



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-089

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

Appearances:

Liz Vladeck, General Counsel, attorneys for petitioner, by Daniel Levin, Esq.

Law Offices of Neal Howard Rosenberg, attorneys for respondents, by Kimberly Wedderburn Henderson, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Aaron School for the 2020-21 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student began receiving services, including occupational therapy (OT), speech-language therapy, physical therapy (PT), and counseling, at age three and she attended a small "therapeutic" nursery school from age three through pre-kindergarten (Dist. Exs. 5 at p. 2; 6 at pp. 2, 4-5). For kindergarten through the beginning of fifth grade (the 2018-19 school year) the student attended a small private school with a class size of 15 students (Dist. Ex. 6 at p. 6). According to the student's father, the student received related services at the private school through an IESP (Parent Ex. V at p. 2).

A psychoeducational evaluation of the student, conducted in September 2018, yielded a full-scale IQ of 84 (Dist. Ex. 5 at p. 2).¹ A CSE meeting was held on November 6, 2018 (Parent Ex. V at p. 2; Dist. Ex. 5 at p. 1). The CSE recommended that the student receive integrated co-teaching (ICT) services in a public school along with related services of OT, PT, speech-language therapy, and counseling (Parent Ex. V at p. 2; Dist. Exs. 5 at pp. 1-2; 12 at p. 1). The student transferred to the public school for the remainder of her fifth-grade (2018-19) school year (Parent Ex. V at p. 2; Dist. Ex. 6 at p. 5).

By parent report, the student experienced "significant academic difficulties" despite receiving services (Parent Ex. V at p. 2; Dist. Ex. 6 at p. 5). By letter dated February 14, 2019, the public school principal advised the parents that the student "was not yet performing at the level [she] need[ed] to be promoted to the next grade in June 2019" (Parent Ex. Q). The principal further informed the parents that the student might stay in the same grade for the next school year unless she made significant progress in English language arts (ELA) and mathematics (id.).

In March 2019, the district conducted a neuropsychological evaluation of the student for the stated purpose of "clarify[ing] her cognitive strengths and weaknesses and assist[ing] in appropriate placement and support" (Dist. Ex. 5 at p. 1). Based on parental report, neuropsychological testing, review of records, behavioral observations, and educational assessments the evaluator found that the student met the criteria for language disorder; ADHD, primarily inattentive subtype; and mathematics disorder; and the evaluator ruled out visual processing and auditory processing disorder (id. at p. 12). The evaluator opined that, academically, the student warranted a supportive learning environment with opportunities for individualized instruction that could be tailored to her specific neurocognitive and behavioral needs (id.).

In April 2019, a district physical therapist reevaluated the student and determined that she was able to perform all the physical skills related to physical therapy rated by the School Function Assessment at the same level as her peers; she also performed within the normal range on the Timed Up and Down Stairs test (Dist. Ex. 12 at p. 1). In addition, the therapist noted that the student was consistently reluctant to be pulled out of class for physical therapy (PT) sessions as she was anxious about missing class work (id.). The therapist recommended that school-based PT be removed from the student's IEP (id.).

Also, in April 2019, the district conducted a classroom observation of the student during her math class (Dist. Ex. 11 at p. 2). The observer reported that, overall, the student presented as respectful, courteous, and focused (id.). She noted that the student was attentive, completed her work independently, and actively participated when given the opportunity (id.). The observer indicated that the student asked questions when she did not hear or understand the work and, in comparison to her classmates, she raised her hand consistently, took initiative and participated "more" (id.).

In May 2019, a district occupational therapist evaluated the student and found that she displayed functional skills for the completion of school-related activities of daily living skills, adequate fine motor skills for the manipulation of classroom tools and materials, appropriate visual

¹ The evaluation report indicated that the student's "medical history [wa]s positive for [p]ervasive [d]evelopmental [d]elays" (Dist. Ex. 5 at p. 2).

perceptual and visual motor skills for school related tasks, including reading and writing; and adequate sensory processing skills to functionally engage in multisensory experiences within the school environment (Dist. Ex. 10 at p. 8). The evaluator indicated that the student had achieved OT goals related to sensory processing, fine motor skills, motor coordination, and praxis tasks (id.). She opined that the student no longer demonstrated needs that warranted the specialized support of school based OT and recommended that any related concerns were best addressed by the primary educational program or other methods (id. at pp. 8-10).

In June 2019, the district sought an auditory processing evaluation of the student (Dist. Ex. 20). The audiologist who conducted the evaluation reported that the student demonstrated auditory processing delays in auditory decoding, auditory memory, organization and integration, as well as delays in temporal processing and processing speech in the presence of noise and when the speaker was talking quickly (id. at p. 7). Among other things, the audiologist recommended that the student receive preferential seating in the classroom, use of a frequency modulation (FM) unit in the classroom, and continued OT, speech-language therapy, and counseling (id. at p. 8).

In an undated letter to the parents, the district requested permission to amend the student's IEP, without a meeting, to align the number of periods of ICT services for ELA and math with the middle school schedule (Parent Ex. S). In a handwritten note at the bottom of the letter, dated September 16, 2019, the parents denied their permission noting that they needed a CSE meeting and that it was due at that time (id.).

In October 2019, the student's speech-language pathologist completed a progress report in which she indicated that the student had met her vocabulary and writing goals (Dist. Ex. 8 at p. 2). She recommended that the student continue speech-language therapy to focus on reading/oral comprehension and recall (working/auditory memory) (id.).

Also, in October 2019, the district trialed the use of a touchscreen tablet with electronic text reader, scanner with optical character recognition, and digital books with the student (Dist. Ex. 18 at p. 4). Staff reported that the device allowed the student greater ability to focus but did not change the quality of her work and also noted that the student had a negative perception of the device and did not want to use it (id. at p. 3). As a result, assistive technology was not recommended for the student (Dist. Ex. 18 at pp. 3-4; see Dist. Ex. 16).

In March 2020, the district developed a special education remote learning plan for the student (Dist. Ex. 14).

In May 2020, the parents sought a private neuropsychological evaluation of the student to clarify her long-standing difficulties with language skills, arithmetic, and attention to determine appropriate school placement and accommodations (Dist. Ex. 6 at p. 2). Based on formal testing, clinical observations and a review of the student's educational records, the evaluator found that the student met the criteria for visual processing disorder; ADHD, inattentive type; language disorder; and specific learning disorder with impairment in mathematics (id. at p. 17-19). The evaluator opined that given the student's difficulty with receptive and expressive language skills, attention, memory skills, arithmetic, and visual processing skills she needed to be placed in "a small, language-based, full-time, highly structured specialized school setting within a small classroom with a high teacher to low student ratio with comparable peers who had language and attention

deficits" (id. at p. 19). Among other things, she stated that the student required "much" 1:1 intervention, a multisensory approach to learning, and related services of OT, speech-language therapy, and counseling (id. at pp. 19-20).

On May 27, 2020, the parents signed a contract for the student's attendance at the Aaron School for the 2020-21 school year (Parent Ex. F; see Parent Ex. O at p. 2). The following day the parents contacted the district via email and requested a CSE meeting to discuss developing an appropriate program for the student based on the results of the private neuropsychological evaluation (Parent Ex. D).

