



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-177

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

Appearances:

Law Office of Noelle Boostani, attorneys for petitioner, by Noelle Boostani, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her requests for reimbursement for the tuition and costs of her son's attendance at The Churchill School and Center (Churchill) for the 2020-21 school year and for the district to fund an independent neuropsychological evaluation of the student. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student attended a charter school for kindergarten for the 2015-16 school year (Parent Exs. B at p. 1; C at p. 1; see Parent Ex. A at p. 3).¹ For the 2016-17 school year, he attended a first grade class at the same charter school; the student's class was staffed by a lead teacher and a teacher assistant (Parent Ex. C at p. 1). In October 2016, response to intervention (RtI) services were initiated due to concerns regarding the student's reading ability and handwriting skills (Parent Exs.

¹ The May 2017 psychoeducational evaluation report indicated that prior to entering kindergarten the student attended an early learning program from 2011 through 2015 (Parent Ex. C at p. 1).

B at p. 1; C at p. 1).² In February 2017, the parent referred the student to the CSE for an initial evaluation due to her concerns regarding the student's progress in reading and his speech-language skills (Parent Exs. C at p. 1; FF at p. 2). As part of the initial evaluation, the district conducted a March 30, 2017 speech-language evaluation, an April 20, 2017 classroom observation, and a May 31, 2017 psychoeducational evaluation (Parent Exs. C, FF at pp. 1-5).³ The March 2017 speech-language evaluation report indicated that the student presented with expressive and receptive language skills in the low-average range and recommended speech-language therapy to address the student's areas of weakness that were adversely affecting his academic performance (Parent Ex. FF at p. 3). The April 2017 classroom observation report noted that the student was interested in the tasks presented and was focused most of the time (*id.* at p. 1). According to the May 2017 psychoeducational evaluation report the student's overall cognitive skills fell in the average range as did his performance on measures of academic achievement (Parent Ex. C at pp. 6-8). The parent reported that after the initial evaluation "there was no determination" and she did not recall attending an IEP meeting (Tr. p. 538).

The student entered second grade at the start of the 2017-18 school year, however, due to significant academic difficulties, after one month he was placed back in first grade (Tr. pp. 538-39; Parent Exs. B at p. 2; F at p. 1).⁴

For the 2018-19 school year the student transferred to a second charter school where he was enrolled in a second grade integrated co-teaching class (ICT) and received speech-language therapy two times per week (Parent Ex. B at p. 1).⁵ The student had an IEP which reflected a disability classification of speech or language impairment (Parent Ex. B at p. 1). An April 2019 report card, which covered the period from November 26, 2018 to March 15, 2019, indicated that the student was meeting expectations in reading, was approaching expectations in writing, and meeting expectations in mathematics (Dist. Ex. 11 at pp. 1-2). However, an April 24, 2019 teacher report indicated that the student was below grade level in reading and was struggling with fluency, which impacted his reading comprehension (Dist. Ex. 10 at p. 1). The teacher stated that the

² The May 2017 psychoeducational evaluation report noted that the student's RtI services included handwriting practice packets, books at various levels sent home, adult check-ins, small group support for number stories, and 1:1 support during writing (Parent Ex. C at p. 1). The student reportedly responded to the interventions and made sufficient progress to exit the RtI process, but he continued to receive 1:1 adult support during writing components (*id.*). The psychoeducational report noted that, according to the December 2016 progress report the student was approaching grade level expectations in reading and writing and was meeting expectations in mathematics (*id.*).

³ The May 31, 2017 psychoeducational evaluation report indicates that testing was conducted in February and March 2017; however, it is referred to as the May 31, 2017 psychoeducational evaluation report because it is marked as being sent on May 31, 2017 (Parent Ex. C at p. 1).

⁴ The parent testified that a month into a new school year struggling students were assessed to determine how they were performing and if they were deemed to be behind, they would be placed back in the lower grade (Tr. pp. 538-39). It was at this point during the 2017-18 school year, after the student had advanced to second grade, that the parent learned that the student was being returned to first grade for the 2017-18 school year (Tr. pp. 538-39).

⁵ According to a June 2019 psychoeducational evaluation report completed by the charter school the student attended in second grade, the May 2017 psychoeducational evaluation had resulted in the student receiving an IEP and special education services (Parent Ex. B at p. 2).

student had strong listening comprehension skills when a story was read aloud and he could make inferences, but he struggled to do so independently (*id.*). With respect to writing, the teacher reported that the student was performing below grade level (*id.*). She noted that he struggled to formulate strong and clear ideas, that his use of grammar and conventions was below grade level, that he often misspelled sight words, and that he needed "a lot" of support to add clear and relevant details to his writing (*id.*). Additionally, the teacher reported that the student's writing was difficult to read (*id.*). Regarding mathematics, the teacher indicated that the student had strong number sense and could compute numbers accurately, but struggled with word and multi-step problems due to comprehension challenges and poor organization (*id.*). She stated that the student was performing below grade level in math (*id.*). Although the student presented with academic difficulties, his teacher indicated that he was very social and had many friends; however, he was shy when speaking and answering questions in class (*id.* at p. 2). According to the teacher, the student had a number of management needs (*id.* at p. 3).⁶ The April 2019 teacher report also identified areas in which the student needed to improve including reading fluency, solving mathematical word problems, and increasing his ability to respond to grade level texts through accurate written responses (*id.* at p. 3).

A CSE convened on May 8, 2019, to determine the student's continued eligibility for special education services for the remainder of the 2018-19 school year as well as for the 2019-20 school year (third grade) (Dist. Ex. 8 at p. 16). Finding the student remained eligible for services as a student with a speech or language impairment, the CSE recommended that the student receive ICT services in English language arts (ELA) and mathematics, individual speech-language therapy for one 30-minute session per week and group (of three) speech-language therapy for one 30-minute session per week (*id.* at p. 12). The May 2019 CSE recommended strategies to address the student's management needs and seven annual goals that addressed the student's reading, writing, mathematics, and speech-language challenges (*id.* at pp. 4, 6-11).

On May 31, 2019, the student was seen for an occupational therapy (OT) evaluation (Parent Ex. D). The evaluator determined that the student demonstrated difficulty with tasks that required motor coordination and noted that, during a writing task, the student demonstrated difficulty with maintaining letters on the line, letter formation and size (*id.* at p. 5). The evaluator indicated that with regard to sensory integration/regulation the student's teacher reported that the student "respond[ed] more to sights than other students" (*id.*). The evaluator recommended two thirty-minute sessions of individual OT services per week to address the student's needs with respect to sensory regulation, fine motor skills, visual perception, and motor coordination (*id.*).

In response to parent and teacher concerns regarding the student's reading abilities, he was referred for an updated education evaluation, which was completed by a school psychologist on June 10, 2019 (Parent Ex. B at p. 1). At the time of the referral, the student presented with "significant difficulty" with early reading skills such as phonological awareness and decoding (*id.*). Completion of the Shaywitz Dyslexia Screen by the student's second grade teacher indicated that

⁶ With regard to management needs the teacher reported that the student benefitted from small group instruction throughout the day within the ICT classroom (Dist. Ex. 10 at p. 3). She noted that due to the student's difficulty with reading, he benefitted from reading a question with a teacher in a small group and thinking about what the question is asking, and also benefitted from small group instruction because he needed to read carefully and needed support in sounding out challenging words (*id.*).

the student was at-risk for dyslexia (id. at p. 2). In addition, the student's performance on the Kaufman Test of Education Achievement-Third Edition (KTEA-3) Dyslexia Index indicated that his risk for dyslexia was in the elevated range (id. at p. 8). The evaluator reported that based on the results of the Feifer Assessment of Reading (FAR), the student's scores were consistent with reading comprehension deficits (id. at p. 9). The evaluator concluded that overall, the testing results were not sufficient to diagnose dyslexia, but noted they could be used to guide further evaluations that might lead to such a diagnosis (id.). The evaluator recommended a number of interventions and activities to be implemented to improve the student's reading skills (id. at pp. 9-12).

