



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-172

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 Board of Education of the Sayville Union Free School District

Appearances:

Guercio & Guercio, LLP, attorneys for respondent, by Douglas A. Spencer, 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 Gow School (Gow) for the 2019-20 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

III. Facts and Procedural History

The student has been the subject of a prior State-level administrative appeal involving the 2015-16 and 2016-17 school years (Application of a Student with a Disability, Appeal No. 18-083). Accordingly, the parties' familiarity with the facts and procedural history up through that matter—as well as the student's prior educational history—is presumed and will not be repeated in detail herein.

The parents reported that the student struggled with reading during elementary school, at which time she received various supports including private tutoring and private speech-language therapy, academic intervention services (AIS) for reading and math, and "informal resource room instruction for reading" at school (see Parent Ex. A at pp. 2-3). In December 2012 (fifth grade), the CSE found the student eligible for special education as a student with a learning disability (id. at p. 3). The student received special education services from the district during middle school;

thereafter, in October of eighth grade, the parents unilaterally placed the student at The Kildonan School (Kildonan) (*id.* at pp. 3-4; *see Application of a Student with a Disability*, Appeal No. 18-083). The student continued to attend Kildonan through the 2018-19 school year (11th grade) (Parent Exs. A at pp. 1, 4; G).

On June 18, 2019 the CSE convened for the student's annual review and to develop an IEP for the 2019-20 school year (12th grade) (Dist. Ex. 19). The CSE recommended that the student receive two 40-minute sessions per day of resource room services in a group of five, five 40-minute sessions per 10-day cycle of small group (5:1) specialized reading instruction, five 40-minute sessions per 10-day cycle of individual specialized reading instruction, and one 40-minute session per month of individual counseling (*id.* at pp. 14-15).

On August 21, 2019, the parents provided the district with notice of their intent to place the student at Gow and "reserve[d] [their] right to seek reimbursement for tuition and associated costs" (Dist. Ex. 22).

The CSE reconvened on August 30, 2019, and, in addition to the resource room services previously recommended, the CSE modified the student's specialized reading instruction to occur every day for 40 minutes on an individual basis and modified the counseling services to occur twice monthly for 40-minutes individually, and twice monthly for 40-minutes in a small group (5:1) (*compare* Dist. Ex. 19 at pp. 14-15, *with* Dist. Ex. 25 at p. 14).

The student attended Gow for the 2019-20 school year (Parent Exs. I-L; S).

A. Due Process Complaint Notice

By due process complaint notice dated June 18, 2021, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (IHO Ex. I at pp. 1, 12).¹ The parents contended that the June 2019 IEP "was substantively and procedurally inappropriate, inadequate and was not reasonably calculated to offer the Student an opportunity to make academic, social or emotional progress" (*id.* at p. 4).

The parents argued that the procedural inadequacies prevented the parent from meaningfully participating in the CSE process (IHO Ex. I at p. 4). The parents contended that the CSE failed to adequately include their concerns in the IEP, and therefore, denied their right to meaningfully participate (*id.* at p. 6). According to the parents, the district refused to provide them with specifics regarding the program and instruction it was recommending and the CSE continually dismissed the parents' concerns, interrupted the parent, and refused to discuss certain topics during the CSE meeting (*id.* at pp. 6, 12).²

¹ Pagination was not added to the exhibit entered as IHO Exhibit I. The first two pages of the exhibit consist of a facsimile cover sheet and a cover letter (*see generally* IHO Ex. I). For the purpose of this decision, the due process complaint notice, which begins at page three of the exhibit will be cited by reference to the pagination original to the document without taking into account the first two pages of the exhibit.

² The parents also argued that the program recommendations had nothing to do with the student's needs, but were based on the availability of programming options within the district and other inappropriate considerations (IHO

The parents argued that the CSE failed to sufficiently consider all of the evaluative information it had and failed to include relevant findings from the clinical neuropsychological evaluation within the IEP (IHO Ex. I at p. 9).

The parents asserted that the June 2019 CSE failed to offer a program that adequately addressed the student's needs for a small highly structured instructional class with individualized attention and specialized evidence-based teaching strategies throughout the school day (IHO Ex. I at p. 5). Although, the IEP included a recommendation for individualized reading instruction, the parent alleged it did not include a description of the type of instruction and the CSE failed to discuss how this instruction would have been tailored to address the student's unique learning needs (*id.*).³ The parents argued that the large general education classes would have been overwhelming for the student and could not provide the necessary supports throughout the school day to enable the student to make progress (*id.*).⁴ The parents pointed to the clinical neuropsychological evaluation, which found that a general education class was too large to address the student's needs and that the student required a full-time classroom environment with a small student-to-teacher ratio in order to address all of her educational needs (*id.* at pp. 5-6). The parents contended that the CSE failed to address which methodologies and strategies would have been used to help the student and address the student's learning needs (*id.* at p. 6). Moreover, the parents claimed that the CSE inadequately identified the student's present levels of performance as the IEP did not meaningfully discuss the student's learning disabilities, other than to state that they existed in the physical development section (*id.* at pp. 6-7).⁵ The parents also argued the IEP did not address the student's executive functioning deficits, which would not have been addressed in the general education setting (*id.* at p. 7).⁶ Moreover, the parents alleged that the CSE failed to recommend adequate instruction in writing and math, two areas of significant need (*id.*).⁷

The parents contended that the annual goals in the IEP were not appropriate to respond to the student's needs and deficits and did not provide a baseline or method of measurement (IHO Ex. I at p. 8). The parents argued that the CSE recommended counseling but did not create an

Ex. I at p. 8). The parents noted that they received an IEP draft prior to the June 2019 meeting, which recommended integrated co-teaching (ICT) services, but were never informed as to why the final IEP did not include ICT services as a recommendation (*id.* at p. 4).

³ The parents also argued that the CSE failed to describe how reading instruction would be integrated throughout the day while the student was in general education classes (IHO Ex. I at p. 7).

⁴ The parents asserted that the student's executive functioning challenges, anxiety regarding school, and attention deficit hyperactivity disorder (ADHD) would have "impeded her from being able to make progress in a large general education class" (IHO Ex. I at p. 5).

⁵ The parents asserted that the IEP made no reference to the student's diagnosis of dyslexia (IHO Ex. I at p. 9).

⁶ The parents argued that the district would not have been capable of implementing any support in the IEP for executive functioning or any other management needs in the large general education setting (IHO Ex. I at p. 7).

⁷ The parents alleged that the CSE did not recommend effective remediation to address the student's difficulties with math calculation and fluency (IHO Ex. I at p. 8).

annual goal related to social/emotional development and provided no strategies to address the student's social/emotional diagnoses and symptoms (id. at pp. 9-10).

Next, the parents argued that there was no evidence that the student would have been placed with peers who were functionally and academically appropriate (IHO Ex. at p. 7).⁸

The parents argued that the prior written notices did not incorporate any of the parents' concerns and did not sufficiently describe the other special education programs considered by the CSEs (IHO Ex. I at p. 10). Also, the parents argued that the August 2019 CSE meeting that convened after they sent their 10-day notice failed to make any meaningful changes to the program developed in June 2019 (id. at p 11). Accordingly, the parents contended that the August 2019 IEP deprived the student of a FAPE (id.).

For relief, the parents requested direct payment/tuition reimbursement for Gow and transportation costs (IHO Ex. I at p. 12). The parents contended that Gow was an appropriate educational placement and that equitable considerations favored reimbursement (id. at pp. 11-12).

B. Impartial Hearing Officer Decision

On February 9, 2022, the parties proceeded to an impartial hearing which concluded on August 18, 2022 after eight days of proceedings (see Tr. pp. 1-1090).^{9, 10} In an interim decision, dated July 1, 2021, the IHO denied the district's motion to dismiss (see IHO Ex. IV).¹¹

In a final decision dated November 10, 2022, the IHO found that the district offered the student a FAPE for the 2019-20 school year (IHO Decision at pp. 19, 24).

The IHO reviewed the student's cognitive profile, areas of educational need, social/emotional functioning, physical development, and management needs, including the information available to the June 2019 CSE from Kildonan (see IHO Decision at pp. 7-10). Regarding the development of the student's program for the 2019-20 school year, the IHO found that the parent was able to fully participate in the June 2019 CSE, specifically noting how many times the parent spoke at the meeting (id. at pp. 10-11, 23-24).

The IHO then summarized the CSE's recommendations for the 2019-20 school year from the June 2019 and August 2019 CSEs (see IHO Decision at pp. 13-15). Following the summary, the IHO noted the legal standard to apply and the issues raised by the parents (id. at pp. 15-16).

⁸ The parents also asserted that the recommended 12-month services were not appropriate as the student would have been placed with lower functioning students and would not have received appropriate instruction tailored to meet her unique learning needs (IHO Ex. I at p. 10).

⁹ The IHO held a prehearing conference with the parties on July 26, 2021 (Jul 26, 2021 Tr. pp. 1-45).

