teacher reported that "there were decoding issues" and that the student had recently begun to avoid doing her work (*id.*). The parents hired a tutor for the student in December 2019 and the student began attending Orton-Gillingham based tutoring sessions twice a week (*id.*). Additional background information indicated that the student had difficulty with spelling and had not yet "internalized punctuation and capitalization" (*id.*). The parents reported that the student's reading comprehension, creative writing skills, and her ability to make inferences were reportedly good (*id.*).

The parents indicated that the student excelled at math and enjoyed doing research projects for social studies (Parent Ex. C at p. 2). The parents characterized the student's executive functioning skills as "sophisticated" as she demonstrated leadership skills during group work and was good at planning and time management (*id.* at pp. 2, 3). The student was confident, creative, organized, outgoing, and cooperative, and had good self-esteem, a positive attitude, and excellent visual spatial skills (*id.* at p. 2).

⁷ The House-Tree-Person Test is also listed as a qualitative measure used to assess the student, but the neuropsychological evaluation report does not include any discussion of the student's performance on this measure (*see* Parent Ex. C). Rather, the "Emotional Functioning" section of the report references the student's performance on the "MASC-2" and "CDI-2" (*id.* at p. 6). Neither assessment is identified by its complete name in the evaluation report and the appendix of test scores does not include the results of these tests (*see id.* at pp. 11-14).

In terms of behavioral observations, the evaluating psychologist reported that the student presented as "very outgoing and fun-loving" and further noted that she was cheerful and cooperative (Parent Ex. C at p. 3). The evaluator reported that the student initiated conversation often and appeared to easily follow directions (id.). She indicated that the student demonstrated satisfactory ability to remain alert and attend to relevant task information for long periods of time (id.). The evaluator noted that the student's writing pace was slow and, although the student was "highly motivated" and a "very hard worker," she was only able to complete two of five written paragraphs of an essay (id.). The evaluator cautioned that the evaluation should be considered an "underestimate" of the student's intelligence and academic abilities (id.).

According to the evaluator, and as reflected on the June 2020 IEP, on the WISC-V, the student's overall cognitive functioning fell in the superior range (FSIQ=129, 97th percentile), the student's performance on the verbal comprehension index was average, and her scores on the visual spatial and fluid reasoning indices were in the extremely high range (compare Parent Ex. B at p. 3 with Parent Ex. C at p. 4). In addition, the student scores on the working memory and processing speed indices fell in the superior range (compare Parent Ex. B at p. 3, with Parent Ex. C at p. 4). The evaluator noted that the student's nonverbal IQ score was 144 (99.7th percentile) (compare Parent Ex. B at p. 3, with Parent Ex. C at p. 4). Based on the student's performance, the evaluator reported that her verbal knowledge, vocabulary, and verbal reasoning skills were age appropriate, but her phonological processing skills were delayed (compare Parent Ex. B at pp. 3, 4, 6, with Parent Ex. C at p. 4). Specifically, the student performed below average on tasks of phonological awareness, low average on tasks of phonological memory, and exhibited "extremely variable" rapid retrieval skills (compare Parent Ex. B at p. 6, with Parent Ex. C at pp. 4-5). In her report, the evaluator noted that these skills were "critical" to the development and practice of reading and weaknesses in these areas "likely ma[de] it more difficult" for the student to read unfamiliar material (Parent Ex. C at p. 5).

The evaluator indicated that the student exhibited "very superior" ability to work with non-verbal materials, "exceptional" performance on measures of visual perception and organization, "excellent" performance on a task where she was required to solve a visual puzzle, "extremely high" logic and problem-solving skills, and "truly outstanding" abilities during a visuo-spatial and visuo-construction task involving the manipulation of blocks into a modeled pattern (Parent Ex. C at p. 5). With regard to executive functions, the student exhibited no difficulties related to attention or executive functioning based on the parent rating scales and her working memory was "excellent" (id.). The evaluator noted that the student's performance was age-appropriate on a rote auditory recall task and superior on "complex tasks with greater mental manipulation" (id.). The evaluator indicated that the student's processing speed of routine visual material without errors (PSI = 125, 95th percentile) and her performance on a complex task that included visual scanning and copying was "very high" (id.).