On June 8, 2020, a CSE met to develop the student's IEP for the 2020-21 school year (Dist. Ex. 2). Finding that the student continued to remain eligible for special education services as a student with a speech or language impairment, the CSE recommended that the student receive ICT services in her core academic subjects (math, ELA, science, and social studies) for five periods per week each, as well as two periods per week of group special education teacher support services (SETSS) for math and two periods per week of group SETSS for ELA (id. at p. 15). In addition, the CSE recommended that the student receive the related services of one 40-minute session per week of group counseling services, one 40-minute session per week of group OT, and one 40-minute session per week of group speech-language therapy (id.). The CSE also recommended 12-month services for the student for summer 2020 consisting of one 40-minute session per week of individual OT and one 40-minute session per week of individual speech-language therapy (id. at p. 16). The CSE also recommended assistive technology in the form of an FM unit, numerous testing accommodations, and special transportation for the student (id. at pp. 17, 19). The IEP listed the student's academic instructional/functional levels as fourth grade for math and fifth grade for reading (id. at p. 20). In a prior written notice to the parents, dated June 22, 2020, the district reiterated the CSE's recommendations (Dist. Ex. 4).

In a letter to the district dated August 26, 2020, the parents stated that the student's then-current educational setting had proven ineffective for the student (Parent Ex. B at p. 2). They noted that they had provided a copy of the private neuropsychological evaluation report to the June 2020 CSE and asserted that although the CSE had adopted much of the evaluation and noted the parents' concerns, it failed to offer a program that sufficiently addressed the student's deficits and learning needs (id.). The parents asserted that the CSE completely ignored the evaluator's recommendation for placement in a small specialized classroom setting within a small school that focuses on language-based disabilities, and instead continued to place the student in an ICT class in which she would not be able to function as evidenced by her prior lack of progress (id. at pp. 1, 2). The parents further asserted that the addition of SETSS was not a substitute for a small class setting (id. at p. 2). The parents advised the district that unless it offered the student an appropriate placement and IEP that could address her needs, the parents would seek prospective funding for the student to attend the Aaron School (id. at p. 3).

The student attended the Aaron School for the 2020-21 school year (see Parent Ex. H).

A. Due Process Complaint Notice

By due process complaint notice dated February 2, 2021, the parents alleged that the district failed to offer the student a free and appropriate public education (FAPE) by not providing the

student with an appropriate IEP and special education placement for the 2020-21 school year in a small school and setting that focuses on language-based disabilities with comparable peers (Dist. Ex. 1). The parents raised procedural and substantive complaints, specifically indicating that the June 2020 CSE was invalidly composed, that the IEP contained insufficient annual goals, that the student's management needs and annual goals could not be attained in an ICT setting (id. at pp. 1, 3).

The parents primary allegation was that the district continued its recommendation for ICT services despite the student having failed to make progress in an ICT setting the prior year, the May 2020 private neuropsychological evaluation report recommending a small specialized classroom setting within a small special school, and the parents' requesting that the student be offered a different setting (Dist. Ex. 1 at p. 2). The parents contended that during the 2019-20 school year the student failed to progress in an ICT class and that continued placement in the same class, which is too large of a setting for the student to receive the individual attention she needs to make progress, was inappropriate (id.). Further, the parents indicated that the doctor who performed the private neuropsychological evaluation found that the student was a "hard-working girl that has significant learning, attention, language and cognitive deficits" and "[t]he complex combination of her disabilities cannot be met in a large ICT classroom" (id. at pp. 1-2). The parents also asserted that the CSE's addition of two periods per week of special education teacher support services (SETSS) in both ELA and math was not sufficient to meet the student's needs because SETSS was not a substitute for placement in a full-time small class setting (id.). The parents also asserted that the student "need[ed] related services that [we]re fully integrated into her schedule so that she [would] not have to sacrifice class instructional time to receive services(id.).

In addition, the parents alleged that despite the district requiring partial remote instruction during the 2020-21 school year due to the COVID-19 pandemic, the June 2020 IEP did not contemplate remote instruction and therefore, it was unclear how the proposed IEP would be implemented (Dist. Ex. 1 at p. 3).

The parents contended that they had no choice but to unilaterally place the student at the Aaron School, a full-time special education placement that could appropriately meet her needs (id.). As relief, the parents requested tuition reimbursement and/or prospective funding, a provision of transportation, and related services (id.)

B. Impartial Hearing Officer Decision

On December 14, 2021, the IHO conducted a prehearing conference followed by two status conferences held on January 25 and February 23, 2022 (Tr. pp. 1-17). The parties convened for an impartial hearing on March 22, 2022, which continued on March 23, 2022, and concluded on April 27, 2022 (Tr. pp. 18-162). Both parties submitted closing briefs.

In a decision dated June 19, 2022, the IHO found that the district "failed to offer the student a FAPE for the 2020-21 school year because the recommended ICT class with SETTS was too large and insufficient to meet the student's needs" (IHO Decision at p. 5). The IHO found that the evaluative data presented at the hearing demonstrated that the student required a small, special class in order to benefit from instruction (id.). Further, the IHO found "the [district's] refusal to consider the findings of the parent's neuropsychological evaluation was baseless" (id.). In addition,

the IHO determined that the district's reliance on an "inflated grading system" in developing the June 2020 IEP was inappropriate (*id.*).

Next, the IHO addressed the appropriateness of the parents' unilateral placement of the student at the Aaron School and found that the evidence provided by the parents demonstrated that the Aaron School met the student's needs (IHO Decision at p. 6). Regarding equitable considerations, the IHO found that they did not weigh against granting relief as evidence showed that the parents provided the district with the requisite notice of the student's placement at the Aaron School prior to enrollment and the parents cooperated with the CSE process (*id.* at pp. 6-7). Accordingly, the IHO ordered the district to reimburse the parents and/or directly pay the Aaron School the total cost of the student's tuition for the 2020-21 school year (*id.*).

IV. Appeal for State-Level Review

The district appeals from the IHO's determination that the district denied the student a FAPE for the 2020-21 school year.²

The district alleges that the IHO incorrectly found that the CSE refused to consider the findings of the parents' neuropsychological evaluation. The district argues that the record is clear that the CSE considered the private neuropsychological evaluation as most of the evaluator's recommendations were adopted in the IEP. The district contends that the CSE is not obligated to adopt all of the private evaluator's recommendations, including the recommendation of a small class in a private school.

The district asserts that the IHO ignored the documentary and testimonial evidence presented by the district, which supports the recommendation for ICT services and instead, gave undue weight to the evaluator who conducted the private neuropsychological evaluation. According to the district, the evaluator never met the student in person, never observed the student in a class setting, and never spoke with the student's teachers or providers. Additionally, the district contends that the IHO failed to consider the district's neuropsychological evaluation from March 2019, testimony by the student's teachers and speech-language provider from the 2019-20 school year, and testimony by the school psychologist who attended the June 2020 CSE meeting. Further, the district contends that the IHO failed to consider the student's reading assessment data, the benefit of the recommendation for SETSS, the benefit of the recommendation for counseling services, and the recommendation for an FM unit.

The district contends that the IHO incorrectly stated that the IEP team relied on "an inflated grading system" to justify his decision. The district argues that the IHO lacks the authority to pass judgement on the district's change in grading policy during the pandemic.³ Further, the district

² The district does not appeal from the IHO's findings that the parents' unilateral placement of the student at the Aaron School was an appropriate placement for the student for the 2020-21 school year or that equitable considerations do not weigh against granting relief. As such, these findings have become final and binding on the district and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see *M.Z. v. New York City Dept't of Educ.*, 2013 WL 1314992, at *6-7, *10 [S.D.N.Y. Mar. 21, 2013]).

³ The district asserts that their grading policy for all students at the end of the 2019-20 school year changed due to the extraordinary circumstances created by the COVID-19 pandemic that resulted in remote instruction.

argues that the fact that homework and class assignments consisted of a larger percentage of the student grades compared to marking periods prior to the COVID-19 pandemic, does not mean that the student's grades were inflated and it does not invalidate the progress that the student made during the entire school year. Specifically, the district asserts that the student's grades prior to the change in policy reflect the student's progress in reading comprehension, spelling, grammar, and writing in the recommended class with ICT services.