¹⁰ The parents were represented by counsel during the impartial hearing.

¹¹ The district filed a motion to dismiss with its response to the due process complaint notice (see IHO Ex. II). The parents filed a letter in opposition to the district's motion (see IHO Ex. III).

Next, the IHO held that the information from the clinical neuropsychological evaluation was "well known to the CSE and w[as] considered" in a November 2018 CSE meeting, as well as in the June 2019 CSE meeting (IHO Decision at p. 17). Moreover, the IHO determined that the IEP did not need to include the student's diagnosis of dyslexia as it was "included as part of the definition of Learning Disabilities" (id.). The IHO concluded that many of the student's "educational needs were included in the IEP's level of Functioning and Rate of Progress" (id. at p. 18).

The IHO also found that he was "satisfied the majority of the Student's academic or educational needs were addressed in the goals as developed in the IEP" (IHO Decision at pp. 12, 18).^{12, 13}

Turning next to the parents' arguments pertaining to teaching methodology, the IHO found that the "IDEA does not guarantee a right to a particular teaching methodology or personnel and that is a matter appropriately left within the discretion of the [district]" (IHO Decision at pp. 18-19). Additionally, the IHO held that there was extensive testimony on the training for district staff in specific methodologies such as Orton-Gillingham and Wilson Reading (id. at p. 19).

Regarding the student's social/emotional needs, the IHO found that the student possessed the psychosocial adaptive skills to make a successful transition into the district school (IHO Decision at pp. 20-21). The IHO concluded, based on the evidence in the hearing record, that the student "did not possess an anxiety or mood disorder that in anyway interfered with her ability to learn in any new and given high school environment" (id. at p. 21). The IHO noted that the student's IEP addressed the student's transition into the district school by including counseling to improve the student's coping skills (id.). As such, the IHO was in agreement with the June 2019 IEP's description of the student that she was capable of making a successful transition into the district's high school (id.). The IHO also found that the IEP's description of the student's physical development was appropriate and that no special education or services needed to be provided to address the student's physical needs (id. at p. 22).

Next, the IHO determined that resource room program and specialized reading instruction, along with annual goals, addressed the student's attentional, executive function, and reading needs (IHO Decision at p. 11). Moreover, the IHO held that "the special education programs in an individual and a group setting would provide the individualization" the student required (id. at p. 23). Overall, the IHO held that the recommended program, supports for the student's management

¹² As part of his discussion of the student's educational needs, the IHO found that there was no need for the annual goals to address the student's diagnosis of an adjustment disorder with mixed anxiety and depressed mood (IHO Decision at p. 8).

¹³ The IHO also noted that the student's IEP could have been amended after the annual review once the student attended the district high school and found that the parents were aware of a State regulation that permitted this (IHO Decision at p. 18, citing 8 NYCRR 200.4[g][2]).

needs, supplementary aids and services, and assistive technology were the necessary supports the student required to succeed in the district's 12th grade program (*id.* at pp. 22-23).¹⁴

Regarding the parents' claims about the grouping of the proposed classroom, the IHO concluded that a review of the class profile for the resource rooms in the hearing record was consistent with the regulation and that the student would have "fit into any number of combinations of possible grouping" within the resource rooms or specialized reading program (IHO Decision at p. 19).

Based on his findings, the IHO stated he was "satisfied that the IEP as developed by the CSE on [June 18, 2019] [wa]s appropriate to meet the Student's educational needs for the 2019-2020 school year" and that the student did not present with "psychosocial or physical issues or needs" that needed to be addressed in the IEP (IHO Decision at pp. 19, 23 [emphasis omitted]). The IHO concluded that the district met its burden to show that it offered a FAPE and would have educated the student in the least restrictive environment (LRE) (*id.* at p. 24). Having found that the district offered the student a FAPE, the IHO declined to address whether the unilateral placement was appropriate or whether equitable considerations favored an award of tuition reimbursement (*id.* at pp. 24-25). The IHO dismissed the parents' complaint for the 2019-20 school year (*id.* at p. 25).

IV. Appeal for State-Level Review

The parents appeal and assert that the IHO erred in finding that the district offered the student a FAPE for the 2019-20 school year. The parents' allegations in the request for review are at times repetitive and not always succinctly stated. Overall, the parents' claims are summarized directly below in terms of the type of violation that the parents reference on appeal; with respect to all allegations, the parents assert either that the IHO erred in incorrectly applying legal standards, making incorrect factual determinations, failing to make certain determinations, or giving undue weight to certain information and insufficient weight to other information. The parents' more specific arguments alleging that the IHO erred are detailed further below within the body of the discussion addressing the specific issues.¹⁵

The parents assert that the CSE was not properly composed. The parents also argue that they were denied the ability to meaningfully participate in the creation of the IEP. Moreover, the parents take issue with the degree that all committee members participated in the meetings and assert that the IEPs were developed outside of the CSE process. The parents raise concerns

¹⁴ The IHO noted that it was unfortunate that the student did not attend the CSEs meetings herself or observe the district's program (IHO Decision at p. 24). The IHO opined that this would have offered her knowledge of the school and an opportunity to ask questions and that in "the absence of this experience[], she was excluded from the decision making process for her final and transitional year in high school" (*id.*).

¹⁵ Although the IHO made a specific finding that the student would have been appropriately grouped within the resource room and specialized reading class (IHO Decision at p. 19), on appeal, the parents have not challenged this finding; accordingly, the IHO's determination that the student would have been appropriately grouped had she attended the proposed district program has 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]).

regarding the district's prior written notices. The parents further contend that the district failed to fully evaluate the student in all areas of suspected disability and failed to fully consider all the evaluative information before the CSE, specifically, the 2018 clinical neuropsychological evaluation.

Pertaining to the June 2019 and August 2019 IEPs, the parents argue that the student's present levels of performance were not appropriate and relied on wrong and/or false information. The parents also make several allegations that the annual goals were not appropriate.

Regarding the recommended educational program of placement in general education with resource room and additional supports, the parents argue that there was nothing to demonstrate how the student would have been supported in general education given her educational needs. The parents also assert that the IHO erred in making an LRE finding because the district did not demonstrate how it would have supported the student in the general education environment. Lastly, the parents argue that the evidence did not support a finding that district staff was properly trained in Orton-Gillingham or Wilson methodology.

In an answer, the district generally denies the allegations in the parents' request for review and asserts that the IHO's decision should be upheld in its entirety. In addition, the district asserts that the parents did not comply with State regulations governing practice before the Office of State Review as the request for review does not contain clear and concise statements of the issues. The district requests that the parents' appeal be dismissed on this basis. Moreover, the district asserts that the parents improperly raise new allegations on appeal that were not raised during the course of the proceedings. Finally, the district argues that the request for review was untimely.¹⁶

In a reply, the parents respond to the district's arguments.¹⁷

¹⁶ I have considered the various arguments raised by the district concerning the parents' compliance with Part 279 of the practice regulations, the scope of the impartial hearing, and the timeliness of the parents' amended request for review. I need not make discrete findings on each of these arguments in light of my findings on the merits herein, and, in any event, the district fails to particularize its arguments by, for example, identifying the specific allegations of the parents that the district deems insufficiently stated or raised for the first time on appeal. Regarding the timeliness of the parents' amended request for review, the district likewise makes no specific allegation regarding dates or improper service and review of the parents' affidavit of service and accompanying documents reflects that the amended pleading was served a few minutes late. The district has not alleged that the brief delay in accomplishing service of the amended pleading was prejudicial in any way, particularly where the original request for review was the pleading that commenced the appeal and the district had the benefit of that earlier document to anticipate the content of the amended pleading. The parties have both set forth cognizable arguments on the issues in dispute herein, sufficient for me to render a decision on the merits. Accordingly, I will not further discuss the district's procedural defenses.

¹⁷ The parents include several documents as additional evidence with their reply. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the documents were available at the time of the impartial hearing and are not necessary in order to render a decision. Further, the parents do not state in their reply for

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. 386, 399 [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]).

what purpose the documents are offered. Further, State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). The district did not raise any claims in or include any additional evidence with the answer to which the parents' additional evidence could be deemed to relate. Accordingly, the proffered documents will not be considered. With that said, to the extent the documents include copies of State guidance or State law, they have been considered to the extent relevant to the issues on appeal but, if necessary, will be cited directly.

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., 580 U.S. at 404). 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., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹⁸

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

¹⁸ 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., 580 U.S. at 402).

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 and August 2019 CSE Processes

1. CSE Composition

The parents contend that the CSEs were not properly composed. Specifically, they argue that the "IHO ignored the fact that the district did not have appropriate or qualified 'required by law' CSE team members" in attendance at the June or August 2019 CSE meetings (Req. for Rev. ¶ 21). The parents do not specifically articulate their claim about CSE composition further. The only allegations that could plausibly be deemed related pertain to the degree to which each member participated in the CSE meetings and the degree to which the background of the regular education teachers qualified them to contribute to the development of the IEPs (see id. ¶¶ 14-16).