According to the evaluator and as reflected on the June 2020 IEP, the student's overall reading fell in the below average range, at the 18th percentile range, as measured by the WIAT-III and the GORT V (compare Parent Ex. B at p. 3, with Parent Ex. C at p. 6).⁸ The student's

⁸ While the student's oral reading index score on the GORT-V fell at the 18th percentile the appendix to the evaluation report did not include an overall reading score as measured by the WIAT-III (see Parent Ex. C at pp. 12-14).

performance on a task of individual word reading fell at an end of third grade reading level (Parent Ex. C at pp. 6, 13). The student demonstrated difficulty with correctly sounding out unfamiliar words and decoding nonsense words, with her skills falling at a second-grade level (compare Parent Ex. B at p. 3, with Parent Ex. C at p. 6). The evaluator noted that the student exhibited "extremely slow" decoding speed, reversed sounds, left out sounds in a blend, and did not demonstrate a knowledge of all of her vowel sounds (compare Parent Ex. B at pp. 3-4, with Parent Ex. C at p. 6). In addition, the student exhibited low average reading comprehension skills, which fell two grade levels below her current grade according to the WIAT-III (compare Parent Ex. B at p. 4, with Parent Ex. C at p. 6). In her report, the evaluator indicated that the student was not a fluent reader and when she tried to read at an age-appropriate pace her accuracy ranged from the 5th to 9th percentile (Parent Ex. C at pp. 6, 13, 14). The evaluator characterized the student's reading skills as "clinically significantly delayed" (id. at p. 6).

Turning to the student's writing skills, the evaluator reported that the student's written language was much better when spelling did not count (Parent Ex. C at p. 6). Based on administered assessments, the evaluator reported that the student's spelling skills fell below average and were two and one-half years below grade level, which was related to her deficits in phonological processing (id.). The evaluator described the student's ability to write short sentences and paragraphs as "somewhat variable" and noted that she had difficulty combining three simple sentences into a meaningful sentence and her ability to create original sentences was below expectation (id. at pp. 6, 13). In addition, she noted that at times the student's spelling was so poor that it was difficult to discern her meaning (id. at p. 6). Still, the evaluator reported—and the IEP reflected—that the student was able to write complete sentences, had internalized the rules of grammar, capitalization, and punctuation, and her ability to write an essay was "excellent" (compare Parent Ex. B at p. 4, with Parent Ex. C at p. 6).

In terms of mathematics, the evaluator stated that the student's skills as measured by the math subtests of the WIAT-III were "good," which observation was reflected in the IEP (compare Parent Ex. B at p. 4, with Parent Ex. C at p. 6). The student was able to consistently add, subtract, multiply, divide, and work with fractions (compare Parent Ex. B at p. 4, with Parent Ex. C at p. 6). According to the evaluator, the student performed above grade level on a math problem solving task, which measured real world applications of mathematics (compare Parent Ex. B at p. 4, with Parent Ex. C at p. 6). On timed tests the student worked quickly and did not make any mistakes, indicating that math was a strength for her (compare Parent Ex. B at p. 4, with Parent Ex. C at p. 6).

As reflected on the IEP, the evaluator noted that, according to the BASC-3 parent inventory, the parents reported no concerns related to externalizing, internalizing, or behavioral symptoms, noted very good adaptive skills, and described the student as "socially adept" (compare Parent Ex. B at p. 7, with Parent Ex. C at p. 6-7). The student was reportedly at ease in many different types of social settings, able to work well under pressure, able to bring others together, and was described as creative (compare Parent Ex. B at p. 7, with Parent Ex. C at p. 7). The evaluator indicated that, as measured by clinical interview, the MASC-2, and the CDI-2, the student presented as happy and confident and did not exhibit any symptoms of anxiety or depression (compare Parent Ex. B at p. 7, with Parent Ex. C at p. 7).

The evaluator summarized her findings, noting that overall, the student's performance on academic tasks during the March 2020 neuropsychological evaluation was "extremely variable" (Parent Ex. C at p. 7). The evaluator reported that the student's reading skills were well below grade level, and her fund of sight words and ability to decode were both well below expectations, falling at two to three grades below grade level (*id.*). According to the evaluator, the student's deficits in phonological processing impacted her reading abilities which were significantly discrepant from her age, intellectual functioning, and educational history (*id.* at pp. 6, 7). The evaluator found that the student qualified for a diagnosis of specific learning disorder with impairments in reading (*id.* at pp. 6, 7, 9). She noted that the student exhibited generally good writing skills, which were negatively impacted by her deficits in spelling, good math skills, and no concerns related to her emotional functioning (*id.* at pp. 7-8). The evaluator opined that the student's deficits in phonological processing required remediation (*id.* at p. 7).