Finally, the district contends that the June 2020 IEP recommended small group instruction under management needs which would have been implemented with ICT services and SETSS as there would have been "small groups pulled aside with two teachers and small group instruction of SETSS in ELA and math."

For relief, the district requests a reversal of the IHO's finding that the district failed to offer the student a FAPE for the 2020-21 school year and reversal of the IHO's award of the cost of the student's tuition at the Aaron School.

In an answer, the parents respond to the allegations contained in the district's request for review with specific admissions and denials.⁴

In a reply to the answer the district correctly asserts that the answer did not set forth an issue related to "predetermination," which appears only in the parents' memorandum of law.⁵

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.

⁴ In the conclusion section of the parents' memorandum of law submitted with the answer, the parents "request[] that the SRO dismiss the Petitioner's appeal, sustain Respondent's cross appeal and answer"; however, the memorandum does not otherwise address a cross-appeal and it does not appear that the parents cross-appealed from any of the IHO's determinations in the instant matter. Additionally, while the parents did file an answer, the answer did not indicate or mention a cross-appeal.

⁵ Review of the parents' answer and memorandum of law shows that the issue of predetermination was not raised in the answer and is only raised in the memorandum of law. A memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Davis v. New York City Dep't of Educ., 2021 WL 964820, at *11 [S.D.N.Y. Mar. 15, 2021]; Application of a Student with a Disability, Appeal No. 19-021; Application of the Dep't of Educ., Appeal No. 12-131). State regulations direct that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6 [a]). Thus, any arguments included solely within the memorandum of law have not been properly raised and will not be considered on appeal.

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]).⁶

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

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

VI. Discussion

A. June 2020 CSE Process

1. Evaluative Information and Parent Participation

The district argues that the IHO erred in failing to consider significant documentary and testimonial evidence presented by the district (IHO Decision at p. 4). The district also appeals from the IHO's finding that "the [district's] refusal to consider the findings of the parent's

⁶ 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).

neuropsychological evaluation was baseless." According to the district, the CSE considered and adopted many of the recommendations from the report of the private neuropsychological evaluation.

Review of the hearing record shows that, as required, the June 2020 CSE considered the results of the initial or most recent evaluation of the student; the student's strengths; the parents' concerns for enhancing the student's education; and the academic, developmental, and functional needs of the student, including the student's performance on State or district-wide assessments; and special factors (see Dist. Exs. 2; 4-6; 8; 15; 20).

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

A prior written notice, dated June 22, 2020, indicated that the June 2020 CSE used the following evaluations and records in developing the student's IEP for the 2020-21 school year: an October 4, 2019 speech and language progress report, the student's prior January 8, 2020 IEP, the parents' May 14, 2020 neuropsychological evaluation report, a May 28, 2020 doctor's letter regarding busing, and a June 8, 2020 teacher report (Dist. Ex. 4 at p. 2; Dist. Exs. 6, 8, 15). A review of the student's June 2020 IEP shows that it included the student's scores on the 2019 New York State Testing Program (NYSTP) for ELA and math, and reflected the student's full-scale IQ score as obtained by the district in its initial evaluation of the student, along with the student's scores on intelligence and academic testing conducted by the parents' private evaluator (compare Dist. Ex. 2 at p. 2, with Dist. Exs. 5 at p. 2; 6 at pp. 21-22). The student's present levels of performance on the June 2020 IEP also included narrative information from the parents' private neuropsychological evaluation, the student's teacher, the student's counselor, the October 2020 speech and language progress report, and a June 2019 auditory processing evaluation (compare Dist. Ex. 2 at pp. 2-5, with Dist. Exs. 6; 8, 20). Accordingly, the hearing record shows that the CSE had information from a variety of sources, the content of which is discussed in more detail below, to identify the student's needs and develop an educational program for the student.

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

A review of the IEP shows that the district adopted many but not all of the recommendations made in the May 2020 neuropsychological evaluation report. The neuropsychologist recommended that the student be placed in a "small, language-based, full-time, highly structured specialized school setting within a small classroom with a high teacher to low student ratio with comparable peers who ha[d] language and attention deficits" (Dist. Ex. 6 at p. 19). She further noted that the student required "much 1:1 intervention" and a multisensory approach to learning (*id.*). Although the CSE did not adopt the private neuropsychologist's program recommendations, it did recommend that the student receive small group instruction and 1:1 conferencing throughout written tasks (*id.* at p. 6). While the private neuropsychologist recommended that the student be provided with frequent teacher check-ins to ensure that she was accurately processing new information and the CSE did not specifically adopt this recommendation in the June 2020 IEP, the IEP did include refocusing prompts (compare Dist. Ex. 6 at p. 19, with Dist. Ex. 2 at p. 6). Additionally, to the extent that the neuropsychologist noted that repetition was imperative when teaching the student new material and stated that it was important that the student repeat back directions to new tasks prior to proceeding; the CSE recommended that the student be provided with repetition of concepts, step-by-step directions, and repeated examples (compare Dist. Ex. 6 at p. 19, with Dist. Ex. 2 at p. 6). The district school psychologist explained that the student would receive management needs such as repetition of concepts, repeated examples and refocusing prompts, during frequent check-ins that would occur during small group instruction as part of the support provided by SETSS and ICT services (Dist. Ex. 22 at p. 4). The neuropsychologist also suggested that the student required an FM system, which the CSE recommended (compare Dist. Ex. 6 at p. 19, with Dist. Ex. 2 at p. 16). The neuropsychologist recommended that the student be provided with speech-language therapy, OT, and counseling as related services, all of which were recommended by the CSE (compare Dist. Ex. 6 at p. 20, with Dist. Ex. 2 at p. 15). The private neuropsychologist recommended that the student receive double time on tests, which was recommended by the CSE, among other testing accommodations (compare Dist. Ex. 6 at p. 20, with Dist. Ex. 2 at p. 6, 17).⁷ Lastly, the private neuropsychologist recommended that longer tasks be divided into small chunks for the student, and that she be provided with highlighted reading material and enlarged fonts with additional spacing for written assignments and tests, most of which the CSE incorporated in some manner into the student's IEP (compare Dist. Ex. 6 at p. 20, with Dist. Ex. 2 at pp. 6, 17; see Dist. Ex. 22 at p. 4).

Based on the above, the June 2020 CSE had sufficient evaluative information available from a variety of sources to develop the student's educational program, including the private May 2020 neuropsychological evaluation report. In addition, the CSE incorporated the May 2020 neuropsychological evaluation report into the June 2020 IEP. Although the evidence in the hearing record reflects parental disagreement with the June 2020 CSE's program recommendation for placement in a general education class with the support of ICT services and SETSS, such disagreement does not amount to a denial of the parents' meaningful participation in the development of the IEP (see E.H. v. Bd. of Educ. of the Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F., 2013 WL 4495676, at *17; DiRocco, 2013 WL 25959, at *18-*20; P.K., 569 F. Supp. 2d at 383; Sch. for Language & Commc'n Dev., 2006 WL 2792754

⁷ Although not specified by the neuropsychologist, the CSE also recommended that the student receive extra time for assignments (Dist. Ex. 2 at p. 6).

at *7). The parents' specific claims that the program recommended by the June 2020 CSE was not appropriate to address the student's needs will be addressed below.

B. June 2020 IEP

The district argues that the IHO erred in concluding that the student required a small, special class in order to benefit from instruction and incorrectly found that the June 2020 CSE's recommendation for ICT services and SETSS placed the student in an educational setting that was too large for her and insufficient to meet the student's needs (*id.*).

