The University of the State of New York

The State Education Department
State Review Officer
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No. 22-087

Application of a STUDENT WITH A DISABILITY, by her parents, 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 Adam Dayan, PLLC, attorneys for petitioners, by Amled Perez, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Gillen Brewer School (Gillen Brewer) for the 2021-22 school year. Respondent (the district) cross-appeals from the IHO's determination that it must reimburse the partial cost of an independent educational evaluation (IEE). The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student has a history of developmental delays resulting from pachygyria (Parent Ex. K at p. 3). At age one, she demonstrated signs of seizure activity that gradually worsened with seizures becoming more frequent and more severe (id. at pp. 5-6). At age two, the student received a diagnosis of epilepsy (id. at pp. 3, 6). She received services through the Early Intervention Program and later the Committee on Preschool Special Education (CPSE) (id. at pp. 6, 7). At age five, the student transitioned to the CSE, where she was found eligible for special education as a student with an other health impairment (Parent Ex. K at p. 8; Dist. Ex. 5 at pp. 1-2). For the 2020-

21 school year, the CSE recommended that the student receive 21 periods of ICT services per week along with three 30-minute sessions each of speech-language therapy, OT, and PT (Dist. Exs. 5 at pp. 1-2; 10 at 19).[1] In addition, the CSE recommended that the student receive the support of a full-time, group health paraprofessional (Dist. Ex. 5 at p. 2).

Due to the COVID-19 pandemic, the student attended a remote-only kindergarten class beginning in September 2020 (Parent Ex. E at p. 4). On April 26, 2021, the student joined in-person learning, five days a week (id. at pp. 4, 7, 8).

On March 9, 2021, the student's occupational therapist completed a report describing the student's OT needs and what was expected for the student with the provision of OT (Dist. Ex. 7).

On March 18, 2021 a CSE convened for the student's annual review, and finding the student continued to be eligible for special education as a student with an other health impairment developed an IEP for the student (Dist. Ex. 10 at pp. 3, 18-20, 24). The March 2021 CSE recommended that the student receive ICT services in math six times per week and ICT services in English-language Arts (ELA) fifteen times per week (id. at p. 19). For related services, the CSE recommended that the student receive two 30-minute sessions of individual OT per week, one in the classroom and the other in the therapy room, one 30-minute session of OT in a group (2:1) per week, one 30-minute session of individual PT per week, one 30-minute session of PT in a group (2:1) per week, one 30-minute session of individual speech-language therapy per week, two 30-minute sessions of speech-language therapy in a group (2:1) per week, and the support of a full-time group health paraprofessional for health and seizures (id. at pp. 19-20).[2] The March 2021 CSE did not recommend a 12-month program or services for the student (id. at p. 20).[3]

In a March 18, 2021 email to the district, the parent indicated that the student needed 12-month services for OT, PT, and speech, and "even a summer school academic program[] if possible" so that she did not regress (Parent Ex. Z at p. 1). On March 25, 2021, the district replied that a 12-month service/program recommendation was not discussed during the student's "annual IEP meeting" (id. at p. 2). The district indicated that it was requesting a re-evaluation of the student and that 12-month services could be discussed at the next CSE meeting, with the school psychologist present (id.).

On April 26, 2021 the student transitioned from remote learning to the in-person kindergarten classroom five days per week, and other than speech-language therapy which continued remotely, she received her related services in-person (Parent Exs. E at pp. 4, 7-8; K at p. 8; Dist. Exs. 4 at p. 2; 8 at p. 2).[4]

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[1] In March 2021 the student's recommended PT was reduced to two sessions per week (see Dist. Ex. 10 at p. 19).

[2] The student was found eligible for special education as a student with an other health impairment (Dist. Ex. 10 at pp. 1; 24). The CSE also recommended one 30-45 minute team consultation per month (id. at p. 20).

[3] The district provided the parent with prior written notice of the March 2021 CSE recommendations, dated March 31, 2021 (see Dist. Ex. 12).

[4] The student's in-person class had eleven students and one teacher (Tr. pp. 69-70). Additionally, the student had

In an undated prior written notice to the parents that referenced the March 2021 IEP, the district proposed to conduct a reevaluation of the student due to the lack of progress toward her IEP goals (Parent Ex. C at p 1). On May 18, 2021 the student's mother provided consent for the district to conduct a psychoeducational assessment and social history update (Parent Ex. C at pp. 1, 4; Dist. Ex. 3).

The district completed a social history update on May 28, 2021 via an online interview with the parents (see Dist. Ex. 8). The resultant report indicated that the student had been hospitalized on several occasions, most recently in February 2021 due to seizures, and that she would be hospitalized in July for further testing (id. at pp. 1-2). According to the social history update, the parents reported that they believed the student regressed academically during the 2020-21 school year and that they were disappointed in the student's current educational program (id. at p. 2).

The district conducted a psychoeducational evaluation of the student over two days in early June 2021, which resulted in a report dated June 8, 2021 (see Parent Ex. D; Dist. Ex. 5).[5] Administration of the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition (WPPSI-IV) yielded a full-scale IQ of 80 which fell in the low average range of functioning (Dist. Ex. D at p. 2). With regard to the student's academic achievement, the evaluator reported that as measured by the Woodcock-Johnson IV Tests of Achievement the student performed within normal limits on tests of reading skills but her performance on the mathematics and writing clusters indicated underdeveloped skills in these areas (id. at pp. 4-6). The evaluator noted that the student's teacher indicated that the student could not identify all letters or their corresponding sounds (id. at p. 6). The evaluator offered strategies for the student's teachers to employ; to assist the student academically, however, she did not make an educational program recommendation (id.).

The CSE convened in June 2021 to conduct the student's annual review and develop her IEP for the 2021-22 school year (Parent. Ex. E at pp. 1, 20; Dist. Ex. 13 at p. 2).[6] The CSE continued to recommend that the student receive ICT services six times per week in math and fifteen times per week in ELA (Parent Ex. E at p. 14). In addition, for related services, the CSE recommended that the student receive one 30-minute session of individual OT per week in a separate location, one 30-minute session of individual OT per week in the classroom, one 30-minute session of OT in a group (2:1) per week, one 30-minute session of individual PT per week, one 30-minute session of PT in a group (2:1) per week, one 30-minute session of individual speech-language therapy per week, two 30-minute sessions of speech-language therapy in a group (2:1)

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a paraprofessional (Tr. pp. 69-70).

[5] The district psychoeducational evaluation was also entered into the hearing record as a district exhibit (see Dist. Ex. 5). For purposes of clarity, only the parent exhibit will be cited to (see Parent Ex. D).

[6] While the June IEP and accompanying prior written notice indicate that the CSE convened on June 6, 2021, the parent testified that the date on the June 2021 IEP was incorrect and that she received a copy of the district's June 2021 evaluation report on June 8, 2021, a day before the CSE meeting which she stated occurred on June 9, 2021 (Tr. pp. 221-22; Parent Exs. E at p. 20; CC at p. 2; Dist. Ex. 13 at p. 2). Further, both the parent and district submitted a copy of the June 2021 IEP into the hearing record, for the purposes of clarity for the remainder of the decision, only the parent exhibit will be cited (see Parent Ex. E).

per week, and the support of a full-time individual health paraprofessional (id. at pp. 14-15).[7] The June 2021 CSE recommended a 12-month program/services for the student, that consisted of special education teacher support services (SETSS) three times per week for both math and ELA (id. at p. 16). Additionally, the CSE recommended the student receive two 30-minute sessions of individual OT per week, one 30-minute session of OT in a group (2:1) per week, one 30-minute session of individual speech-language therapy per week, two 30-minute sessions of speech-language therapy in a group (2:1) per week, and the support of a fulltime individual health paraprofessional (id. at pp. 15-16). The placement recommendations for both the 10-month and summer portion of the 12-month school year were listed on the IEP as a non-specialized school (id. at pp. 17, 21).

By prior written notice dated June 17, 2021 the district notified the parents of the June 2021 CSE recommendations for the 2021-22 school year (Dist. Ex. 13. at p. 1). The notice also indicated that the parents had applied to a different program called Summer Rising and expressed a preference for that program over the six periods of SETSS each week proposed in the summer services portion of the June 2021 IEP (id. at p. 2; Parent Ex. E at p. 16). The notice indicated that the recommended services were set to be put into effect on September 7, 2021 (Dist Ex. 13 at p. 3).

In a July 14, 2021 e-mail to district staff, the parents indicated that they believed the student was going to receive related services in the Summer Rising program but were informed that the public school site where the Summer Rising program was located did not provide related services (Parent Ex. X). In a July 22, 2021 email to the parents, the district confirmed that the parents gave consent for the student to receive related services through teletherapy (Dist. Ex. 2). The hearing record includes a notation that the student attended the Summer Rising program as of July 2021, but received related services "elsewhere" (Parent Ex. K at p. 8).