On January 21, 2020, the student was seen for a child neurology appointment "because of possible dyslexia and learning issues" (Dist. Ex. 4 at p. 1). In consideration of the June 2019 education evaluation, which focused on reading, and the in-office reading screening test, as well as a physical exam, the evaluator established a diagnosis of dyslexia and reading comprehension disorder (id. at p. 3). The evaluator recommended immediate implementation of the recommendations outlined in the June 2019 education evaluation with a re-evaluation of the student's academic progress three to four months later (id. at pp. 2-3). The evaluator suggested that if the June 2019 education evaluation recommendations were implemented and found to be insufficient then consideration should be given to placing the student in a 12:1+1 classroom (Parent Ex. E at p. 1; Dist. Ex. 4 at p. 3). A March 4, 2020, speech-language therapy IEP progress report indicated that the student received services to address receptive and expressive speech-language difficulties for increased overall academic success, through structured and unstructured tasks (Dist. Ex. 5 at p. 1). At the time of the progress report, the student had not yet met his speech-language goals targeting the ability to identify the main idea from an informational text along with supporting details, to answer a variety of critical thinking questions with references to the text, and to formulate syntactically and semantically correct sentences (id. at p. 2). A teacher report dated March 5, 2020, indicated that the student was performing below grade level in reading and writing skills, as well as in mathematics, as he struggled with fractions and identifying accurate steps to solve word problems that contained different mathematical concepts (Dist. Ex. 6 at pp. 1-2). According to the teacher, the student was unfocused during academic tasks, even in small group settings (id. at pp. 2-3). She noted that the student acted maturely when interacting with adults and peers and did not need support to appropriately socialize, nor did he present with motor or sensory development concerns (id. at pp. 2-4). With respect to management needs the teacher report noted that for academic success the student needed 1:1 coaching, small group instruction, and manipulatives for mathematical concepts, and that he benefitted from previewing a text before reading as well as the use of visual aids (id. at p. 4).

A CSE convened on March 10, 2020, to determine the student's continued eligibility for special education services (Dist. Ex. 1 at p. 18). Upon review of the available evaluative information, the CSE found the student continued to be eligible for special education as a student with a learning disability and recommended that he receive ICT services for ELA and mathematics, individual OT for two 30-minute sessions per week, individual speech-language therapy for one 30-minute session per week, and group speech-language therapy for one 30-minute session per week (id. at p. 14). Additionally, the CSE identified strategies and resources to address the student's management needs and recommended ten annual goals that collectively targeted reading, writing, mathematics, speech-language skills, and motor abilities (id. at pp. 4, 6-12). The CSE

also recommended testing accommodations including on-task focusing prompts, extended time, and breaks during exams (id. at p. 15).⁷

On March 13, 2020, the parent sent an email to the district indicating that she needed "a firm diagnosis of what [the student's] learning needs are related to, and his previous evaluations have not helped in that way"; she further indicated that she found a private neuropsychologist to perform the assessment and wanted to know if the district would pay for the evaluation if the parent disagreed with the district's evaluations (Parent Ex. X).

By letter dated August 18, 2020, the parent informed the district of her intent to place the student at Churchill for the 2020-21 school year, as well as her intention seek direct funding for the placement (Parent Ex. Z at p. 1). The parent asserted that the district's recommendations for the 2020-21 school year had already proven to be inappropriate as they were largely identical to the previous year's services that failed to enable the student to meet New York State's promotional criteria for grade level advancement (id.).

A. Due Process Complaint Notice

By due process complaint notice dated September 4, 2020, the parent alleged that the district did not offer the student a free appropriate public education (FAPE) for the 2020-21 school year because it failed to perform sufficient evaluations of the student and review the available evaluative information concerning the student (Parent Ex. A at pp. 1-2). The parent also averred that the district failed to develop a procedurally compliant IEP and failed to identify the student's disability needs (id. at p. 2). The parent further contended that the district failed to recommend appropriate services, provide timely notices and to offer a school location with qualified providers able to implement "appropriate instruction methodologies and therapeutic interventions" (id.). The parent further claimed that the district failed to provide appropriate testing accommodations, identify appropriate IEP goals, monitor and report the student's progress towards his IEP goals, and provide and implement an appropriate IEP for the student (id.).

The parent also alleged that although the March 2020 CSE changed the student's disability classification from speech or language impairment to learning disability, it recommended identical services to address his reading and language skill delays, and merely added OT services to his IEP, despite the student's lack of progress under a substantially similar IEP during the prior school year (2019-20) (Parent Ex. A at p. 5).

The parent further claimed that CSE limited its program recommendations to the preexisting services on the district's continuum, rather than basing its recommendations on the student's needs and also failed to provide the parent with meaningful participation, access to a copy of her procedural due process guidelines, a timely prior written notice, and a school location letter (Parent Ex. A at p. 7).

⁷ To address the student's management needs the March 10, 2020 CSE recommended frequent reminders to remain focused, frequent 1:1 coaching, small group instruction, manipulatives for mathematical concepts, previewing a text before reading and the use of visual aids, scaffolding, visual and verbal prompts, writing models/exemplars, providing questions to answer while reading a text, graphic organizers, stop and jot with teacher modeling, talking through ideas before engaging in the writing process, and previewing of text material (Dist. Ex. 1 at p. 4).

The parent also asserted that although she informed the district in writing in March 2020 that she disagreed with the student's evaluations and IEP recommendations and requested funding for an independent educational evaluation (IEE) of the student, the district failed to either respond to her request or to initiate a due process hearing to defend its evaluation (Parent Ex. A at p. 5).

In addition, the parent complained of several "illegal policies" by the district, which she asserts also impeded the student from receiving a FAPE, including: a refusal to offer class sizes based on the student's needs, and limiting class sizes of twelve (12) or less to students that it deems cognitively impaired; refusing to diagnose specific learning impairments and to provide peer reviewed, research based, and widely recognized methodologies to address the learning needs of students with language-based and/or learning disabilities; failing to use standardized methods for assessing the development of a student's foundational academic skills during grades kindergarten through second; failing to provide recommended services on premise, including the option of before and/or afterschool services; and failing to establish, implement, and monitor sufficient district-wide policies and practices for an adequate remote learning program in response to the Covid-19 pandemic (Parent Ex. A at p. 8).

The parent asserted that her placement of the student at Churchill for the 2020-21 school year was appropriate for the student because it offered him a "language-enriched program . . . designed to target the learning needs of students with language-based and/or learning disabilities" which was individualized to meet the student's unique needs in an educational setting that was "cognitively and social/emotionally appropriate for the [s]tudent" (Parent Ex. A at pp. 5-6). Concerning equitable considerations, the parent asserted that she consented to all evaluations, made the student available for all evaluations, attended all requested IEP meetings and provided all required notices to the district (*id.* at p. 6).

With respect to relief, the parent requested direct funding and/or reimbursement of all fees and costs associated with the student's attendance at Churchill for the 2020-21 school year and appropriate transportation services to enable the student's attendance to and from Churchill (Parent Ex. A at p. 9).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on February 10, 2021, which concluded on June 17, 2021 following eight days of proceedings (see Tr. pp. 1-650).⁸ By decision dated July 15, 2021, the IHO determined that the district offered the student a FAPE for the 2020-21 school year (IHO Decision at pp. 8-31). The IHO determined that "[b]ased on the evidence presented by the District . . . the IEP prepared for the 2020-2021 school year accurately reflected the results of the evaluations before the CSE team and identified the Student's needs and provided for the use of appropriate special education services" (*id.* at p. 17). The IHO also found that the parent's assertion that the student required a special class in a special school in order to make progress was not supported by the hearing record (*id.* at pp. 17-20).

⁸ In an interim decision dated May 19, 2021, the IHO confirmed an earlier ruling made during the April 23, 2021 hearing, in which the IHO granted the district's motion to reopen its case and present testimony from additional witnesses (May 19, 2021 Interim IHO Decision; Tr. pp. 303-14).

With respect to the student's progress, the IHO found that although the parent contended that the same ICT program was being recommended as the program from the prior school year, the student had not progressed in that program and was performing below grade level, even over two levels lower than the benchmark for his grade, evidence in the hearing record supported a determination that the programs were not the same (IHO Decision at p. 16). The IHO noted that a district witness had testified that "to the best of her knowledge," the management needs were not identical and the March 2020 CSE added OT services to the student's program (id. at p. 17). The IHO opined that "[a]lthough it is possible for a student with a disability, such as dyslexia, to perform at grade level, the [s]tudent had a disability classification change at the time of the [March 2020] IEP meeting . . . where [he] received evaluations, which identified that there was a reading disability" and "there were additional services and supports put in place to help support these challenges that were identified in the evaluations" (id.). The IHO also noted the parent had informed the CSE at the March 2020 meeting that the student had shown some improvement in reading (id. at p. 19). The IHO further stated that progress reports generated in May 2020, after the March 2020 IEP meeting, corroborated the parent's statement to the CSE that the student was making progress as they showed the student was "approaching" his annual goals in reading, writing, and speech-language (id. at p. 21).

