



The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 23-057

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

Appearances:

Liz Vladeck, General Counsel, attorneys for the respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) directly fund the student's tuition at the John Cardinal O'Connor School (Cardinal O'Connor School) for the 2021-22 and 2022-23 school years. 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 received diagnoses of mild language disorder, specific learning disability with impairment in reading, attention deficit hyperactivity disorder (ADHD)-combined type, and unspecified anxiety disorder (Parent Ex. M at p. 1). She received speech language therapy services through the Early Intervention Program and, while she was in preschool, through privately obtained speech-language therapy (Parent Exs. H at p. 4; X at ¶¶ 16, 17).¹ From kindergarten through fourth grade the student attended the Bronx Charter School for Excellence II (Parent Exs. H at p. 4; X at ¶ 20).

¹ The parent reported that the district recommended that the student receive speech-language therapy in preschool but no special education program (Parent Ex. X at ¶ 16). She stated that she "decided to get those services outside of school and had the case closed" (Parent Exs. H at p. 4; X at ¶ 17).

During the student's 2019-20 school year (third grade), the parent was advised the student's promotion to the next grade was in doubt (see Parent Exs. H at p. 4; S at p. 1; V at p. 1; X at ¶ 21).² The charter school referred the student to the CSE and the parent provided written consent for the district to conduct an evaluation to determine if the student was eligible for special education programs and services for the 2020-21 school year (Parent Exs. R at p. 1; X at ¶¶ 21-22).³ The district conducted an initial evaluation of the student on various dates in July through November 2020, which included a psychological evaluation, a social history, and a classroom observation (Parent Exs. K at p. 2; L; N; S).

At or about the same time the district was conducting the initial evaluation, the parent obtained a private evaluation of the student through Montefiore Rose. F. Kennedy Medical Center (Montefiore Kennedy Center) which included an integrated evaluation by a pediatrician, a psychological evaluation, a psychoeducational evaluation, and a speech-language evaluation (Parent Exs. M; O; P; Q; T).⁴

The student continued to attend the charter school during the 2020-21 (fourth grade) school year (Parent Ex. X at ¶ 20). A CSE convened on November 23, 2020 and found the student eligible for special education as a student with an other health impairment (Parent Ex. K at pp. 1, 20). The November 2020 CSE recommended that the student attend a general education classroom with integrated co-teaching (ICT) services for English language arts (ELA), math, sciences, and social studies, and also recommended the student receive two 30-minute sessions of speech-language therapy per week (*id.* at p. 16). According to the parent, the student continued to remotely attend her general education classroom for the remainder of the 2020-21 school year but did not receive the ICT services or speech-language therapy recommended by the November 2020 CSE (Parent Ex. X at ¶ 45).

In an email to the CSE chairperson, dated August 24, 2021, the parent noted her disagreement with the November 2020 IEP, the most recent IEP developed for the student, and notified the district of her intent to unilaterally place the student at the Cardinal O'Connor School, a non-public parochial special education school located outside the district, for the 2021-22 school

² The hearing record contains one undated report card for "Grades 3 and 4," which reflects that the student was reading one year below her grade reading level and that her promotion was in doubt "[d]ue to low scores in reading and math" (Parent Ex. V at p.1). In her affidavit, the parent states that she was notified "[d]uring the first trimester of 4th grade" that the student "was facing Promotion in Doubt" (Parent Ex. X at ¶ 21). However, the district's social history reports that the student "will be in fourth grade for the 2020-21 school year" and that "[s]he has never been retained but in the past her promotion has been in doubt" (Parent Ex. S at p. 1). Based on the evidence, it appears that the student's promotion was in doubt during third grade and possibly also in fourth grade.

³ Parent Exhibit R is an unsigned and undated copy of the written consent agreement.

⁴ The CSE noted in the November 23, 2020 IEP that the parent "had [the student] evaluated" and would "make the evaluations available to the CSE," implying that the CSE did not have access to the results of private evaluations before they convened to create the IEP (Parent Ex. K at p. 21). However, the November 2020 IEP reflected the results of a speech language evaluation dated September 4, 2020 and the only speech-language evaluation contained in the record dated September 4, 2020 is the private speech-language evaluation (Parent Exs. K at p. 2; O at pp. 1, 10), which seems to reflect that the CSE had at least the speech-language evaluation available for its review.

year "at public expense" (Parent Ex. J).⁵ The student attended the Cardinal O'Connor School for the 2021-22 school year (Parent Exs. W; X at ¶ 48). According to the parent, the Irvington Union Free School District, the district in which the Cardinal O'Connor School was located, convened a CSE in February 2022 and developed an individualized education services program (IESP) for the student (Parent Ex. H at p. 5).