In an August 2, 2021 letter to the district, counsel for the parents asserted that the student required a full-time special education classroom setting and that an ICT setting was not supportive enough to meet the student's needs (Parent Ex. F at p. 1). In addition, the letter indicated that the student continued to need a full-time special education classroom setting over the summer in order to avoid substantial regression (id.). The parents maintained that three sessions per week of SETSS for math and ELA were not supportive enough to prevent the student from regressing (id.). The letter indicated that the parents were concerned that the CSE and district did "not have a clear understanding" of the student's needs and abilities (id.). According to the letter, the district's June 2021 evaluation of the student was not comprehensive and did not result in appropriate program and placement recommendations; therefore, the parents requested a neuropsychological IEE (id. at pp. 1-2). The letter indicated that without a district response, the parents would secure an IEE with a specific pediatric neuropsychologist and seek reimbursement from the district (id. at p. 2).[8]

[7] The CSE also recommended team consultation as a support for school personnel on behalf of the student once per month for 30-45 minutes (Parent Ex. E at p. 15).

[8] The pediatric neuropsychologist identified by the parents subsequently conducted a neuropsychological IEE in August 2021 with a evaluation report completed in September (see Parent Exs. F at p. 2; K at pp. 3, 23).

On August 9, 2021 the parents executed an enrollment contract with Gillen Brewer for the student's attendance for the 2021-22, 10-month school year, beginning in September 2021 (see Parent Ex. O). The contract indicated that the student would receive specialized health management support services and the costs of those extra services were reflected in the cost of tuition (id. at p. 1). The contract also provided that the student would be enrolled in a 10:1:2 special class (id. at p. 2).

In an August 18, 2021 letter, the district provided the parent with information on how to secure, at no cost, an IEE (see Dist. Ex. 1). The letter indicated that payment for the agreed upon evaluation was not to exceed the maximum rate set by the rate schedule (id. at pp. 2). The rate schedule attached to the letter provided that the maximum rate for a neuropsychological assessment was $5,000.00 (id. at p. 6).

In a letter dated August 25, 2021, the parents notified the district that they believed that the student required "a full-time special education classroom setting" and that the CSE's recommended program was not sufficiently supportive to address the student's unique needs (Parent Ex. B at p. 1). The parents asserted that they had no choice, but to enroll the student at Gillen Brewer, a school that could address the student's needs, for the 2021-22 school year and that, if the district did not address their concerns, they intended to seek funding for the cost of the program from the district (id. at p. 1). Additionally, the parents requested the district provide appropriate transportation to Gillen Brewer along with all necessary transportation accommodations including limited travel time and door-to-door service (id.).[9]

The student began attending Gillen Brewer on September 9, 2021 (Parent Ex. S).

In a letter dated September 10, 2021, the parents informed the district that they received the district's response to their requested IEE on August 18, 2021, including a list of independent evaluators (Parent Ex. I). The parents indicated that they had contacted several of the listed providers but they were not able to evaluate the student until mid-November to January 2022 (id.). The parents asserted that the anticipated wait was too long as they needed to make a "determination about the supports and instructional methodologies" the student needed for the 2021-22 school year (id.). The parents indicated that they had begun the assessment process with a neuropsychologist not on the provider list, that the cost of the evaluation would be approximately $6,000.00, and that they sought reimbursement from the district for the cost of the evaluation (id.).

The neuropsychological evaluation was conducted over four days in August 2021 and the report was completed on September 29, 2021 (Parent K at pp. 3, 23). The evaluator found that the student met the criteria for diagnoses of other specified neurodevelopmental disorder, speech sound disorder, language disorder, and specific learning disorders in reading, writing and mathematics (id. at p. 19). In an email dated October 6, 2021, the parents provided the district with a copy of the neuropsychological IEE (id. at p. 1). In a letter attached to the neuropsychological evaluation report, the parents informed the district that they had chosen an evaluator who was not on the list provided by the district because they could not find a qualified evaluator who could promptly evaluate the student (id. at p. 2). The parents also requested that

[9] On September 14, 2021 the parent signed consent to amend the student's IEP without a CSE meeting in order to add "specialized busing" to the IEP (Parent Ex. J).

the CSE reconvene so that the IEE recommendations could be implemented during the 2021-22 school year (id.).

A. Due Process Complaint Notice

By due process complaint notice dated November 2, 2021, the parents asserted that the June 2021 was not appropriate to meet the student's needs and the district failed to provide the student with a free appropriate public education (FAPE) for the 2021-22 school year (Parent Ex. A at pp. 1, 4-6). More specifically, the parent asserted that the district's June 2021 evaluation was not comprehensive as the evaluator made no placement recommendation (id. at p. 4). The parents asserted that this was not appropriate as the evaluator "would be the most capable and trained to make recommendations while the participants in the IEP meeting typically read documents and have never met or observed the children they're tasked with understanding" (id. at p. 5).

The parents indicated that after the June 2021 CSE meeting, they informed the district, by letter, that they disagreed with the recommendation for ICT services and requested an IEE (Parent Ex. A at p. 5).[10] The parent next asserted that they sent a letter to the district on August 25, 2021 notifying it that they unilaterally placed the student at Gillen Brewer for the 2021-22 school year and reiterating that a recommendation for ICT services was inappropriate for the student (id.).

The parents then contended that they attempted to contact several evaluators from the district list, but were unable to secure an immediate evaluation (Parent Ex. A at p. 5). As such, the parents indicated that they emailed the district to inform it that they found their own evaluator to conduct the IEE and sought reimbursement for the cost (id.).

The parents asserted that in October 2021, they provided a copy of the September 2021 IEE to the district and requested a new CSE; however, "to date, the district has not responded" (Parent Ex. A at pp. 5-6). The parents assert that the IEE indicated the student required "a special education school with integrated supports and services throughout the school day," as well as placement in a small class with no more than four students per instructor (id. at p. 4). According to the parents, based on their allegations, it was "clear that the June 2021 [IEP was] inappropriate to meet [the student's] educational needs" (id. at p. 6).

Moreover, the parents contended that the district failed to provide the student with a placement recommendation by the start of the 2021-22 school year (Parent Ex. A at p. 6). According to the parents, the district failed to address the parents' "concerns about the IEP recommendations and failed to give [the student] any placement where the June 2021 IEP could be implemented" (id.). As such, the parents contended that the district failed to offer the student a FAPE for the 2021-22 school year and the parents were forced to enroll the student at Gillen Brewer (id.).

For relief, the parents requested a finding that the district failed to provide the student with a FAPE for the 2021-22 school year, a determination that Gillen Brewer was reasonably calculated for the student to obtain an educational benefit, and that equitable considerations did not bar

[10] The parents noted that the district responded to the IEE request with an "Authorization Form for an independent evaluation" and a registry of evaluators who performed evaluations (Parent Ex. A at p. 5).

funding for Gillen Brewer (Parent Ex. A at pp. 6-7).[11] Also, the parent requested a finding that the student was entitled to a 12-month program and reimbursement/funding for the cost of the neuropsychological IEE (id. at p. 7).[12]

B. Impartial Hearing Officer Decision

After prehearing conferences were held on January 5, 2022 and January 19, 2022, the parties proceeded to impartial hearing, which convened on March 16, 2022 and concluded on April 11, 2022 after three nonconsecutive days of hearings (see Tr. pp. 1-267). The IHO in a decision dated June 7, 2022 found that the district offered the student a FAPE for the 2021-22 school year but that the parents were entitled to an IEE at district expense and awarded the parents reimbursement of $5,000 toward the cost of the August/September 2021 neuropsychological evaluation (IHO Decision at pp. 22, 26-27).

Initially, the IHO reviewed the June 2021 psychoeducational evaluation and summarized the facts of the case related to the 2020-21 school year (IHO Decision at pp. 3-5). In reviewing testimony, the IHO noted that the student did not attend school in-person until April 2021 and that when the student did return she was behind the other students academically (id. at pp. 4-5).[13] The IHO found that when the student returned to in-person learning, she showed progress in socialization and noted the district teacher's testimony that she would have expected more academic progress from the student if the student attended in person for the entire 2020-21 school year (id. at p. 5).