1. Student's Progress During the 2019-20 School Year

Prior to reaching the merits of the parties' disagreements as to the district's program, as recommended in the June 2020 IEP, a review of the student's educational history leading up to the June 2020 CSE must first be made. Specifically, the student's progress during the 2019-20 school year—while the student was attending a district general education class with the support of ICT services—is a relevant factor for determining whether continuation of a similar placement was reasonable.⁸ On this point the IHO had found that the district's reliance on an "inflated grading system" in developing the June 2020 IEP was inappropriate and the district appeals from this determination asserting that the student's grades are evidence that she made progress during the 2019-20 school year.

A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (*see H.C. v. Katonah-Lewisboro Union Free Sch. Dist.*, 528 Fed. App'x 64, 66 [2d Cir. Jun. 24, 2013]; *Adrienne D. v. Lakeland Cent. Sch. Dist.*, 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; *M.C. v. Rye Neck Union Free Sch. Dist.*, 2008 WL 4449338, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; *see also* "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]). Furthermore, "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 a subsequent 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. v. Scott P.*, 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

The student received the following quarterly marking period grades for her the 2019-20 school year (sixth grade) core academic classes: ELA 6 Honors (88, 91, 85, 96), social studies 6 honors (80, 87, 95, 85), math 6 honors (89, 86, 81, 91), and science 6 honors (72, 74, 87, 98) (Dist.

⁸ Although there is no IEP for the student for the 2019-20 school year included in the hearing record, the student's father testified that a CSE meeting was held in October 2019 and recommended that the student receive 24 periods per week of ICT services, eight periods for ELA, six periods for math, and five periods each for science and social studies (Parent Ex. V at p. 3). The district special education teacher who participated in the June 2020 CSE meeting testified that the student was in her ICT class for ELA for eight periods per week for the 2019-20 school year (Tr. pp. 45-46; Dist. Ex. 24 at p. 2).

Ex. 3).^{9, 10} Her overall quarterly marking period averages were as follows: 83.3, 85.72, 88.64, 94.46 (*id.*). The student's general education teacher for mathematics testified via affidavit that the student received mostly "B" letter grades on assignments and tests in her class during the 2019-20 school year (Dist. Ex. 21 at p. 1). According to the general education teacher, it was clear at the beginning of the 2019 -20 school year that the student was struggling with the math material, but she was still able to show on tests that she could do the work (*id.*). The teacher noted that by the spring semester the student was performing well in class and did not seem to need as much individualized attention in small groups for ICT or when she checked in with students during individual work (*id.*). She explained that the student's grade of 91 in the fourth marking period was indicative of the academic progress she made during the year and her need for less support in the classroom (*id.*). The general education teacher reported that with the help of her father, the student handed in optional math assignments ("problem of the week") for extra credit on a weekly basis which were harder than the regular curriculum problems (Tr. pp. 87-88; Dist. Ex. 21 at p. 1).

While the student attained passing grades during the course of the 2019-20 school year, the June 2020 IEP indicated that the student was at a fourth grade instructional/functional level in math and a fifth grade instructional/functional level in reading (Dist. Ex. 2 at p. 20).

The student's sixth-grade general education teacher for math, who participated in the June 2020 CSE meeting, testified that the student had been successful in her class, her grades had been in the 80s and 90s and she felt that with the support the student was getting she could continue to do well going forward (Tr. pp. 78-79; Dist. Ex. 2 at p. 22). She explained that about 40 percent of the student's grade was based on tests and quizzes, approximately 25 percent was based on homework, and the rest was based on accountability and classwork (Tr. p. 79). With regard to the student's grade of 91 in the fourth marking period, the general education teacher testified that the student's test grades for that marking period were, for the most part, in the 70s which showed there was still room for growth in some areas (Tr. pp. 79-80). However, she noted that when combined with homework, classwork, and accountability the student earned a grade of 91 (Tr. p. 80). The general education teacher reported that at the end of the year when everyone went remote there was a change in the grading policy that emphasized the work that students were doing and that tests counted for less (*id.*). She indicated that a grade of 91 would not reflect that the student had mastered a percentage of the material rather the grade was a "compilation of all the parts, all the categories that we had, so it was an average" (Tr. p. 81). With regard to the student's progress toward sixth grade math standards, the general education teacher testified that there were certain tests that the student did very well on and other tests where she struggled more (*id.*). She did not remember the student's performance on specific tests, nor did she remember specific scores (*id.*). The general education teacher for math reiterated that she could not speak to the student's specific

⁹ The school psychologist reported that the CSE discussed the student's grades at the CSE meeting (Dist. Ex. 22 at p. 4).

¹⁰ The neuropsychologist stated that "It should be noted that a large contributing factor to the higher grades [the student] received in various subjects [wa]s the fact that she [wa]s in an ICT class and received [s]peech-[l]anguage therapy, OT, PT and [c]ounseling. She is also given extensive accommodations to assist her throughout the day in school" (Dist. Ex. 6 at p. 5).

test scores but noted that the staff felt the student had mastered enough of the sixth grade skills that she would be successful with ICT services in seventh grade (Tr. p. 82).

The student's special education teacher for ELA for the 2019-20 school year, who participated in the June 2020 CSE meeting, testified via affidavit that she served as the student's case manager and was the point person for contact with the student's parents about her academic performance (Dist. Exs. 2 at p. 22; 24 at p. 1). She recalled that during the 2019-20 school year the student was a very capable student who completed all of her assignments and got good grades (Dist. Ex. 24 at p. 2). She noted that at times the student had trouble focusing due to her ADHD, but staff would give the student cues and prompts to redirect her attention back on the assignment (*id.*). According to the special education teacher, the student "did very well" during the period of remote learning during the 2019-20 school year and received a score of 96 "which was better than her ICT peers" (*id.*).

The student's special education teacher for ELA reported that during the 2019-20 school year she conducted benchmark reading assessments of the student in order to determine her independent and instructional reading level (Dist. Ex. 24 at p. 2). She indicated that the student started the 2019-20 school year at a Fountas and Pinnell level Q and ended the school year on a level S/T, which was slightly below grade level (*id.*). The special education teacher opined that the student's improvement from level Q to level S/T showed she made significant progress in reading during the 2019-20 school year (*id.*). In addition, the special education teacher reported that she assigned the student classwork during the 2019-20 school year to improve and measure her progress in reading and writing (*id.*). The student's classwork consisted of reading comprehension questions, writing samples, poetry reading and writing, and reading materials (*id.*). The special education teacher cited the student's work samples as evidence that she made progress at the public school during the 2019-2020 school year (Dist. Ex. 24 at p. 2; *see* Dist. Ex. 25). The special education teacher explained that at the beginning of the school year there were assignments that the student did not complete and that contained many spelling and grammar errors (Dist. Ex. 24 at p. 2). However, the teacher indicated that toward the middle and into the end of the school year the student was able to complete her work such as shown in the work samples, most of which the student completed during remote learning (*id.*). The teacher reported that the student improved her writing as she practiced it using graphic organizers and sentence stems (*id.* at p. 4). She gradually was able to write using fewer supports such as sentence stems and sentence frames as she remembered to use words and phrases of the stems and frames herself (*id.* at pp. 2-3).

The special education teacher testified that the student made progress during the 2019-20 school year in that at the beginning of the year she had trouble focusing and thinking about a text in a more advanced way (Tr. p. 49). She indicated that throughout the year she was able to give the student one-to-one support and writing and reading scaffolds and through discussion that led the student to be able to think about a text in a more advanced way and be able to make higher level inferences (*id.*). The special education teacher reported that a student starting seventh grade ELA would need to possess the ability to summarize text, find the main idea and give supporting details, and make an inference based on the text (Tr. p. 56). She believed that the student had improved on these skills by the end of sixth grade (*id.*). She stated that she did not think the student was at the seventh grade level by the end of the year but opined that the student had made large gains (*id.*).