In addressing the parent's procedural violation claims, the IHO found that there were procedural violations with respect to the district's failure to conduct a timely triennial evaluation of the student and the failure to have the student's special education teacher present at the March 2020 CSE meeting; however, the IHO found that those procedural violations did not rise to the level of a denial of FAPE either individually or cumulatively (IHO Decision at pp. 22, 25-27, 29-30). In addition, the IHO reviewed the parent's allegations related to illegal policies and practices and found that the evidence in the hearing record did not support finding that there were any illegal policies in place (id. at pp. 22-25). The IHO also determined that the district demonstrated that it had an appropriate Covid 19-related remote learning program in place for the 2020-21 school year (id. at pp. 28-29).

Concerning the parent's request for an independent neuropsychological examination at district expense, the IHO found that disagreement by the parent with an evaluation was a prerequisite to trigger the right to obtain an IEE funded by the district "and no such disagreement, to an evaluation conducted by the [d]istrict, is on record" (IHO Decision at p. 29). The IHO concluded that although the parent had sent "an exploratory email" from the district seeking guidance about the process for requesting an IEE, the parent did not express her disagreement with an evaluation conducted by the district (id.). As a result, the IHO denied the parent's request for an IEE at district expense (id.).

Having found that the district offered the student a FAPE for the 2020-21 school year, the IHO denied the parent's request for reimbursement of the tuition and costs of the student's attendance at Churchill, including transportation (IHO Decision at pp. 30-31).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred by finding that the March 2020 IEP offered the student a FAPE for the 2020-21 school year because evidence in the hearing record established that the CSE failed to conduct current cognitive testing of the student and the IEP was

substantially similar to the prior year's IEP, including identical academic goals, even though the student did not demonstrate progress during the 2019-20 school year. With respect to the student's lack of progress, the parent contends that the IHO ignored evidence that the student demonstrated "a lack of progress to achieve grade level advancement." The parent further argues that the IHO's determination that the ICT classroom recommended by the CSE was appropriate for the student was in error because even with the lack of current cognitive testing by the district there was sufficient evidence in the hearing record to support a finding that ICT services "alone w[ere] inappropriate to address [the student's] current skill level delays, which were substantial, requiring 1:1 interventions to remediate, and specialized instruction to enable his literacy development." Additionally, the parent avers that the IHO erred by determining that the district's failure to conduct a timely triennial evaluation of the student or to have the student's special education teacher participate in the March 2020 CSE meeting did not rise to the level of a denial of FAPE to the student. The parent also asserts that the district failed to show that it could provide appropriately modified IEP services for remote learning and the IHO erred by determining the district had presented sufficient evidence that it could provide a FAPE to the student while utilizing a remote learning format.

The parent also claims that the IHO erred by failing to address the parent's claims in the due process complaint notice pertaining to the district's alleged "illegal policies" which consisted of "systemic practices that deprived [the student] of individualized recommendations and/or deprived [the student] of due process." Further, the parent claims that the IHO failed to hold a timely proceeding, did not exhibit "due propriety and impartiality" during the hearing and also engaged in unjustified delays and made improper off-the-record determinations on evidentiary issues. The parent also alleges that the IHO improperly excluded evidence from the record and failed to approve the issuance of certain subpoenas requested by the parent.

The parent contends that the IHO erred by failing to award her an IEE at public expense. The parent asserts that she followed the procedure required to request an IEE from the district and is entitled to funding from the district for independent neuropsychological evaluation, to be performed by a qualified provider of her choosing, at a maximum rate of up to \$6,000.00.

With respect to the issue of whether Churchill was an appropriate unilateral placement for the student, an issue the IHO did not reach in his decision, the parent argues that Churchill was appropriate because it was "both generally specialized to meet the needs of students with language-based disorders" and also provided "highly differentiated services to meet [the student's] specific needs." The parent also states that she cooperated fully with the CSE process and equitable considerations weigh in favor of an award of full reimbursement to her of the tuition and costs of the student's attendance at Churchill during the 2020-21 school year.⁹ The parent further requests that the district be directed to provide transportation to and from Churchill for the student.

The parent also requests that additional evidence, marked as SRO Exhibits A-P, be accepted and considered on appeal.

⁹ Relatedly, the parent asserts the IHO incorrectly determined that if tuition reimbursement was available to the parent as a remedy, she was only liable for a \$1,000.00 deposit made to Churchill as the enrollment contract for Churchill reflects that she was liable for the full tuition for the 2020-21 school year.

In an answer, the district responds to the parents' material allegations with admissions and denials and requests that the IHO's decision be affirmed. With respect to the parent's argument that Churchill was an appropriate unilateral placement for the student, the district contends that Churchill was not an appropriate placement because it did not provide the student with related services of speech-language therapy or OT.

In a reply, the parent largely reiterates her arguments requesting that the IHO decision be reversed.

V. Applicable Standards

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

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

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹⁰

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

¹⁰ 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).

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. Preliminary Matters

1. Additional Evidence

The parent has requested that 16 documents attached to the parent's request for review, identified as SRO Exhibits A-P, be considered on appeal. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). A review of the additional evidence submitted by the parent reflects that SRO Exhibits A-L consist of what appears to be email correspondence between the parties during the impartial hearing, which in some instances included the IHO concerning the production of documents, subpoenas, and other matters related to the impartial hearing. The parent submits the emails and related documents as general support for her claims that the IHO engaged in unnecessary delays and otherwise made improper rulings and displayed bias against the parent during the hearing. However, the hearing record contains a full transcript of the proceedings and the exhibits admitted into evidence during the hearing which are sufficient for purposes of determining whether the IHO conducted the hearing in compliance with the mandates of due process. With respect to SRO Exhibits M-P, these documents were available at the time of the impartial hearing and moreover, are not necessary in order to render a decision on this portion of the district's appeal. As such, I decline to exercise my discretion to accept the submitted documents as additional evidence.

2. Conduct of Impartial Hearing and IHO Bias

With respect to the IHO's conduct of the hearing, the parent alleges that the IHO demonstrated impropriety and bias by accepting District Exhibit 17 into evidence,¹¹ limiting the

¹¹ District Exhibit 17 consists of a series of emails sent from the district charter school the student attended during the 2019-20 school year concerning the remote instruction which went into effect after the Covid-19 related closure of New York City schools in March 2020 (see Dist. Ex. 17). Although the parent claims on appeal that the admission of District Exhibit 17 was prejudicial because its relevance was not established during the hearing, the parent conceded that the exhibits was relevant to the proceeding and the parent's objection to the exhibit was limited to how the document was labeled (Tr. pp. 511-13, 518). Considering the parent's concession that the document was relevant at the time of the hearing, her argument on appeal has no basis.

scope of the parent's subpoena for the student's records, making off-the-record evidentiary rulings, and delaying proceedings by engaging in "lengthy and improper off-the-record monologues."

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]). Moreover, it was well within the IHO's discretion to attempt to control the hearing by excluding evidence or testimony that the IHO finds to be irrelevant, immaterial, or unduly repetitious and by limiting the witnesses who testify to avoid unduly repetitious testimony (see 8 NYCRR 200.5[j][3][xii][c]-[e]). A review of the hearing record demonstrates that the parent had the opportunity to present evidence and arguments in support of her requests for relief and that the IHO conducted the impartial hearing in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]). Accordingly, the evidence in the hearing record does not support a finding that the IHO exhibited bias against the parent or conducted the hearing in a manner that impeded the parent's right to due process.

B. 2020-21 School Year

1. Sufficiency of Evaluative Information

The parent asserts that the IHO erred by determining that the CSE had sufficient evaluative information before it at the March 2020 CSE meeting to identify the student's needs and recommend an appropriate educational program for him. Specifically, the parent alleges that

because cognitive testing and a psychoeducational evaluation conducted of the student were three years old at the time of the CSE meeting, the evidence in the hearing record does not reflect that the CSE had "a current and reliable assessment" of the student's cognitive and academic functioning when it developed his IEP for the 2020-21 school year.¹² Due to the lack of current and reliable assessments of the student's cognitive and academic functioning, the parent challenges the IHO's finding that the 2020-21 IEP was reasonably calculated because the student "possessed 'average' cognitive skill levels."