By email dated August 28, 2022 the parent notified the district of her intent to continue the unilateral placement of the student at the Cardinal O'Connor School for the 2022-23 school year and seek district funding for the portion of the student's tuition for the 2021-22 and 2022-23 school years not covered by scholarships (Parent Ex. I at pp. 1-3). The parent also requested that the district provide the student with door-to-door transportation and conduct "appropriate assessments" including "an independent neuropsychological evaluation" to confirm the student's diagnoses (*id.* at p. 2). The student remained at the Cardinal O'Connor School for the 2022-23 school year (Parent Exs. C; H at p. 5).

A. Due Process Complaint Notice

In a due process complaint notice dated October 17, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years (Parent Ex. H). Specifically, the parent argued that the November 2020 CSE wrongfully disregarded the results of the Montefiore Kennedy Center's August 20, 2020 psychoeducational evaluation and instead relied only on the district's September 9, 2020 psychoeducational evaluation (*id.* at p. 4). The parent opined that the fact that the two psychoeducational reports administered the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) to the student less than a month apart "created a conflict of test reliability," which the district failed to take into account (*id.*). In addition, the parent contended that the CSE should have taken into account the clinical diagnoses identified in the private evaluation and found the student eligible for special education as a student with a speech or language impairment or specific learning disability, rather than as a student with an other health impairment (*id.* at p. 5). As to the CSE's recommendations, the parent argued that "the student required a smaller educational setting with the benefit of full-time special educational instruction, especially so that her Dyslexia could be addressed by more individualized instruction" (*id.*). The parent also argued that the district's IEP failed to provide the student with "evidence-based instructional programming" that should be provided to students diagnosed with dyslexia (*id.* at p. 6).

Thereafter, the parent alleged that the district failed to "follow the appropriate special education standard operating procedures required" for a parentally placed student (Parent Ex. H at p. 6). The parent alleged that no representative from the district attended the Irvington Union Free School District's February 2022 CSE meeting, which "converted the student's IEP to an IESP" and that, at the time of the due process complaint notice, the district was "out of compliance" (*id.* at p. 5).

As relief, the parent requested that the district fund the student's tuition at the Cardinal O'Connor School for the 2021-22 and 2022-23 school year (Parent Ex. H at p. 6). The parent further requested that the district pay for a specific district-contracted clinician to conduct an

⁵ The Cardinal O'Connor School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

independent education evaluation (IEE), specifically a neuropsychological evaluation, so that the student was fully evaluated (id.). The parent also requested that the district reconvene the CSE within 30 days after receiving the results of the IEE to create a new IEP (id.).

B. Impartial Hearing Officer Decision

On January 19, 2023, the parties proceeded to a prehearing conference before the Office of Administrative Trials and Hearings (OATH), and an impartial hearing was held on February 9, 2023 (see Tr. pp. 1-98). The IHO issued an interim decision dated January 20, 2023, which ordered the district to immediately fund an IEE consisting of a neuropsychological evaluation to be performed by the provider of the parent's choice (Interim IHO Decision at p. 5). Thereafter, in a final decision dated February 28, 2023, the IHO concluded that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years, but also ruled that the parent failed to prove that the student's unilateral placement provided the student with educational instruction specifically designed to meet the student's unique needs, and, therefore, denied the parent's request for tuition reimbursement for both school years at issue (IHO Decision at pp. 8-9).

In finding that the parent failed to sustain her burden to establish the appropriateness of the Cardinal O'Connor School as a unilateral placement, the IHO pointed out that the parent's primary witness, the Cardinal O'Connor School principal, was not employed by the Cardinal O'Connor School during the 2021-22 school year and "testified only generally about the practices of [the Cardinal O'Connor School] and knew nothing about any assessments, observations, goals, benchmarks, management tools, educational plans or modifications thereof, check-ins, conferences, etc., created by [the Cardinal O'Connor School] specifically for the [s]tudent" (IHO Decision at p. 9). Additionally, with regard to speech-language therapy, the IHO noted that "the [p]arent provided no information about the duration, frequency, or type (push-in, pull-out, individual/group/dyad) of therapy, no progress reports, and no qualifications (or even the identity) of the provider" (id.). The IHO described her review of the student's 2021-22 school year (fifth grade) report card by noting that it "included some final grades and brief comments about the [s]tudent, but again, it provided no goals, assessments, criteria for tracking progress, or any specific information of any kind" (id.). Based on the foregoing, the IHO determined that the record was "very limited" with respect to the unilateral placement and that, therefore, the parent failed to sustain her burden to prove that the Cardinal O'Connor School was an appropriate unilateral placement for the student (id. at pp. 8-10).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred by holding that the testimony provided by the student's mother, grandmother, and the Cardinal O'Connor School principal was insufficient to prove that the Cardinal O'Connor School was providing the student with special education programming designed to meet the student's specific educational needs. Additionally, the parent asserts that the IHO should have adjourned the impartial hearing until after all parties had access to the IEE that the IHO ordered the district to fund because an essential portion of the parent's due process complaint notice was the argument that the district misclassified the student.