The student's speech-language pathologist who provided speech-language therapy to the student during the 2018-19 and 2019-20 school years administered the CELF-4 and CELF-5 to the student in October 2019 and participated in the June 2020 CSE meeting (Dist. Ex. 23 at pp. 1-3; see Dist. Exs. 7; 8). She testified that the student's performance on the CELF-5 showed that she was making significant progress in speech-language therapy in addressing her deficits (Dist. Ex. 23 at p. 3). The speech-language pathologist noted that although the student's "father believed that [the student] was a weaker student with speech deficits," she did not observe those deficits in her sessions with the student during the 2019-20 school year (id.). She further noted that the student's test results on the CELF-4 and CELF-5 contradicted the parent's belief (id.). The speech-language pathologist testified that in her sessions with the student during the 2019-20 school year she found the student to be "very verbose" and that she liked to talk to people and make new friends (id.). She opined that the student was making progress academically and in her related services (id.).

The school psychologist, who served as the district representative at the June 2020 CSE meeting, noted that the student's grades were "pretty solid"—mostly in the 70s and 80s—and that the teacher reports were positive (Tr. p. 39). He did not recall any evaluative data beyond the student's grades that showed she had made progress (id.). With regard to the student's speech-language development, the school psychologist reported that the student's score on the CELF-5 showed that she was making significant progress in improving her speech deficits (Dist. Ex. 22 at p. 3). He further noted that the student scored an "'11'" on the reading comprehension and word definitions section of the test, and a "'10'" on the word classes section of the test (id.). According to the school psychologist, a scaled score of 10 was considered the average range and the student scored in the average range on all three sections (id.). Consistent with his testimony, the progress report describing the administration of the CELF-5 indicated that the student "scored above the mean for [r]eading [c]omprehension, [w]ord [d]efinitions, and [w]ord [c]lasses" (Dist. Ex. 7 at p. 2). With regard to the student's motor development, the school psychologist noted that a January 2020 report written by the student's occupational therapist indicated that the student had made significant progress and completed her three occupational therapy goals (Dist. Ex. 22 at p. 2).

The district did not offer the student's IEP progress reports from the 2019-20 school year, benchmark reading assessments, or the results of other academic assessments into evidence. The student's special education teacher testified that "since the school year was interrupted by COVID-19, [district staff] weren't able to complete end of the year assessments. . .that [they] had done at the beginning of the year (Tr. p. 50). She noted, however, that when the school went remote, she was able to work with the student one-on-one at least a couple of times a week which allowed her to see the progress the student was making (Tr. p. 50).

In contrast to the testimony of district staff, the private neuropsychologist opined, and the parents asserted, that grades were not an accurate indicator of academic progress for the student as "grading policies are not normed and objective and instead are extremely subjective and take into account effort, attendance, and submission of work rather than retention and comprehension of academic skills and content" (Parent Ex. W at pp. 7-8). According to the neuropsychologist, "[p]sychological testing clearly revealed that [the student's] academic struggles were causing her to experience considerable emotional stress and [were] interfering with her ability to develop social relationships and appropriate self-esteem" (id. at p. 8). The neuropsychologist reviewed her testing and testified that a decline in the student's cores on cognitive testing, particularly verbal comprehension, indicated that the student's deficits were not being properly addressed (id. at p. 6).

The neuropsychologist also testified that on academic testing the student's "performance declined from prior testing in the areas of reading comprehension, verbal memory tasks, math problem solving and oral expression" (*id.* at p. 7).

The hearing record substantiates the neuropsychologist's claim that the student's scores on measures of cognitive testing declined between September 2018 and April 2020, as well as her scores on measures of memory and learning (compare Dist. Ex. 5 at pp. 2, 4, with Dist. Ex. 6 at pp. 21, 23). However, a review of the neuropsychologist's affidavit shows that in some instances her testimony portrayed the student as having more significant academic deficits than her testing results or written evaluative narrative supported.

For example, the neuropsychologist stated that with regard to her administration of the WIAT-III to the student, the student continued to exhibit problems with reading comprehension and her performance was "significantly impaired" and slightly lower than on the prior testing (Parent Ex. 6 at p. 16). The hearing record supports this as a comparison of test results shows that the student attained a standard score of 88 on the reading comprehension subtest of the WIAT-III in 2018 and a standard score of 85 in 2020 (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 6 at p. 22). The neuropsychologist further reported that the student's reading comprehension score had dropped from a sixth grade level in 2019 to an early-to-mid second grade level in 2020; however, she appeared to be comparing the student's comprehension score on the GORT-4 administered in 2019 to the student's score on the reading comprehension subtest of the WIAT-III administered in April 2020 (compare Dist. Ex. 5 at p. 4, with Dist. Ex. 6 at p. 22).

Initially, a decrease in a score on a standardized test from one year to the next does not necessarily mean a student was regressing in the assessed skills rather than simply experiencing less growth than the student's peers (Mr. and Mrs. G. v. Canton Bd. of Educ., 2019 WL 1118094, at *14 [D. Conn., Mar. 11, 2019]). Further, there is not a sufficient basis in the hearing record to show that the student's scores on the GORT-4 can be correlated, or compared with the student's scores on the WIAT-III in order to determine whether the student was progressing or regressing in reading comprehension (see Mr. and Mrs. G., 2019 WL 1118094, at *14 [acknowledging the difficulty of comparing results of assessments from one year to the next given the different manner in which some tests are updated or normed]).

Additionally, in her written report, the neuropsychologist noted that the student's performance continued to be in the average range on word reading and pseudo-decoding skills, although she did not mention this in her affidavit (compare Dist. Ex. 6 at pp. 16, 22; with Parent Ex. W). In her written report she acknowledged that the student's word reading fluency was in the average range, and her spelling skills continued to be in the average range but also did not mention this in her affidavit (*id.*). In her affidavit, the neuropsychologist emphasized that the student's writing contained punctuation errors, incomplete and illogical sentences, and that she was not able to write more than one paragraph on the essay portion of the exam; however, in her written report she noted that the student's performance on an essay composition task was in the average range for both the previous and current evaluations (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 6 at p. 16; Parent Ex. W at p. 7). The neuropsychologist also noted in her written report that she administered sentence composition tasks as part of her evaluation and the student's overall performance on these tasks fell in the average range (Parent Ex. 6 at p. 16). With regard to math, the neuropsychologist stated that the student continued to exhibit significant difficulty with both timed and untimed

mathematical skills and in her affidavit, she indicated that the student's performance had declined from prior testing in math problem solving and the student had made little to no progress in math skills and fluency (id.). However, her own testing results belie this conclusion. Between 2018 and 2020, the student's standard scores on math-related subtests of the WIAT-III increased as follows: math problem solving 77 to 81; numerical operation 80 to 96; math fluency (addition) 85 to 85; math fluency (subtraction) 63 to 82; and math fluency (multiplication) 83 to 90 (compare Dist. Ex. 5 at p. 11, with 6 at p. 22). Rather than showing a lack of academic progress, the neuropsychologist's testing showed that the student made gains in mathematics and continued to perform in the average range on many reading and writing skills (see Dist. Ex. 6 at p. 22).

Based on a review of the above, the hearing record contains sufficient information to show that the June 2020 had evaluative information to make a reasonable determination that the student was having some success in her general education class with the support of ICT services and related services during the 2019-20 school year. Certainly, the student's attainment of passing grades during the 2019-20 school year was a valid consideration for the June 2020 CSE as "'the attainment of passing grades and regular advancement from grade to grade' will generally constitute evidence of satisfactory progress" (Cerra, 427 F.3d at 196, quoting Walczak, 142 F.3d at 130). Additionally, while there were some identified areas of concern in comparing the student's scores on measures of cognitive testing and in some areas of academic testing from September 2018 and April 2020, considering the student as a whole, including the reports of the student's progress by the student's teachers and speech-language therapy provider, as well as the student's grades, the June 2020 CSE's determination that the student had made progress in sixth-grade (2019-20 school year) in an ICT setting with related services was reasonable.