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]).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

Given that the parent has raised a challenge to the IHO's decision regarding the sufficiency of the evaluative information used to recommend a program that met the student's needs, a review

¹² Relatedly, the parent argues that the district's failure to conduct a timely triennial evaluation of the student and to include the student's special education teacher as a participant at the March 2020 CSE meeting were procedural violations that cumulatively denied the student a FAPE because they had an adverse impact on the CSE's understanding of the student's needs for the 2020-21 school year. While I do not find that the procedural violations alleged by the parent, considered in isolation, denied the student a FAPE, the district's failures in this regard nonetheless affected the CSE's ability to assess the student's progress or lack thereof under the prior year's IEP and so will be discussed below in the context of the 2020-21 IEP.

of the assessments relied on by the March 2020 CSE is needed. According to the March 30, 2020, prior written notice and the March 2020 CSE district representative's testimony, the CSE relied on a January 21, 2020 neurology exam, a March 4, 2020 speech-language progress report, a March 5, 2020 teacher report, and a May 31, 2019 OT report, as well as parent input (Tr. p. 352-54, 382; Dist. Ex. 2 at p. 1; see Parent Exs. B; D; Dist. Exs. 4; 5; 6). While the district representative testified that the assessments put forth on the prior written notice indicated "all of the documents that were reviewed in developing the IEP," she also testified that in the evaluation results section of the IEP the CSE incorporated a "psychoeducational evaluation, that reported [the] student's overall cognitive level of functioning and the Feifer Assessment of Reading" (Tr. pp. 351-52).¹³ She testified that she did not review the student's progress reports from the prior (2019-20) IEP and did not consider whether ICT services had been appropriate for the student in the past, as she was looking at the current data and moving forward to put together an IEP for the 2020-21 school year (Tr. pp. 382-83). However, the district representative acknowledged that part of developing an IEP included a review of whether similar services had been effective or not and explained that is why the CSE reviewed goals and management needs (Tr. p. 383). She also indicated that she was familiar with the student's proficiency levels at the time of the CSE meeting as she received that information from the school and the parent, and she reviewed the student's prior IEP before heading into the new CSE meeting (Tr. p. 385).

The May 2019 OT evaluation report indicated that the student was referred for evaluation due to his difficulty with "handwriting and neatness" (Parent Ex. D at p. 1). The evaluation report included the results of the student's performance on the Berry-Buktenica Developmental Test of Visual-Motor Integration (VMI) and the WOLD Sentence Copy Test, Digit-Symbol Test, Visuo-Motor Test, as well as the student's teacher's responses on the Sensory Profile 2: School Companion Form (id.). The report indicated that on the VMI the student attained a visual-motor integration standard score of 113 (81st percentile), visual perception standard score of 111 (77th percentile) and motor coordination standard score of 66 (1st percentile) (id. at p. 2). The May 2019 OT evaluation report indicated that the student performed lower than his expected age group on motor coordination tasks which the evaluator opined might impact his ability to do well during classroom tasks that require that skill (id.). The evaluator opined that the student's difficulty with motor coordination might impact his ability to "copy material near point, paper to paper such as tests and homework, as well as far point such as blackboard to paper, with appropriate accuracy" (id.). With respect to the WOLD Sentence Copy Test, the student completed 67.34 letters per minute with the average pace for a second-grade student being 30 letters per minute (id.). The OT report indicated that the student maintained good posture during the task until the halfway point when he began to slouch due to fatigue, he was able to remember and reproduce one word with one fixation at a time, he demonstrated adequate spacing for the letters and words, he was quiet throughout the task, he wrote fast, he remained focus without the need for redirection but reported fatigue after writing, and he was calm and cooperative throughout the testing, but demonstrated difficulty with maintaining letters on the line, letter formation, and size (id. at p. 3).

¹³ The March 2020 IEP reported scores from the June 10, 2019 psychoeducational assessment (Dist. Ex. 1 at p. 1). However, while the student's scores reported from the Feifer Assessment of Reading were current, the cognitive testing reported in the June 2019 psychoeducational assessment report were taken from the February 2017 psychoeducational evaluation report and were not reflective of the student's abilities at the time of the June 2019 evaluation (Parent Ex. B at pp. 1-2).

Regarding the student's sensory profile, the May 2019 OT evaluation report indicated that the student's behaviors were "just like the majority of other" students in all areas with the exception of "visual" (Parent Ex. D at p. 4). The evaluator noted that the student reportedly responded to sights more than other students, missed verbal directions in class more than same-aged students, and was attracted to TV or computer screens with fast-paced, brightly colored graphics (id.).

An "Assessment and Planning Report," included as part of the Sensory Profile 2, indicated that while the student was very social, made friends easily, and had great number sense in mathematics, he struggled in the learning environment to read fluently on grade level, and made slow progress in reading despite interventions and tutoring (Parent Ex. D at p. 7). The Assessment and Planning Report indicated that the student found it difficult to participate in classroom activities because he did not think about the context of a text as he read and extra reading assignments to complete at home were not always completed (id.). The evaluator also reported that the student struggled to write neatly making his handwriting difficult to read (id.).

Based on the student's strengths and challenges as identified during the May 2019 OT assessment, the evaluator recommended that the student receive individual OT services for two 30-minute sessions per week to work on sensory regulation, fine motor skills, visual perception, and motor coordination skills (Parent Ex. D at p. 5).

According to the June 2019 psychoeducational evaluation report, the student was referred for an assessment due to teacher and parent concerns regarding his reading abilities (Parent Ex. B at p. 1). At the time of the evaluation, the student exhibited "significant difficulty" with early reading skills particularly phonological awareness and decoding and based on these weaknesses the parent was concerned the student might be dyslexic (id.). The evaluation report indicated that evaluation techniques included completion of the Shaywitz Dyslexia Screen by the student's teacher, along with administration of the Feifer Assessment of Reading (FAR), and the Kaufman Test of Educational Achievement-Third Edition (KTEA-3): Dyslexia Index to the student (id. at pp. 1-3). Although the evaluation included scores from the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) and the Wechsler Individual Achievement Test-Third Edition (WIAT-III), these scores were obtained during the student's initial evaluation, conducted in February 2017, and not during the evaluation conducted in June 2019, as no cognitive assessment was done at that time (compare Parent Ex. C at p. 8, with Parent Ex. B at pp. 1-2).¹⁴

The June 2019 psychoeducational evaluation report reflected the results of the Shaywitz Dyslexia Screen-Form 2 (second grade), a teacher rating scale of language and academic risk factors for dyslexia (Parent Ex. B at p. 2). According to the report, the results from the Shaywitz Dyslexia Screen alone were not sufficient to diagnose or rule out dyslexia but provided a reliable, valid indication of risk for dyslexia based on the teacher's ratings (id.). The teacher's ratings indicated that the student was at risk for dyslexia on nine out of ten "items" (id.). Specifically, the teacher rated the student as sometimes completing work satisfactorily and recalling information learned earlier while rarely understanding written concepts when first presented (id. at p. 3). The

¹⁴ The results of the February 2017 WPPSI-VI as reported in the June 2019 psychoeducational assessment indicated that in February 2017 the student was cognitively performing in the average range in all areas assessed as well as reporting average performance on the WIAT-III in reading, writing, and oral language, with above average performance in mathematics and math fluency (Parent Ex. B at pp. 1-2).

student reportedly almost always had difficulty learning new tasks that required reading and very likely had a problem learning when tasks required reading or writing (id.). According to the teacher's ratings the student had a low overall reading level, below average reading comprehension and written expression, and her basic reading/decoding skills were the lowest 1-2 in the class (id.). The teacher indicated that the student never had trouble identifying letters or numbers as that was the only item of the ten where the student did not demonstrate challenges (id.).

The June 2019 psychoeducational evaluation report also include the results of the Feifer Assessment of Reading (FAR) which it described as an individually administered comprehensive reading test to examine the underlying cognitive and linguistic processes that support proficient reading skills (Parent Ex. B at p. 3). In addition to individual subtest scores, administration of the FAR yielded a phonological index score, fluency index score, comprehension index score, mixed index score, and total index score (id.). According to the evaluation report, the FAR total index score was the most reliable and valid representation of the student's overall reading capabilities and the best predictor of overall reading proficiency (id. at p. 4). The student's total index score of 91 was classified as average and fell at the 27th percentile as compared to same-grade peers (id.). With regard to the individual indices, the student's score of 91 on the phonological index was classified as average and fell at the 27th percentile, his score of 100 on the fluency subtest was classified as average and fell at the 50th percentile, and his score of 85 on the comprehension index was classified as below average and fell at the 16th percentile (id.). In addition, the student's mixed index score, which was a combination of the phonological and fluency scores, was 95, classified as average, and fell in the 37th percentile range (id.). With regard to specific subtests, the student's performance on measures of nonsense word decoding (89, 23rd percentile), irregular word reading fluency (86, 18th percentile), word recall (85, 16th percentile) and morphological processing (85, 16th percentile) was classified as below average (id.).¹⁵

The student's performance of the fluency index of the FAR suggested that he demonstrated adequate skills in recognizing letters as well as reading phonologically irregular words that did not follow a consistent grapheme-to-phoneme pattern (Parent Ex. B at p. 5). However, the student's phonemic awareness score suggested difficulty with sound recognition and awareness skills as well as inconsistencies deciphering individual acoustical properties in words often accompanied by difficulty categorizing and manipulating sounds within words (id. at p. 4). The student's below average classification on the nonsense word decoding subtest suggested difficulty utilizing "bottom-up" or rule-based strategies to sequentially decode phonemes within novel words and his scores were indicative of a student who has weaker decoding skills (id. at p. 5). The evaluator indicated that an inability to develop adequate grapheme-phoneme connections lead to marked inconsistencies when decoding individual words in print, and often lead to inaccurate spelling skills (id.). According to the results on the FAR, the student's performance with respect to irregular word reading fluency suggested weaker automatic recognition of words that did not follow a consistent grapheme-phoneme pattern (id. at p. 6).