Based on the foregoing, the hearing record supports a finding that the June 2020 CSE had a clear understanding of the student's needs and had sufficiently comprehensive evaluative information about the student to develop her IEP without conducting further evaluations. Thus, the evidence in the hearing record does not support the IHO's finding that the district did not sufficiently evaluate the student for the 2020-21 school year or that the CSE did not consider the March 2020 private neuropsychological evaluation. The hearing record demonstrates that the district was aware of the student's needs and that further evaluative information would not have altered or significantly expanded that knowledge.

2. SETSS and Methodology

Turning to the CSE's recommendations, the crux of the parties' arguments is related to whether the June 2020 CSE recommended an appropriate placement, which the district maintains could be achieved through a general education classroom with group SETSS four times per week.

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a resource room program, as a consultant teacher service, in a special class, or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>).⁹

⁹ State guidance specific to students with disabilities resulting from dyslexia, dysgraphia, and dyscalculia emphasizes that "[t]he specially designed instruction that is appropriate to the unique needs of each student with a disability resulting from dyslexia, dysgraphia, and/or dyscalculia may vary across individual students with each of these specific learning disabilities" and that "[b]ecause of this, there is no single approach, product, or method of delivering specially designed instruction to such students that is required in federal or State law and regulations" ("Students with Disabilities Resulting from Dyslexia, Dysgraphia, and Dyscalculia: Questions and Answers, at p.

The evaluator who conducted the March 2020 neuropsychological evaluation of the student reported that the student had clinically significant learning difficulties that had made it difficult for her in her then-current classroom setting (Parent Ex. C at p. 9). The evaluator opined that the student would require a small classroom setting with access to a special education classroom for reading- and writing-based classes such as English and history (*id.*). The evaluator stated that the student would also require daily access to a structured, sequential, multisensory program, in a class with children who had no behavioral problems and average to above average cognitive abilities, and accordingly recommended a private school which utilized the Orton-Gillingham methodology (*id.*). In addition, the evaluator recommended accommodations of extended time on all tests, a reader for one year on all standardized tests, use of a laptop with spell check for all written assessments, access to books on tape for social studies and longer English assignments, and daily access to "Orton Gillingham based reading remediation such as PAF, WILSON, Slingerland, etc." (*id.*).¹⁰ The evaluator stated that the student would require 500 hours of compensatory services and access to a reading "bootcamp" program (*id.*). In addition, if the student did not make significant gains in reading after one year, the report recommended placement in a small, integrated special education environment for children with average intellectual skills, no behavioral problems, and language-based learning disorders with daily Orton-Gillingham instruction and access to general education classes (*id.*). To improve the student's writing skills, the evaluator recommended the use of a computer for written work and utilization of specific applications (*id.* at p. 9-10). Finally, the evaluator recommended re-evaluation of the student's academic and executive functioning in 24-30 months to determine progress and assist in educational planning (*id.* at p. 10).

Initially and as alluded to above, 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.*, 885 F.3d at 753; *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]). This includes recommendations pertaining to the precise teaching methodology to be used by a student's teacher, which is usually a matter to be left to the teacher's discretion (*Rowley*, 458 U.S. at 204; *R.B. v. New York City Dep't of Educ.*, 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; *A.S. v. New York City Dep't of Educ.*, 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; *K.L. v. New York City Dep't of Educ.*, 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; *R.E.*, 694 F.3d at 192-94; *M.H.*, 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (*R.B.*, 589 Fed. App'x at 576

6, Office of Special Educ. [Aug. 2018], available at <http://www.p12.nysed.gov/specialed/publications/documents/q-and-a-students-with-dyslexia-dysgraphia-dyscalculia.pdf>; *see generally* Educ. Law § 305[56]; *Dear Colleague Letter*, 66 IDELR 188 [OSERS 2015]).

¹⁰ The evaluator stated that the teaching method "should not 'pull from' an Orton Gillingham source . . . but rather follow a manualized treatment (Parent Ex. C at p. 9).

[upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94).

However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).

During the impartial hearing, the evaluating psychologist explained that she recommended the student for a smaller classroom setting in the classes for which she needed to read a lot, such as English and history, where things were heavily dependent on a student's ability to read the material on his or her own and then discuss it in class (Tr. p. 292). For reading and writing, the evaluator explained that the student needed special education instruction because she was very far behind in reading and her spelling was "so delayed" (Tr. p. 294). The evaluator testified that for classes such as history the student needed a small special education classroom setting because she couldn't read at the level expected in a general education classroom and be able to keep up (id.).