Regarding the 2021-22 school year, the IHO summarized the testimony of the district teacher explaining the ICT recommendation for the student; notably, clarifying that the ICT classroom would have returned to having two teachers for the 2021-22 school year, identifying the type of instruction that the student would have received in the ICT classroom, explaining that the student would have received parallel instruction which would have allowed the student to receive extra support both 1:1 and in a small group, and explaining that the teachers would have been able to present a lesson to the whole group on grade level and then tailor things for the student (id. at pp. 5-6). The IHO reviewed the teacher's description of the student, noting the teacher's testimony that 1:1 learning keeps the student most engaged and that during the 2021-22 school year, the

[11] Regarding funding for Gillen Brewer for the 2021-22 school year, the parent requested reimbursement and direct and/or prospective funding for tuition and any other related costs and an order that the district must provide appropriate transportation or reimburse any private transportation costs (Parent Ex. A at p. 7).

[12] Subsequent to the filing of the due process complaint notice, the parents sent a letter dated December 8, 2021 to the district, in which the parents asserted that they did not receive a public-school recommendation and that they remained open to considering and enrolling the student in public school, if the placement was appropriate (Parent Ex. L). The parents requested a school location letter (id.). Seemingly in response to the parents' letter, the hearing record includes a prior written notice and school location letter both dated December 9, 2021 (Parent Ex. M at pp. 1, 5).

[13] The IHO also stated that the student's ICT class when she returned to in person learning was not "the usual ICT staffing ratio" as there was only one teacher and eleven students due to Covid restrictions (IHO Decision at p. 4). The IHO noted that the school had offered in-person learning at the start of the 2020-21 school year (id.). The 2020-21 school year was not at issue during the impartial hearing.

student really benefitted from her paraprofessional (IHO Decision at p. 5). Further, the student enjoyed whole group instruction and was able to participate through the use of visuals and movement (id.). However, small groups were more beneficial to the student (id.).

The IHO next reviewed the evaluative information regarding the student and found that the results of the August/September 2021 neuropsychological IEE were "markedly different" from the district's June 2021 psychoeducational evaluation (IHO Decision at p. 7). The IHO specifically noted that the cognitive results were much lower in the IEE, but that the evaluator concluded that the student "could not be diagnosed with an intellectual disability, as her adaptive function measured in the low average range" (id.). The IHO indicated that the "evaluator did not indicate that this meant, perhaps, that the Student's functioning was not as low as his determination of her IQ might suggest" but noted that it "[wa]s on[]e of many indications that that is the case" (id.). The IHO noted that the student's scores in fluid reasoning and verbal tasks designed to assess her quantitative reasoning were both very low; however, the student performed in the high average range on similar tasks when the language demands were largely reduced (id.). Based on this, the IHO found that "one could conclude, perhaps, that the Student did not, in fact have global difficulties in fluid reasoning, but that her difficulties were connected more specifically with language" (id.). In contrast, the IHO noted that the district's testing of fluid reasoning "support[ed] a finding that the Student's deficits were not so marked in fluid reasoning" (id.).

The IHO then reviewed and compared the student's IQ scores in both evaluations, noting that the August/September 2021 neuropsychological IEE used the Stanford-Binet Intelligence Scales, which did not include processing speed, an area of particular strength for the student (IHO Decision at p. 8). In comparing the student's scores in fluid reasoning between the two evaluations, the IHO noted that the June 2021 psychoeducational evaluation used fewer subtests that relied on language (id.). The IHO concluded that the student's fluid reasoning skills "when language is not involved may be in the average range" in contrast with the August/September 2021 neuropsychological IEE, placing the student in the 0.4th percentile, which the IHO stated was "a hugely significant fact" (id.).[14] Next, the IHO went through other scores reported in the neuropsychological IEE including knowledge, quantitative reasoning, visual-spatial processing, working memory, language functioning, listening comprehension, reading comprehension, mathematics, and conceptual skills and noted when or if they contrasted with the scores reported in the district psychoeducational evaluation (id. at pp. 8-9).

Based on a comparison of the district and IEE testing, the IHO found that the student "ha[d] higher potential than determined by the neuropsychologist" (IHO Decision at p. 9). The IHO determined that if the student "was able to perform at the levels determined by the" district psychologist, "that indicates that she has that ability" (id. at pp. 9-10). According to the IHO "[o]ne can not perform higher than one's ability" (id. at p. 10). The IHO reviewed possible reasons why the student might have scored lower on the August/September 2021 neuropsychological IEE than on the June 2021 psychoeducational evaluation (id.). In particular, the IHO noted that the psychologist who conducted the August/September 2021 neuropsychological evaluation indicated it was difficult to comprehend what the student was communicating due to challenges with

[14] The IHO noted that the district's testing of fluid reasoning placed the student in the 16th percentile, while the IEE placed the student in the 0.4th percentile (IHO Decision at pp. 7-8).

articulation, enunciation, and spoken grammar (id. at pp. 9, 10). The IHO further noted that the student had experienced a seizure the day before the third day of testing "which seemed to fatigue [the student] at a quicker pace" and that she "generally seemed more irritable and had less patience" (id.). The IHO also noted the assessment used to test the student's fluid reasoning as discussed above (id.). Additionally, in reviewing the neuropsychologist's conclusion that the student's "difficulties make it difficult for her to engage in deliberate or intentional learning," the IHO noted that the conclusion was based on test scores "which differed significantly from" the district's and accordingly called it into question (id. at p. 9).Taking all of these findings into account, the IHO found that the student's "cognitive potential is higher than that tested by the neuropsychologist" (id.).[15] Therefore, the IHO held that the student's "program recommendations should conform more closely to her academic functioning" (id. at p. 11).

Next, the IHO determined that the district psychoeducational evaluation was sufficiently comprehensive (IHO Decision at p. 12). The IHO noted that the parent's objection that the evaluation did not contain a program recommendation is without merit because it is "the CSE's job to interpret . . . data" from evaluations (id. at pp. 12-13). The IHO further noted that the evaluation "need not include a recommendation for placement, as that recommendation is within the purview of the CSE" (id. at p. 13). Moreover, the IHO noted that any recommendations made in the psychoeducational evaluation would have been made based on a limited set of information, rather than the "full set of information" which the CSE has (id. at pp. 13-14).

Next, the IHO analyzed whether the program offered by the district was appropriate for the student (IHO Decision at pp. 14-22). First, the IHO held that the CSE was properly composed (id. at p. 15). After a review of the recommendations, evaluations, and other aspects of the IEP, the IHO found that the student's "cognitive potential [was] more accurately described by the psychologist who conducted the psychoeducational evaluation for the [district]" (id. at p. 16). The IHO then reviewed additional tests scores (id. at pp. 17-18). Following that review, the IHO noted that a student with the student's scores in receptive vocabulary and reading comprehension "can derive a great deal of benefit in the general educational environment with typically developing peer models" and that the least restrictive environment for the student was the general education setting, such as the recommended class with ICT services (id. at pp. 19).

The IHO described the evidence in the hearing record regarding the provision of ICT services and how ICT services would have benefited the student and addressed her needs (IHO Decision at pp. 19-20). Additionally, the IHO noted that ICT services would have provided the student with the opportunity to work with a teacher individually or in small groups to support her learning needs (id. at p. 19). The IHO credited the testimony of the district witness regarding the structure of the ICT class and how the student would have been able to get individual instruction in that class (id. at pp. 19-20). The IHO also held that "any regression or slow progress" from the student the prior school year was due to remote instruction as the student was "unable to derive sufficient benefit" from remote instruction (id. at p. 20). The IHO found that any lack of progress during the 2021-22 school year was not due to the recommendation for ICT services (id. at pp. 20-21). Further, the IHO noted that there was evidence that the student showed progress in

[15] The IHO also noted that the student's actual performance was higher than the results indicated in the August neuropsychological IEE, pointing to listening comprehension, repetitive vocabulary, reading comprehension and several other areas (IHO Decision at pp. 10-11).

mathematics and some progress in reading during remote instruction (id. at p. 21). The IHO found that the district recommended a program that was reasonably calculated to provide the student with an educational benefit (id. at p. 22).[16]

Turning to the parents' allegations regarding the district's failure to identify the school that would have implemented the June 2021 IEP, the IHO found that the parents knew "where the IEP would be implemented prior to the start of the 2021-22 school year" and that the parents "knew that the summer services would be provided in the [district's] Summer Rising Program" (IHO Decision at p. 22). Further, the IHO found the parents were aware the student would continue at the same school she attended for the 2020-21 school year (id.). Moreover, the IHO found that there was no support in the hearing record for the parents' assertion that the ICT recommendation would not have had both a general education and special education teacher for the 2021-22 school year (id. at p. 23).[17] The IHO noted that any complaints regarding the make-up of the ICT classroom regarding potential restrictions due to the COVID-19 pandemic were not raised in the due process complaint notice and stated that the "hearing request [was] devoid of any specifics regarding the Parents' disagreement with the IEP" (id. at p. 24). Also, the IHO determined that the "hearing request d[id] not directly state that the Parents disagree[d] with the IEP or what their disagreement consist[ed] of," only implying disagreement by pointing to the August 2021 letter notifying the district of their intent to place the student at Gillen Brewer (id.). The IHO determined that "a due process complaint must include a description of the nature of the problem of the student relating to such proposed or refused initiation or change, including the facts related to such problem" and that the parents "having failed to specific the facts regarding the proposed class with which they disagreed, [] have created ambiguity" (id.). Further, that the "ambiguity should not be resolved in [the parents] favor" as it would be unfair to the district (id.). Based on all of the evidence in the hearing record, the IHO found that the question of whether the parents were told prior to the start of the school year that the restrictions due to the COVID-19 pandemic would not have been in place during 2021-22 school year, was not raised in the due process complaint notice or as one of the reasons why the parent unilaterally placed the student (id.).[18]