2. The Student's Needs

Having determined that the student made progress during the 2019-20 school year, it must still be noted that the purpose of reviewing the student's progress was not to diminish her ongoing educational needs and the June 2020 CSE was still responsible for identifying the student's needs and developing an appropriate educational program to address her needs. While not at issue in this case, review of the student's needs and current functioning will provide the further background necessary to evaluate the appropriateness of the June 2020 IEP.

The student's needs at the time of the June 2020 CSE meeting were identified in the present levels of performance and are not in dispute. The IEP reflected the student's performance on the New York State Testing Program (NYSTP) in ELA and math given in 2019, as well as the results of the private neuropsychological evaluation report dated May 14, 2020 (compare Dist. Ex. 2 at pp. 2-5, with Dist. Ex. 6 at pp. 21-22).¹¹ Based on the neuropsychological testing results, the IEP noted that the student exhibited difficulty completing visual-spatial tasks, "very significant" difficulty with verbal and non-verbal memory skills, slowness in processing speed, and difficulty

¹¹ The IEP indicated that the student scored at "[l]evel 1" for both the math and ELA State-wide tests for 2019 (Dist. Ex. 2 at p. 2). Administration of the 2020 elementary and intermediate level State assessments were suspended for the 2019-20 school year due to the COVID-19 pandemic (see "Statement From Board of Regents Chancellor Betty A. Rosa and Interim State Education Commissioner Shannon Tahoe Regarding Elementary- and Intermediate-Level State Assessments," available at <http://www.nysed.gov/news/2020/statement-board-regents-chancellor-betty-rosa-and-interim-state-education-commissioner-2>).

with receptive and expressive language (Dist. Ex. 2 at pp. 2-5). With regard to reading, the IEP indicated that the student performed adequately when asked to read words and phonetically decode nonsense words but exhibited a weakness in reading comprehension (*id.* at p. 4). The student's spelling abilities were average; however, consistent with her significant language difficulty she often misheard presented words (*id.*). According to the IEP, during testing the student produced sentences that were illogical and incomplete and although she was able to correct her errors her writing still contained punctuation errors (*id.*). On an essay writing task, the student made some spelling errors and wrote run-on sentences; her essay lacked elaborations and included limited transitions and she only wrote one paragraph and did not fully develop her ideas (*id.*). According to the IEP, the student was able to complete mathematics independently but required prompting to stay on task, as she often became distracted and talked to a friend at her work-table about non-math topics (*id.*). The IEP stated that the student worked best when placed in a small group with students who were at or above her level of academic achievement and she thrived when working in a small group with a teacher (*id.*). The IEP indicated that the student was capable of recalling multiplication facts, could add and subtract multi-digit numbers, and could divide but needed to strengthen her division skills (*id.*). The student was able to compute fractions using multiple operations but required additional support when working with multi-step word problems that required more than one operation and also required support using order of operations to solve problems (*id.*).

According to the IEP, the student's teacher indicated that it seemed like the student wanted to succeed and she attempted to keep up with classwork but easily lost focus (Dist. Ex. 2 at p. 4). After a 5-10 minute mini lesson the student would ask "what are we doing" or state "I don't get it" (*id.*). After reviewing the mini lesson and going over independent work one-on-one the student would say that she understood but would not finish the work (*id.*). The IEP noted that the student had been successful on tests that were short and had a word bank and she required study sheets for all exams (*id.*).

With regard to speech-language therapy, the IEP indicated that the student was seen twice for speech – once in a group and once individually (Dist. Ex. 2 at p. 4). According to the IEP, the student was focused and motivated when she initiated work and maintained interest and completed tasks with minimal cues or redirections (*id.*). The student followed multi-step directions in the group and individually (*id.*). The IEP reflected the results of an administration of the CELF-4 which showed that the student was able to identify words that were related and express their relationship, but had difficulty recalling sentences of varying lengths and complexities verbatim as the sentences became longer and also had difficulty understanding spoken paragraphs (*id.* at p. 5). The IEP indicated that the student had difficulty answering orally presented questions about a story that was presented orally (*id.*). When the student was given a visual cue and story grammar model format, and asked to construct a short story using the picture cue, she was able to do so in a descriptive, jointed, and imaginative manner (*id.*). The student made minimal spelling errors, her sentence structure was judged to be within normal limits and she used a variety of complex vocabulary words (*id.*). The IEP stated that the student was very independent in her work in speech and that she participated and self-advocated (*id.*).

Turning to the student's social development, the IEP indicated that the student attended individual counseling after school with a doctor of psychology (Dist. Ex. 2 at p. 5). The IEP indicated that the student's psychologist reported that the student had a history of global delays

present since early childhood and that she struggled with reading comprehension and arithmetic (id.). Although the student always had "a couple" of good friends in school she was socially immature and struggled with the social dynamics of school (id.). According to the IEP, the psychologist used play therapy with the student to talk about feelings and solve problems (id.). The IEP stated that the student continued to suffer from low self-esteem and sad moods due to her difficulty in the social arena at school (id.). The IEP noted that according to the parents the student loved the social parts of school and making friends but due to pragmatic language difficulties experienced by the student and her peers at times misunderstandings could occur (id.). According to the IEP, the parents reported that the student was aware of her learning differences which led to frustration with regard to academics (id.).

In terms of the student's physical development, the IEP indicated that the student had hyperthyroidism for which she took medication which seemed to improve her energy and ability to perform (Dist. Ex. 2 at p. 6). The student had visual-perceptual problems and used to wear reading glasses to correct an astigmatism and nearsightedness, but no longer needed them (id.). The IEP reflected the results of a June 2019 auditory processing evaluation that revealed auditory processing delays in auditory decoding, auditory memory, organization and integration, as well as delays in temporal processing or processing speech in the presence of noise or when the speaker talked quickly (id.). Citing the auditory processing evaluation, the IEP indicated that the identified weaknesses could result in poor phonetics, difficulty with reading comprehension, spelling, sound blending and following oral directions (id.). In addition the evaluation results, as reflected in the IEP, suggested that the student would present with poor prosodic skills, difficulty with peer communication and difficulty listening with background noise or with multiple speakers (id.).

3. Program Recommendation – Integrated Co-Teaching Services

Having reviewed the student's progress with the support of ICT services and related services during the 2019-20 school year and the student's needs as known to the June 2020 CSE, I next turn to the June 2020 CSE's program recommendation. The district appeals from the IHO's finding that the student required a smaller, more restrictive program in order to make progress and asserts that the June 2020 CSE's recommendation for the student to receive ICT services, with SETSS and related services for the 2020-21 school year was inappropriate.

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>).

SETSS are not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible

hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

On June 8, 2020, a CSE met to develop the student's IEP for the 2020-21 school year (seventh grade) (Dist. Ex. 2). Finding that the student remained eligible to receive special education as a student with a speech or language impairment the CSE recommended that the student receive ICT services in each of her core academic subjects (math, ELA, science, and social studies) for five periods per week, as well as two periods per week of group SETSS for math and two periods per week of group SETSS for ELA (id. at pp.1, 15). In addition, the CSE recommended that the student receive the related services of one 40-minute session per week of group (5:1) counseling services, one 40-minute session per week of group (3:1) OT, and one 40-minute session per week of group (3:1) speech-language therapy (id. at p. 15). With regard to special factors, the IEP indicated that the student needed an assistive technology device and/or service and the CSE recommended that the student be provided with an FM unit daily, throughout the school day (id. at pp. 7, 16). The CSE also recommended that the student receive 12-month services for summer 2020 consisting of one 40-minute session per week of individual OT and one 40-minute session per week of individual speech-language therapy (id. p. 16).