The evaluator opined that the student also required daily Orton-Gillingham based instruction in order to catch up because she was so far behind (Tr. p. 292). She suggested that the instruction "ha[d] to really be that structured, sequential, multisensory instruction where you follow . . . the manual by the letter" otherwise for a student such as this it was not going to work and would end up backfiring (Tr. p. 293). The evaluator indicated that when a student had deficits in phonological processing "the researched-based methodology [wa]s Orton Gillingham" and it worked well as long as "you don't kind of hop around" (Tr. p. 295). The evaluating psychologist reported that the student really needed a computer because she needed spellcheck and emphasized that the student's reading difficulties impacted her in classes other than ELA (Tr. p. 293). The evaluator reported that she recommended the student for a private school because there was only one Orton-Gillingham provider within the student's district and Orton-Gillingham instruction would not have been available to the student in any of the middle schools she might have been assigned to attend (Tr. p. 295).

The evaluator opined that the IEP recommended by the district was inappropriate in that SETSS programming varied by school and the IEP did not indicate that the student would be getting Orton-Gillingham instruction (Tr. p. 297). She opined that there could be any number of students in the room, some of whom were dyslexic and some of whom had ADHD and therefore SETSS in a group was not an appropriate recommendation without more specifications (id.). In addition, she noted that the IEP "missed the idea" that the student required special education classes

for ELA and history going forward (*id.*). The evaluator also opined that the student's goals were too general and suggested, for example, that instead of saying the student would blend words with 80 percent accuracy the IEP should have qualified the grade level at which the student was expected to perform the skill (Tr. pp. 297-98). The evaluator indicated that the goal that called for stretching out sounds and chunking reflected strategies for teaching a student without dyslexia, not with it, and noted the goals did not reflect the use of multi-sensory instruction (Tr. p. 298). The evaluator noted that there were no goals that addressed sight words (Tr. pp. 298-99). The evaluator opined that the student did not need a full-time special education school (Tr. p. 324).

The district school psychologist testified that SETSS was a service that allowed a student to work on targeted skills that a teacher would not be able to address within a classroom, such as, in the case of the student, "fundamental skills" (Tr. p. 66). She testified that the CSE recommended four weekly sessions of SETSS in ELA to address the student's deficits in phonological awareness and decoding and allow her "to work on the foundation skills to generalize and carry into the class" (Tr. pp. 67, 77). The psychologist indicated that the student would benefit from attending a general education setting with supports because she had been performing on grade level and the SETSS could address the student's skill deficits as identified in the March 2020 private neuropsychological evaluation report (Tr. pp. 72-73). She indicated that the CSE was looking for the LRE for the student and that the recommendation in the private neuropsychological evaluation for a small class represented a "jump from no services to small classroom" and that, likewise, a private school was not appropriate because the student was functioning in a general education environment (Tr. p. 129).

As for Orton-Gillingham methodology, the school psychologist testified that the district had to ensure that the special education teacher would be able to use whatever worked for the student and that "it wouldn't be within best interest to just stick to one specific program when multiple different programs could be targeted to help [the student]" (Tr. pp. 130-31).

During the impartial hearing, the student's teacher for the 2019-20 school year testified that the student needed "recasting" or repetition of instructions, had difficulty verbally answering questions with correct word order, and she struggled with French (Tr. p. 184). The teacher also stated that the student "thrived in so many ways" that when remote learning began, it was difficult to accurately assess what her deficits were (Tr. p. 185). The teacher described the student as "very bright" and "very successful" in many respects, but indicated that she exhibited deficits in decoding, and in speaking at times (*id.*). The teacher averred that the student would "thrive" with instruction differentiated to her individual needs (*id.*). In addition, the teacher agreed with the SETSS recommended by the June 2020 CSE, because the service would provide the student with instruction in phonemic awareness not provided by the general education curriculum at the middle school level (Tr. pp. 185-86).

According to the teacher, the student reportedly understood "key skills" and "key themes" in the general education setting, and her "best subjects" were social studies and science, which were "literacy-based" and required "reading and research" (Tr. p. 186). The teacher opined that the student was able to keep up with grade level content and that her decoding skills could be "specifically targeted" with SETSS (*id.*). The teacher opined that the student "would thrive in a general education classroom" with SETSS because it would target her deficits within the general education curriculum (Tr. p. 187). In addition, the teacher suggested that the general education

setting was helpful for the student's emotional development as she had "so many friends," and the teacher did not want her to "feel badly about herself" (id.).