The IDEA requires a CSE to include the following members: the parents; one regular education teacher of the student (if the student was, or may be, participating in the regular education environment); one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a district representative; an individual capable of interpreting instructional implications of evaluation results; at the discretion of the parent or district, other persons having knowledge or special expertise regarding the student; and if appropriate, the student (see 20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]).

Here, members of the June 2019 CSE included the CSE chairperson, an administrator for special education, a school psychologist, a special education teacher, a regular education teacher, a guidance counselor, the student's mother, and an administrator from Kildonan (Dist. Ex. 19 at p. 1). The August 2019 CSE included the same CSE chairperson and school psychologist as attended the June 2019 CSE meeting, different regular education and special education teachers, and the student's mother (compare Dist. Ex. 25 at p. 1, with Dist. Ex. 19 at p. 1). Based on this attendance, the CSEs included all of the required members. While the parents seem to generally take issue with the degree to which all of the committee members participated in the CSE meetings, the IDEA requires specific members to attend CSE meetings; it does not dictate the degree to which each member must participate. Instead, the IDEA requires that the CSE 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]). As detailed below, the CSEs considered these elements in developing the student's IEPs.

The parents also raise allegations regarding the qualifications of both of the regular education teachers who attended the CSE meetings. State regulation defines a "regular education teacher" for a school-age student as "a teacher qualified to serve nondisabled students who is providing regular education instruction to the student [or,] [i]f the student is not receiving instruction from one or more regular education teachers, a teacher qualified to provide regular education in the type of program in which the student may be placed" (8 NYCRR 200.1[pp][1]).

The teacher who attended the June 2019 CSE meeting, as the regular education teacher, testified that she was a reading teacher for the district middle and high schools and holds a certification as a reading specialist (Tr. pp. 264-66, 301, 343; Dist. Ex. 19 at p. 1; see Parent Ex. N; see also 8 NYCRR 80-2.7). The teacher testified that she was not certified as a regular education teacher and did not teach any general education classes at the district high school, but that she was able to participate in the CSE meeting as a general education teacher because she is a teacher (Tr. pp. 350-51). Based solely on this testimony, the parents' concern as to whether the teacher met the requirements for being a regular education teacher are understandable; however, as it is undisputed that the teacher was not a certified special education teacher (Parent Ex. Q at pp. 1-2; see 8 NYCRR 80-2.6), and as reading instruction is provided to both general education and special education students, it is likely that the teacher was correct and that she met the definition of a "regular education teacher" as set forth in State regulation (8 NYCRR 200.1[pp][1]). Nevertheless, even if she did not meet the standard, in this instance, given the participation of a different regular education teacher at the August 2019 CSE meeting, whose qualification is discussed below, any question about the qualifications of the teacher at the June 2019 CSE meeting was ultimately cured.

As the parents note, the regular education teacher at the August 2019 CSE meeting was a math teacher (Parent Ex. R at p. 3). However, this does not support a finding that the CSE was not properly composed as the math teacher at the August 2019 CSE was serving as a regular education teacher, which she acknowledged during the CSE meeting (Parent Ex. R at pp. 86, 107; see also Dist. Exs. 24 at p. 1; 25 at p. 1). The teacher further testified that she attended the CSE meeting as a regular education teacher (Tr. p. 735). Review of the transcript of the CSE meeting does not indicate that the math teacher was not capable of serving as a regular education teacher (see Parent Ex. R). Rather, she offered information during the CSE meeting as to how the general education setting would work for the student and how the student would be supported (id. at pp. 85-87).

As such, the hearing record demonstrates that the CSEs were properly composed, and the parents' claim to the contrary is without merit.

2. Parental Participation

The parents contend that they were unable to meaningfully participate in the creation of the student's IEPs. The parents argue that the IHO failed to listen to the recordings of the CSE meetings, which demonstrate that the CSE chairperson continually interrupted and dismissed the parent during the CSE meetings.

Initially, it is noted that the audio recordings of the CSE meetings were not formally entered into evidence during the impartial hearing; however, based on the parents' allegations, the

recordings were requested by the undersigned and are included as part of the hearing record as additional evidence. The recordings were listened to in their entirety and compared to the CSE meeting transcripts that were entered into the hearing record (see Parent Exs. Q; R). The recordings and transcripts are extremely similar if not an exact match in nearly all instances. Nevertheless, the recordings were helpful in ascertaining the tone of the meeting between district staff and the parent. Review of both the transcripts and the recordings show that the CSE meetings were at times contentious, especially the June 2019 meeting. However, the hearing record, including the CSE meeting audio recordings, does not support a finding that the parent was unable to meaningfully participate in the CSE process, especially in light of the second CSE meeting held in August 2019.

During the June 2019 meeting, the CSE chairperson attempted to facilitate the meeting in a coordinated way with the discussion first focusing on the student's present levels of performance. This discussion included information and contribution from both the parent and the Kildonan headmaster (see generally Parent Ex. Q at pp. 4-5, 10-15, 20-22, 23-24). However, at a certain point, the CSE chairperson's attempts to steer the discussion resulted in a tone that was increasingly argumentative and led to confusion as to what part of the IEP was being discussed, which explains some of the parent's concerns regarding the meeting. For example, while discussing the student's present levels of performance, the committee members delved into a discussion regarding annual goals, which was then later dismissed by the CSE chairperson as not the right time to discuss (*id.* at pp. 22-23, 61). The discussion regarding the inclusion of a spelling goal became heated at times with the committee members expressing frustration with one another (*id.* at pp. 24-38).¹⁹ After the discussion regarding the spelling goal, the CSE chairperson then dismissed the parent's question about other goals, stating that they were not discussing the goals section of the IEP yet (*id.* at p. 61).

In a few other instances during the June 2019 CSE meeting, it would be easy to understand why the student's mother felt dismissed or that her questions went unanswered. The CSE chairperson indicated that they would not be creating certain goals at the meeting because the Kildonan reports had not yet been included in the IEP (see Parent Ex. Q at pp. 67, 71-72). Towards the end of the meeting, during a discussion regarding the placement recommendation, the parent asked questions about a special class setting/grouping and how the student would receive remedial instruction during the school day (*id.* at pp. 81-83). Rather than taking the time to fully understand what the parent was asking, the CSE chairperson cut the parent off and ended the conversation without a full discussion of the questions being raised (*id.* at pp. 83, 85-86). The parent also asked several questions about the type of instruction the student would receive (*id.* at 83, 84-86, 94-95).²⁰

¹⁹ During this discussion, the student's mother wanted the CSE to include a baseline within the goal itself, while the CSE chairperson did not believe that was appropriate because the student was at grade level per the reports (Tr. pp. 32-34).

²⁰ These questions also pertain to the parents' allegations regarding methodology. The precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (*Rowley*, 458 U.S. at 204; *R.B. v. New York City Dep't of Educ.*, 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; *A.S. v. New York City Dep't of Educ.*, 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; *K.L. v. New York City Dep't of Educ.*, 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; *R.E.*, 694 F.3d at 192-94; *M.H.*, 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a

The CSE chairperson answered part of the parent's questions with a short and succinct answer, which likely did not satisfy the parent due to its lack of specificity related to the student's needs and how instruction would be given during the student's general education classes (*id.* at pp. 84, 91-92). When the meeting wrapped up, the parent requested another copy of the initial working draft of the IEP for her husband, but the CSE chairperson refused and informed the parent a final copy would be sent to them shortly (*id.* at 100-01). Despite all the shortcomings of the June 2019 CSE meeting, the parent was still able to ask questions and voice her opinion throughout the meeting. Additionally, overall, although the chairperson of the June 2019 CSE meeting could have handled the parent's questions in a more congenial manner, review of the transcript and the audio recording shows that the district was attempting to gather information regarding the student's needs with the intent of developing an appropriate IEP for the student and addressing the parent's concerns and that both the parent and the Kildonan headmaster made significant contributions to the meeting.