The June 2019 psychoeducational evaluation report indicated that the student's below average performance on the word recall subtest of the comprehension index suggested limited

¹⁵ The student's score on the phonemic awareness subtest (88, 21st percentile) was classified as average in a grid summary of scores but below average in the narrative report (compare Parent Ex. B at pp. 3, with Parent Ex. B at p. 4).

verbal working memory skills and a poor ability to slot and self-organize verbal information to facilitate more effective recall (Parent Ex. B at p. 7). In addition, the student's below average performance on the morphological awareness subtest suggested "difficulty using semantic or 'top-down' cueing to facilitate word-recognition skills" (id. at pp. 7-8).

The June 2019 psychoeducational evaluation report indicated that the results of the FAR suggested that the student presented with "core overall reading skills relatively consistent with age-and grade-level expectations" (Parent Ex. B at p. 8). However, the report also noted that there were significant issues with the student's overall passage comprehension skills as his cluster of scores appeared consistent with reading comprehension deficits (id.). According to the report, students with reading comprehension deficits struggled to derive meaning from print despite good reading mechanics (id.).

The June 2019 psychoeducational evaluation report also included the results from the KTEA-3 Dyslexia Index Score where the student's performance reflected below average ability in nonsense word decoding (standard score 82, 12th percentile) and spelling (standard score 82, percentile 21) (Parent Ex. B at p. 8). The student performed in the average range with respect to word recognition fluency (standard score 93, 32nd percentile). The student's overall dyslexia index score, as measured by the KTEA-3, was 86 (18th percentile) which indicated that the student was at an elevated risk for dyslexia, although the evaluator indicated that the results of the KTEA-3 dyslexia index alone were not sufficient to identify or diagnose dyslexia (id.).

The evaluator concluded that the student was at risk for dyslexia and stated that the results of the June 2019 psychoeducational evaluation could "be used to guide further evaluations that m[ight] lead to a [d]yslexia diagnosis" (Parent Ex. B at p. 9). The evaluator also indicated that the student's performance was consistent with reading comprehension deficits and recommended instructional strategies that might be helpful "to improve [the student's] comprehension skills" (id. at pp. 9-12).

The May 2020 CSE also considered a January 21, 2020, neurology exam that was privately obtained by the parent (Dist. Ex. 4 at pp. 1-4; see Tr. p. 624). Upon review of the student's medical, educational, and family history, as well as completion of a physical exam and an in office reading screening test, the physician concluded that the student presented with dyslexia, and a reading comprehension disorder (id. at p. 3). The physician noted that "studies ha[d] shown that suboptimal reading fluency [wa]s a barrier to comprehension and academic success" (id.). The January 2020 neurology report recommended the "immediate[]" implementation of the recommendation in the June 2019 psychoeducational assessment for three to four months, followed by an assessment of the student's progress (id.). The physician stated that if, after that time, the interventions were not sufficient there should be consideration of a 12:1+1 classroom placement (id.).

A March 4, 2020, speech-language progress report, also considered by the CSE, indicated that the student's speech-language therapy focused on increasing his overall receptive and expressive speech-language difficulties for increased overall academic success by way of structured and unstructured tasks (Dist. Ex. 5 at p. 1). The March 2020 speech-language progress report noted that the student occasionally benefited from repetition of verbal directions and sometimes presented with mild difficulty forming cohesive thoughts and benefited from extra time

to answer, which also resulted in dysfluent speech (id.). The provider noted that the student required moderate semantic cues to identify main ideas from grade level texts, as well to identify supporting details (id. at p. 1). The provider reported that the student had difficulty with reading and spelling skills and according to his classroom teachers was performing below grade level in reading (id.). According to the speech-language progress report, the student benefited from phonemic cues when reading short texts and needed to improve story retelling skills; the provider suggested targeting this skill by using graphic organizers to facilitate the memory skills needed for the task (id.). The speech-language therapy report indicated that, expressively, speech-language therapy focused on supporting the student's conversational sentences with appropriate syntax and semantics (id.). The report noted that the student's sentences included verb tense errors and he required cues to correct verb tense agreement (proficiency at less than 50%) (id.). At the time of the March 2020 speech-language progress report, the student had not yet met his speech-language related goals and the provider recommended that he continue to receive speech-language therapy to address his ongoing needs (id. at pp. 1-2).

A March 5, 2020 teacher report considered by the CSE, indicated that the student was performing below grade level with respect to reading and according to the Fountas and Pinnell Reading Assessment, the student was reading at level L when the class average was level O, the expected third grade benchmark for that time of year (Dist. Ex. 6 at p. 1). The Fountas and Pinnell assessment indicated that the student remained at level L from December 2019 to the next assessment in February 2020, while the class average progressed from level O to level P (id.). The teacher reported that the student had difficulty making inferences about characters based on their actions, struggled to understand why the author wrote the text, and had difficulty decoding large and unfamiliar words, as well as recalling what he read (id.).

With respect to the student's writing abilities, the March 2020 teacher report indicated that the student was performing below grade level with a score of 27 percent on his then most recent writing assessment (Dist. Ex. 6 at p. 1). The report noted that the student struggled to interpret what a writing prompt was asking and then in response to the question writing an idea (id.). According to the teacher's report the student's evidence did not support his ideas; the teacher noted that the student was provided with verbal prompting and benefited from verbalizing his response prior to writing it to clarify his idea (id.). Additionally, the teacher's report indicated that the student's writing included grammar and spelling inaccuracies (id. at p. 1). According to the report, on a November 2019 ELA assessment the student scored 37.5 percent compared to the class average of 75.5 percent and on the ELA State exam practice test, in February 2020, the student performed at 27 percent proficiency compared to the class average of 62 percent (id. at p. 2).

According to the March 2020 teacher report the student was performing below grade level in mathematics as reflected on a then recent assessment (Dist. Ex. 6 at p. 2). On a November 2019 Math assessment, the student received a score of 68.8 percent as compared to the class average of 82.8 percent, in February the student scored 37.5 percent compared to the class average of 77.7 percent, and on the February 2020 math State practice test the student scored 68 percent compared to the class average of 89.2 percent (id.). His teacher indicated that the student understood third grade concepts and he solved one-step word problems independently, but he struggled with identifying accurate steps to solve word problems that contained different mathematical concepts (id.). His teacher reported that during one-on-one teaching the student required verbal prompting and the student struggled when comparing fractions, so he was supported with models (id.).

The March 2020 teacher report indicated that the student became unfocused during academic components, he needed constant reminders throughout the day to stay focused, and that although he was pulled into small groups for mathematics and ELA components, even in the smaller group setting the student had difficulty staying on task and participating in discussions (Dist. Ex. 6 at p. 2). During supported reading comprehension, the student required reminders to stop after a few paragraphs, reflect on what he read, and write down what happened before continuing (id. at p. 3). To decrease the student's confusion with larger text he was encouraged to cover the text he has not read yet with a paper so that he did not become overwhelmed and confused (id.). With respect to writing, the teacher indicated that the student benefited from having a conversation about his ideas to clarify his thinking before beginning to write (id.). She also reported that the student required visual aids such as models and manipulatives to understand the steps needed to solve a word problem (id.).

With respect to the student's social emotional development, the March 2020 teacher report indicated that the student acted maturely "to mostly all situations" when interacting with peers and adults, noting that the student was a kind and loving student who actively helped around the classroom (Dist. Ex. 6 at p. 3). The student got along well with his classmates and gave his best effort in all tasks regardless of the level of difficulty (id.). The teacher indicated that the student did not need support to appropriately socialize with peers and regarding physical development she reported that the student's motor and sensory development appeared normal (id.).

The teacher concluded that in order to be academically successful the student needed one-on-one coaching, small group instruction, manipulatives for mathematical concepts, and visual aids and noted that he benefited from previewing a text before reading (Dist. Ex. 6 at p. 4).