The IHO determined that having found the district offered the student a FAPE, she did not need to undertake an analysis of the unilateral placement; however, after a review of the unilateral placement, the IHO determined that Gillen Brewer was an appropriate placement for the student for the 2021-22 school year and was reasonably calculated to provide educational benefits (IHO

[16] The IHO found that the parent did not make any allegations regarding extended school year services in the due process complaint notice (IHO Decision at p. 22). Further, the IHO held that the due process complaint notice made no allegations regarding the provisions of a summer program and that the district "objected continuously" to any questions regarding summer services (id.). The IHO also noted that there were no arguments in the parents' August 2021 letter notifying the district of their intent to place the student at Gillen Brewer regarding the summer program or implementation (id.).

[17] The IHO noted that the evidence in the hearing record indicated that the restrictions due to the COVID-19 pandemic during the 2020-21 school year were lifted for the 2021-22 school year (IHO Decision at p. 23).

[18] Despite this finding, the IHO did review the educational program, specifically ICT services, recommended for the student for the 2021-22 school year (IHO Decision at pp. 24-26). The IHO determined that "had the Student continued in the program provided in person at the end of the 2020-21 school year for the 2021-22 school year, it would have met her needs" (id. at p. 26).

Decision at p. 27). Also, the IHO held that equitable considerations favored the parents as there was no evidence the parents failed to cooperate with the district (id. at p. 28). Nevertheless, since the IHO found that district offered an appropriate placement, the IHO denied the parent's request for tuition funding (id. at p. 27).

However, the IHO found that the parent was entitled to reimbursement of $5,000.00 for the neuropsychological IEE (IHO Decision at p. 14). According to the IHO, the parent sent a letter to the district requesting an IEE indicating that she did not agree with the district's evaluation and the district responded authorizing the evaluation up to the cost of $5,000.00 (id.). Although, the district evaluation was found to be appropriate, the IHO held that the district had agreed to fund an IEE up to $5,000.00 and ordered the district to fund the IEE at that amount (id.).

IV. Appeal for State-Level Review

The parents appeal. The parents delineate seven issues for review: (1) the IHO erred in finding that the district fulfilled its procedural obligations under the IDEA—specifically asserting that the district did not timely provide a 12-month program, effectively implement the June 2021 IEP, address new evaluation findings identifying shortcomings in the IEP, or provide a cogent, responsive answer to the parents' concerns regarding the IEP and the assigned school; (2) the IHO correctly concluded that the student required 1:1 educational support, but improperly determined that a paraprofessional appropriately and sufficiently met that need; (3) the IHO gave improper weight to the district witness and district psychoeducational report; (4) the IHO relied on evidence not in the hearing record giving "full, unmitigated credence to the district's speculation regarding the effects of remote learning" instead of exploring evidence presented to show that the district disregarded the student's needs; (5) the IHO disregarded the district's duty to have provided a summer placement at the start of the 2021-22 school year and the district's failure to meet that duty; (6) the IHO's "well-reasoned determination" that Gillen Brewer was appropriate undermines her finding that the district placement was appropriate; and (7) the IHO improperly reduced the amount to be reimbursed for the IEE.

Before enumerating the specific issues raised on appeal, the parents also summarized some of the student's educational history and the parents' disagreements with the district. In this summary, the parents also generally asserted that the IHO erred in finding the June 2021 IEP appropriate for the student and by discounting the testimony of the parent and IEE evaluator while relying too heavily on the testimony of the district special education teacher regarding the appropriateness of ICT services for the student. Additionally, the parents argued that the IHO gave improper weight to the student's experience receiving ICT services during the 2020-21 school year, asserting that the IHO improperly blamed the parents for their choice of having the student receive services remotely during the 2020-21 school year by attributing the student's regression during that school year to the remote option.

The parents request that the IHO decision be vacated, and an order be made that the district denied the student a FAPE for the 2021-22 school year. Further, the parents request an order of

funding for tuition at Gillen Brewer and full reimbursement for the cost of the August 2021/September neuropsychological IEE in the amount of $6,000.00.[19]

In response, the district filed an answer with a cross-appeal. The district contends that the IHO correctly held that the June 2021 evaluation of the student was comprehensive and that the IHO properly rejected the parents' contention that the evaluation was deficient for not making a program recommendation as that is the purview of the CSE. Further, the district asserts that the parents' assertions regarding the findings of the August/September 2021 neuropsychological IEE are retrospective because the June 2021 CSE did not have the IEE as it was conducted after the CSE convened. The district further asserts that the CSE had sufficient information regarding the student. According to the district, the hearing record supports the IHO's finding that the recommendations of the CSE were appropriate and reasonably calculated to provide the student with an educational benefit in the her least restrictive environment. The district contends that the IHO correctly found that ICT services during the 2021-22 school year were going to return to the pre-pandemic structure and that the school location was able to implement the June 2021 IEP.

Regarding 1:1 instruction and support, the district asserts that the hearing record establishes that the student would have received 1:1 instruction from the ICT teachers, not just the paraprofessional. Moreover, the district argues that the IHO carefully considered and weighed the evidence in the hearing record and used the hearing record to support her conclusions.

The district asserts that the parents were aware at the time they decided to unilaterally place the student where and how the June 2021 IEP would be implemented. Regarding a reconvene of the CSE, the district argues that the operative IEP was the IEP in effect at the time the student was unilaterally placed and that the parents did not provide the district with a copy of the IEE until after they had unilaterally placed the student. Moreover, the district contends that any allegations regarding the summer of 2021 were outside of the scope of the impartial hearing as they were not raised in the due process complaint notice.[20]

The district cross-appeals from the IHO's determination regarding reimbursement for the cost of the August/September 2021 neuropsychological IEE. The district contends that because the IHO found that district's June 2021 evaluations were comprehensive, the parents should not have been awarded any of the expense of the IEE.

The parents filed an answer to the cross-appeal. In the answer to the cross-appeal, the parents generally denied the district's assertions. Specifically, regarding the district's cross-appeal, the parents assert that the district admitted it did not conduct a comprehensive evaluation by agreeing to the IEE after they voiced their disagreement. The parents reiterate their assertion that the IHO improperly reduced reimbursement and they should have been awarded the full cost of the IEE.

[19] The parents argue that there was "no controversy regarding the need for reevaluation since the [district] agreed to fund the IEE."

[20] Additionally, the district contends that the parent was aware that the student would attend the Summer Rising program.

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]).[21]

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

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

[21] 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).

VI. Discussion

A. Scope of Proceeding and Scope of Review

Prior to reaching the merits of the parties' dispute, it is necessary to identify the issues that are properly raised on appeal.

As noted above, the parents raised seven issues for appeal in their request for review and the district raised one issue in its cross-appeal. Additionally, the parents raised several allegations of IHO error in a summary of the proceeding prior to identifying each of the issues presented for review by number. The regulations governing practice before the Office of State Review require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). While most of the facts presented in the summary relate in some way to the numbered issues, to the extent that the summary raises issues outside of the numbered allegations, those issues are deemed abandoned and will not be addressed on appeal.

Additionally, as noted by the district in its answer, the IHO correctly determined that the parents did not raise any allegations related to the appropriateness or the implementation of 12-month services in their due process complaint notice. The parent now claims for the first time on appeal that the district failed to implement the student's 12-month program (Req. for Rev. at ¶5).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59[2d Cir. June 18, 2014]).

Review of the parents' due process complaint notice shows that the parents failed to raise any issues regarding 12-month services. The summer portion of the school year was only mentioned in the due process complaint notice twice; first, to indicate that the IEE recommended that the student receive 12-month services and, second, to request a determination that the student is entitled to 12-month services as part of the relief (Parent Ex. A at pp. 4, 7).