Moreover, a second CSE meeting occurred prior to the start of the school year in August 2019, which enabled to the parent to ask questions and obtain answers to her questions (*see generally* Parent Ex. R). Further, the tone and discussion during the August 2019 CSE meeting was cordial and overall showed cooperation (*see generally id.*). During the August 2019 meeting, the CSE members were much more active in the discussion and answered the parent's questions with much more information and specificity. For example, the CSE chairperson explained in detail the four reading programs that they might utilize to help the student with her reading deficits based on what they were seeing in the classroom (*id.* at pp. 8-10). All of the district CSE members discussed how they would help and assess the student when she arrived at school to determine which of the four programs they would use with her to assist her reading (*id.* at pp. 19-24, 38-41).²¹ CSE participants also answered the parent's questions regarding the instruction and support the student would receive in resource room (*id.* at pp. 56-59, 66-67). The special education teacher explained how a special education teacher would address the student's needs in resource room (*id.* at pp. 59-61, 63-65).²² The district staff addressed the parent's questions regarding multi-sensory instruction throughout the school day (*id.* at p. 83-86). The parent might not have been satisfied with the information she was provided at the August 2019 meeting, but the district staff clearly answered her questions and indicated how they would have helped the student if she enrolled in

procedural violation (*R.B.*, 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and *R.E.*, 694 F.3d at 192-94). The IHO correctly pointed out that an exact methodology is not required to be on the IEP, and review of the June 2019 and August 2019 IEPs shows that they did not indicate that any particular methodology was required to be used with the student (IHO Decision at pp. 18-19; *see* Dist. Exs. 19; 25). The CSE explained to the parent at the CSE meeting what type of teaching methods would be employed during general education and special education classes with the student and there is no reason to disturb the IHO's findings on this issue. Additionally, as discussed in the decision, the district did attempt to answer the parents' questions regarding methodology and teaching practices. Accordingly, any allegation regarding methodology as it pertains to the parents' ability to participate in the development of the student's IEP is without merit.

²¹ They also discussed how the programs would have enabled them to make decisions in the classroom as they helped the student (Parent Ex. R at p. 24).

²² He also discussed how the resource room teacher would coordinate with the student's other teachers (Parent Ex. R at p. 69-71).

the district for the 2019-20 school year. Additionally, the August 2019 CSE modified and added services compared to those recommended at the June 2019 CSE in an attempt to provide the student with more support and address some of the parent's concerns (*id.* at pp. 46-47, 102-03, 114-15; compare Dist. Ex. 19 at pp. 14-15, with Dist. Ex. 25 at pp. 14-15).²³ While the parent may have felt justified in being skeptical of the district due to prior experiences, the hearing record demonstrates that the parent was able to voice her concerns, which the August 2019 CSE considered.

On appeal, the parents also allege that the IEPs were developed outside of the CSE process. However, use of a draft IEP is not impermissible, nor is drafting the goals outside of the CSE meeting (see *G.W. v. Rye City Sch. Dist.*, 2013 WL 1286154, at *21 [S.D.N.Y. Mar. 29, 2013] [discussing the permissibility of using draft IEPs or having pre-formed opinions so long as that is combined with a willingness to hear parental objections and suggestions], *aff'd*, 554 Fed. App'x 56 [2d Cir. 2014]; *E.A.M. v. New York City Dep't of Educ.*, 2012 WL 4571794, at *8 [S.D.N.Y. Sept. 29, 2012] [recognizing that the IDEA does not require that goals be drafted at the CSE meeting]; *J.G. v. Briarcliff Manor Union Free Sch. Dist.*, 682 F.Supp.2d 387, 394 [S.D.N.Y.2010] [explaining that parental presence is not required during actual goal drafting]). As discussed above, the parents actively participated in the CSE meetings, and the district demonstrated an open mind. Thus, the district's use of a draft IEP does not support a finding that the district impeded the parents' participation or engaged in impermissible predetermination.

Based on the above, the hearing record, including the transcript and audio recordings of the June 2019 and August 2019 CSE meetings, supports the IHO's finding that the parents were able to meaningfully participate in the development of the student's IEPs.

3. Consideration of Evaluative Information

The parents argue on appeal that the IHO ignored that the district refused to discuss the "extensive 'comprehensive'" privately obtained 2018 neuropsychological evaluation during the CSE meetings in June and August 2019. The district asserts that in developing the June 2019 IEP, evaluations from prior years, including the 2018 neuropsychological evaluation, were considered along with updated information from the student's current school in the form of report cards and oral reports from the Kildonan headmaster who was present at the meeting.

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 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 accord the private

²³ For example, the CSE increased counseling services to include group counseling in order to address the concerns related to the student's transition back into the district (Parent Ex. R at p. 47).

evaluation any particular weight or adopt their recommendations (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]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

Review of the evidence in the hearing record shows that the 2018 neuropsychological evaluation had been considered at a prior CSE meeting, and that the June and August 2019 CSEs incorporated information from the report into the IEPs, together with updated information from other sources.²⁴

Specifically, the chairperson of the November 2018, June, and August 2019 CSE meetings testified that the CSE first considered the clinical neuropsychologist's input and recommendations both through his 2018 evaluation report as well as his attendance at the November 2018 CSE meeting (Tr. pp. 413, 418, 454-457, 481; Parent Ex. A at p. 24; District Exs. 9 at p. 1; 19 at p. 1; 25 at p. 1). During the June 2019 CSE meeting, the CSE chairperson asked the parent if she wanted to "go through" the prior evaluations that were included in the IEP, noting that "[t]hose ha[d] been reviewed at previous CSE [meetings]" (Parent Ex. Q at pp. 17, 40). The transcript of the June 2019 CSE meeting reflects the CSE chairperson's statement that "all the older evaluations [were] in [the IEP]" and that regarding the clinical neuropsychologist's recommendations, the CSE would "continue to keep those pieces in" (id. at pp. 16, 40-41). She testified that the student's deficit areas identified within the 2018 neuropsychological evaluation report were considered by the CSE and "documented throughout the IEP," the CSE considered the student's "standardized test scores and how they play[ed] into the development of the needs and goals," and that the diagnoses listed in the June 2019 IEP were also from the clinical neuropsychologist's evaluation (Tr. pp. 456, 481). Further, the CSE chairperson stated that "the committee took into consideration all the recommendations from [the clinical neuropsychologist's] report" (Tr. p. 457). In addition, the parent inquired about the CSE's understanding of the student's deficits and dyslexia diagnosis as reflected in the 2018 neuropsychological evaluation at the August 2019 CSE meeting (see, e.g., Parent Ex. R at pp. 26-34, 42, 99; Dist. Ex. 25 at p. 2).

Review of the 2018 neuropsychological evaluation report shows the clinical neuropsychologist described the student as having "relative strengths in her verbal conceptualization skills and fund of vocabulary" and her "non-verbal problem-solving, deductive reasoning, and visual-spatial processing abilities [were] also generally well-developed" (Parent Ex. A at p. 17). Additionally, the student exhibited strengths in language skills; she had "a solid memory capacity" and intact visual-spatial perception, visual discrimination, and fine motor skills

²⁴ Review of the June and August 2019 IEPs shows they are identical but for the evaluation/reports considered and recommended special education programs and services sections (compare Dist. Ex. 19, with Dist. Ex. 25). As the majority of the IEP was developed at the annual review meeting in June 2019, I will refer to the June 2019 IEP in this decision except when noted.

(id. at p. 18). In contrast, the student's "visual-motor processing speed remain[ed] a meaningful deficit within her overall cognitive profile," and weaknesses were noted "in executive functioning" that "contribute[d] to vulnerabilities in her working memory capacity" (id. at p. 17). According to the report, the student demonstrated "weaknesses in aspects of her self-generated planning, organization, self-monitoring, and cognitive flexibility" (id. at p. 18). Further, the clinical neuropsychologist indicated that the student exhibited "meaningful weaknesses in reading, writing, and math," which affected her academic performance (id. at p. 17). The student received diagnoses of specific learning disorder, moderate severity, with impairment in reading, written expression, and mathematics; attention-deficit/hyperactivity disorder, predominantly inattentive presentation; and adjustment disorder with mixed anxiety and depressed mood (id. at p. 20). Based on the testing conducted, the clinical neuropsychologist included a variety of recommendations in his report (id. at pp. 21-24).

Within the June 2019 IEP, information from the clinical neuropsychologist's evaluation report was found in numerous places. For example, the specific diagnoses from the clinical neuropsychologist were on the IEP summary page, as well as within the academic achievement, functional performance and learning characteristics, social development, and physical development, and the effect of student's needs on involvement and progress in the general education curriculum sections of the IEP (compare Parent Ex. A at p. 20, with Dist. Ex. 19 at pp. 1, 10-12).

Review of the IEP evaluation results section includes information from both the Beery Buktenica Test of Visual Motor Integration and Behavior Rating Inventory of Executive Functioning, results which were reflected in the clinical neuropsychologist's testing (compare Parent Ex. A at p. 27, with Dist. Ex. 19 at p. 4). The IEP summary of the student's intellectual functioning included results from both the district's September 2018 psychological evaluation as well as the clinical neuropsychologist (Dist. Ex. 19 at p. 10; see Dist. Ex. 5 at p. 2). Specific to the neuropsychological evaluation, the IEP reflected the student's performance on the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV); that her processing speed was noted as a weakness, as was her deficit in rapid naming and executive functioning (compare Parent Ex. A at pp. 9, 10, 11, 12, 17, 18, 19, 25, with Dist. Ex. 19 at p. 10). The IEP described "[a]ll other" IQ subtest scores as average to above average as reported "by both evaluators" (compare Parent Ex. A at p. 25, with Dist. Exs. 5 at p. 2; 19 at p. 10).