The aforementioned evaluative information provides significant information regarding the student's speech-language performance, motor abilities, sensory profile, and classroom performance which is likewise reflected in the March 2020 IEP present levels of performance (compare Parent Exs. B at pp. 1-9; D at pp. 1-7; Dist. Ex. 4 at pp. 1-3; 5 at pp. 1-2; 6 at pp. 1-4, with Dist. Ex 1 at pp. 2-4). The June 2019 psychoeducational evaluation report informed the CSE regarding the student's needs relative to a reading comprehension disorder and difficulties with nonsense word decoding, irregular word reading fluency, semantic concepts, word recall, morphological processing, and spelling (Parent Ex. B at pp. 2-8). The March 2020 teacher's report described the student's below grade level performance in reading, writing, and mathematics and identified the student's need for one-on-one coaching, small group instruction, manipulatives for mathematical concepts, visual aids, and previewing a text before reading (Parent Ex. 6 at pp. 1-4).

Based on the above, the evaluative information considered by the March 2020 CSE reflected a sufficient overview regarding the student's needs in the areas of reading, writing and mathematics, as well as his challenges with attention, although without updated cognitive testing (see Parent Exs. B; D; Dist. Exs. 2; 4; 5; 6). However, the impact of the student's deficits in the area of decoding and his progress or lack thereof with respect to this reading skill was perhaps not fully explored, despite the diagnosis of dyslexia. Additionally, as discussed below, the lack of the student's special education teacher as a participant in the CSE meeting may have limited the CSE's consideration of the student's progress and consistent failure to "keep up" with grade-level

expectations.¹⁶ Overall, as acknowledged by the parent in the request for review, despite some gaps in updated testing, the evaluative information before the March 2020 CSE "contain[ed] numerous informal or otherwise quantified assessment reports of [the student's] academic skill levels" and "prove[d] that [the student] was substantially delayed across all core subjects, and required appropriate interventions to remediate and instruct him appropriately" (Req. for Rev. at pp. 3, 4). As a result, although it must be determined whether the March 2020 CSE recommended an appropriate program for the student based on the evaluative information available to it at the time of the meeting, in accordance with the IHO's determination, I find that, while not perfect, the evaluative information considered by the CSE was sufficient under the applicable federal and State regulations based on the evidence in the hearing record.

2. March 2020 IEP

The parent contends that the IHO erred by determining that the 2020-21 IEP developed by the district recommended a program and placement for the student which offered him a FAPE. Specifically, the parent argues that although the student did not make progress under the prior year's IEP, the March 2020 CSE recommended a substantially similar program, including identical academic goals, for the 2020-21 school year and the modifications to the 2020-21 IEP credited by the IHO did not address the student's substantial academic needs, particularly his reading needs. Moreover, the parent asserts that the ICT classroom recommended by the March 2020 CSE was not appropriate because it failed to provide the student with "specialized instruction to enable his literacy development."

According to the district representative and IEP attendance page, the CSE that convened in March 2020 consisted of a district representative who served in that capacity and that of the school psychologist, the student's ICT general education teacher, a "sprint specialist," and the parent (Tr. p. 351; Dist. Ex. 1 at p. 21).¹⁷ Neither a special education teacher nor the student's related service provider participated in the CSE meeting (Dist. Ex. 1 at p. 21).

As discussed in detail above, to establish the student's needs the March 2020 CSE considered the May 2019 OT evaluation, the June 2019 psychoeducational evaluation, the January 21, 2020 neurological evaluation, the March 4, 2020 speech-language progress report, the March 5, 2020 teacher report, as well as parent input (Tr. pp. 352-54, 382; Dist. Ex. 1 at p. 1; 2 at p. 1). The description of the student in the present levels of performance of the March 2020 IEP was largely drawn from the March 2020 teacher's report and the March 2020 speech-language progress report (compare Dist. Exs. 5; 6, with Dist. Ex. 1 at pp. 2-4). According to the March 2020 IEP the student presented with challenges related to decoding, reading comprehension, and written expression and was performing below grade level when compared to his peers in reading and writing (Dist. Ex. 1 at pp. 2, 4). The IEP also indicated that the student was performing below grade level when compared to his peers in mathematics, particularly with respect to identifying

¹⁶ As indicated in the student's educational history, he had previously been retained in first grade for his below grade level performance and limited progress (Tr. pp. 538-39; Parent Exs. B at p. 2; F at p. 1).

¹⁷ The district representative testified that the sprint specialist was the coordinator at the school who managed the students with IEPs, helped her schedule CSE meetings, and tried to ensure that the students' teachers were available to participate at CSE meetings (Tr. p. 380).

accurate steps to solve word problems that contain different mathematical concepts and comparing fractions (id.). The student's written expression was described as below grade level standards noting that the student was struggling to interpret what the writing prompt was asking for and responding with appropriate evidence in a coherent fashion (id.). With respect to speech-language development, the March 2020 IEP noted the student presented with a mild difficulty forming cohesive thoughts, he benefited from extra time to answer as well as moderate semantic cues to identify main ideas from grade level texts, and he needed to work on including supporting details from texts in his responses (id. at p. 2). Expressively, the student needed to develop conversational sentences that included appropriate syntax and semantics and benefited from syntactic cues to correct sentence errors (id. at p. 3).

To address the student's needs, the March 2020 CSE recommended ICT services for ELA and mathematics, individual OT for two 30-minute sessions per week, individual speech-language therapy for one 30-minute session per week, and group speech-language therapy for one 30-minute session per week (Dist. Ex. 1 at p. 14). The March 2020 IEP identified strategies and resources needed to address the student's management needs, including frequent reminders to remain focused, frequent one-to-one coaching, small group instruction, manipulatives for mathematical concepts, previewing a text before reading, and visual aids (id. at p. 4). Additional strategies and resources included scaffolding, visual and verbal prompts, writing models/exemplars, questions to answer while reading text, graphic organizers, stop and jot with teacher modeling, talking through ideas before engaging in the writing process, and previewing text material (id.). The IEP provided the student with testing accommodations including on-task focusing prompts, extended time, and breaks during exams (Tr. pp. 361-62; Dist. Ex. 1 at p. 15).

Turning to the annual goals recommended for the student, the goals for reading, writing, and mathematics contained in the in the March 2020 IEP remained the same as the academic goals recommended in the student's previous May 2019 IEP (compare Dist. Ex. 8 at pp. 6-9, with Dist. Ex. 1 at pp. 6-9).

The March 2020 CSE recommended 10 annual goals that targeted the student's weaknesses in reading, writing, mathematics, speech-language skills, and fine motor skills (Dist. Ex. 1 at pp. 6-12). With respect to reading the CSE recommended a goal to increase the student's fluency and a goal that targeted the student's need to make inferences and support them with details, both when reading text at his instructional level (id. at pp. 6-7).¹⁸ The IEP also included a goal to address the student's need to understand grade level grammar rules and to apply those rules independently to generate complete and coherent sentences (id. at p. 7). For writing, the CSE recommended a goal to address the student's need to produce a well-developed narrative and informational piece that contained a clear idea or theme with details that remained on topic (id. at p. 8). With respect to mathematics the CSE recommended that the student analyze 2-3 step word problems, identify the key terms, generate a plan with efficient strategies, and execute each step (id. at p. 9).

¹⁸ The district school psychologist testified that the student's fluency goal incorporated strategies which supported the student's decoding challenges (Tr. p. 232-233). This witness was aware of the student based on a review of the student's records and a conversation with the district representative who attended the March 2020 CSE meeting (Tr. p. 42-43).

The March 2020 CSE also recommended additional annual goals, that were either not included or were updated from the student's prior IEP, to address the student's language needs including a goal for the student to answer a variety of critical thinking questions with reference to the text and identify supporting evidence and a goal to formulate syntactically and semantically correct complex sentences with details and correct grammatical markers in the context of oral and written narratives (Dist. Ex. 1 at pp. 9-10). The CSE also recommended an annual goal that targeted the student's ability to produce an organized oral narrative including a beginning/middle/end, providing details about characters/setting, using descriptive and temporal terms, and ordering at least 4/5 story events given visual organizers (*id.* at p. 11).

New to the March 2020 IEP were OT annual goals, which focused on the student's need to maintain attention to classroom activities and not be distracted by normal visual stimuli and a handwriting goal targeting the student's ability to print or draw symbols, letters, and/or words in a variety of classroom activities across academic settings (Dist. Ex. 1 at pp. 11-12).