The teacher further reported that, during the 2019-20 school year, the student had met with her during office hours to go through her work for the week and address any questions, concerns, and obstacles, and to receive individualized supports on difficult assignments (Tr. p. 199). As a result, the teacher determined that the student would benefit from additional reading supports such as leveled books and scaffolds and provision of "external support" a couple of times a week to address her decoding issues within the LRE (Tr. p. 200).

In the June 2020 progress report, the student's teacher from the 2019-20 school year indicated that the student was successful in a mainstream classroom but also benefitted from working in stations or small groups (Dist. Ex. 3 at p. 5). She opined that the student was appropriately placed in her then-current setting (id.). The teacher noted that while the student had some difficulty decoding at grade level and sometimes mixed up words, she was progressing in writing at grade level (id.). The teacher opined that the student could potentially benefit from additional support in reading given that having additional supports had led the student to greater understanding of her reading (id.). The teacher noted that, although overall the student's work was at standard, additional time for assignments had proven beneficial to her success (id.). The teacher noted that the student had been thriving in the distance learning model (id.). She opined that the student should be promoted to the next grade (id.).

In terms of recommendations, the teacher noted that she had been able to work with the student in smaller groups, differentiated to her reading level, and provide leveled questions and supports for her personal learning needs (Dist. Ex. 3 at p. 6). The teacher noted that the student received tutoring outside of school and if she were not, she would benefit from extra help in reading (id.). The teacher opined that the student did not require a different academic setting than a mainstream setting (id.). She indicated that it was difficult to say what program changes were needed as she had been working with the student one to two times a week across content areas and the student had been working with a reading specialist outside of school (id.). The teacher opined that the student would benefit from additional reading support such as scaffolds, leveled books, and differentiated instruction for her learning needs (id.). She further opined that "linguistically," the student could benefit from external support at least once a week to help with decoding issues (id.). Lastly, she opined that being placed in the LRE with added supports would best benefit the student's social, emotional, and academic needs (id.).

The student's father testified that the parents started the June 2020 CSE meeting by "making it clear . . . to everyone, that [they] were there to discuss that specific diagnosis . . . [t]he specific learning disorder with impairment in reading" and that, although all of the recommendations of the neuropsychological evaluation were discussed at the CSE meeting, he "thought that those recommendations were going to be incorporated into the IEP" and that Orton-Gillingham would be part of the student's program (Tr. pp. 327-30). The teacher testified that, at the June 2020 CSE meeting, the parents discussed the neuropsychological evaluation report recommendation regarding the student's need for Orton-Gillingham instruction (Tr. pp. 225-26). However, the teacher indicated that the purpose of the meeting was not to determine the specific reading program which would be used to target the student's needs, nor could the CSE recommend a specific reading program (Tr. pp. 226, 231-32). The teacher stated that there were many evidence-based programs

which targeted reading disorders, and the student reportedly did "really well" in the regular classroom setting (Tr. pp. 225-29, 232-33).

According to the June 2020 IEP, the teacher and parents noted that the tutoring services and in class instruction provided had been effective in addressing the student's reading deficits (Parent Ex. B at p. 6). The IEP noted that this demonstrated that SETSS would benefit the student to assist with her fundamental reading skills identified during the initial evaluation (*id.*). Accordingly, the June 2020 CSE recommended SETSS to address the student's reading deficits in the LRE (*id.* at p. 7).

The reading specialist who delivered tutoring services to the student beginning in November 2019 testified at the impartial hearing that she used Orton-Gillingham methodology with the student, as well as a program call Teaching Basic Writing Skills, which was "often used hand in hand with Orton-Gillingham" (Tr. pp. 379-81). The reading specialist described Orton-Gillingham as "the gold standard for remediating reading disabilities" and indicated that the student was an "ideal candidate" for the methodology since she was "extremely bright and articulate" but "really needed to be taught the . . . rules and the letter sounds in . . . English very explicitly" (Tr. pp. 381-82). The reading specialist testified that the student "took to it amazingly well" (Tr. pp. 382-83).