Initially, the parents assert, without further explanation, that the IHO erred in declining to address the provision of 12-month services because it was not raised in the due process complaint notice, asserting that the IHO should have found it to be a denial of FAPE (Req. for Rev. at ¶5). The parents' memorandum of law in support of their request for review does not offer much more than the request for review, focusing on the June 2021 CSE recommendation for 12-month services and when services were provided, but offering little explanation as to how the issue was raised in the parents' due process complaint notice (Parent Mem. of Law at pp. 15-16). The parents' merely state that the due process complaint notice "noted this need," generally referencing 12-month services and citing to the two pages noted above on which 12-month services appeared in the due process complaint notice (id. at p. 16). Finally, in their reply and answer to the district's cross-appeal, the parents indicated that "[t]he Due Process Complaint alleged that this student was entitled to a 12-month program" (Reply ¶14).

As the district argues and the IHO pointed out, the parents' arguments miss the mark. The due process complaint notice did not identify either the appropriateness of the recommendation for 12-month services or the implementation of 12-month services as a problem to be addressed at the hearing (see Parent Ex. A). Merely stating that 12-month services were recommended and requesting that the student receive 12-month services as part of the requested relief, did not put the district on notice that it had to produce evidence to prove the appropriateness of the recommendation or how the service was provided, especially when the scant information in the hearing record appears to indicate that the parents decided to apply to and placed the student in a different public program other than the one recommended by the CSE and the due process complaint notice does not mention that program at all. [22] Accordingly, I find this issue was not properly raised in the due process complaint notice.

The next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir.

[22] The available evidence in hearing record shows that the student did not attend the June 2021 CSE's recommended program, and instead attended another district program, noted above the Summer Rising program. The June 2021 CSE recommended that the student receive SETSS and related services for the 12-month portion of the 2021-22 school year (Parent Ex. E at pp. 16-17). The student's mother testified that the district school psychologist recommended the district's Summer Rising program for the student at the June 2021 CSE meeting (Parent Ex. CC at ¶15). In a January 5, 2022 letter to the district, the parents indicated that they had no choice but to enroll the student in the Summer Rising program because the school the student had been attending was closed for the summer; the parents indicated that the Summer Rising program was different from the student's IEP (Parent Ex. N at p. 1). In contrast, the district's prior written notice indicated that the parents preferred the Summer Rising program over the CSE recommendation for SETSS (Dist. Ex. 13 at p. 2). Email correspondence between the parents and district staff showed that the parents applied for the Summer Rising program and were put on a wait list for the program by June 14, 2021 (Parent Ex. U at p. 1). As of July 14, 2021, an email from the parents to the district indicated that the student was attending the Summer Rising program but was not receiving her related services (Parent Ex. X). In a July 22, 2021 email to the parents, the district confirmed that the parents gave consent for the student to receive related services through teletherapy (Dist. Ex. 2). In addition, the hearing record includes a notation that the student received related services "elsewhere" while attending the Summer Rising program (Parent Ex. K at p. 8). Accordingly, the hearing record appears to show that the student attended some kind of public programming for summer 2021 (but not the programming offered by the CSE), and that the student nevertheless received related services during the summer albeit after parent asked for them at the programming selected by the parent.

June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

At the impartial hearing, the district objected to the introduction of evidence regarding the summer of 2021 arguing it was outside the scope of the due process complaint notice (Tr. pp. 43-49, 153-55, 157-58). Accordingly, the district did not open the door to this issue. The parents were required to raise specific claims regarding either the appropriateness or implementation of 12-month services if they wanted those issues to be addressed during the hearing and at no point did the parents request to amend the due process complaint notice to include those issues. The IHO properly concluded that the issue of the appropriateness or implementation of the recommended 12-month services was not properly raised (IHO Decision at p. 22).

B. June 2021 CSE

Turning next to recommendations contained in the June 2021 IEP, it is again noted that the parents did not raise any objections regarding the June 2021 IEP with any specificity in the due process complaint notice (see Parent Ex. A). Rather, the only objections regarding the 2021-22 school year were that the district did not produce a school location letter, the district's June 2021 psychoeducational evaluation was not comprehensive because the evaluator did not make a placement recommendation within the evaluation report, and the district did not reconvene the CSE to review the results of the neuropsychological IEE (Parent Ex. A at p. 6). Notably, the IHO pointed this out; however, the IHO still addressed the district's recommended programming in her decision (see IHO Decision at p. 24).

Initially, related to the parties' arguments regarding 12-month services, there is a dispute as to the time period for which the district is required to defend its decisions related to the student's programming for the 2021-22 school year in this proceeding. For example, the district contends that because the parents are requesting tuition reimbursement for the 10-month portion of the school year, only the June 2021 CSE's recommendations set to begin in September 2021 are relevant to this proceeding. Additionally, to the extent the parents assert that the district failed to reconvene to address the recommendations contained in the neuropsychological evaluation conducted in August 2021, the district asserts that the evaluation report was not provided to the district until October 2021—after the parents had already placed the student at Gillen Brewer for the 2021-22 school year.

Turning to the request for a reconvene of the CSE, the parents first sent a copy of the neuropsychological IEE report to the district in October 2021 (Parent Ex. K at p. 1). At that time, the parents had already enrolled the student at Gillen Brewer for the 2021-22 school year and the student had begun attending (Parent Exs. O; S). In line with the prospective analysis required by the Second Circuit, the June 2021 IEP was the operative IEP at the time of the parent's decision to place the student at Gillen Brewer and the district was not required to defend its decision not to reconvene a CSE to review the neuropsychological evaluation report as it did not have this information until after the student was attending the unilateral placement (see Bd. of Educ. of Yorktown Cent. Sch. Dist., 990 F.3d at 173; R.E., 694 F.3d at 187-88). Although in ideal circumstances the CSE perhaps could have reconvened immediately upon receiving the IEE, there

is no explicit timeframe governing the deadline for reconvening a CSE to consider an IEE and the failure to do so between October 6, 2021 and the parents' filing of the due process complaint on November 2, 2021 asserting a failure to reconvene was certainly not a denial of FAPE in this instance.

Additionally, as the parents did not properly raise any allegations related to the appropriateness or implementation of 12-month services for the 2021-22 school year, as discussed above, the focus of this proceeding is on the recommendations contained in the June 2021 IEP for the 10-month school year beginning in September 2021.

Finally, the parents' request for review makes multiple arguments based upon perceived deficiencies in the student's experience during the 2020-21 school year; however, the parents have not challenged the program provided to the student for the 2020-21 school year. Instead they challenged the ICT services offered by the June 2021 CSE. Accordingly, the student performance over the course of the 2020-21 school year is due is relevant to the essential question that is presented in this proceeding, whether the June 2021 CSE's decision to recommend ICT services for the 2021-22 school year was appropriate in light of the student's unique circumstances.

Generally, 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]; Adrianne 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 https://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 if 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]).

The problem here is that in their request for review the parents are now essentially bolstering their 2021-22 school year dispute by adding implementation concerns from an earlier portion of the 2020-21 school year that in large part preceded the student's return to in person instruction in April 2021, such as allegations that the student regressed during remote learning, that the student's ICT class during the 2020-21 school year did not have both a special education and a general education teacher during both remote and in-person learning, and that the school had allegedly informed the parents the educational program would not have changed for the 2021-22

school year. The IHO took these factors into account an acknowledged that remote instruction did not go well for the student but that the student subsequently returned to in person instruction, and it does not follow that the CSE must rule out in-person ICT services for the 2021-22 school year because of the remote provision of services from September 2020 through March 2021. Notwithstanding these points, to the extent that the student's progress under the various circumstances that occurred over the 2020-21 school year is relevant to the June 2021 CSE's determinations, it is discussed below along with the program recommendations.

Accordingly, based on the above, the analysis in this decision will focus on the parents' allegations related to the school location letter, the sufficiency of the evaluative information before the June 2021 CSE, and the program recommended in the June 2021 to be implemented as of September 2021.

1. Evaluative Information

Reviewing the parents' allegations, the parents assert that the IHO erred in giving too much weight to the June 2021 district psychoeducational evaluation report. Review of the IHO decision shows that she rendered a detailed discussion of the evaluative information before the June 2021 CSE.

Pursuant to the IDEA, federal and State regulations, 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 must conduct one 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]). Pursuant to State regulation, a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability (see 8 NYCRR 200.4[b][4]). The reevaluation "shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]). 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]). An 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]; 8 NYCRR 200.4[b]; 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]).

Insofar as the parents are arguing that the district had insufficient evaluative information at the time of the June 2021 CSE meeting, a review of the hearing record does not support this claim. In developing the student's June 2021 IEP, the CSE reviewed classroom assessments, the June 2021 psychoeducational evaluation, reporting from the student's teachers and providers, and input from the parent (see Tr. pp. 84-86; Parent Ex. E at pp. 1-9). The district special education teacher stated that the present levels of performance section of the student's June 2021 IEP was a summary of assessments and descriptions of the student's performance in her various classrooms and related services (Tr. p. 84). The June 2021 CSE also had available a March 2021 OT clinical guide, a May 2021 social history update, and a June 2021 speech-language progress report, information from all of these reports can be found within the student's present levels of performance identified on the June 2021 IEP (compare Parent Ex. E at pp. 4-9, with Dist. Ex. 4 at pp. 1-2; 7 at pp. 1-2; 8 at pp. 1-3).