During the 2019-20 school year (third grade), the student received ICT services in ELA and math along with one individual and one group session of speech-language therapy per week similar to what was being recommended for the student for the 2020-21 school year with the addition of OT (compare Dist. Ex. 8 at p. 12, with Dist. Ex. 1 at p. 14; Dist. Ex. 4 at p. 1). As discussed above, the March 2020 IEP included the same academic goals as those in the 2019-20 IEP, which brings into question the extent of the student's progress under the prior year's IEP (compare Dist. Ex. 8 at pp. 6-9, with Dist. Ex. 1 at pp. 6-9). Additionally, at the time of the March 2020 CSE meeting, the student's speech-language progress report indicated that the student had not met his annual goals related to identifying a main idea from informational text or increased his sentence complexity using appropriate morphological markers (Dist. Ex. 5 at p. 2). Further, the March 2020 IEP indicated, based on the evaluative material available to it, that the student remained at a second grade instructional/functional reading level but had progressed to the third-grade level in mathematics (Dist. Exs. 1 at p. 18; 3 at pp. 1-2). However, at the time of the March 2020 CSE meeting, the student was performing below grade level in reading, writing, and mathematics and had not progressed in reading from December to February as the student's Fountas and Pinnell reading level remained unchanged (Dist. Ex. 6 at p. 1).

The parent testified that during the 2019-20 school year she was called in to meet with the student's teachers to discuss the student's failing assessments and grades and in January 2020, after a formal assessment she was told the student was at risk of being held over again for third grade (Tr. p. 545). She also testified that she informed the March 2020 CSE that the student was in jeopardy of being retained and that she had asked the CSE to recommend additional services such as Orton-Gillingham or Wilson to address the student's reading delay (Tr. pp. 548-49, 600).¹⁹ The parent testified to a similar meeting in January of second grade where she was informed that the student was at risk of repeating second grade because "he was so far behind compared to his peers" (Tr. p. 541).

¹⁹ Although not necessary to render a decision in this matter, the parent's testimony is supported by a February 2020 email from the student's special education teacher to the parent indicating that the student was at risk for repeating the grade (see SRO Ex. O).

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]).

In consideration of the evidence regarding the student's progress, I find that there is limited support for a determination that the student made sufficient progress during the 2019-20 school year to warrant repetition of the core components of his IEP for the 2019-20 school year in the IEP developed for the 2020-21 school year without recommending any additional supports geared toward addressing his persistent reading deficits and overall difficulties in keeping up with grade-level academic expectations. The evidence in the hearing record indicates that although the student made some small measure of progress during the 2019-20 school year, it was not sufficient to bring the student toward grade level performance, and at the time of the March 2020 CSE meeting the student was at risk of being retained in third-grade due to his below grade level academic functioning. In light of the student's academic struggles and slow progress under a substantially similar program the prior year, the CSE's failure to modify the student's program to reflect and address his substantial reading needs and overall inability to keep pace with grade-level expectations was not reasonable. Additionally, although the IHO found that the absence of the student's special education teacher from the CSE meeting, while a procedural violation,²⁰ did not

²⁰ The IDEA requires a CSE to include the following members: the parents; one regular education teacher of the student (if the student was, or may be, participating in the regular education environment); one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a district representative; an individual capable of interpreting instructional implications of evaluation results; at the discretion of the parent or district, other persons having knowledge or special expertise regarding the student; and if appropriate, the student (see 20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). Additionally, as relevant here, State regulation requires, in pertinent part, that a CSE must include "not less than one special education teacher of the student, or, if appropriate, not less than one special education provider of the student" (8 NYCRR 200.3[a][1]). The hearing record reflects that the March 2020 CSE was composed of a district representative who served in that capacity and that of the school psychologist, the student's ICT general education

rise to the level of a denial of a FAPE to the student, the lack of input from the student's then current special education teacher, coupled with the parent's testimony that the student's teachers indicated the student was in danger of being retained for a second time, lends significant credence to the parent's contention that the CSE failed to take the student's lack of progress into account and, as a result, did not recommend an appropriate program in the March 2020-21 IEP. Accordingly, I find that the hearing record supports a finding that the recommendation to continue the student in an ICT classroom with relatively minor changes to the IEP after the student exhibited limited progress in that learning environment does not represent an IEP that was reasonably calculated to confer educational benefit to the student and the IHO's determination that the district offered the student a FAPE for the 2020-21 school year must be reversed.

C. Unilateral Placement

Having determined that the district failed to offer the student a FAPE for the 2020-21 school year, it is necessary to determine whether Churchill was an appropriate unilateral placement for the student for the 2020-21 school year.

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).

teacher, a "sprint specialist" (a coordinator at the school who managed issues pertaining to students with IEPs) and the parent (Tr. p. 351; Dist. Ex. 1 at p. 21). Neither the student's special education teacher nor the student's related service providers participated in the CSE meeting (Dist. Ex. 1 at p. 21).

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

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

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

The district contends that the parent failed to sustain its burden that Churchill was an appropriate placement citing to a presumed lack of OT services to address the student's handwriting needs and speech-language therapy to assist in reading comprehension.²¹ Contrary to the district's claim, however, a review of the hearing record shows that the program at Churchill sufficiently addressed the student's identified special education needs to support a determination that it was an appropriate unilateral placement.

The student's fourth grade teacher at Churchill testified that at the beginning of the 2020-21 school year she reviewed the student's materials provided by his previous school and conducted a series of assessments to understand the student as a learner (Tr. pp. 421-22). Based on her familiarity with the student, the teacher reported that he liked to read and that he did well with mathematic fluency and calculations, "solving problems in the abstract manner" (Tr. pp. 423-24). With respect to the student's needs she testified that in ELA the student presented with challenges writing complete sentences and paragraphs, and with applying proper capitalization, punctuation, and spelling to his writing (Tr. p. 424). The teacher indicated that in decoding the student needed support with new spelling patterns and spelling words with more than one syllable and in mathematics he needed to work on story (word) problems, comprehending what the problem was asking for and then solving those problems with the correct operation (Tr. p. 424).

With respect to the program that was developed at Churchill for the student, the teacher testified that the student was a remote learner for the 2020-21 school year (Tr. p. 425).²² In creating

²¹ Churchill has been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

²² The student's teacher testified that, due to COVID-19 and the change in health and safety protocols in the school, remote learning was made available for any student whose family chose that option as well as for students

a remote program for the student, the student's teacher testified that she followed the Churchill protocol for creating a fully synchronous schedule—as well as developing her own lessons—from eight in the morning until two thirty in the afternoon which correlated with the hours of the in-person program (Tr. p. 425-26). The student was required to attend every class in its full duration remotely and he was called on frequently to ensure he was focused and present (Tr. p. 445). According to the teacher, the student was provided with all the necessary materials at home to participate in the classroom remotely and he received all the same classes as he would be provided in person (Tr. pp. 425-426). According to the student's teacher, the student was provided with an iPad; multiplication charts, place-value chips, and fraction strips to support his understanding of mathematic concepts; two decoding notebooks that corresponded with the Foundations curriculum; and a dry-erase board with markers (Tr. pp. 432, 444). The furnished materials were intended to provide the student with the tools to meet his needs so that he was able to access the curriculum and lessons while learning from home (Tr. p. 432, 444).

The student was in a class of 12 students who were reportedly "around the same age as [the student]" (nine to eleven), chronologically at the fourth-grade level (Tr. pp. 426-28). His teacher testified that the smaller grouping benefited the student because he required frequent check-ins, on-task focusing prompts, reminders, and redirection (Tr. pp. 475-76).

According to the student's teacher she used the Wilson Foundations, Level two (second grade program) for the daily decoding class and Math in Focus four, a grade level four curriculum, for mathematics (Tr. p. 428, Parent Ex. S).²³ She indicated that both the reading and mathematics curriculums were modified to meet students' individual needs and that, specifically for this student, the level two reading curriculum corresponded to the student's reading level and the level four math curriculum corresponded to the student's mathematics level (Tr. p. 428). The student's teacher testified that in addition to reading and mathematics the student received special education, music, health, steam (technology class), art, current events, science, performing arts, library, and physical education (Tr. p. 428). Although the student did not receive speech-language therapy at Churchill, the teacher reported that he received a health and human relations counseling group (Tr. pp. 429, 487).