Next, the IEP reflected information from the 2018 neuropsychological evaluation indicating that the student benefitted from extra time to read in order to improve her comprehension (compare Parent Ex. A at pp. 14-15, with Dist. Ex. 19 at p. 10). Math fluency was also identified as an area of difficulty (compare Parent Ex. A at p. 15, with Dist. Ex. 19 at p. 10). The student's specific test results related to mathematics (Kaufman Test of Educational Achievement, Third Edition), writing (Kaufman Test of Educational Achievement, Third Edition) and speech-language (Clinical Evaluation of Language Fundamentals, Fifth Edition) as reported by the clinical neuropsychologist were reflected in the IEP, as was a recommendation for the student to use a graphic organizer for writing (compare Parent Ex. A at pp. 22, 26, 30, with Dist. Ex. 19 at p. 10).

The clinical neuropsychologist's observation that the student struggled with aspects of her executive functioning skills, specifically related to time management and organization, was

included in the IEP within the academic, developmental, and functional needs of the student section (compare Parent Ex. A at p. 10, with Dist. Ex. 19 at pp. 10-11). The clinical neuropsychologist also noted that the student would benefit from "access to audio versions of all assigned textbooks" and "[u]sing an online or computer-based thesaurus or dictionary" along with the "[u]se of computer with spell check" and "[u]se of graphic organizers (e.g., Inspiration software)" (Parent Ex. A at p. 22). Consistent with that observation, the CSE identified that the student needed to use assistive technology (Dist. Ex. 19 at p. 12). The clinical neuropsychologist recommended that the student participate in extracurricular activities so that she could connect with her peers; the IEP reflected that the CSE shared the high school club and activity handbook with the parent (compare Parent Ex. A at p. 24, with Dist. Ex. 19 at pp. 12-13, 17).

The CSE developed measurable annual goals using information from the clinical neuropsychologist's report. Specifically, the annual goals included using a systematic approach to time management and organization to address executive functioning skills; increasing the student's rate and fluency when reading; and using the writing processes of planning, revising, editing, and rewriting with a focus on editing and proofreading skills (compare Parent Ex. A at pp. 22-23, with Dist. Ex. 19 at pp. 13-14). Additionally, a coping skills annual goal was also included in the IEP, along with counseling (Dist. Ex. 19 at pp. 14, 15). The CSE chairperson indicated counseling was recommended due to the student's diagnosis of mixed anxiety and depressed mood from the clinical neuropsychologist (compare Tr. p. 506, with Parent Ex. A at p. 20; see Dist. Ex. 19 at p. 15).

The CSE chairperson acknowledged that "[the student] work[ed] at a reduced pace" and exhibited attention deficits, therefore, the CSE provided test accommodations to allow her that extra time, and resource room services to account for her processing speed delay (compare Tr. pp. 515-16, with Dist. Ex. 19 at pp. 14, 16). The CSE recommended the following supplementary aids and services/program modifications/accommodations consistent with the clinical neuropsychologist's recommendations: copy of class notes; preferential seating; check for understanding of directions; spelling waived; use of a calculator; access to a Chromebook; text-to-speech software (compare Parent Ex. A at pp. 21-22, with Dist. Ex. 19 at p. 15). In addition, the clinical neuropsychologist also recommended testing accommodations included in the June 2019 IEP of extended time (double-time), location with minimal distractions, spell check device (or spelling waived), access to a word processor (including access to speech-to-text and text-to-speech software), and use of a calculator (compare Parent Ex. A at pp. 21-23, with Dist. Ex. 19 at p. 16).

Based on the foregoing and contrary to the parents' contention on appeal, review of the June 2019 IEP reflects numerous points at which the clinical neuropsychologist's 2018 neuropsychological testing results and recommendations were reviewed, considered, and included in the student's program for 2019-20 school year.²⁵

²⁵ On this same basis, there is no merit to the parents' allegation on appeal that the IHO erred in relying on the prior written notices issued by the district because they "misrepresented" that the 2018 neuropsychological evaluation was reviewed at the CSE meetings (see Dist. Exs. 21; 27).

4. Sufficiency of Evaluative Information

The parents argue on appeal that the IHO: relied on IEPs which failed to include 'comprehensive and current evaluation data' that identified the student's specific needs; disregarded that the district's 2018 psychological re-evaluation was conducted by an intern who made errors; ignored that the district's academic evaluation was not comprehensive in that it failed to assess the student's "foundational skill deficits/dyslexia"; relied on "misinformation" from the OT evaluation report; and dismissed the fact that the district did not conduct assistive technology or transition assessments of the student. Contrary to the parents' allegations, review of the evaluative information available to the June and August 2019 CSEs shows that it was sufficient for the CSE to develop the student's IEPs.

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

Review of the evidence in the hearing record shows that the June 2019 CSE had before it the following evaluative information from Kildonan: April 2019 Kildonan teacher reports regarding present levels of performance; 2018-19 Kildonan testing; 2018-19 Kildonan quarter three report cards; and verbal input from the headmaster of Kildonan and the parent (Tr. pp. 465, 471, 477-79; Dist. Exs. 10; 17; 19 at pp. 2-3; 21).²⁶ Review of the June 2019 IEP shows that it contained the results of standardized testing completed by Kildonan during the 2018-19 school year as well as explanations of the results (compare Dist. Ex. 19 at pp. 2-3, 10, with Dist. Ex. 17 at p. 4; see Parent Q at pp. 4-10). The June 2019 IEP present levels of performance included the

²⁶ The 2018-19 Kildonan testing included results of administrations of the Woodcock Reading Mastery Tests-Third Edition (WRMT-3) to the student in September 2018 and June 2019, the Gates-MacGinitie Silent Reading Test-Fourth Edition (GMRT-4) in September 2018, the Gray Oral Reading Test-Fifth Edition (GORT-5) in May 2019, and the Nelson-Denny Reading Test (Nelson-Denny) in May 2019 (Dist. Ex. 17).

student's grades as reported by the 2018-19 Kildonan quarter three report card for all three quarters as well as what was reported by Kildonan's headmaster during the CSE meeting (compare Dist. Ex. 19 at p. 10, with Dist. Ex. 10; see Parent Ex. Q at pp. 4-10). Additionally, the June 2019 IEP contained evaluation results from an August 2018 private neuropsychological evaluation, a September 2018 district psychological evaluation, a September 2018 district educational evaluation, a September 2018 district psycho-social update, and an October 2018 OT evaluation (compare Dist. Ex. 19 at pp. 3-4, 11, with Parent Ex. A, and Dist. Exs. 4-7).²⁷ Given that a significant amount of information was prepared during the 2018-19 school year by Kildonan and was made available to the June 2019 CSE, including standardized testing conducted during that school year, the parents' claims that the CSE lacked comprehensive and current evaluative data that identified the student's academic needs is not supported by the evidence in the hearing record.

Although as described above the hearing record shows that the CSE had considered and used information from the 2018 neuropsychological evaluation, the parents also assert claims regarding the district's 2018 reevaluation on appeal.²⁸ Specifically, the parents allege that the district's 2018 psychological evaluation was conducted by a provisional intern who did not evaluate the student's processing speed and made scoring "errors." Review of the district's evaluation report shows that the sole evaluator listed carried the title of "Certified School Psychologist" and identified her credentials as "MS.ED. PD" (Dist. Ex. 5 at pp. 1, 4). To the extent that the administration of the Stanford-Binet Intelligence Scale-Fifth Edition (SB-5) to the student as part of the district's 2018 psychological evaluation did not specifically assess her processing speed (see id. at p. 2), that skill was evaluated during the clinical neuropsychologist's administration of the Wechsler Adult Intelligence Scale-Fourth Edition, which indicated that the student's processing speed was a "notable deficit"; a need reflected in the June 2019 IEP (compare Parent Ex. A at pp. 9, 10, with Dist. Ex. 19 at p. 10).²⁹ While it appears that the student's full-scale IQ was inconsistently reflected on page two of the district's 2018 psychological evaluation report, both quotients were in the average range, consistent with results from the August 2018 clinical neuropsychologist's evaluation of the student's intellectual functioning (compare Parent Ex. A at p. 9, with Dist. Ex. 5 at p. 2). Regarding the parents' allegation that the student's working memory skills were in the low average range yet the "district IEP note[d] that working memory [wa]s a 'strength,'" the June 2019 IEP specifically stated that "[m]emory [wa]s a strength"—not working memory—which was consistent with the clinical neuropsychologist's finding that the student's "overall performance on tasks of learning and memory fell within or above age expectation" (compare Parent Ex. A at p. 13, with Dist. Ex. 19 at p. 10). Even if, as alleged, the district's 2018 psychological evaluation did not assess all areas of cognition or the report contained minor errors, as discussed above, that report was only one of many sources of evaluative information considered

²⁷ The CSE chairperson testified that the August, September, and October 2018 evaluation reports had been reviewed at the November 2018 CSE meeting (Tr. pp. 413-18; Dist. Ex. 9 at p. 2).