As discussed above, the IHO reviewed the results of the June 2021 psychoeducational evaluation report and found that the evaluation was sufficiently comprehensive as it assessed the student both cognitively and academically, it explained the results of the testing in detail, included strategies to assist the student, and considered the parents' concerns (IHO Decision at pp. 11-12) Upon review, the IHO correctly found that the June 2021 psychoeducational evaluation included a "long list" of strategies to assist the student (IHO Decision at p. 11; see Parent Ex. D at p. 6). Additionally, as determined by the IHO, the evaluator used a student interview, a record review, administration of cognitive and academic testing, pre-assessment teacher forms, and parent input (IHO Decision at p. 12; see Parent Ex. D at pp. 2-5). As noted above, testing included administration of the WPPSI-IV, which yielded a full-scale IQ of 80 which fell in the low average range of functioning, and administration of the Woodcock-Johnson IV Tests of Achievement, which showed that the student performed within normal limits on tests of reading skills but indicated underdeveloped skills in mathematics and writing (Parent Ex. D at pp. 4-6).

Much of the parents' dispute with the IHO's findings regarding the June 2021 psychoeducational evaluation is that the IHO attributed more weight to that evaluation and the district witness than the IHO attributed to the September 2021 neuropsychological evaluation report. More specifically, the parents argue that "[t]he IHO gave improper weight to. . . . [t]he unsworn report of [the district evaluator] while disregarding the highly specialized, sworn testimony provided by experienced pediatric neuropsychologist . . . without presenting anything more than unsupported speculation as to the reasons why [the neuropsychologist's] report findings differed from the [district's] testing" (Req. for Rev. at ¶3[b]). However, in reviewing the program offered to the student, the focus of the inquiry is on the information that was available at the time the IEP was formulated in June 2021 (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the

IEP in question was developed]). Accordingly, the IHO's attributing more weight to the June 2021 psychoeducational evaluation report was logical; the parents reliance on information from an IEE of the student, which postdated the June 2021 CSE meeting and, thus, was not available at the time of the meeting, does not justify the parents' claim that the evaluative information before the June 2021 CSE was not comprehensive.

Further, with respect to the parents' argument that the June 2021 psychoeducational evaluation did not include a placement recommendation, the IHO found, citing to State regulations, that it was not the job of the evaluator to make a recommendation but to describe the student's characteristics (IHO Decision at pp. 12-13; see 8 NYCRR 200.1(bb)). The IHO correctly found that it was the CSE's role to interpret the data from the evaluation, drawing on information from a variety of sources (not just one assessment or "evaluation"), in developing recommendations for the IEP (IHO Decision at p. 13). Contrary to the parents' allegation that the district evaluation was lacking because it did not contain a placement recommendation, State regulation does not require that an evaluation report include a specific placement recommendation, rather, an evaluation must "gather relevant functional, developmental and academic information about the student that may assist in determining whether the student is a student with a disability and the content of the student's individualized education program" (8 NYCRR 200.4[b]).

Upon review of the June 2021 psychoeducational evaluation report, the IHO's findings, and the parents' arguments presented on appeal, I decline to disturb the IHO's finding that the June 2021 psychoeducational evaluation was sufficiently comprehensive.

2. Program Recommendation

Turning to the programming recommended by the June 2021 CSE, the parents argue that although the IHO correctly concluded that the student required 1:1 educational support, the IHO improperly determined that a paraprofessional sufficiently met the student's need. The district contends that the record supports the IHO's findings that the June 2021's recommendation for ICT services along with a 1:1 paraprofessional, related services, and other accommodations and management strategies contained within the June 2021 IEP were reasonably calculated to provide the student with an educational benefit in the student's least restrictive environment.

The June 2021 CSE recommended that, beginning in September 2021, the student receive ICT services six times per week in math and fifteen times per week in ELA (Parent Ex. E at p. 14). In addition, the CSE recommended that the student receive related services, including individual and group OT, individual and group PT, and individual and group speech-language therapy (id. at pp. 14-15). Further, the June 2021 CSE recommended that the student receive the support of a full-time individual health paraprofessional (id. at p. 15).[23] The student's management needs as identified in the June 2021 IEP included multisensory instruction; visuals to support the classroom routine and organization; frequent review and repetition of newly learned concepts; visuals paired with verbal information; a longer wait time (for responses to questions); modeling language, prompts, and sentence starters; breakdown of multi-step directions; 1:1 support for communication with peers and practicing skills; deep pressure and movement prior to functional and academics-

[23] The June 2021 IEP identifies a "health" paraprofessional; however, neither the IDEA nor federal or State regulations establish subspecialties for paraprofessionals (see 8 NYCRR 80-5.6, 200.1[hh]).

based activities; monitoring of seizure activity; provision of graph paper for organization of writing; access to small writing utensils, pencil grips, and a slant board; use of activity worksheets; a place to rest in the classroom; a spot in the back of lines for more space and to ease the support of the paraprofessional (id. at p. 9).

The district sent the parents a prior written notice of the recommendations made by the June 2021 CSE, in which the district indicated that a special class was considered for the student "but was deemed to be too restrictive" (Dist. Ex. 13 at p. 2). According to the prior written notice, the student required "the support of ICT [services] but also access to typically developing peers" (id.).

Initially, ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" in a classroom staffed "minimally" by a "special education teacher and a general education teacher" (8 NYCRR 200.6[g]). ICT services provide for the delivery of primary instruction to all of the students attending such a setting ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 14-15, Office of Special Educ. [Nov. 2013], available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf).

Additionally, in a January 2012 guidance document by the Office of Special Education entitled "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," with respect to special classes, an additional 1:1 aide should only be considered based upon the student's individual needs and in light of the available supports in the setting where the student's IEP will be implemented (see http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf). For those students recommended for a special class setting, the 1:1 aide should be recommended "when it has been discussed and determined by the CPSE/CSE that the recommended special class size in the setting where the student will attend school, other natural supports, a behavioral intervention plan, etc., cannot meet these needs" (id.).

In reviewing the parents' arguments related to the recommendation for a 1:1 paraprofessional, the IHO did not find that the student required 1:1 instruction. Instead, the IHO noted that the district special education teacher testified that the student was most engaged with 1:1 instruction (IHO Decision at p. 5). Also, the IHO found that the paraprofessional was helpful and provided benefit to the student during the prior school year (id.).

The teacher, who served as the student's special education teacher for the 2020-21 school year, testified that in spring 2021 when the student was receiving instruction in-person, because of the COVID-19 pandemic and social distancing restrictions and the "square footage requirement" for each student, the district administration's interpretation of the COVID-19 rules and guidelines allowed for her classroom to include one teacher and a mix of eleven "special and general ed students" within the "ICT ratio" (Tr. pp. 70, 113-14, 120-21). She explained that the idea was that the "ICT students" would have access to both a general education and special education teacher through the planning process, and, in addition, the special education teacher noted that she was dually certified (Tr. p. 113).

The special education teacher stated that the student was able to participate, with support, in the ICT setting and that at the time of the June 2021 CSE meeting, the CSE felt that ICT services

would continue to be the appropriate setting for the student (Tr. p. 103). She further explained that, while the CSE always had the option of "revisiting" if it seemed like it was not going well for the student in the first grade, the district always made it a goal to recommend the least restrictive environment in which the student would be successful (id.). The special education teacher testified that if the student continued into first grade, her ICT class would have had two teachers because the social distancing/square footage restrictions were lifted, and she would have continued with her paraprofessional (Tr. pp. 70, 77, 117).

In addition, the special education teacher testified that there were a variety of supports that could be offered in an ICT setting including "parallel teaching" where the two teachers could be teaching different lessons to different groups of students based on the students' areas of need (Tr. pp. 103-04). The ICT setting also allowed for "whole group lessons" where an ICT teacher could sit next to a student or a small group of students to help them with attention, help direct their attention to certain details, or to model language (Tr. pp. 103-04). In addition, the special education teacher explained that during "work time" the ICT setting allowed for teachers to meet individually with students as well as with small groups with high needs "a lot more often," if not every day (Tr. p. 104-05).