The teacher further reported that the student received OT as part of a whole class service twice a week for 30-minutes per class and a 15-minute movement break lead by the occupational

who needed to quarantine or learn remotely due to a COVID related absence (Tr. pp. 429-430). In this instance, the parent chose for the student to be a remote learner (Tr. p. 426). The student accessed the synchronous work via Zoom, the classes were live streamed, and the student participated with his camera and microphone on (Tr. 425-26, 430). The teacher testified that synchronous meant that the program was live learning/teaching and that the student was learning at home at the same time that she was teaching and the students in the classroom were learning (Tr. pp. 430-31). The head teacher, assistant teacher, and the other 11 students in the classroom were on Zoom as well with camera and voice (Tr. p. 430). The teacher also testified that they used an app or website called Seesaw to post assignments and allow students to actively engage in an assignment that may traditionally have appeared as a worksheet in the classroom (Tr. p. 430).

²³ The student's teacher testified that the Wilson Foundations program focused on phoneme and phonemic awareness and included building students' understanding of letter and sound correspondence in a systematic and multisensory manner (Tr. pp. 433-34). Further, she stated that the program taught skills in isolation and then progressed to the application of those skills in the context of reading and writing (Tr. p. 434).

therapist (Tr. pp. 429, 485-86). The teacher testified that during the 2020-21 school year OT was offered in a class format due to the COVID pandemic (Tr. p. 467, 487). She testified that the group class sessions for OT and counseling were only for the 2020-21 school year as a result of the health and safety protocols that were in place during that time (Tr. pp. 487-88). The school psychologist and OT pushed into the classroom because the students were not permitted to leave the classroom for small group sessions (Tr. p. 487). The student's teacher testified that the student also received individual check-in counseling as needed (Tr. pp. 488-89).

The teacher stated that each lesson throughout the day had an objective and goal—guided by school and State curriculum and standards—and she was able to check with the students on an individualized basis to track their progress and develop their areas of need (Tr. p. 434). Upon entering Churchill, the student's reading was assessed at Level J, 1.5 (halfway through first grade) and he was noted to struggle with reading comprehension, particularly with inferencing (Tr. p. 435). The teacher reported that the student's goals were related to understanding what he was reading, being able to make an inference, and being able to answer beyond the text type questions (Tr. p. 435). In addition, the teachers' goal was to move up the student in the Fountas and Pinnell levels (Tr. pp 435-36). With respect to writing, the teacher testified that the student could not write a complete paragraph at the beginning of the school year and did not use appropriate capitalization, punctuation, and spelling (Tr. p. 436). She indicated that Churchill set writing goals for the student to learn and apply spelling patterns to his writing, apply appropriate capitalization and punctuation, and write in paragraph form (Tr. p. 436). The teacher indicated that the student received instruction using the "Empire program which she described as a writing curriculum developed with a series of graphic organizers that best supported students with language-based learning disabilities (Tr. p. 472). The school also employed the mnemonic device CAPS (capitalization, all sentences make sense, punctuation, and spelling) (T. p. 472). The mathematics goals developed for the student focused on his understanding of story problems/word problems because the incorporation of words into math made understanding the problem difficult for the student (Tr. p. 437).

Regarding speech-language services at Churchill, the student's teacher testified that the need for services was determined based on the results of a speech-language assessment administered by a speech-language therapist (Tr. p. 466). According to the September 23, 2020 Churchill virtual speech-language screening, the student's receptive language skills were determined to be within the normal range (Parent Ex. F at p. 2). The student was found to have strengths in auditory memory skills with inconsistencies in his ability to recall specific details from auditory information at the paragraph level, although at the time of the assessment he was distracted by environmental activity (*id.*). The screening indicated that the student presented with a strong foundation of semantic knowledge and ability to understand word relationships (*id.*). On the assessment he demonstrated that he was able to make successful inferences and generate solutions to simple scenarios and the evaluator concluded that the student's receptive language skills were not a concern at that time (*id.*). More specifically, the speech-language screening indicated that the student demonstrated correct use of grammar and syntax, defined target words, and provided a cohesive narrative with the appropriate use of grammatical markers throughout the beginning and middle of the paragraph although lacking at the end (*id.*). The evaluator opined that the student's difficulty may have been indicative of distractions in the environment because when asked to describe a visual scene, the student's discourse consisted of strong transitions and grammatical markers with appropriate attention to detail leading the evaluator to conclude that the

student's expressive language skills were not a concern at that time; however, she recommended that the student's teacher monitor his ability to recall specific details (id.).

The student's Churchill January 2021 report card indicated that the student's OT class included gross and fine motor warm-ups, handwriting practice, cutting projects, and visual motor control activities (Parent Ex. J at p. 8). The handwriting practice included review of proper letter size and placement on the lines, as well as strategies for proper spacing between the letters within a word and between words (id.). The student also learned about various sensory systems and engaged in sensory activities and movement groups focused on promoting an optimal level of arousal and fostering bilateral coordination, postural control, and upper extremity and core strength (id.).

Based on the above, the hearing record shows that the program provided to the student at Churchill included instructional strategies and supports, such as support from a teacher and assistant teacher, daily decoding instruction using the Wilson Foundations program, check-ins, on-task focusing prompts, reminders, redirection, and instruction that was multisensory and systematic. The student's OT program addressed the student's needs with respect to handwriting, focus, and regulation despite being provided as a whole class intervention, rather than an individual service, due to the constraints implemented as a result of the COVID-19 pandemic. The hearing record shows that Churchill's decision not to provide the student with speech-language therapy was based on an initial screening on which the student performed typically with respect to receptive and expressive language and the omission of such services would not render the placement at Churchill inappropriate. The hearing record supports a determination that Churchill addressed the student's needs academically and with respect to related services and, thus, the parent's decision to place the student at Churchill for the 2020-21 school year was reasonable. Accordingly, the hearing record contains sufficient evidence to conclude that the parents have met their burden to show that Churchill was an appropriate unilateral placement for the student for the 2020-21 school year.

D. Neuropsychological IEE

The parent argues that the IHO erred in determining that she failed to establish that she had not formally disagreed with the district's evaluation of the student and, accordingly, was not entitled to a neuropsychological IEE at district expense. The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent

disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Here, the parent sent an email to the district dated March 13, 2020 which stated, in relevant part, that the parent had "found a new private neuropsychologist to perform the assessment" of the student and "really need[ed] a firm diagnosis of what [the student's] learning needs [we]re related to, and his previous evaluations have not helped in that way" (Parent Ex. X). The email further stated that the parent could not use her health insurance for the private neuropsychologist and queried "I was told that the [district] will pay for it if I disagree with the [district's] evaluation. Is that true?" (id.) In rejecting the parent's request for an IEE at public expense, the IHO found that the email sent by the parent "at best, properly interpreted, is an exploratory email from the [p]arent to the [d]istrict seeking guidance. In it the Parent does not express her disagreement with an evaluation conducted by the DOE" (IHO Decision at p. 28). However, it is well settled that in order for an IEE to be provided at public expense, State and federal regulations only require that "the parent disagrees with an evaluation obtained by the public agency"; the regulations do not speak to how a parent must manifest this disagreement to the district (34 CFR 300.502[b][1]; 8 NYCRR 200.5[g]; see Genn v. New Haven Bd. of Educ., 219 F. Supp. 3d 296, 317 [D. Conn. 2016] [a parent does not have to express disagreement "in a formalistic manner . . . to be found to have disagreed in substance with [an] assessment"]). Accordingly, while the format of the parent's request for an IEE may have, in part, resembled a more informal inquiry concerning the procedure for obtaining an IEE at district expense, her email to the district noted that the previous evaluations of the student had not been helpful in identifying the underlying reasons for the student's learning needs and also reflected her understanding that she could obtain an IEE at public expense based on her disagreement with the district's evaluation of the student. I find that the relevant regulations do not require more with respect to the form and content of the parent's request for an IEE at district expense and it is uncontroverted that the district never replied to the parent's request for an IEE or initiated a due process proceeding defending its evaluation of the student. As a result, the IHO erred by denying the parent's request for a neuropsychological evaluation funded by the district and that portion of his decision must be reversed.

VII. Conclusion

Having determined that the evidence in the hearing record supports a finding that the district failed to offer the student a FAPE for the 2020-21 school year, Churchill was an appropriate unilateral placement and equitable considerations weigh in favor of an award of tuition reimbursement to the parent, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated July 15, 2021 is modified by reversing those portions which found that the district offered the student a FAPE for the 2020-21 school year;

IT IS FURTHER ORDERED that the district reimburse the parent for the cost of the student's tuition at Churchill for the 2020-21 school year upon presentation of proof of payment;

IT IS FURTHER ORDERED that the IHO decision dated July 15, 2021 is further modified by reversing that portion which denied reimbursement for a neuropsychological IEE and the district is directed to fund the requested independent neuropsychological evaluation at a maximum rate of up to \$6,000.00.

Dated: **Albany, New York**
 October 13, 2021

STEVEN KROLAK
STATE REVIEW OFFICER