²⁸ Although these evaluations were conducted during the prior school year which is not at issue, I will review the parents' claims insofar as they relate to the evaluative information that the June 2019 CSE used to describe the student's present levels of performance.

²⁹ Similarly, the student's executive functioning skills were assessed during the 2018 neuropsychological evaluation, and her ADHD diagnosis and executive functioning deficits in the areas of time management and organization were reflected in the June 2019 IEP (Parent Ex. A at pp. 12-13; Dist. Ex. 19 at p. 10, 11).

by the CSE, including the 2018 neuropsychological evaluation of the student (Tr. pp. 413, 418, 454-457, 481; Parent Ex. A at p. 24; Dist. Exs. 5; 10; 17; 19 at p. 2).

The parents next assert that the IHO ignored her argument that the district's 2018 educational evaluation was not "comprehensive" to assess the student's "foundational skills deficits/dyslexia." Review of the evaluation report shows that specific to reading skills, the special education teacher administered the Wechsler Individual Achievement Test-Third Edition (WIAT-III) and the Gray Silent Reading Test (GSRT) to the student (Dist. Ex. 4; see Dist. Ex. 19 at p. 1). WIAT-III results included a total reading composite standard score of 89 (average) with reading comprehension, word reading, pseudo-word decoding, and oral reading fluency subtest standard scores all in the average range (Dist. Ex. 4 at p. 2). Results of the GSRT, a measure of silent reading comprehension, indicated that the student's skills were in the average range (id. at pp. 2, 5). Although on these measures the student's reading skills were assessed to be in the average range, other evaluative information available to the June 2019 CSE reflected the student's specific reading difficulties. For example, the 2018 neuropsychological evaluation indicated that the student's single word-reading, phonemic decoding, word reading efficiency, and overall oral reading skills fell below expectation (Parent Ex. A at pp. 14-15). Kildonan's administration of the GORT-5 to the student in May 2019 yielded scores at the 25th percentile, and a Nelson-Denny reading rate score in the 8th percentile (Dist. Ex. 17 at pp. 1, 2, 4). Therefore, contrary to the parents' arguments on appeal, the CSE did have evaluative information about the student's "most severe deficits."

The parents allege that the IHO relied on "misinformation from the student[']s inappropriate and inaccurate [OT] evaluation." They assert that the functional skills assessment chart "could not have been done sitting in a conference room for two hours" and that the OT report stated that the student should use, but did not contain, compensatory strategies. Review of the October 2018 OT evaluation report shows that it was conducted by a licensed occupational therapist from an agency at the district office (Dist. Ex. 7 at p. 1). According to the report, the student completed all testing items with little or no guidance, was cooperative, and performed all writing tasks requested of her (id.). The evaluation report reflected the parent's report that the clinical neuropsychologist had "made mention of [the student] having fine motor and eye hand coordination deficits" (id.). The occupational therapist administered standardized assessments which included the Motor-Free Visual Perception Test-Third Edition (MVPT-3) and the Wide Range Assessment of Visual Motor Abilities (WRAVMA) and described the student's skills in the areas of postural stability, fine motor and bilateral coordination, visual motor skills including handwriting, sensory processing and motor planning, and overall classroom performance (id. at pp. 2-3). The student achieved a MVPT-3 standard score of 92 (30th percentile), and the following WRAVMA subtest standard scores: drawing 121 (92nd percentile), matching 108 (70th percentile), and pegboard 89 (23rd percentile) (id. at p. 2). The report indicated that the drawing subtest assessed visual motor skills, and the pegboard subtest measured fine motor skills (id.). Other information related to the student's eye hand coordination and fine motor skills included that she easily completed the writing sample when provided with increased time, she demonstrated good letter formation and spacing, she copied a paragraph with good legibility, during motor tasks she "was able to sequence from one task to another with minimal prompting" (id. at p. 3). Completion of a functional skills assessment for high school-based OT indicated that the student was able to perform school related activities of daily living, and fine motor, visual motor, sensory, cognitive, and psychosocial tasks at a level "3" (skill level is functional, may require verbal cues)

or "4" (student completes task independently or age appropriately) (*id.* at p. 5). The occupational therapist concluded that the student demonstrated an immature writing grasp that may cause fatigue during writing (*id.* at p. 3). Contrary to the parents' assertion, the OT evaluation report contained general strategies to improve the student's pinch strength, recommended using a slant board, ensuring adequate lighting, demonstrating correct grasp and providing a pencil grip, and copying pegboard and Lite Brite designs (*id.* at p. 4). As such, without further elaboration from the parents as to how the OT evaluation was "inappropriate" and "inaccurate," review of the report shows that the occupational therapist assessed a variety of skills the student needed to be able to perform in the classroom, provided strategies to address the weaknesses the student demonstrated, and the evaluation was sufficient to provide information to the CSE in order to develop the student's IEPs.

As to the parents' claim that the IHO ignored her assertion that the district failed to conduct a transition assessment, review of the November 2018 IEP shows that it included information from an August 2018 Level 1 vocational assessment, and the CSE chairperson testified that was "part of the transition process" (Tr. p. 417; Dist. Ex. 9 at p. 2).³⁰ She explained that the vocational assessment looked at what special education supports students required to assist their transition to "either education or adult life" depending on the student (Tr. pp. 417-18). The assessment contained student, parent, and teacher components to "look[] at that student and transition from all three perspectives" (Tr. p. 418). While the Level 1 vocational assessment was not included in the hearing record, in September 2018, the student reported that post-high school she saw herself "going on to a 4 year college preferably Pace or Boston University" where she hoped to "get into their acting programs" and eventually have a career as an actor (Dist. Ex. 4 at p. 1). The student also indicated that she envisioned herself living independently (*id.*). Review of the June 2019 IEP shows that the CSE developed a transition plan and post-secondary goals for the student, which the parents do not allege were inappropriate (Dist. Ex. 19 at pp. 12-13, 17). Specifically, the June 2019 IEP reflected the student's report that her goal was to attend a four-year college, and that she was interested in becoming a writer, actor, or entrepreneur (*id.* at pp. 12-13). The CSE provided the student and family with information about electives and afterschool activities that aligned with those interests and various resources to aid in the student's transition from high school to post-secondary, including information regarding "ACCES-VR" and course offerings regarding vocational programs (*id.* at pp. 12-13, 17).³¹ The IEP indicated that should the student return to the district, she would need to "investigate extracurricular activities and explore post-secondary options" with her case manager and guidance counselor (*id.* at pp. 13, 17). Further, the June 2019

³⁰ Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; *see* Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills, and transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). State regulation requires districts to conduct vocational assessments of students at age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]).

³¹ ACCES-VR refers to the New York State Education Department's Adult Career and Continuing Education Services-Vocational Rehabilitation office.

IEP indicated the student would be working on Regents level curriculum in all academic areas, and the district would conduct a transcript review upon her return to the district (*id.*). The transition plan identified that the student would receive specialized reading instruction to improve her reading ability and counseling to develop self-determination skills (*id.* at p. 17). Lastly, the CSE determined that a functional vocational assessment was not applicable to the student at that time (*id.*). Given the above, the June 2019 CSE had sufficient information upon which to identify the student's transition needs and develop a plan for the student to transition from school to post-school activities.

The parents also alleged that the district failed to conduct an assistive technology evaluation of the student. While the hearing record does not include evidence that an assistive technology evaluation was ever conducted, review of the evaluative information available to the June 2019 CSE did not reveal a recommendation for or suggest that the student required an assistive technology evaluation in order for the CSE to determine what the student's assistive technology needs were or recommend the assistive technology devices and services that it did—including those consistent with the clinical neuropsychologist's August 2018 recommendations as discussed above—together with four hours per year of assistive technology consultation services (*see* Dist. Exs 4-7; 10; 17; *compare* Parent Ex. A at pp. 21-22, *with* Dist. Ex. 19 at pp. 15).

Based on all of the foregoing, the evidence in the hearing record does not support the parents' allegations that the evaluative information available to the June and August 2019 CSEs was insufficient for the CSE to develop the student's IEPs.

B. June and August 2019 IEPs

1. Present Levels of Performance

On appeal, the parents argue that the IHO erred in finding that the IEP for the 2019-20 school year was appropriate, in part because it failed to reflect the nature and extent of the student's disabilities. According to the parent, the CSE "cherry-picked" data to include in the IEP, and the student had physical development and sensory needs that were not addressed.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; *see* 8 NYCRR 200.1[ww][3][i]). 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]).