The special education teacher noted that while the student really enjoyed participating in whole group instruction, with respect to producing work or staying focused during work time she thought that smaller groups were more beneficial for the student (Tr. pp. 122-23). However, the special education teacher testified that the most significant part of the student's learning would have been the one-on-one support that she received to keep her engaged and that the student really benefited from having her paraprofessional as the support of the paraprofessional was what the student probably relied on the most (Tr. p. 123). The special education teacher explained that the student's paraprofessional's primary task was to monitor the student for any sign of seizures and to take preventative measures, intervene and make sure that the student was comfortable, but the paraprofessional also provided the student with "a lot of academic support, even though that was outside of her health paraprofessional duties" (Tr. pp. 82-83).

The special education teacher noted that, when the student returned to in-person learning in April, she needed a lot of review and a lot of teaching with regard to letters and counting (Tr. p. 70). The special education teacher recalled that the paraprofessional was "incredibly good" at sitting and reviewing things with the student and helping the student participate in the lessons, activities, and learning that the class was doing (Tr. pp. 70-71). Additionally, the teacher noted that the paraprofessional was "incredibly attentive" to the student and noticed when she was getting tired or frustrated and would take her on a break, let her have "that mental rest" or cool down, and then help her engage again quickly and reenter the room (Tr. p. 71). The special education teacher explained that because the student would tire quickly of writing, she would often "give dictation" and the student's paraprofessional would write down what the teacher said in yellow and allow the student to then trace it, which removed some hurdles in writing for the student (Tr. pp. 71, 74). The special education teacher also explained that she provided the paraprofessional with review activities for use when the student was tired from a reading or writing activity, and therefore, the paraprofessional had something on hand that was easier and more accessible at the time (Tr. p. 124). For example, if the student grew tired of reading, they would practice chanting letters or letter sounds (Tr. pp. 74-75, 124). The special education teacher explained that, in this way the student was able to stay engaged and active in the learning task, but it was easily adaptable to the

student's endurance (id.). The special education teacher confirmed that the paraprofessional modified tasks based on her instruction (Tr. p. 124).

With respect to the parents' contention that the student relied too heavily on the paraprofessional for instruction, as detailed above and as noted by the IHO, the hearing record demonstrates that while the paraprofessional was of great help to the student, the special education teacher was responsible for providing lessons to the student, differentiation, and individual and small group instruction. Initially, I note that the term "paraprofessional" is an older term that was replaced long ago in State regulation with the term "supplementary school personnel" (see "'Supplementary School Personnel' Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," VESID Mem. [Aug. 2004], available at http://www.p12.nysed.gov/specialed/publications/ policy/suppschpersonnel.pdf). Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1[hh]). A teaching assistant may provide "direct instructional services to students" while under the supervision of a certified teacher (8 NYCRR 80-5.6[b], [c]; see also 34 CFR 200.58[a][2][i] [defining paraprofessional as "an individual who provides instructional support"]). Teaching assistants must meet certain licensure and certification requirements (8 NYCRR 80-5.6[c][2]). A "teacher aide" is defined as an individual assigned to "assist teachers" in nonteaching duties, including but not limited to "attending to the physical needs of children" and "supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6[b]).

According to the IHO's decision, the student's paraprofessional during the 2020-21 school year was available to handle the tasks that the special education teacher felt the paraprofessional could handle such as reviewing letters and sounds, keeping the student on task, and re-explaining a lesson (see IHO Decision at pp. 25-26).

The special education teacher opined that once the student returned from remote to in-person instruction she was in an appropriate class setting (Tr. p. 76). Specifically, she indicated that her class was appropriate for the student's social development and the student was able to hear the ideas of her peers and the language that they used in reference to lessons (Tr. pp. 76-77). The special education teacher testified that the student was involved in "the social fabric" of the classroom and she enjoyed being with the friends she was with (Tr. p. 77). The teacher noted that in terms of academics the student did not seem to make tremendous progress, but she was spending a lot of time on task, working and reviewing the things she needed to (Tr. p. 77). The special education teacher stated that she did not feel that the student needed a more restrictive placement at that time and that the ICT class was appropriate (Tr. p. 77). She indicated that if the student had continued on to first grade the class would have had two teachers and the student would have continued to have her paraprofessional (Tr. p. 77). Even though there would have been more students in the classroom there would also have been an additional teacher (Tr. p. 77).

The special education teacher noted that within the ICT class staff provided whole group instruction, small group instruction, and small group check-ins (Tr. p. 121). She reported that staff also worked with small groups who had specific difficulties (Tr. p. 121). She indicated that if a group needed help with letters, staff would pull the group based on their needs and focus an activity on just that (Tr. p. 121). With regard to reading, the special education teacher reported that the class would do a group reading lesson and if the student was working on a more basic skill she

would be able to hear the group lesson "even if she wasn't there yet" (Tr. pp. 121-22). She indicated that then she would meet with the student individually (Tr. p. 122). This allowed the student to hear the ideas that were on grade level but also practice skills that were more tailored to her (Tr. p. 122). According to the teacher, the student participated in whole group math instruction and although when she answered a question it might be a bit off topic, the student loved to participate and would make a guess or share an idea (Tr. p. 122). She explained that, especially with story problems, the class would act them out or draw a picture and the student was able to attend and participate through the use of visuals and movement (Tr. pp. 122-23).

The student's mother testified that the student regressed while receiving ICT services (Tr. p. 227). She reported that the student knew how to write her name at the beginning of the 2020-21 school year but had forgotten the letters in her own name (Tr. p. 227). In addition, she noted that at the end of the year the student was not holding her pencil correctly (Tr. p. 227). She indicated that the student's skills did not improve when she started attending school in person and stated that the student went from a B reading level to an A reading level (Tr. pp. 228-29). She stated that the student needed more attention, and she did not get it in person or remotely (Tr. p. 229).

Overall, considering the student benefitted from the support of a 1:1 paraprofessional during the prior school year, the CSE decision to recommend that the student continue to receive the support of a 1:1 paraprofessional as part of the recommended program for the 2021-22 school year. Additionally, review of the hearing record does not support finding that the student was unable to receive an educational benefit during kindergarten in an ICT setting or that the school relied too heavily on the paraprofessional. The hearing record instead supports that the district utilized the paraprofessional to ensure the student was able to stay engaged academically and physically healthy while taking into account the district's obligation to place the student in her least restrictive environment. As such, there is no reason to disturb the IHO's finding on this issue.[24]

Finally, although the September 2021 neuropsychological evaluation report was not available to the CSE for the review prior to the student being removed from the district schools and placed at Gillen Brewer for first grade, the neuropsychologist noted the student's struggles with remote learning and IEP implementation deficiencies during the kindergarten school year (Parent Ex. K at p 8). I have my own concern regarding the neuropsychologist's recommendation to remove the student from her nondisabled peers altogether for first grade in favor of placement in "in a full-time special education school designed for students with language-based learning disabilities and other neurodevelopmental challenges" and the conclusion that the student's "developmental needs and learning challenges cannot be adequately addressed within a traditional

[24] To the extent that the parents argue that the IHO's finding that Gillen Brewer was an appropriate placement for the student necessitates a determination that the IHO erred in finding the June 2021 IEP appropriate, the parents' argument is not legally valid. A school district is not required to mirror the same services in an otherwise appropriate IEP that were privately obtained by parents in a private school (see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "'the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent'"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]).

academic setting or specialty program provided through the Department of Education" (Parent Ex. K at p. 20) which was a drastic difference from the ICT setting recommended by the CSE in the June 2021 IEP in terms of the restrictiveness of the setting.

The CSE in June 2021 was required to take into consideration the restrictiveness of the recommended placement and its place on the continuum of services when recommending an educational program for the student as well as ensure that the student was mainstreamed to the maximum extent appropriate (see Newington, 546 F.3d at 114; Gagliardo, 489 F.3d at 108; Walczak, 142 F.3d at 132). I see little evidence in the hearing record why, if given appropriate, in-person specialized instruction in a regular education setting, the student should be completely excluded from her non-disabled peers. Even considering the parents' desire for a smaller class setting, it was reasonable for the CSE to reject a special class placement for the student based on concerns that a special class placement would be too restrictive. Ultimately, a CSE is required to consider an IEE obtained by the parent provided it meets district criteria. If it has not done so already, the CSE should consider the neuropsychological evaluation and weigh the benefits of access to her nondisabled peers with the need for appropriate special education supports and programming.

C. Assigned School

The request for review includes a general allegation that the IHO erred by not finding that the district failed to effectively implement the June 2021 IEP. In their memorandum of law, the parents expand on this allegation to assert that the IHO erred in finding that the school the student would have attended for the 2021-22 school year would have provided her with ICT services. . Additionally, although the parents' assertions that the district failed to notify them of the location where 12-month services would have been provided to the student is discussed above, the parents' due process complaint notice included an allegation that "[t]he district had an obligation to provide [the student] with a placement recommendation by the beginning of the school year in September" (Parent Ex. A at p. 6). As that allegation was in the parents' due process complaint notice it is addressed here.