The CSE was aware that the tutoring that the student had been receiving—and which the IEP acknowledged was effective—was delivered using Orton-Gillingham methodology because that information was contained in the March 2020 private neuropsychological evaluation report (Parent Exs. B at p. 5; C at p. 2). Further, the recommendation for the methodology in the March 2020 neuropsychological evaluation report was clear (Parent Ex. C at p. 9). The student's teacher for the 2019-20 school year seemed to recommend that the student receive additional or "external" support in reading and specifically to address decoding, referencing that this would be appropriate if the student was not receiving tutoring (Tr. p. 200; Dist. Ex. 3 at pp. 5-6). The teacher was equivocal with respect to stating what program the student might benefit from since the student had been working with the private reading specialist (Dist. Ex. 3 at p. 6).

Given input from the student's then-current teacher at the June 2020 CSE meeting, the CSE's recommendations for SETSS may have appropriately addressed the student's needs in the LRE, notwithstanding the private psychologist's view that the student required a more supportive class setting in certain subjects. However, while there is merit to the proposition that methodology be left to the teacher's discretion, under the circumstances presented here, the district has not met its burden of showing that the student's program did not require the inclusion of Orton-Gillingham instructional methodologies on her IEP in order for the student to receive a FAPE.¹¹ More specifically, in light of the student's receipt of instruction using Orton-Gillingham methodology with her tutor and the IEP's acknowledgment of her success therewith, the recommendations in the private evaluation, and the discussion of the methodology during the CSE meeting (that was not ultimately reflected on the IEP), it was incumbent upon the district to offer evidence during the impartial hearing that the student could receive educational benefit without the inclusion of Orton-

¹¹ Further, there is no merit to the position that the CSE could not recommend a specific reading program (*see* Tr. p. 231) because, as set forth above, if there is a clear consensus that the student required a particular methodology, the IEP must reflect the same (*see, e.g., A.M.*, 845 F.3d at 544-45; *R.E.*, 694 F.3d at 194).

Gillingham methodology on her IEP, and testimony from district staff that it was better to leave the methodological question to the discretion of the teacher was not sufficient (see A.M., 845 F.3d at 543-45).

While I do not share the IHO's strong view that the evidence showed the CSE's complete disregard of the neuropsychological evaluation including the recommendations therein or his adamant that the student required a "much different program" than recommended by the June 2020 CSE or that defense of the CSE's recommendations represented the district's "wishful thinking" (see IHO Decision at pp. 15-16), for the reasons set forth above, there is insufficient basis in the hearing record to disturb the IHO's ultimate finding that the district failed to meet its burden to show that it offered the student a FAPE for the 2020-21 school year.

B. Unilateral Placement

Having found that the IHO did not err in finding that the district failed to offer the student a FAPE for the 2020-21 school year, the next inquiry is whether the unilateral placement of the student at Bay Ridge was appropriate.

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

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

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

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

This district's only argument on appeal with respect to the appropriateness of Bay Ridge is that it is a more restrictive environment than the student needed. 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., 231 F.3d at 105; 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., 744 F.3d at 830, 836-37 [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).

The district attempts to compare the restrictiveness of the CSE's recommended program to the unilateral placement; however, having determined that the district failed to offer the student a FAPE, the proper analysis is not one of comparison of the district and private programs. Moreover, the Bay Ridge coordinator testified that, based on the student's "cognitive strength" and "above average capability" coupled with her "significant impairments in reading and in spelling," it was determined that the student should attend the Achieve Program at Bay Ridge, which "allow[ed] students to be mainstreamed" but receive a daily individualized support in an academic enrichment class (Tr. pp. 351-52). Within the academic enrichment class, the student received instruction with an Ortron-Gillingham certified instructor for half of the period (Tr. p. 352). Given the student's access to nondisabled peers at Bay Ridge, the district's position based solely on LRE considerations is without merit.

Based on the foregoing, the district has not pointed to a sufficient basis to disturb the IHO's determination that Bay Ridge was an appropriate unilateral placement for the student for the 2020-21 school year. As the district has not appealed the IHO's determination that equitable

considerations weighed in favor of the parents' request for tuition reimbursement, that finding has become final and binding on the parties.

VII. Conclusion

Based on the foregoing, there is insufficient basis in the hearing record to disturb the IHO's determinations that the district failed to offer the student a FAPE for the 2020-21 school year and that Bay Ridge was an appropriate unilateral placement for the student.

I have considered the parties' remaining contentions and find they need not be addressed in light of my determinations above.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 15, 2021**

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**