The June 2019 IEP present levels of academic achievement and functional performance reflected results from the September 2018 administration of the SB-5, which showed that the student's full-scale IQ of 94 was in the 34th percentile (*compare* Dist. Ex. 19 at p. 10, *with* Dist. Ex. 5 at p. 2). The IEP also included results of an administration of the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV) contained in the August 2018 neuropsychological evaluation,

which indicated that her full-scale IQ of 100 was in the 50th percentile (compare Dist. Ex. 19 at p. 10, with Parent Ex. A at pp. 9, 25). Further, the IEP indicated that both evaluations showed that the student's processing speed was a weakness; however, all other IQ subtests administered by both evaluators yielded scores that were average to above average (Dist. Ex. 19 at p. 10). Finally, the IEP indicated that the student had deficits in rapid naming and executive functioning, her memory was a strength, and her language skills were well developed (id.).

In reading, the June 2019 IEP indicated that the student had received the diagnosis of specific learning disorder with impairment in reading, moderate severity, and noted that her reading rate was a deficit and she comprehended better when given extra time (Dist. Ex. 19 at p. 10). Additionally, according to teacher reports, the student had difficulty making critical claims and supporting her claims from literature and that she had a weakness in her reading rate (id.).

In mathematics, information reported at the June 2019 CSE meeting included the student's pre-calculus grades during the first three quarters of the 2018-19 school year, which ranged from 80 to 85 and indicated that she successfully demonstrated an understanding of algebraic operations using the correct order of operations (compare Dist. Ex. 19 at p. 10, with Dist. Ex. 10 at p. 1). The IEP further reflected teacher reports that the student demonstrated weakness when working on algebraic expressions in order to work with linear equations and quadratic functions, and noted that in the past she had difficulty with math fluency for problem solving (Dist. Ex. 19 at p. 10). The June 2019 IEP reported information from the November 2018 reevaluation meeting, which indicated that the student continued to have weakness with math fluency and basic calculations (id.). Additionally, the IEP reflected the student's math composite standard score of 84 (14th percentile) from the September 2018 administration of the WIAT-III, and that her score on the August 2018 administration of the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) math concepts and applications subtest was in the 37th percentile (compare Dist. Ex. 19 at p. 10, with Parent Ex. A at pp. 1, 30, and Dist. Ex. 4 at pp. 1, 2). The IEP further indicated that the student's KTEA-3 math computation score was in the 19th percentile and in the 14th percentile on the WIAT-III (compare Dist. Ex. 19 at p. 10, with Parent Ex. A at p. 30, and Dist. Ex. 4 at p. 2). Finally, the IEP indicated that the student's standardized math scores completed by Kildonan in September 2018 and May 2019 were considered to be average (Dist. Ex. 19 at p. 10; see Dist. Ex. 17).

With regard to writing, the June 2019 IEP present levels of performance indicated that the student's writing skills were reported to be weaker than her reading skills (Dist. Ex. 19 at p. 10). During the June 2019 CSE meeting, Kildonan staff reported that the student: had deficits with writing higher level critical thinking pieces when making claims from text and providing supporting details; was weak in writing mechanics and proof-reading skills; wrote short pieces and struggled with expanding her writing ideas; and that she lacked fluency, stamina, and her writing rate was poor (id.). Additionally, the June 2019 IEP contained the following information from the November 2018 reevaluation meeting: the student achieved a standard score of 97 (42nd percentile) in written expression on the KTEA-3, and 98 (45th percentile) on the Test of Written Language, Fourth Edition (TOWL-4) (id.). The IEP indicated that both of the student's scores were considered to be in the average range (compare Dist. Ex. 19 at p. 10, with Parent Ex. A at pp. 15, 30, and Dist. Ex. 4 at p. 2). According to the IEP, at that time the student required the support of a graphic organizer, and due to the parents' concerns about the student's spelling skills—despite

test results from Kildonan that indicated the student's spelling skills were above a 12th grade level—the CSE "agreed to add a spelling goal" (Dist. Ex. 19 at p. 10).

Regarding speech-language development, the June 2019 IEP reflected that the student achieved a core language score in the 70th percentile on administration of the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5) (compare Dist. Ex. 19 at p. 10, with Parent Ex. A at p. 26).

The June 2019 IEP reflected the student's academic development and functional needs, including needs that were of concern to the parents, indicating that the student needed to: write at a higher level with more critical thinking when making claims from text and providing supporting details in written pieces; improve her mechanics of writing and proof-reading skills; expand her writing ideas; improve her fluency, stamina and rate of writing; improve her ability to make critical claims and support her claims from literature when reading; increase her rate and fluency of reading; improve her executive functioning skills in the areas of time management and organization; spell words from grade level curriculum; and improve her skills with algebraic expressions in order to work with linear equations and quadratic functions (Dist. Ex. 19 at pp. 10-11).

With regard to the student's present level of social development, the June 2019 IEP indicated that the student had received the following diagnoses: specific learning disorder, moderate severity, with impairment in reading, written expression and mathematics; attention deficit hyperactivity disorder, predominantly inattentive presentation; and adjustment disorder with mixed anxiety and depressed mood (Dist. Ex. 19 at p. 11). Additionally, the IEP described the student as a "leader in the campus community" and noted that she had many friends at Kildonan (id.). The June IEP indicated that the parent continued to report that the student would be anxious if she returned to the district (id.). The CSE determined that if the student returned to the district, she may need social/emotional support and that she would need to improve her coping skills during the transition (id.).

The June 2019 IEP described the student's present level of physical development, reflecting the parent's report that the student had amblyopia and scoliosis (Dist. Ex. 19 at p. 11). The IEP indicated that the student could be reluctant at times to participate in sports and fitness activities at Kildonan and that she successfully participated in the school ski program (id.). The IEP further reported from an October 2019 OT evaluation that the student attained scores in the average range and therefore direct services were not recommended (Dist. Ex. 19 at p. 11; see Dist. Ex. 7). According to the IEP, the parent "requested services based on the general strategies for all students that were provided to her as part of the report"; therefore, the CSE recommended an OT consultation (Dist. Ex. 19 at pp. 11, 15). With regard to physical development needs, the June 2019 IEP indicated that "there [we]re no physical, sensory or motor needs that should be addressed through special education at this time. There [we]re no fine motor or gross motor delays at this time to be addressed through special education" (id. at p. 11).

With regard to management needs, the June 2019 CSE determined that "the student require[d] the additional support of special education services to be successful in the regular education classroom. [The] [s]tudent require[d] support in a small group to transition from the 1:1

tutoring and small group setting that she has been educated in for the past 4 years" (Dist. Ex. 19 at p. 11).

To the extent the parents argue that the June 2019 CSE "cherry-picked" the information used to develop the student's present levels of performance, based on the information described in detail above, the IEP reflected the student's diagnoses of specific learning disorder in reading, mathematics and writing and associated areas of academic weakness; diagnosis of ADHD and specific areas of executive functioning deficits; and diagnoses of anxiety and adjustment disorder and need for supports and counseling to assist with her potential return to the district (Dist. Ex. 19 at pp. 10-11, 15-16). Additionally, review of the evidence in the hearing record does not support the parents' position that the student exhibited physical and/or sensory needs to the extent that they were required to be included in the IEP (see Parent Ex. A at pp. 11-12, 18; Dist. Exs. 3; 6; 7).

2. Annual Goals

In the decision, after reviewing the present levels of performance, the IHO summarized the annual goals and concluded that "the majority of the [s]tudent's academic or educational needs were addressed in the goals as developed in the IEP" (IHO Decision at p. 18). The parents argue that the IHO erred in finding that the June 2019 IEP annual goals—which were "recycled without change" on the August 2019 IEP—were appropriate and that the IHO failed to provide any evidence or explanation to support his determination.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).³²

Generally, review of the June 2019 IEP shows that it included an annual goal to improve the student's use of a systematic approach to time management and organization in order to improve her executive functioning skills, which were specifically identified as areas of need (Dist. Ex. 19 at pp. 10, 13). Regarding writing, the IEP included annual goals to improve the student's use of correct grammar, capitalization, and punctuation; ability to correctly spell words from literature and content area subjects; write a narrative using concrete and sensory details from different points of view using various techniques; use the writing process with a focus on editing and proofreading skills; and increase writing stamina and rate; all areas of need reflected in the present levels of performance (id. at pp. 10-11, 13-14). In the area of social/emotional functioning, the CSE developed an annual goal for the student to improve her coping skills to support her

³² Review of the June 2019 IEP annual goals shows that they included criteria for measurement (e.g. 75 percent success over 5 weeks, 85 percent success over two weeks), methods of how progress would be measured (e.g. daily planner, recorded observations, work samples), and schedules when progress would be measured (e.g. every 5 weeks, every 10 weeks) (Dist. Ex. 19 at pp. 13-14).

transition back to the high school, to address the parents' concerns about the student's anxiety upon return to the district (id. at pp. 11, 14).

With respect to the parents' argument that the IEP did not contain annual goals related to the student's needs in decoding, the 2018 neuropsychological evaluation report indicated that "she evidenced vulnerabilities in her decoding skills," which, together with "issues with working memory and executive functioning" affected her decoding and word reading accuracy (Parent Ex. A at p. 14). However, in September 2018 on the WIAT-III word reading and pseudo-word decoding subtests, the student achieved standard scores of 100 and 90, respectively, both in the average range (Dist. Ex. 4 at p. 2). In September 2018 and May 2019 Kildonan administered the WRMT-3 word identification and word attack subtests to the student—measuring her ability to read lists of isolated words accurately and apply phonetic and structural analysis skills to read nonsense/low frequency words, respectively—on which she achieved standard scores between 90 to 104 that were all within the average range (Dist. Ex. 17). The June 2019 IEP included an annual goal for the student to increase her rate and fluency when reading (Dist. Ex. 19 at p. 13). The CSE chairperson testified that at the time the annual goals were developed, "[b]ased on the reports from her teachers at her current school" the student's "decoding was pretty solid" so that the CSE was "looking at more like text based evidence goals" to help the student connect her reading and her writing skills together (Tr. pp. 627-29, 649). Additionally, various reading programs that could have been used with the student had she returned to the district included a decoding component that would have allowed her to continue to improve her decoding skills (see Tr. pp. 443-44, 526-27, 626). The student's other annual goal addressing reading was designed to improve her ability to determine central ideas of a text, analyze their development over the course of the text, and provide an objective summary of the text, consistent with her need to connect reading and writing skills (Dist. Ex. 19 at pp. 10, 12).

The parents state that the IHO acknowledged that the IEP math annual goals were "simply general education math goals and should not be placed on an IEP." At the time of the June 2019 CSE meeting, the student had achieved math standardized test scores in the average range on assessments administered by Kildonan (Dist. Exs. 17; 19 at 10). The student's grades in pre-calculus class were in the 80 range, and the CSE reported that her teacher identified that the student needed to improve her ability to work on algebraic expressions in order to work with linear and quadratic functions (Dist. Ex. 19 at p. 10). The student was recommended to attend a general education classroom and the math annual goals contained in the June 2019 IEP were developed to improve the student's ability to solve linear equations and pairs of simultaneous linear equations and to describe linear and exponential functions that arose in problems in terms of context (id. at p. 14). According to the mathematics teacher who attended the August 2019 CSE meeting, both of the annual goals targeted skills in algebra 1 (9th grade level) and algebra 2 (11th grade level) and were concepts taught within the high school curriculum (Tr. pp. 727-28, 734-35, 739-40). Without further specification from the parents as to why the mathematics goals were inappropriate or what the annual goals should have targeted, there does not appear to be a basis to overturn the IHO's finding that the IEP annual goals were appropriate. Also, the annual goals were developed at the June 2019 CSE meeting and not implemented with the student; there is nothing in the hearing record to suggest that the annual goals were no longer appropriate at the time of the August 2019 CSE meeting such that the CSE erred in carrying them over to that IEP (see e.g. Parent Ex. Q at pp. 61-73).

3. Educational Placement

On appeal the parents argue that the IHO failed to account for the student's learning disabilities combined with her attention deficits, slow processing speed, and lack of appropriate supports, services, and accommodations when he determined that a general education placement was appropriate for the student.

During the June 2019 CSE meeting, the CSE discussed placement options for the student including special class, ICT services, and general education with resource room (see Parent Ex. Q at pp. 77-87). Regarding the parent's opinion that the student needed a small class with specially designed instruction throughout the day, the CSE chairperson asked the CSE if it wanted to recommend a special class (id. at p. 81). The parent objected given her understanding that special classes were "for children with cognitive impairment," which the student did not have (id.). The CSE chairperson explained that the "older" special classes, such as those for students in 12th grade, were composed in part of students with learning disabilities (id. at p. 82). The CSE chairperson discussed ICT services, explaining that the district "d[id] not have integrated co-teaching in every subject in every course," and opining that resource room services may be "most appropriate" as "typically for our seniors we work on independence, we typically recommend resource room" (id. at pp. 77-78). The parent questioned how the student would receive "specific remedial instruction within the context of the ICT class," to which the CSE chairperson stated that the recommendation was for the student to attend general education classes for math, science, English, and social studies and receive resource room services (id. at pp. 78-81). She further explained that the student's reading and writing goals would be addressed when the student received resource room and specialized reading services, and the math goals would be worked on during resource room (id. at pp. 79-80). Finally, the CSE chairperson explained that if it became evident that the student needed ICT services to support a specific course then "we could recommend that" (id. at p. 80).

Ultimately, the June 2019 CSE recommended that the student attend a general education classroom and receive two 40-minute sessions per day of resource room services in a small group (5:1), five 40-minute sessions per 10-day cycle of individual specialized reading instruction, five 40-minute sessions per 10-day cycle of specialized reading instruction a small group, and one 40-minute session per month of individual counseling (Dist. Ex. 19 at pp. 14-15). The CSE further recommended the following supplementary aids and services: copy of class notes and scaffolding for long writing assignments; preferential seating away from distractions; refocusing and redirection; checks for understanding of directions; spelling waived or access to a spell check device; and the use of calculator (id. at p. 15). Additionally, the June 2019 CSE recommended that the student have access to a Chromebook during the school day and at home, as well as speech-to-text and text-to-speech software (id.). Next, the June 2019 CSE recommended one 30-minute OT consultation per year as support for school personnel of behalf of the student; up to 10 hours per school year of educational consultation services; staff consultation regarding IEP implementation as needed; and up to four hours per year of assistive technology consultation services in the use of the Chromebook with the text-to-speech and speech-to-text technology (id.). Testing accommodations included in the IEP provided the student with extended time (2.0), location with minimal distractions, on-task focusing prompts, spell check device or spelling waived, access to a word processor, speech-to-text and text-to-speech software, and use of a calculator (id. at p. 16). The June 2019 CSE also determined that the student was eligible for 12-

month services consisting of three 60-minute sessions per week of special class reading instruction in a 5:1 group (id.).

The CSE reconvened on August 30, 2019, to address the parents' August 21, 2019 10-day notice of unilateral placement (Parent Ex. R at pp. 1, 4; Dist. Exs. 22; 23; 25 at p. 1). During the August 2019 CSE meeting, the parent questioned whether the district had a program for students of average to above average intelligence with small classes that provided multisensory instruction in all subjects (Parent Ex. R at pp. 1, 100). The CSE chairperson explained that the "resource room supplements all subject classes" and opined that "her program as a whole and the way that we've written the IEP, increasing the counseling, adding the reading consultation, two times a [day] resource room, specialized reading daily" would allow the student to be "successful in a larger class" (id. at pp. 100-01). The CSE chairperson explained that the student's learning profile was similar to students who were successful with "a lot less support" (id. at pp. 101-02). In addition to the twice daily sessions of resource room services previously recommended and consistent with the CSE chairperson's discussion at the meeting, the August 2019 CSE modified the June 2019 CSE's recommendations so that the student would receive five 40-minute sessions per week of individual specialized reading instruction, two 40-minute sessions per month of individual counseling, and two 40-minute sessions per month of counseling in a small group (5:1) (compare Dist. Ex. 19 at pp. 14-15 with Dist. Ex. 25 at pp. 14-15; see Parent Ex. R at p. 100).

Contrary to the parents' assertion, the August 2019 IEP provided the student with appropriate supports and services to meet her academic and social/emotional needs, albeit in larger general education classes than the parents preferred (Dist. Ex. 25 at pp. 14-15). While the student may have been successful with the smaller class sizes at Kildonan, districts are not required to replicate the identical setting used in private schools (see, e.g., M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson, 325 F. Supp. 2d at 145). Moreover, the evidence in the hearing record does not support a finding that the student could only successfully receive instruction in a small class, especially here, as she would have received special education instruction twice daily in a group of five in a separate location (resource room), together with daily specialized reading instruction on an individual basis (id. at p. 14).³³

³³ On appeal the parents argue that the IHO "inadequately applie[d]" the LRE principle by dismissing the CSE's failure to discuss or recommend appropriate supports, services, and accommodations for the student in the general education environment (see Req. for Rev. ¶ 17). As described by the Second Circuit, the LRE determinations are made by considering the extent to which the student has been placed with nondisabled peers; that is, "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child," and, if not, then "whether the school has mainstreamed the child to the maximum extent appropriate" Newington, 546 F.3d at 120, quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 [5th Cir. 1989]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 639 [S.D.N.Y. 2011]). Here, as discussed above, the evidence in the hearing record shows that the CSE recommended a general education program with appropriate supports and services to address the student's special education needs (see Dist. Ex. 25 at pp. 14-15). Accordingly, consistent with the regulations and case law governing LRE, there is no basis to overturn the IHO's determination on this issue.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's finding that the district offered the student a FAPE for the 2019-20 school year, the necessary inquiry is at an end and I need not reach the issues of whether Gow was an appropriate unilateral placement for the student or whether equitable considerations support the parents' request for relief (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 23, 2023**

**STEVEN KROLAK
STATE REVIEW OFFICER**