In describing the student's management needs, the CSE noted that the student required the following supports to enable her to benefit from instruction: repetition of concepts, step-by-step directions, chunking information, graphic organizers, sentence starters and sentence stems, visual supports, small group instruction, one-to-one conferencing throughout written tasks, highlighters and markers, refocusing prompts, modified notes, extra time on tests and assignments, and repeated examples (id. at p. 6). The IEP indicated that due to the student's language deficits, struggles with inattention and focus, executive functioning, and difficulties in math, she continued to require supports such as modifications in classwork and presentation of materials, small group instruction, positive behavior strategies, and repetition to continue to make progress in the general education curriculum (id. at p. 7). In addition, the CSE recommended numerous testing accommodations for the student including extended time (double), breaks, revised test format, revised test directions, preferential seating, on-task focusing prompts, tests read, answers recorded in test booklet, and additional paper for math calculations (Dist. Ex. 2 at p. 17).

The June 2020 CSE recommended nine annual goals that targeted the student's needs in the areas of auditory memory, verbal and reading comprehension, writing, math operations and problem solving, executive functioning, and counseling (Dist. Ex. 2 at pp. 8-14).

The school psychologist provided testimony explaining the district's recommendation. He asserted that the June 2020 CSE recommendations were appropriate and had the student remained in the district for the 2020-21 school year she would have made academic progress (Dist. Ex. 22 at p. 2). With respect to related services, the school psychologist reported that the CSE recommended that the student receive one 40-minute session of OT per week to address her "executive functioning deficits for fine motor and visual motor skills," based on the January 2020 OT report (id.). He indicated that the occupational therapist noted in her report that the student

struggled with multi-step directions and as a result, the CSE recommended an annual goal that targeted the student's ability to complete classroom tasks at a comparable pace to peers (id.).

Next, the school psychologist reported that the CSE recommended speech-language therapy for the student once a week for 40-minutes to address her deficits related to focusing, working memory, and processing speed, as well as in the areas of expressive and receptive language (Dist. Ex. 22 at p. 3). The school psychologist indicated that based on the student's test scores, the CSE recommended a reduction in speech-language services because having sessions two times per week was no longer necessary (id.).

Turning to the student's social/emotional development, the school psychologist noted that the June 2020 IEP reflected that the student suffered from low self-esteem and sad moods (Dist. Ex. 22 at p. 3). He reported that, according to the student's teachers, the student felt frustrated at times with her learning deficits (id.). As a result, the CSE recommended the student receive one 40-minute session per week of counseling to increase her self-esteem and self-confidence (id.). The school psychologist indicated that based on feedback and comments from the student's teachers and providers, the CSE recommended a counseling goal related to improving her self-esteem (id.).

The school psychologist indicated that the CSE also recommended an FM unit to improve the student's processing delays in auditory decoding, auditory memory, organization, and integration, as noted in the student's auditory processing evaluation (Dist. Ex. 22 at p. 3). He indicated that the auditory processing evaluation also recommended counseling, OT, and speech-language therapy to improve the student's auditory processing skills, reduce distractibility and frustration, and increase attention span and that the CSE recommended those services (id.). According to the school psychologist, the CSE also recommended an annual goal addressing the student's need to recall sentences of increasing lengths and complexities without prompts in order to improve her auditory memory (id.). The school psychologist testified that the June 2020 IEP included annual goals that targeted improving the student's auditory retention, memory skills, self-esteem, expressive and receptive language, and academic deficits (id. at p. 2). He stated that each of the goals were tailored to the student's needs and were based on her progress and abilities shown to her teachers during the 2019-20 school year (id.).

According to the school psychologist, the CSE added SETSS to the student's IEP because the parents did not feel that the support of ICT services was sufficient to address the student's learning needs (Tr. p. 39). The school psychologist noted that he did not feel that a 12:1 special class in a community school was appropriate for the student because she was functioning at a higher level than most of the students in district 12:1 special classes, therefore as an alternative the CSE recommended additional supports on top of ICT services, in the form of SETSS in ELA and math (Tr. pp. 39-40). The school psychologist testified that the CSE did not recommend something smaller than ICT services with SETSS because the students who scored similar to the student (standard scores in the 70s and 80s) did well in the district's ICT class and the students in the district's special classes generally received standard scores lower than the 70s and were at the first and second grade reading level, which was not appropriate for the student (Tr. p. 41). He acknowledged that the district did not have a small class for students at the student's cognitive level and explained that the special class was for students who were significantly behind grade level and significantly lower functioning (id.). The school psychologist explained that for students

who had ADHD, their attention deficits were addressed with ICT services through preferential seating (front of room or proximity to teacher), extra time, and small group instruction (*id.*). He indicated that the district had lots of students with a similar profile to the student in this case, who had more than one disability (such as a learning disability and an attention deficit or a learning disability and autism) and they were able to make progress in a general education classroom with ICT services (Tr. pp.43-44).

The school psychologist reported that the CSE also recommended summer services for the student consisting of one 40-minute session each of speech-language therapy and OT per week to accommodate the parents' request for additional support for the student (Dist. Ex. 22 at p. 3). According to the school psychologist, the student had memory deficits, and therefore, the team wanted to make sure that she did not suffer any regression over the summer without instruction (*id.*).

Next, the school psychologist testified that the CSE recommended strategies to address the student's management needs related to her memory and processing deficits (Dist. Ex. 22 at p. 4). He reported that the strategies included repetition of concepts, step by step directions and chunking of information into small parts, and the use of highlighters and markers while reading to distinguish the important information in a reading passage (*id.*). Further, the school psychologist indicated that the CSE recommended graphic organizers to assist the student with organizing her thoughts, small group instruction, and 1:1 conferences to allow for repetition of concepts, repeated examples, and frequent check-ins (*id.*). Lastly, the CSE recommended that sentence starters and visual supports be used to further support the student's reading and writing needs (*id.*).

The student's special education teacher for ELA and general education teacher for math also testified explaining the June 2020 CSE's recommendations.

The special education teacher reported that it took the student longer than some of her peers to be able to understand what was happening in a text, as well as in class in relation to assignments and directions (Tr. p. 48). She reported that the student often needed directions rephrased or one-to-one support to fully understand the text the class was reading or to understand what to do in terms of her own work (*id.*). According to the special education teacher, the student could comprehend lower-level texts, which included most of the texts read as a class, and could do certain assignments without support (Tr. p. 49). The teacher reported that the student was capable of doing much of the class work herself but she was easily distracted, which led her to need additional support (Tr. p. 51). According to the special education teacher, the student's ADHD impacted her in the classroom in that she was distracted by some social situations, she cared a lot about what her peers thought of her, and she was often distracted by friendships in the class and was not able to focus on her work (Tr. p. 53).

The student's special education teacher testified that, at the June 2020 CSE meeting, the parents requested additional academic support for the student and the CSE added SETSS for ELA and math because they wanted to accommodate the parents' request (Dist. Ex. 24 at p. 3). The special education teacher asserted that the CSE believed that SETSS would help the student make even more academic progress during the 2020-21 school year by providing her with additional individualized instruction to maximize her potential (*id.*). The special education teacher also reported that based on the successful strategies used with the student during the 2019-20 school

year, the CSE continued to recommend strategies to address the student's management needs, including: graphic organizers, sentence starters and sentence stems, small group instruction, one to-one check-ins, step-by-step directions, visual support, and refocusing prompts on written tasks (id.).

The student's general education teacher testified that the CSE recommended preferential seating for the student to address her attention deficits related to ADHD and further noted that the CSE recommended refocusing prompts, which she found were successful for the student and would continue to be provided to the student during the 2020-21 school year (Dist. Ex. 21 at p. 2). The general education teacher contended that with the support of ICT services, coupled with SETSS and related services, the student would have continued to make progress in math in the district school for the 2020-21 school year (id.). She stated that the CSE added two periods of SETSS per week based on the parents' request for additional support (id.). She noted that the CSE believed that the SETSS instruction for math would have provided the student with additional individualized instruction and would have continued to help her improve her skills in solving multi-step word problems and understanding the order of operations for math problems (id.). The general education teacher opined that the student was "very capable" of performing the work in the her class and was successful academically and did not need a more restrictive nonpublic school program (id.).

The district speech-language pathologist reported that as part of the June 2020 CSE meeting, she recommended that the student receive one 40-minute session per week of small group speech-language therapy and that she believed this recommendation to be appropriate for the student (Dist. Ex. 23 at p. 3). She noted that the student had "great grades" on her report card and was meeting her IEP goals (id.). According to the speech-language pathologist, the student's June 2020 IEP included three annual goals that she recommended based on her weekly sessions with the student and her performance on standardized testing, including goals related to: using auditory strategies to improve auditory processing and focusing deficits, recalling sentences of increasing length to improve auditory memory without prompts, and listening/reading a story and answering questions about the story (id. at p. 4). The speech-language pathologist reported that the CSE also recommended that the student be provided with an FM unit for auditory processing (id.). She reported that the student was doing well and did not need an FM unit to make progress but that the team recommended it to give the student "every tool at her disposal to succeed academically" (id.). The speech-language pathologist also indicated that the CSE added summer speech-language therapy at the request of the parents who were afraid the student would regress over the summer; however, in her opinion the student would not have regressed (id. at p. 3).

In contrast to the district staff, the parents and private neuropsychologist asserted that the district recommended program was inappropriate. The student's father noted that by spring 2020 the parents had exhausted all district offered evaluations and the student was approaching two years in an ICT setting, in which she had been unsuccessful (Parent Ex. V at pp. 2-4). The parents sought a private neuropsychological evaluation which, according to the student's father, revealed that the student had significant learning, attention, language, and cognitive deficits and the complex combination of her disabilities could not be met in a large ICT classroom (id. at p. 4). According to the student's father, the student struggled daily to keep up with assignments and homework, often felt lost and unable to access the curriculum, and despite great effort lagged behind her peers (Tr. p. 53). The parent reported that the student's classes had 33-34 students,

including students with behavior problems, which made it difficult for the student, who had ADHD, to concentrate (id.). The student's father expressed concerns that the student could not do her homework independently, she became aware of her learning differences, and she developed frustration and negative feelings about school and her academic abilities (id.).

The student's father summarized the evaluating neuropsychologist's diagnoses of the student and stated that the student needed to be placed in a small, specialized classroom setting within a small school for students with disabilities (Parent Ex. V at p. 4). The student's father reported that the parents provided the district with a copy of the evaluation report and requested a new CSE meeting; at the meeting they expressed their concerns regarding the student's long-standing difficulties with language skills, arithmetic, and attention and asked that she be moved to a different setting (id.). The student's father stated that the CSE copied many of the private neurologist's recommendations and noted the parents' concerns, yet failed to offer a program that sufficiently addressed the student's learning deficits and needs (id.). He reported that, notably, the CSE ignored the private psychologist's placement recommendation and again recommended the student for ICT services, which were further reduced for ELA (id.). The student's father acknowledged that the CSE recommended four periods of SETSS, along with the ICT services (id.). However, he testified that the student required special education support delivered in a "full-time special education small classroom setting with related services integrated into the school day" (id.). He explained that the student had ADHD and had a lot of difficulty reorienting herself and getting back to task when she was interrupted (id. at p. 5). He further indicated that the ICT setting was too large for the student to receive the level of individualized attention she needed (id. at p. 4). The student's father stated that SETSS was not a substitute for a full-time small class setting (id.). He asserted that the addition of SETSS did not change the pace of instruction, level of instruction, or level of distraction in the classroom (id. at p. 5). The student's father further testified that the strategies identified to address the student's management needs could not be implemented in an ICT setting (id.). Additionally, according to the student's father, the pull-out related services caused the student to miss essential instruction, which negated the gains she got from the sessions (id.). The student's father testified that the student's "pull-out" related services interrupted her day and she struggled to regain focus (Tr. p. 53).

Similarly, the private neuropsychologist testified that ICT services were insufficient to meet the student's needs. The neuropsychologist stated that psychological testing revealed that the student's academic struggles were causing her to experience considerable emotional distress and were interfering with her ability to develop social relationships and appropriate self-esteem (Parent Ex. W at p. 7). The neuropsychologist recommended that the student attend a small class with a high teacher to low student ratio located within a full time, specialized school offering a highly structured program and language-based curriculum (id. at p. 8). She opined that the student required 1:1 teacher attention for purposes of remediating her academic delays and ensuring that she received ample repetition of materials (id.). The neuropsychologist stated that it was imperative that the student receive multisensory instruction, simplified visual aids, and an FM system within the class (id. at p. 7). She indicated that in her professional opinion ICT supports with related services were inadequate to address the extent of the student's language-based disabilities and associated memory and attention deficits (id. at pp. 7-8).

Overall, the evidence in the hearing record shows that the June 2020 CSE recommended the student an educational program for the 2020-21 school year that was designed to confer

educational benefit and enable the student to make progress in the general education curriculum. In developing the student's IEP, the CSE considered information from the student's teachers and related services providers, as well as the results of district and private testing, and identified the student's areas of weakness. The CSE developed annual goals that targeted the student's deficit areas and recommended an educational program that was reasonably calculated to provide her special education support throughout out the day, including small group instruction in reading and math. The recommended program was similar to the student's program the previous year, in which she demonstrated progress, and was modified to include additional services in response to the parents' concerns. As the hearing record supports finding that the student made progress during the prior school year, the June 2020 CSE was reasonable when it recommended programming for the 2020-21 school year that was similar to what the student received during the 2020-21 school year and it was reasonable for the June 2020 CSE to expect the student to continue to make progress (see S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10-11 [S.D.N.Y. Dec. 8, 2011] [decision to recommend continuation of the same program student had made progress in for prior school year was appropriate and a more restrictive placement was not necessary]).

Additionally, while the private neuropsychologist recommended a small class with a higher teacher to student ratio located within a full time, specialized school and the IHO concurred, opining that "based on the evaluative data, the student require[d] a small, special class in order to benefit from instruction, which the DOE did not recommend" (IHO Decision at p. 6), the hearing record demonstrates that the CSE considered the student's needs and recommended a program that addressed her areas of need, identifying appropriate management needs and annual goals and providing ICT services, SETSS, and related services to address the student's needs. It is worth noting that, while the private neuropsychologist was not obligated to consider the student's LRE in recommending a placement for the student and the parent's desire for the student to be placed in a smaller setting with more individualized attention is understandable, the CSE 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, and, accordingly, it was reasonable for the CSE to reject a special class placement for the student based on her academic ability, her progress in an ICT setting for the prior school year, and concerns that a special class placement would be too restrictive. Given that a student's recommended program must also be provided in the LRE, the CSE should not be faulted in making LRE considerations a part of the CSE's deliberations (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, 489 F.3d at 108; Walczak, 142 F.3d at 132).

As a result of the foregoing, the hearing record supports a finding that the June 2020 IEP offered the student a FAPE in the LRE, and the IHO's contrary determination must be reversed.

VII. Conclusion

Having determined that the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2020-21 school year, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED.

Dated: Albany, New York
September 19, 2022

STEVEN KROLAK
STATE REVIEW OFFICER