In general, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).[25] Although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016] ["a parent must necessarily receive some form of notice of the school placement by the start of the school year"]; Tarlowe, 2008 WL 2736027, at *6 [a district's delay does not violate the IDEA so long as a public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to

[25] In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (N.Y. Educ. Law § 2[15]).

comply with federal and State regulation, it nonetheless follows that it must be shared with the parent before the student's IEP may be implemented.

The hearing record demonstrates that the parents were aware of what school the student would be attending when school started in September 2021 as she was to return to the same school she attended the prior school year (Tr. pp. 224-25; Parent Ex. CC at p. 4). However, the student's mother also testified that the classroom the student was in for the 2020-21 school year did not have two teachers in it and that student's special education teacher told her that for the 2021-22 school year "it would be exactly the same" (Tr. pp. 225-26). This is contrary to the testimony of the special education teacher, who testified that "if [the student] would have continued into 1st grade, the ICT class would have had two teachers" (Tr. p. 77).

Once an IEP is developed and a parent consents to a district's provision of special education services, the IDEA is clear such services must be provided to the student by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (id. at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).

In this instance, the parents' testimony that she was informed by the student's special education teacher that the student would not have received ICT services with both a special education and general education teacher (Tr. pp. 225-26), the way ICT services are described in State regulation (see 8 NYCRR 200.6[g]), appears to be a nonspeculative claim that the June 2021 IEP could not be implemented at the proposed school because it would not have provided ICT services as defined in State regulation and as required by the IEP (see M.O. v. New York City Dept. of Educ., 793 F.3d 236, 244 [2d Cir. 2015]). However, the district produced testimony by the special education teacher contradicting the parents' claim and showing that the assigned school would have provided ICT services staffed by both two teachers, and that the social distancing restrictions were lifted (Tr. pp. 70, 77, 117). Thus, the district produced evidence showing that it could implement the June 2021 IEP (see B.P. v. New York City Dep't of Educ., 634 Fed. Appx. 845, 848 [2d Cir. 2015] [finding that testimony by district staff demonstrated that the placement school had the ability to implement the student's IEP despite any misinformation provided to the parents]).

Accordingly, the hearing record does not establish that there was any confusion as to where the student was to report on the first day of the 10-month school year and the district produced sufficient evidence to show that it could have implemented the June 2021 IEP at the start of the 10-month school year.

D. IEE Reimbursement

The IHO awarded the parents reimbursement for the cost of the neuropsychological IEE in the amount of $5,000.00 because the district agreed to fund an evaluation up to that amount (IHO Decision at pp. 14, 27). The parents argue that the IHO improperly reduced the amount of reimbursement for the IEE to $5,000.00 asserting that the IHO's reduction was improperly "based on her unfounded conclusion that, . . . the evaluator's results differed from the [district's] earlier results." The district cross-appeals the IHO's finding, arguing that since the IHO found the district evaluation was sufficiently comprehensive, the IHO should not have awarded reimbursement for any amount of the IEE.

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]).[26]

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]).

Regarding the issue of the maximum reimbursement rate, when a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency

[26] 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]).

uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

Here, the parents sent a letter, dated August 2, 2021, to the district via email on August 6, 2021 (see Parent Ex. F). In that letter, among other concerns, the parents stated that they did not believe the district evaluation was "comprehensive" (id. at p. 1). The parents specifically requested an "independent neuropsychological evaluation to make sure [the student was] in the correct placement with all necessary supports to make progress" (id. at p. 2). Moreover, the parents indicated that if they did not receive any communication from the district, they would secure the evaluation identifying the evaluator they had selected for the cost of approximately $6,000.00 and would seek reimbursement from the district for that cost (id.).[27]

On August 18, 2021, the district responded to the parents' request for an IEE (Dist. Ex. 1). The district authorized the requested IEE at no cost to the parents with a list of requirements including a cost-containment policy indicating that the cost of the evaluation could not exceed the maximum rate of reimbursement for a neuropsychological evaluation set at $5,000.00 (Dist. Ex. 1 at p. 6).

Initially, as the district authorized the IEE, the district's cross-appeal, that the parents are not entitled to reimbursement because the IHO found that its psychoeducational evaluation was comprehensive, is without merit. The district agreed to the cover the costs of the neuropsychological IEE, "without cost" to the parent, at a maximum rate of $5,000 (Dist. Ex. 1 at pp. 1, 6). The district cannot now retract that statement, if the district did not want to be responsible for the payment of the IEE, it should have filed a due process complaint notice in response to the parents' request.

The question then turns to whether the IHO erred in awarding $5,000.00 towards the cost of the IEE, rather than the $6,000.00 requested by the parents. To the extent the parents assert that the full cost of the IEE should be awarded because the IHO erred in finding the district June 2021 psychoeducational evaluation to be comprehensive, the IHO's finding on that point was addressed above and need not be reiterated. Accordingly, the only question to be addressed here is whether the IHO was correct to apply the district's cost-containment policy to the awarded IEE.

[27] It is noted that the parents incorrectly spelled the IEE evaluator's name in their letter; however, based on the hearing record it is presumed that the parents meant the evaluator who ultimately conducted the evaluation (compare Parent Exs. F at p. 2; I at p. 1, with Parent Ex. K at p. 3).

The student was evaluated over several dates in August 2021 beginning on August 9, 2021 (Parent Ex. K at pp. 3).

As noted above, the parents enrolled the student at Gillen Brewer in August 2021 and the student began attending Gillen Brewer on September 9, 2021 (Parent Exs. O; S).

In a September 10, 2021 letter to the CSE, the parents acknowledged that they received approval for the neuropsychological IEE along with a registry of independent evaluators (Parent Ex. I at p. 1; see Parent Ex. H). In the letter, the parents indicated that they had contacted five evaluators from the registry and that the evaluators were able to evaluate the student from mid-November 2021 to January 2022 (Parent Ex. I at p. 1). According to the parents, this was "too long for an evaluation to be completed and a report issued as we need to make a determination about the supports and instructional methodologies [the student] needs for the 2021-2022 school year" (id.). The parents then indicated that they had begun the assessment process with the evaluator they had chosen and that the cost of the evaluation would be approximately $6,000.00 and they intended to seek reimbursement for the evaluation from the district (id.).

The neuropsychological evaluation report was completed on September 29, 2021 (Parent Ex. K at p. 23). The parents provided a transmittal letter dated October 4, 2022 and copy of the report of the neuropsychological IEE to the district on October 6, 2021 (Parent Ex. K at p. 1). The parents filed the due process complaint notice in this matter shortly thereafter, on November 2, 2021 (Parent Ex. A).

Turning to the maximum rate of reimbursement, the district provided the parents with information for obtaining the IEE along with a list of evaluators and its cost-containment policies (Parent Ex. H; Dist. Ex. 1; see Parent Ex. I). Reviewing the parents' arguments, the parents did not provide adequate justification for why the district's cost-containment policy should not apply. The parents' assertion that they could not wait approximately two months to have the student evaluated by a provider from the district's registry is not supported by the hearing record, as the student was already attending Gillen Brewer at the time of the parents' September 10, 2021 letter, the June 2021 CSE had already formulated an IEP for the student for the 2021-22 school year, and the only reason offered was that a determination needed to be made as to the supports and instructional methodologies the student needed for the 2021-22 school year (Parent Exs. D; I; S). Additionally, although a school district must not restrict the providers of IEEs to a set list, and must give parents the opportunity to show that circumstances require choosing an evaluator who does not meet school district criteria (Letter to Parker, 41 IDELR 155 [OSEP 2004]; Letter to Anonymous, 103 LRP 22731 [OSEP 2002]), the parents did not allow for any time for the district to respond to a request that circumstances required an evaluator who did not meet district criteria before going forward with the IEE. In this instance, the parents had already identified the neuropsychologist they wanted to use for the IEE when they first made the request for an IEE to the district; when the parents first expressed a reason why they did not want to select a provider off of the district list, the evaluation had already been conducted in its entirety; and, prior to the district having an opportunity to defend its cost-containment policy, the parents initiated due process (see Parent Exs. F at p. 1; I at p. 1; K at p. 3).

Considering the above, there is an insufficient basis to depart from the IHO's finding that the district's cost-containment policy applies to the awarded IEE and, therefore, the IHO's finding that the parent is entitled to $5,000.00 reimbursement for the neuropsychological IEE is affirmed.

VII. Conclusion

The hearing record supports the IHO's findings that the district recommended an appropriate program for the 2021-22 school year and that the parents are entitled to reimbursement for the cost of the neuropsychological IEE in the amount of $5,000.00.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 28, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER