



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-127

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

Appearances:

Law Offices of Adam Dayan, PLLC, attorneys for petitioners, by Kelly Bronner, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, Esq. and Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Rebecca School for the 2021-22 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

At the age of five, the student received diagnoses of autism and a severe intellectual disability (Parent Ex. X at p. 2).¹ The student was not enrolled in an early intervention program but, after receiving the diagnoses, she attended preschool at YAI-New York League for Early Learning wherein she received speech-language therapy, occupational therapy (OT), physical therapy (PT), and home-based applied behavior analysis (ABA) special education itinerant teacher

¹ The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits were cited in instances where both a parent and district exhibit were identical. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

(SEIT) support (id.). Thereafter, the student attended AMAC a New York State approved nonpublic school in a 6:1+3 special class and received speech-language therapy, OT, PT, and ABA services (id.).

In February 2017, when the student was 15 years of age, the parents obtained a private neuropsychological evaluation of the student due to concern that the student was not making adequate progress in her then-current program (Parent Ex. X at p. 1-2).² The private neuropsychological evaluation included a review of the student's developmental and educational history and a classroom observation in addition to assessments of the student's language-mediated functioning, nonverbal functioning, memory, academic achievement, and social, emotional, behavioral and adaptive functioning (id. at pp. 1-9). Due to the student's significant language delays and pervasive difficulties with communication and comprehension, and accompanying attention and sensory deficits, a modified battery of tests was administered, but a full-scale IQ was not determined (id. at p. 9). The student's cognitive skills were noted to be better represented by her performance on specific subtests and composites of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) and the report noted scores at or below the first percentile on all subtests administered (id. at pp. 6, 12). The student's receptive and expressive language skills were assessed through the Receptive One-Word Picture Vocabulary Test and Expressive One-Word Picture Vocabulary Test, where she obtained scores in the first percentile (id. at p. 12). On the math problem solving and spelling subtests of the Wechsler Individual Achievement Test-Third Edition and Woodcock-Johnson Tests of Achievement, Fourth Edition the student obtained scores below the first percentile (id.). The student's nonverbal abilities as measured by the WISC-V and NEPSY: A Developmental Neuropsychological Assessment Test-Second Edition also fell in the first percentile (id. at pp. 9, 12). The private neuropsychologist diagnosed the student with autism spectrum disorder (level 3) with accompanying intellectual and language impairment (id. at p. 9).

Beginning in July 2017, the student was enrolled by her parents at the Rebecca School (Parent Ex. Z at ¶ 1).³ During the 2019-20 school year, the student attended a 12-month program at the Rebecca School where she was in an 8:1+3 special class and received OT, speech-language therapy, music therapy, PT, and adapted physical education (Dist. Ex. 6 at pp. 1, 9).

In December 2019 a private agency completed a psychological diagnostic evaluation of the student as a prerequisite for a guardianship determination and to apply for supplemental security income (SSI) (Parent Ex. Y at p. 1). On the Stanford-Binet Intelligence Scales-Fifth Edition (SB-5), the student obtained a nonverbal IQ of 42, which placed her cognitive functioning "within the [m]oderate [i]ntellectual [d]isability range and well below the [first] percentile" (id. at pp. 1, 3). The psychological evaluation report noted that due to a statistical quirk of this intelligence measure, the student received some credit on one of the subtests, despite having failed every item administered and suggested that this nonverbal IQ score somewhat overestimated her intellectual

² The student was previously evaluated by the district in 2015 as part of her triennial evaluation, and by a private agency in 2016 to establish eligibility for a Medicaid waiver and Office of People with Developmental Disabilities services (Parent Ex. X at p. 2).

³ The Rebecca School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

abilities (*id.* at p. 3). The evaluator also attempted to administer the Comprehensive Test of Nonverbal Intelligence-Second Edition (CTONI), but the student was unable to complete the assessment due to her cognitive limitations (*id.* at p. 5). The student's word recognition was measured using the Wide Range Achievement Test-Fifth Edition (WRAT5) word reading subtest, where she obtained a score below the first percentile (*id.*). The evaluator also administered the Vineland Adaptive Behavior Scales-Third Edition (Vineland-3) comprehensive interview form to the parent to assess the student's adaptive functioning and the student scored below the first percentile in each of the domains of communication, daily living skills, socialization, and adaptive behavior (*id.* at p. 4).

A CSE convened on December 8, 2020 to review the student's progress and develop the student's IEP for spring of the 2020-21 school year and fall of the 2021-22 school year (Parent Ex. C at p. 11).⁴ The CSE determined that the student remained eligible for special education programs and services as a student with autism and recommended a 12-month extended school year program in an 8:1+1 special class in a district specialized school, with three periods per week of adapted physical education (Parent Ex. C at pp. 7-8; Dist. Ex. 3 at pp. 1-2).⁵ The CSE also recommended: two 45-minute individual sessions of OT per week; one 45-minute group session of OT per week; one 60-minute group session of parent counseling and training three times per year; two 45-minute individual sessions of PT per week; two 45-minute individual sessions of speech-language therapy per week; one 45-minute group session of speech-language therapy per week; together with collaboration between the student's special education teacher, related services providers and family once a week for 20 minutes (Parent Ex. C at pp 7-8). The district issued a school location letter, dated June 16, 2021, that identified the specific district specialized school that was the planned location for implementing the student's December 2020 IEP (*see* Dist. Ex. 4).

The parents signed an enrollment contract with the Rebecca School on May 25, 2021, for the student's attendance during the 2021-22 school year (Parent Ex. N).

In a letter dated June 17, 2021, the parents expressed their disagreement with the December 2020 IEP and notified the district of their intent to unilaterally place the student at the Rebecca School for the 2021-22 school year and pursue funding from the district for the cost of the student's tuition (Parent Ex. B at p. 1). During the 2021-22 school year, the student attended a 12-month program at the Rebecca School where she was in a 6:1+2 special class and received OT, speech-language therapy, music therapy, PT, travel training, and adapted physical education (Parent Exs. W at p. 1; Z ¶ 19; Dist. Ex. 6 at p. 1).

A CSE convened on January 10, 2022 to review the student's progress and develop the student's IEP for the remainder of the 2021-22 school year (Parent Ex. H).⁶ The January 2022 CSE recommended a 12-month extended school year program in an 8:1+1 special class in a district

⁴ The projected implementation date of the December 2020 IEP was December 22, 2020, with a projected annual review date of December 8, 2021 (Parent Ex. C at pp. 1, 7).

⁵ The student's eligibility for special education as a student with autism is not in dispute (*see* 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

⁶ The implementation date for the January 2022 IEP was January 24, 2022, and the projected date of annual review was January 10, 2023 (Parent Ex. H at pp. 1, 18-19).

specialized school, with two periods per week of adapted physical education (id. at pp. 18, 20). The January 2022 CSE also recommended: one 45-minute session per week of individual counseling per week; one 45-minute session per week of group counseling ; two 45-minute sessions per week of individual OT ; one 45-minute session per week of group OT ; one 60-minute monthly session of group parent counseling and training ; two 45-minute sessions per week of individual PT ; two 45-minute sessions per week of individual speech-language therapy ; one 45-minute session per week of group speech-language therapy ; and collaboration between the student's special education teacher, related services providers, and family once a week for 20 minutes (Parent Exs. H at pp. 18-20; I at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice dated, August 18, 2021, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (see Parent Ex. A).

The parents alleged that during the December 8, 2020 CSE meeting they expressed concerns that the student required an 8:1+3 special class with ABA instruction; however, the CSE failed to recommend either on the student's IEP (Parent Ex. A at p. 5). Accordingly, the parents disagreed with the December 2020 IEP and, on June 17, 2021, the parents notified the district that they "would continue to send [the student] to The Rebecca School" and seek reimbursement/direct funding of the tuition at Rebecca School (id.).

The parents did attend a virtual tour of the recommended placement for the 2021-22 school year, but stated that the school failed to have "sensory equipment in the classroom or a sensory gym or quiet room, which [the student] need[ed] to self-regulate" (Parent Ex. A at p. 5). Further, the parents alleged that the recommended school failed to "use a specific teaching method" and instruction was not "tailored to individual learning needs" (id.).

Further, the parents claimed that they informed the district on July 27, 2021 that they disagreed with the district's reevaluation of the student as it was not "comprehensive or thorough" and requested an "updated neuropsychological evaluation" and if such evaluation was not conducted the parents further indicated they would seek an independent educational evaluation (IEE) (Parent Ex. A at p. 6).

According to the parents, because of the district's failure to offer the student a FAPE for the 2021-22 school year, they enrolled the student at the Rebecca School (Parent Ex. A at pp. 6-7). The parents claim that the Rebecca School was "reasonably calculated to result in [the student's] educational benefit" (id. at p. 7). The parents further claim that they "have communicated their concerns and cooperated" with the district in the "special education process" (id.).

As relief, the parents requested a determination that the district failed to offer the student a FAPE for the 2021-22 school year; that the Rebecca School was appropriate to meet the student's needs; and equitable considerations did not bar an award of tuition to the Rebecca School for the 2021-22 school year (Parent Ex. A at p. 7). Additionally, the parents sought tuition reimbursement and/or direct funding for the tuition and related costs and fees for the Rebecca School for the 2021-22 school year (id.). The parents also requested "appropriate transportation" to and from the

Rebecca School or reimbursement/direct funding of transportation expenses incurred for the district's failure to provide the student with transportation (*id.*). Lastly, the parents sought reimbursement/direct funding of a neuropsychological IEE (*id.* at p. 8).

B. Impartial Hearing Officer Decision

An impartial hearing convened on February 1, 2022 and concluded on June 17, 2022, after five hearing dates (*see* Tr. pp. 1-116). In a decision dated August 20, 2022, the IHO found that the district offered the student a FAPE for the 2021-22 school year and dismissed the parents' due process complaint notice (IHO Decision at pp. 5-6).

At the outset, the IHO acknowledged the parents "multiple challenges" to the CSE's recommended program and placement without any further specifics (IHO Decision at pp. 3-4). Next, the IHO reviewed the evidence and testimony in the hearing record that she determined supported a finding that the district offered the student a FAPE for the 2021-22 school year. (*id.* at p. 4). Specifically, the IHO discussed the testimony of the district's special education teacher who recounted the discussions at the December 2020 CSE meeting with respect to the student's present levels of performance, progress reports, evaluative information, social-emotional issues, annual goals, parent participation, and the CSE's recommendations (*id.*). The IHO specifically referenced a line of questioning of the district's special education teacher and his opinion that the recommended program was the least restrictive environment (LRE) and appropriate for the student (*id.* at pp. 4-5). In addition, the IHO discussed the testimony of the district's unit coordinator who testified that the recommended school placement could implement the student's IEP including "a sensory area" and space for quiet time (*id.* at p. 5). Ultimately, the IHO found that the district offered "a cogent and responsive explanation" for the CSE's recommendations (*id.*). Accordingly, the IHO found the district met its burden of proof and there was "no need to go further in the inquiry" (*id.* at pp. 5-6). But the IHO did find that "if challenged there is nothing that would disfavor the Rebecca School as an appropriate placement" and there were no equitable factors that favored or disfavored either party (*id.* at p. 6).

IV. Appeal for State-Level Review

The parents appeal.⁷ The parents contend that the IHO erred in finding that the district offered the student a FAPE for the 2021-22 school year and in denying the parents tuition reimbursement/funding for the Rebecca School.

The first issue presented for review is whether the IHO erred in finding that the district met its burden of proof that it offered the student a FAPE for the 2021-22 school year. More specifically, the parents allege that the December 2020 IEP "was not based on any formal evaluation of the student's needs" (Req. for Rev. at p. 4). In addition, the parents allege that the 8:1+1 "was insufficient" for the student and the district failed to explain "their unreasonable rationale" in recommending the special class, and therefore, deprived the parents of participation

⁷ On September 29, 2022, the parents' served a request for review (*see* Req. for Rev.). On October 4, 2022, the undersigned rejected the filed request for review as it was 12 pages in length when the regulations provide that a request for review be no more than 10 pages in length (8 NYCRR 279.8[b]). The parent was granted the opportunity to amend the request for review no later than October 18, 2022. On October 18, 2022, the parents served and filed an amended request for review. All references herein shall be to the amended request for review.

in the CSE process (*id.* at pp. 5-6). The parents also argue that the December 2020 CSE failed to recommend the specific methodology used by the Rebecca School, on the IEP despite requests by the parents and Rebecca School teacher (*id.* at p. 5). Further, the parents contend that the December 2020 IEP failed to provide for the student's sensory needs including the need for a sensory gym, access to sensory tools/equipment, length of sensory breaks, and access to a quiet place (*id.*). The parents argue that the December 2020 IEP "was deficient in the areas of present levels of performance, annual goals, and student management needs" (*id.*). Lastly, the parents argue that the IHO erred by relying on the testimony of the district's witnesses without giving due consideration to the parents' contrary evidence (*id.* at pp. 6-7).

The parents argue that the Rebecca School was an appropriate placement based on the private neuropsychological evaluation recommendations and the student's progress (Req. for Rev. at p. 8). The parents also argue that equitable considerations do not bar an award of tuition reimbursement as the parents provided timely notice of the unilateral placement and cooperated with the district (*id.*). The parents further contend that since the IHO failed to find that equitable considerations favored either party it "is essentially a finding that the equities favor the [parents]" and the parents are entitled to the requested relief (*id.* at pp. 8-9).

The parents further assert that the IHO failed to determine whether the parents were entitled to funding for an independent educational evaluation (IEE). The parents contend that the district "conceded" that the parents were entitled to an IEE, but the cost of the evaluation could not be agreed upon by the parties (Req. for Rev. at p. 9). Additionally, the parents argue that the district failed to present any evidence with respect to the parents' request for an IEE.

The parents request the following relief: a finding that the district failed to offer the student a FAPE for the 2021-22 school year; a finding that the Rebecca School was appropriate for the student and equitable considerations favor the parents, and an order awarding the parents tuition reimbursement and/or direct funding of the cost of the student's tuition at the Rebecca School for the 2021-22 school year and funding for an IEE by an evaluator of their choice.

In an answer, the district generally denies all material allegations contained in the parents' request for review. The district argues that it offered the student a FAPE for the 2021-22 school year on both procedural and substantive grounds. Next, the district contends that the parents' request for an IEE should be denied because the parents failed to locate an evaluator after the district agreed to fund the evaluation. The district does not appeal the IHO's findings with respect to the appropriateness of the Rebecca School or equitable considerations (IHO Decision at p. 6).⁸

In reply to the district's answer, the parents restate their arguments raised in their request for review.

⁸ The IHO found that if her finding on FAPE was "challenged" there was "nothing" that would "disfavor" Rebecca as an appropriate placement and there were no "equitable factors that favor or disfavor either side;" however, the district failed to cross-appeal these findings and as such, these findings have become final and binding on the parties 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 Dep't of Educ.*, 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]; IHO Decision at p. 6; see Answer).

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize"

the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew 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]).⁹

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).

⁹ 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" (Andrew F., 137 S. Ct. at 1000).

VI. Discussion

A. December 8, 2020 IEP

The parents argue on appeal that the IHO erred in finding that the district met its burden of proving that it offered the student a FAPE for the 2021-22 school year. As described above the parents contentions include that the December 2020 IEP was not "based on any formal evaluation of the student's needs," the 8:1+1 student-teacher ratio was insufficient, the IEP failed to adequately describe the student's sensory needs and did not adequately describe the student's present levels of performance, the annual goals lacked measurable benchmarks, and the management needs included in the IEP were not specific and rigorous enough to meet the student's level of need (Req. for Rev. at pp. 4-6). The district, in contrast, seeks to uphold the IHO's finding that it offered the student a FAPE for the 2021-22 school year because the December 2020 CSE reviewed and considered "appropriate evaluative materials," included an "extensive list of management needs" including ways to address the student's sensory needs, and offered "a cogent and responsive explanation[]" for the CSE's program and placement recommendations."

Considering these arguments, much of the dispute between the parties appears to relate to a differing view between the parents and the December 2020 CSE as to the level of support that the student required in order to meet what Rebecca School staff described as sensory needs. For example, as noted in the IEP, during the CSE meeting, the parent raised concerns that the student required a 2:1 student to teacher ratio and the student's teacher expressed concerns that the student required 2:1 support along with space to take sensory breaks and "a lot of sensory support and space" (Parent Ex. C at p. 12).

Turning to the December 2020 CSE meeting, although no specific evaluations were identified in the student's December 2020 IEP, or the June 2021 prior written notice, the hearing record demonstrates that in developing the December 2020 IEP, the CSE reviewed the student's March 25, 2020 IEP, the 2017 private neuropsychological evaluation report, the 2019 psychological evaluation report, and the June 2020 Rebecca School interdisciplinary report of progress update (Tr. p. 57; Parent Exs. C at pp. 2-3; D at p. 2; Dist. Ex. 3; see Dist. Ex. 6). The district special education teacher who participated in the December 2020 CSE testified that the CSE used the academic report from the Rebecca School and information discussed during the CSE meeting to create the student's annual goals, and relied on information from the Rebecca School progress report, the 2017 private neuropsychological evaluation, and the 2019 psychological evaluation to develop the goals and determine the recommended program (Tr. pp. 57, 60-61, 69-70; see Parent Exs. X-Y).

The evaluative information used by the December 2020 CSE showed that the student had been in special classes with high staff to student ratios since at least the 2016-17 school year (Parent Ex. X at pp. 1, 2, 4). The 2017 private neuropsychological evaluation noted that the student was at that time in a 6:1+3 special class in an approved nonpublic school for students with disabilities (id. at p. 2). The private neuropsychological evaluation report noted that within that program the student received one and one-half hours per day of 1:1 instruction using ABA (id. at p. 4). The private neuropsychological report further reflects that the student had been in the same approved private school since her transition from preschool (id. at p. 2).

The 2017 private neuropsychological evaluation report also described the student's difficulties with sensory functioning, including rocking back and forth and biting her nails (Parent Ex. X at pp. 1-2). However, the 2017 report described these difficulties in a behavioral context, including an observation that the student engaged in "sensory seeking and self-stimulatory behaviors (i.e., singing, finger biting, loud vocalizations, rocking in her chair)" (*id.* at p. 5). The report noted that the student was typically easily redirected with verbal prompting, the student's sensory behavior increased with extraneous noises, and that the student benefitted from sensory/movement breaks between tasks (*id.*). Recommendations for the student included in the report also indicated that the student required a sensory diet throughout her day to address her sensory seeking and self-stimulatory behaviors (*id.* at p. 10).

The December 2020 IEP reflects that the CSE discussed the student's strengths and needs and obtained information from the student's teacher, parents, and the Rebecca School progress report (*see* Parent Ex. C). Addressing whether the CSE discussed the student's present levels of performance, the district's special education teacher asserted that he "took good notes" during the CSE meeting, adding that "the report from the school is very, very detailed. And then we also got good input from the teachers, and [the] parents also gave input during the meeting" (Tr. pp. 58-59; *see* Dist. Ex. 7).

With respect to the student's present levels of performance, the December 2020 IEP first indicated that the student required "constant" sensory breaks throughout the day to maintain regulation, which included going to a quiet space, and that the student enjoyed sensory-based projects, water play, singing songs, and music therapy (Parent Ex. C at p. 2). This is generally consistent with information in the June 2020 Rebecca School progress report; however, the progress report provided a more detailed description of the student's sensory needs (Compare Parent Ex. C at p. 2, with Dist. Ex. 6 at pp. 1-2). Additionally, while, as noted above, the 2017 private neuropsychological evaluation report described the student's sensory issues in a behavioral context, the Rebecca School progress report described supports for the student's sensory system, such as a sensory diet and sensory gym, to maintain regulation throughout the day and to assist the student when she became dysregulated (Dist. Ex. 6 at pp. 1-2).

More specifically, the report noted that the student was very motivated by sensory play, particularly shaving cream, mixing different liquids, and waterplay (Dist. Ex. 6 at p. 1). According to the Rebecca School progress report, the student used music to regulate and soothe herself, producing auditory output by singing familiar songs (Dist. Ex. 6 at p. 1). The report noted that to help the student integrate her sensory system and maintain regulation throughout the day, staff implemented her sensory diet up to five times a day, which included "deep pressure on the arms, legs, and feet, using a massager in order to give her tactile input, and therapeutic brushing on the extremities," as well as use of the school's sensory gym at least once a day (*id.* at pp. 1-2). While implementing the student's sensory diet, staff members would use slow, predictable movements and soft voiced rhythmicity to better engage the student (*id.* at p. 2). Each morning, or upon request throughout the day, a staff member accompanied the student to the sensory gym where she chose a preferred swing and the staff member pushed her gently while singing a preferred song (*id.*). After getting the needed sensory input the student was more regulated and available to join activities in the classroom (*id.*).

The Rebecca School June 2020 progress report provided additional information regarding the student's dysregulation noting that the student often moved quickly from place to place and

from idea to idea, which contributed to her dysregulation (Dist. Ex. 6 at p. 2). But the report also noted that the student had made progress in slowing down during sensory play when provided with "maximum adult support in the form of sensory input, rhythmicity, narration and gestural cues," and had become much more accepting of slowing her body down during transitions (*id.*). When dysregulated, the student moved very quickly, made loud vocalizations such as screaming, and occasionally became physically aggressive and would hit or throw things (*id.*). Most often, the student became dysregulated when an area was too loud or unpredictable or during transitions from preferred activities to less preferred ones (*id.*). When the student was dysregulated a staff member would go with the student to a quiet space and implement her sensory diet while singing or providing "regulating songs" for the student to listen to, which were provided by her occupational therapist (*id.*). After 20 minutes of co-regulation with a staff member the student would often be ready to join the group again (*id.*). According to the Rebecca School June 2020 progress report, staff used modulation between high and low affect, rhythmicity and song, and sensory input, such as tickles on her hand or feet to increase the student's engagement for up to 12 minutes during a familiar, routine activity such as morning meeting (*id.*). During highly motivating sensory activities with a preferred adult, the student could remain engaged for up to 15 minutes (*id.* at pp. 2-3).

The December 2020 CSE appears to have adopted the language used in the Rebecca School progress report in describing the student's sensory issues. For example, in discussing the student's academic performance, the December 2020 IEP described that when regulated, the student benefited from rhythmic, familiar books and could remain engaged in a reading group for 15 minutes (Parent Ex. C at p. 2). The IEP noted that the student could answer simple "wh" questions that were supported by visuals, could recognize and spell her own name, could recognize and spell other preferred words with less consistency, and when regulated could write her name (*id.*). While this information was generally consistent with the June 2020 Rebecca School progress report, the progress report described the level of sensory support provided to the student by an adult in order for her to engage in literacy instruction in more detail. For example, the report related that the student was most successful during readings that were familiar and rhythmic and was most able to attend group literacy activities when she was "on the periphery and ha[d] sensory support, such as a sequin blanket on her lap and an adult applying deep pressure on her feet" (Parent Ex. 6 at p. 4). The progress report further described that "with maximal adult support in the form of deep pressure and tickles on the feet, [the student] was able to remain in a group reading activity for up to 15 minutes" (*id.*). With moderate adult support in the form of gestural and verbal cuing, sensory support, and narration the student could answer "simple, concrete "wh" questions" (*id.*).

The December 2020 IEP noted that the student's math program was focused on sequencing, counting, and pattern recognition (Parent Ex. C at p. 2). The IEP noted that with support and when regulated, the student could count to 30, count the days on a calendar up to 30, and count three objects using 1:1 correspondence (*id.*). The IEP indicated the student could rote count in increments of 5 and 10 with support, follow a familiar sequence of up to 3 steps, and follow familiar visual cues in a sequence of up to three steps and up to eight steps with adult support (*id.*). In addition, the IEP reported that movement, cooking, and baking were used to support the student's conceptual understanding of numbers (*id.*). This is generally consistent with information provided in the June 2020 Rebecca School progress report (*see* Dist. Ex. 6 at p. 5).

Speaking to the student's "organization of time and space," the December 2020 IEP noted that the student continued to need support in order to transition from one activity to another, and

when provided with ample processing time, warnings and count downs, and visual support, she could complete routine tasks in the classroom (Parent Ex. C at p. 2). The Rebecca School progress report provided a more detailed description of the supports the student required to follow a sequence of activities (Dist. Ex. 6 at p. 5). For example, the student was able to complete a routine sequence of five obstacles in an obstacle course with minimal adult support in the form of narration and rhythmicity, but when presented with more novel sequences, the student benefitted from maximum staff support through narration, gestural, and physical cues, and a first-then sequence (Dist. Ex. 6 at p. 5). The student was noted to need a similar level of support and use of a "first-then" sequence when she desired to leave one activity for a preferred activity (id.).

Regarding the student's daily living skills, the December 2020 IEP noted that based on teacher report, the student was independent with using the bathroom but at times needed reminders to wash her hands and had developed more independence in navigating the bathroom (Parent Ex. C at p. 2). The Rebecca School report described that the student usually needed minimal adult support to use the bathroom, noting that she often used the bathroom as a quiet space to get away from the classroom and a staff member would accompany her and wait outside (Dist. Ex. 6 at p. 6). The report also related that the student moved quickly while transitioning from the classroom to other spaces in the school, such as the bathroom or the quiet room, though she had become much more accepting of moving slowly when given maximal adult support in the form of rhythmicity and physical cues to slow down (id. at p. 2). For example, previously the student indicated she wanted to use the bathroom by saying "bathroom," and would then "sprint towards the bathroom, often times beginning to disrobe before entering the bathroom"; "while this would still happen when the student was dysregulated at certain times, she would often be able to walk to the bathroom as a staff member would walk next to her using low affect, singing or saying 'we walk slowly' repeatedly" (id.).

On the Vineland-3 daily living skills domain administered as part of the 2019 psychological evaluation the student obtained a standard score of 40 (< first percentile) (Parent Ex. Y at p. 4). The 2019 psychological evaluation report indicated that the student did not put on pullover garments, wash and dry her face, or wipe or clean her face and hands as needed after meals, and did not act carefully around hot or sharp objects or wipe her spills adequately (id.). The December 2020 IEP also related parent concerns regarding safety, noting that at times, when the student was outside, she would run away, and she continued to hold an adult's hand when walking in the community (Parent Ex. C at p. 2). The Rebecca School progress report stated that the student was able to smoothly transition from the classroom to outside of the building with maximal adult support in the form of narration, singing, increased processing time, and the use of visuals (Dist. Ex. 6 at p. 6). While in the community, the classroom staff continued to work with the student on staying safe because a sudden change could cause the student to become dysregulated and frustrated, as expressed by loud vocalizations, swaying back and forth, biting her nails, and rapid movements and a staff member would have to narrate to her, give sensory input in the form of squeezes, and sing to her to help her to enter a state of regulation again (id.). According to the report, because of this, it was important for the student to have 1:1 support in the community (id.).

Notably, although the evaluative information reviewed by the December 2020 CSE identified that the student had significant impairments in expressive and receptive language, neither the December 2020 IEP nor the December 2020 CSE meeting notes reflect any discussion of the student's strengths or needs related to language development (see Parent Ex. C; see Dist. Ex. 7). The 2017 private neuropsychological evaluation assessed the student's receptive and

expressive language skills as being below the first percentile, which the evaluator noted was "generally at a 1 year old level" (Parent Ex. X at pp. 9, 12). The 2019 psychological evaluation report revealed that on the communication domain of the Vineland-3, the student obtained a standard score of 20, which was below the first percentile and the evaluation report noted that the student followed instructions with only one action, understood the meaning of "yes," and responded to the tone of spoken words, but did not identify at least three actual objects when asked, understand at least 50 words, or respond appropriately to at least three more advanced gestures (Parent Ex. Y at p. 4). The student vocalized or gestured if she wanted an activity to keep going or stop, used at least three basic gestures, and repeated or tried to repeat common words immediately upon hearing them, but did not say any name for her parents, name at least 3 objects, or say "yes" (id.). The Rebecca School progress report noted that the student communicated through non-verbal language, such as vocalizations, facial expressions, eye gaze, gestures, touch, and body language, and verbal language such as one-to-three-word utterances, verbal approximations, and "emotionally meaningful, memory-based lines from songs or television shows using both English and Japanese" (Dist. Ex. 6 at p. 1). Consistent with how the student's academic skills were described by Rebecca School, the report indicated that the student's receptive language skills were dependent on her level of regulation and engagement within a given interaction (id. at p. 11). According to the report, the student demonstrated echolalia, and when given a verbal choice, consistently chose the second option (id. at p. 11). Visuals were used with increasing consistency throughout the day to help her respond to questions presented to her and she had a "where do you want to go" board and a keyring of preferred spaces, objects, and activities for her to reference throughout the day but was noted to need moderate affect, verbal, and gestural support (id.). Expressively, the student was working on expanding precursory language skills, and during highly motivating activities, such as sensory based activities or cooking activities that incorporated the student's interests such as mixing, she was more able to attend to adult action on objects and imitate those actions (id.).

Addressing the student's physical development, the December 2020 IEP identified that the student was ambulatory and could safely navigate the school environment and noted that no physical development needs were identified at the time of the December 2020 CSE meeting (Parent Ex. C at p. 3). The December 2020 IEP included a statement from the June 2020 Rebecca School progress report which noted that OT "continue[d] to implement an individualized program rich in movement and sensory input to support [the student's] functional, emotional, [and] developmental growth [and] address her needs, in areas of sensory integration, fine and gross motor skills, and visual spatial processing" (id.). The December 2020 IEP also indicated that the student continued to work on motor planning, sequencing, body awareness, postural control, bilateral coordination, muscle strength, endurance, and balance (id.).

In order to address the student's needs as described above, the December 2020 IEP identified management needs to support the student (Parent Ex. C at p. 4).¹⁰ With respect to academics, the IEP included visual supports to increase comprehension and communication skills, rhythmic books, visuals for "wh" questions, 1:1 instruction and check-ins, small group support,

¹⁰ Management needs are defined by State regulations as "the nature of and degree to which environmental modifications and human material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social and physical development (8 NYCRR 200.1[ww][3][i][d]).

increased processing time, high interest activities, teacher modeling, and scaffolding (id.). The December 2020 IEP identified management needs for math including the use of "manipulatives for math such as baking and cooking" (id.). The December 2020 IEP also identified management needs that included the use of gestural cues, visual support, and increased processing time when asking about the student's wants and needs and verbal reminders for transitions (id.). The December 2020 IEP further included management needs that reflected the student's need for sensory and movement breaks, access to quiet space for breaks and sensory activities, and access to sensory supports, tools, and equipment (id.).

In addition to the above-described management needs, the December 2020 IEP included annual goals targeting the areas of English Language Arts (ELA), math, writing, speech-language, OT, and PT (Parent Ex. C at pp. 5-7). In the area of ELA, the IEP included one reading goal that focused on developing reading skills and included short-term objectives for identifying the letters of the alphabet from a field of 2-3 options and identifying sight words paired with pictures from class activities, safety awareness words and vocabulary words from familiar stories when given a field of 2-3 options (id. at p. 5). The IEP also included one general writing goal, which included short-term objectives for tracing, copying, and writing the letters of the alphabet with appropriate size, capitalization and spacing of letters, and for tracing, copying, and writing familiar and novel sight words, vocabulary words, and simple phrases within the classroom (id.). The IEP also included one general math goal for the student, which included short-term objective for identifying a number up to 25 from a field of 2-3 options and for demonstrating "1:1 correspondence with numbers from 5 through 25 by matching objects to their corresponding numbers" (id. at p. 6). The December 2020 IEP included a single broad OT goal for the student to demonstrate progress in motor planning, bimanual coordination, overall strengthening and endurance, sequencing, and sensory processing by completing a seven-step obstacle course (Parent Ex. C at pp. 6-7). Similarly, the IEP included a single broad PT goal for the student to demonstrate improved balance, postural control, and bilateral coordination (id. at p. 6). Although the December 2020 IEP did not describe the student's speech and language strengths or needs as discussed above, the IEP did include three speech-language goals focused on initiating an interaction with a peer by using a verbal greeting paired with a gesture, expanding expressive language from one-to-three-word utterances to one-to-four-word utterances in order to indicate her wants and needs, with adult scaffolding and visual supports, and following a novel eight-step direction (id.).

The parent contends on appeal that the annual goals included in the December 2020 IEP were not appropriate, with some lacking in specificity and measurable benchmarks. Here, this student was identified as requiring alternate assessments, and therefore, the December 2020 CSE was required to develop short term objectives in the student's annual goals (Parent Ex. C at p. 10). As described above, the annual goals for reading, writing, and math contained short-term instructional objectives but the annual goals for the student's related services of speech-language therapy, PT, and OT did not contain short-term objectives (id. at pp. 5-7).

Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who, like the student in this appeal, participate in alternate assessment (see 8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]). The New York State Alternate Assessment is administered to students whom the CSE has designated as having severe cognitive disabilities as defined by the Office of Special Education (see "Eligibility Criteria for Participation in the New York Alternate Assessment Criteria – NYSAA,"

at p. 1, Office of Special Educ. [May 2019], available at <http://www.p12.nysed.gov/specialed/publications/documents/eligibility-criteria-for-participation-in-nysaa-advisory-and-attachments.pdf>; see 8 NYCRR 100.1[t][2][iv]). To be eligible for the New York State Alternate Assessment, a student must be found to have: "a severe cognitive disability and significant deficits in communication/language and significant deficits in adaptive behavior; and . . . require[] a highly specialized educational program that facilitates the acquisition, application, and transfer of skills across natural environments . . .; and . . . require[] educational support systems, such as assistive technology, personal care services, health/medical services, or behavioral intervention" (id. at pp. 3-6).

In this instance, the December 2020 CSE's failure to include short-term objectives for the related service goals was a procedural error. However, a procedural violation only results in a denial of a FAPE if the procedural inadequacy (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]). Accordingly, this will be considered along with the substantive appropriateness of the December 2020 IEP recommendations.

To address the student's need for special education programs and services during the 2021-22 school year, the December 2020 CSE recommended 12-month services in an 8:1+1 special class in a district specialized school with adapted physical education and related services, including OT, PT, and speech-language therapy, with parent counseling and training (Parent Ex. C at p. 7). State regulation provides that an 8:1+1 special class placement is intended to address the needs of students "whose management needs are determined to be intensive and requiring a significant degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][b]). The hearing record additionally shows that the December 2020 CSE considered a 6:1+1 special class in a specialized school and a 12:1+1 special class in a specialized school (Parent Ex. C at p. 13; Dist. Ex. 3 at p. 2).

Speaking to the appropriateness of the December 2020 CSE recommendation for an 8:1+1 special class in a district specialized school, the district special education teacher opined that the recommendation was appropriate, asserting that

Looking at the continuum 12:1+1, I don't think that would have been supportive enough [the student] needed more support than the level that would be available in that setting. And then if you look at more restrictive, 6:1+1 probably would have been too restrictive. And the need that the students in that classroom [sic] would not have met the needs of [the student].

(Tr. p. 64; see Tr. pp. 66, 72).

Further, he testified that the 2:1 ratio that was provided at the Rebecca School was too restrictive for the student (Tr. pp. 66-67).

The district special education teacher testified that regarding restrictiveness, "you look at the continuum—so we try to recommend the least restrictive. Meaning the setting where they can make progress" (Tr. pp. 64-65). He further explained that "if you look at 6:1:1 or anything more

restrictive, 12:1:4, it would have not – it wouldn't have been appropriate because [the student] ha[d] skills that are higher than that level of classroom setting" (Tr. p. 65). He attempted to explain that least restrictive "means we want the student to be able to succeed and access the curriculum—or the—access the class in a way that they can be successful. So the goal is to move them with less scaffolding and less support as they make progress" (Tr. pp. 64-65).¹¹ The district special education teacher asserted that "[the student] did have some academic skills ... [and] when provided some of the sensory supports [she was] able [to] access the curriculum" (Tr. p. 69). He noted that the CSE focused on the student's dysregulation and given the management needs and additional support of the classroom paraprofessional in an 8:1+1 special class" recommended in the December 2020 IEP, it] "felt [the student] did have enough skills to be able to progress okay in the 8:1+1," noting that information about the student's needs was taken from the June 2020 Rebecca School progress report, the 2017 neuropsychological evaluation report, and the 2019 psychological evaluation report (Tr. pp. 69-70).

The record further reflects that during the December 2020 CSE meeting the parents expressed concern regarding the recommended 8:1+1 program, asserting that the class was too large, and the student needed a classroom with a 2:1 ratio with the use of the same methodology used by the Rebecca School, and access to space for sensory breaks (Tr. p. 63; Parent Exs. C at p. 12; AA at ¶ 7). Speaking to the 2:1 program requested by the student's parents, the district special education teacher noted that "there's not really a 2:1 ratio setting" and opined that "that would have been way to[o] restrictive and the students in that setting would not have fit the profile of [the student]" (Tr. pp. 66-67). He asserted that the student "did have some academic skills" adding that "it looked like, when provided some of the sensory supports that they were able to access the curriculum" and given the recommended management needs and the extra support of a paraprofessional in the classroom, the CSE believed that the student had "enough skills to be able to progress okay in the 8:1+1 [special class]" (Tr. p. 69). He also testified that in the 6:1+1 special classes "a lot of the student[s] have severe behavioral issues" and that the student's behavior did not pose as a challenge for the student to access academics; accordingly, overall, he believed the 8:1+1 special class was best for the student in terms of academics, behaviors, and social/emotional profile (Tr. pp. 71-72).

Initially, the special education teacher's use of the term least restrictive environment (LRE) is not in line with the usage of that term in the IDEA, as the question of whether a student's placement is in the appropriate LRE focuses first and foremost on a student's access to nondisabled

¹¹ In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]).

peers. Accordingly, contrary to the special education teacher's reference to LRE in analyzing the appropriateness of the recommended 8:1+1 special class and his apparent view that the class was less restrictive than other placements considered, such as a 6:1+1 special class, due to the number of students, any difference between the ratios of the special classes do not bear on LRE (34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; R.B. v. New York Dep't of Educ., 603 Fed App'x 36, 40 [2d Cir. Mar. 19, 2015][stating that "[t]he requirement that students be educated in the least restrictive environment applies to the type of classroom setting, not the level of additional support a student receives within a placement"; see T.C. v. New York City Dep't of Educ., 2016 WL 1261137 at *13 [S.D.N.Y. Mar. 30, 2016] [finding that the IHO's application of LRE requirement to a ratio dispute was improper, stating that "[a] less restrictive environment refers to the ratio of special education to general education students in the same classroom, not the ratio of special education students to teachers"]). Accordingly, the special education teacher's use of LRE as support for finding the 8:1+1 special class appropriate for the student must be disregarded.

Looking at the remainder of the district special education teacher's testimony explaining the CSE's rationale for the recommendation for an 8:1+1 special class, the testimony lacks a detailed explanation as to how the student's significant needs could have been met with the supports offered in the December 2020 IEP, particularly as the evaluative information used by the December 2020 CSE, as discussed above, described a student who required intensive adult support throughout the school day and who had consistently received instruction in classrooms with a significantly higher staff to student ratio.

While the December 2020 IEP incorporates some degree of detail with respect to the student's sensory needs from the Rebecca School progress report, it falls short in identifying specifically how the district program, which provides far less adult support in the classroom and fewer OT-related goals and interventions than the student is currently receiving at the Rebecca School, would address the student's primary need for consistent sensory regulation throughout the school day. As noted above, the student required consistent sensory input provided by an adult throughout the school day to increase shared attention and regulation and engagement in the classroom and also had a sensory diet that was implemented up to five times a day (Dist. Ex. 6 at pp. 1-2).¹²

The Rebecca School progress report described that while implementing her sensory diet, staff members used slow, predictable movements and soft-voiced rhythmicity to better engage the student (id. at p. 2). The progress report indicated that the student could become dysregulated when overwhelmed by sensory stimuli and if the environment was busy or loud, the student might pace around the periphery of the room, cover her ears, vocalize loudly, swat at peers or adults, search for items to mix, such as shaving cream or lotion, or run away from an interaction/activity in an effort to block out overwhelming stimuli (id. at p. 7). At these times, the student benefitted from an environment with reduced audio and visual input with a familiar adult providing slow and low affect and deep touch pressure (id.). She also benefitted from listening to music from Quickshifts, "a therapeutic listening intervention," and an OT program rich in predictable sensorimotor-based activities to help the student attain and maintain regulation (id.). The student

¹² The Rebecca School progress report initially describes the student as receiving sensory support through her individualized sensory diet up to five times per day, but later indicates that her sensory diet is implemented up to three times per day (compare Dist. Ex. 6 at pp. 1-2, with Dist. Ex. 6 at p. 8).

received regular sensory input through an individualized sensory diet up to three times a day, monitored by the occupational therapist, that included tactile and passive proprioceptive input (e.g., squeezes to extremities or brushing), rhythmic vestibular input (e.g., linear movement on a swing, or seesaw), and active proprioceptive input (e.g., crawling, or walking up and down the stairs) (*id.* at p. 8). In addition to this sensory diet the progress report thoroughly described the use of adult-implemented sensory input during academic instruction and throughout the student's school day (*id.* at pp. 4 -6, 10-11).

Further, while the December 2020 IEP identified the student's management needs, it did not reflect the level of adult support the student required to facilitate the use of visuals, implement the student's sensory diet, assist with daily living skills, and ensure the student's safety in the classroom and community as described in the evaluative information considered by the CSE. Although the "law does not require every aspect of a child's specific educational needs to be detailed in the IEP," the district failed in this case to adequately address the level of support the student required in order to receive an educational benefit (*see C.F. v. New York City Dep't of Educ.*, 746 F.3d 68, 79 [2d Cir. 2014] [finding recommendation for 6:1+1 special class inappropriate where evidence showed student required 1:1 support]; *E.E. v. New York City Dep't of Educ.*, 2018 WL 4636984, at *5 [S.D.N.Y. Sept. 26, 2018] [finding that a CSE addressed a student's sensory needs because the IEP "assessed the causes of the Student's problematic behaviors and specified strategies for remedying them"]).

As a final matter, the district presented the testimony of the district unit coordinator to explain how the assigned school would have implemented the student's management needs. The district unit coordinator testified that sensory movement breaks would be embedded into student schedules, stating "[w]e also work with OT, PT to kind of determine what are the appropriate breaks for students and what are the appropriate ways to kind of time them out throughout the day or how do we support the student in asking for one if as needed, whatever that might look like for the student" (Tr. p. 93). She noted that "[w]e work really closely with our related service providers to make sure that we are meeting the needs of the students but also kind of incorporating those sensory needs to help them focus as much as they possibly can" (Tr. p. 94). The district unit coordinator indicated that "if a student needs sensory activities or needs sensory toys, then we work with the OT and PT to kind of embed them into instruction" and added that in terms of quiet space for students to go to, "we have multiple places that are kind of utilized" and clarified that those spaces were "our dean's office and our counselor's office" (Tr. pp. 96-97). Describing how the student would access these quiet spaces when needed, the district unit coordinator noted that "if a student requires a quiet space then they are escorted by a staff member" (Tr. p. 99). She further noted that the assigned public-school site did not have a sensory gym, but asserted that "as student's require it, we have it" (Tr. p. 100). The district unit coordinator also described that related to 1:1 instruction and check-ins, "paraprofessionals and teachers go throughout the class and make sure that we're checking in with students to assess their understanding multiple times within the class period" (Tr. p. 94). Regarding verbal reminders and transitions, she reported that "a lot of teachers have times posted. And they also do countdowns for when class is about to end. So like five minutes, three minutes, one minute to pack up, and then moving" (Tr. pp. 94-94). Additionally, she testified that the assigned school was able to offer the student "gestural visual supports," "increased processing time," "[r]hythmic books," and visuals for "WH" questions (Tr. pp. 93-94). Instruction was differentiated based on the needs of the students and visual supports are provided "in all lessons" (*id.*). Further, she testified that the assigned school offered "small-

group instruction within each class" with manipulatives as needed (Tr. p. 94). The class uses visual schedules, verbal reminders, transitions, teacher scaffolding, and teacher modeling (Tr. pp. 94-95). Furthermore, she testified that students have "[a]ccess to sensory supports, tools, and equipment" and the classroom teacher works with the related service providers to incorporate the sensory needs to help the students focus (Tr. p. 95). Lastly, the district unit coordinator testified that the assigned school had an available 8:1+1 special class for the student with adapted physical education with an occupational therapist, speech-language pathologist, physical therapist and parent counseling and training for the 2021-22 school year (Tr. pp. 92, 97).

Although the district unit coordinator asserted that the assigned public school site could have met the student's management needs as described in her December 2020 IEP, as discussed above, the overall program recommendation does not appear to have been supportive enough to address the student's needs. Additionally, while the student's management needs included 1:1 and small group instruction as a support, the unit coordinator only testified that the school had small group instruction in each class and, with respect to 1:1 instruction, grouped her response with teacher check-ins indicating that the teachers and paraprofessionals go through the class to check that the student's are understanding instruction (Tr. p. 94; Parent Ex. C at p. 4). As the level of support available in the recommended 8:1+1 special class was already in question, the unit coordinator's explanation as to how small group instruction and 1:1 instruction—management needs identified for the student—would have been implemented does not lend support to finding that the recommended program could have met the student's needs.

Based on the above, the recommended 8:1+1 special class was not sufficiently supportive to address the student's needs and the hearing record supports finding that information available to the December 2020 CSE showed that the student required additional supplementary support personnel in the classroom to receive an educational benefit. Based on the foregoing, I find that the IHO erred in finding that the district met its burden to prove that it offered the student a FAPE for the 2021-22 school year. Having found a denial of FAPE for the 2021-22 school year, and the district's failure to cross-appeal the IHO's findings regarding the appropriateness of the Rebecca School for the student for the 2021-22 school year and equitable considerations, the parents are entitled to reimbursement for the student's tuition at the Rebecca School for the 2021-22 school year.

B. Independent Educational Evaluation

The parents contend that the IHO erred in failing to determine whether the student was entitled to a neuropsychological IEE at district expense (Req. for Rev. at p. 9; Parent Mem. of Law at p. 21). The parents further contend that the district already agreed to fund the IEE, but the cost was the issue to be determined.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see *K.B. v Pearl Riv. Union Free*

Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense].¹³

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

The student's father testified that at the December 2020 CSE meeting he notified the CSE that the student had not been recently evaluated and he was concerned that there was insufficient information "to understand her needs and current functioning levels" (Parent Ex. AA at ¶ 7). The student's father testified that on January 26, 2021, he requested that the district conduct a neuropsychological evaluation (*id.* at ¶ 9). The next request for an IEE came in the parents' due process complaint notice dated August 18, 2021 (*see* Parent Ex. A).

Next, in a letter dated February 8, 2022, the parents claimed that the student was evaluated by an outside provider in December 2019, but indicated they believed the student's "needs ha[d] changed and an updated evaluation [wa]s required" (Parent Exs. J at p. 1; AA at ¶ 9). The parents requested a neuropsychological evaluation and any other indicated testing (Parent Exs. J at p. 1; M at p. 2).

In response, on February 8, 2022, the district sent the parents prior written notice of the parents' request for a reevaluation (*see* Parent Ex. L). The district determined that the student needed a neuropsychological assessment as part of the reevaluation and sent the parents a consent form, assessment authorization form, list of independent evaluators, and procedural safeguards notice (Parent Exs. L at pp. 1, 4; M at p. 2).¹⁴ The district also included its "maximum allowable

¹³ Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that, if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; *see* Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

¹⁴ Although the February 8, 2022 prior written notice indicates that a list of independent evaluators was sent to the parents, the list of evaluators was not contained in the hearing record (*see* Parent Exs. L-M).

[district] rates for assessments" which for a neuropsychological evaluation was \$1,000 (Parent Ex. L at p. 9).

Again, on March 3, 2022, the parents wrote another letter stating that the December 2020 CSE did not have "sufficient information available to understand [the student's] needs and make an appropriate recommendation" (Parent Ex. K at p. 1). The parents again stated that during the December 2020 CSE meeting they notified the CSE that the student had "not been evaluated in several years" and requested a reevaluation (*id.*). The parents claimed that they followed up in letters dated January 26, 2021, and February 8, 2022, regarding their request for a neuropsychological evaluation (*id.*).¹⁵ Accordingly, the parents were again requesting a neuropsychological evaluation or other indicated testing (*id.* at pp. 1-2). On March 4, 2022, the district resent the request for reevaluation notice, consent form, assessment authorization form, and list of independent evaluators to the parents (Parent Ex. M at p. 1). On March 5, 2022, in response to the district's assessment authorization form, the parents requested an authorization form requesting funding of a neuropsychological evaluation up to \$5,000 as they "heard" neuropsychological evaluations "can cost" between \$4,000 to \$6,000 (Parent Exs. M at p. 1; AA at ¶ 9). The district did not respond to the parents request for increased funding of the IEE (*see* Parent Ex. AA at ¶ 9).

Regarding the issue of the maximum reimbursement rate, when a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; *see Letter to Parker*, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; *see Letter to Anonymous*, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; *see Individual Educational Evaluation*, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (*see Letter to Anonymous*, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (*id.*; *Individual Educational Evaluation*, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

Turning to the maximum rate of reimbursement, the district provided the parents with information for obtaining the IEE along with a list of evaluators and its cost-containment policies (*see* Parent Exs. L-M). Reviewing the parents' arguments, the parents did not provide adequate justification for why the district's cost-containment policy should not apply. The parents' assertion that neuropsychological evaluations cost between \$4,000 to \$6,000 is not supported by the hearing record (Parent Ex. M at p. 1). Additionally, a school district must not restrict the providers of IEEs to a set list and must give parents the opportunity to show that circumstances require choosing an evaluator who does not meet school district criteria (*Letter to Parker*, 41 IDELR 155 [OSEP 2004];

¹⁵ The January 26, 2021 letter was not contained in the hearing record.

Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). In this instance, the parents had failed to identify an evaluator to conduct an evaluation of the student and have not adequately identified the cost of such evaluation.

Here, the district does not assert that it was unwilling to provide the student with an IEE; on the contrary, the district agreed to the neuropsychological evaluation. As the parents have not yet obtained an IEE, there is no harm in requiring that the IEE conform to the district's criteria. Therefore, the parents are entitled to reimbursement for an IEE, subject to the district's criteria and, in the event the parents wish to obtain an evaluation from an evaluator whose fee is greater than permitted by the district's cost containment criteria, the district must provide the parents with an opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's cost containment criteria.

VII. Conclusion

Having determined that there are sufficient reasons to overturn the IHO's finding that the district offered the student a FAPE for the 2021-22 school year, and the district failing to cross-appeal the appropriateness of the Rebecca School, the parents are entitled to tuition reimbursement for the cost of the student's tuition at the Rebecca School for the 2021-22 school year. In addition, I find that the parents are entitled to district funding for the cost of a neuropsychological IEE as set forth above.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision, dated August 20, 2022, is modified reversing that portion of the decision that found the district offered the student a FAPE for the 2021-22 school year; and

IT IS FURTHER ORDERED that the IHO decision, dated August 20, 2022, is modified by awarding the parents reimbursement for the cost of tuition for the student's attendance at the Rebecca School for the 2021-22 school year; and

IT IS FURTHER ORDERED that the IHO decision, dated August 20, 2022, is modified by awarding the parents a neuropsychological IEE subject to the district's cost-containment policies.

Dated: Albany, New York
December 1, 2022

STEVEN KROLAK
STATE REVIEW OFFICER