The district answers and asserts that the IHO's decision should be upheld in its entirety. Specifically, the district argues that the IHO properly determined that the parent failed to prove that the Cardinal O'Connor School was an appropriate placement for the student because the

parent's presented testimony and evidence was insufficient to meet her burden of proof. The district asserts that there was no reason why the IHO should have delayed the impartial hearings until after the IEE was completed because the IHO already ruled that the November 2020 IEP failed to provide the student with a FAPE and therefore delaying the proceeding for information regarding the student's IEP classification was unwarranted.

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]). 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" (Andrew 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 Andrew 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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁶

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

⁶ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

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. Conduct of the Impartial Hearing

As an initial matter, the parent argues that the IHO should have adjourned the impartial hearing until after the district's CSE had reviewed the results of the IEE, which the IHO ordered the district to fund in the January 2023 interim decision.

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). As for the timeline for the impartial hearing, the IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). However, extensions may only be granted consistent with regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). An IHO is explicitly prohibited from "solicit[ing] extension requests or grant[ing] extensions on his or her own behalf or unilaterally issue extensions for any reason" (8 NYCRR 200.5[j][5][i]).

Here, the IHO's January 2023 interim decision granted the parent's request for district funding of an IEE (Interim IHO Decision). In her rationale, the IHO cited the parent's disagreement with the district's evaluation and the district's failure to contest that result (id. at p. 3). In other words, the IHO found that the parent had a right to an IEE conducted at public expense based on the parent's expressed disagreement with an evaluation conducted by the district (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). However, the IHO also went on to find that "an up-to-date and comprehensive neuropsychological evaluation of the Student [wa]s necessary to complete the record and provide a basis for a decision" and would "provide important current information on Student's needs and rate of progress, which will make her future special education programming better tailored and more effective" (Interim IHO Decision at pp. 3-4). The IHO cited her authority pursuant to State regulation to order IEEs to be performed during the impartial hearing at public expense (id. at p. 3, citing 34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]).

Given the IHO's rationale set forth in the January 2023 interim decision, the parent's confusion as to why the hearing went forward without the IEE that the IHO reasoned was necessary

is understandable to a degree since the IHO did not discuss the potential for delays that frequently occur when IEE results are pursued during the course of a due process proceeding. On the other hand, the IHO was unquestionably bound by the regulatory deadline for issuing a final decision and there is no indication in the hearing record that the parent's advocate requested an adjournment of the impartial hearing and extension of the final decision timeline for the purposes of obtaining the IEE, and the IHO was not permitted to solicit such an extension request from the parties (8 NYCRR 200.5[j][5][i]).⁷ Accordingly, the IHO did not abuse her discretion in going forward with issuing her final decision before the IEE was complete.

Moreover, even if IHOs possessed the unilateral authority to extend the proceeding timelines the parent's argument to support her view that the IHO erred in failing to adjourn the impartial hearing is unavailing because it speculates on the actions that a future CSE may have taken after considering the IEE. In particular, the parent cites the importance of the IEE given that the parent disputed the November 2020 CSE's determination that the student was eligible for special education as a student with an other health impairment. However, the findings or recommendations of a future CSE based upon a new evaluation would not be appropriate evidence for the IHO to consider when assessing the adequacy of the November 2020 CSE or its recommendations (R.E., 694 F.3d 184-88 [explaining that the adequacy of an IEP must be examined prospectively as of the time of its drafting]). Moreover, to the extent the parent's concern lies in the degree to which the IHO addressed her allegations of a denial of a FAPE, she is not aggrieved by the IHO's decision finding that the district denied the student a FAPE, which finding is not appealed.⁸ The parent does not otherwise allege that, had the IEE been available for the IHO to consider, that it may have warranted a different outcome in terms of the IHO's finding regarding

⁷ The parent argues that the IHO should have adjourned the hearing sua sponte based on the IHO's "knowledge of the issues of the Complaint and legal proceedings" since the parent had "no access to an Attorney." However, the parent was represented during the impartial hearing by a non-attorney advocate (see Tr. p. 6, 46).

⁸ Even if the matter had been properly raised, the argument would not be persuasive. CSEs are not supposed to rely on the disability category to determine the needs, goals, accommodations, and special education services in a student's IEP. That is the purpose of the evaluation and annual review process, and the resulting IEP must address all the student's 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]). Similarly, on the question of disability classification, courts have given considerably less weight to identifying the underlying theory or root causes of a student's educational deficits and have instead focused on the process of identifying the academic skill deficits to be addressed through special education and through the formulation of the student's IEP (Navarro Carrillo v. New York City Dep't of Educ., 2023 WL 3162127, at *2 [2d Cir. May 1, 2023] [agreeing that the classification issue was a "red herring" and that the disability categories served only the purpose of ascertaining the student's eligibility for special education]; B.D. v. Eldred Cent. Sch. Dist., 2023 WL 3025308, at *10 [S.D.N.Y. Apr. 20, 2023] [characterizing the eligibility category as "a distinction without a difference"]; Polanco v. Porter, 2023 WL 2242764, at *6 [S.D.N.Y. Feb. 27, 2023] [finding that "well-reasoned decisions in other circuits have clarified that a student's disability classification is generally immaterial in determining whether a FAPE was provided if the IEP otherwise sufficiently met the needs of the disabled student"]; see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]). "Indeed, [t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education" (Heather S. v. State of Wisconsin, 125 F.3d 1045, 1055 [7th Cir.1997]).

the unilateral placement. Accordingly, I find no basis to disturb the IHO's decision based on the failure to adjourn the impartial hearing until after the IEE had been completed.

B. Unilateral Placement

As noted, on appeal, neither party is challenging the IHO's findings that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years. Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Accordingly, the next issue to be determined is the appropriateness of the Cardinal O'Connor School.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's

individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

Although not in dispute, a discussion of the student's needs is relevant to determining whether the unilateral placement was appropriate.

1. Student Needs

The student's November 2020 IEP indicated that she was referred for a psychoeducational evaluation "due to concern regarding her level of attention, organization, and ability to complete work in a timely manner" (Parent Ex. K at p. 3). The November 2020 IEP reflected the parent's concern about the student's attention and the fact that her classwork was not completed in school and was, therefore, sent home to be completed (id. at p. 4). In addition, the IEP included a report from the student's teacher that described that she was easily distracted, could miss what was being said to her, sometimes needed an idea or concept repeated or presented in a different way, and benefitted from reminders to get started on her work (id. at pp. 4-5). Both the district's September 9, 2020 psychoeducational evaluation report and the private evaluations completed by the Montefiore Kennedy Center described that the student had difficulty with focus and attention (Parent Exs. M at p. 1; N at pp. 1-2, 4; O at pp. 2, 9; P at pp. 2, 4; Q at pp. 5, 7-8; T at pp. 2, 5-6). The Montefiore Kennedy Center team conference report offered a diagnosis of ADHD-combined type (Parent Ex. M at p. 1).

Speaking to the student's academic needs, the November 2020 IEP identified that the student was reading at a Fountas and Pinnell level O and according to her teacher she could read "grade level sight words and . . . about 70-80% of the text with fluency" (Parent Ex. K at p. 4). The student struggled with using strategies to decode unfamiliar words, omitted words when reading, failed to look for smaller parts of words, sound blends, digraphs or "vowel teams," skipped smaller words, left endings off words and was slow in decoding unfamiliar words which, at times, affected her comprehension (id. at pp. 4- 5). The student's difficulty with reading was also evident in the district's September 9, 2020 psychoeducational evaluation report, which noted that on the Wechsler Individual Achievement Test-Third Edition the student obtained scores in the below average range on pseudoword decoding, math problem solving, and sentence composition (Parent Ex. N at pp. 3-4). Similar reading difficulties were described in the September 3, 2020 private psychoeducational evaluation report, which noted the student's scores in the very low range on the sight word efficiency and phonemic decoding efficiency subtests of the Test of Word Reading Efficiency-Second Edition and the low average and average range on subtests of the Woodcock-Johnson IV-Tests of Achievement (Parent Ex. P at p. 3). The private psychoeducational evaluation report indicated that the student demonstrated difficulties with vowel sounds and blends and was "inconsistent in providing the correct sound to consonants within the nonsense words" (id.). When reading words in isolation, the student performed in the average range when the task was untimed and in the very low range when timed (id.). The student attained fluency and reading

comprehension scores in the low average range (*id.*). The October 19, 2020 Montefiore Kennedy Center team conference report offered a diagnosis of specific learning disability with impairment in reading and recommended instruction using “a phonics-based, multisensory reading remediation program such as the Wilson Reading System or Orton-Gillingham [a]pproach which [would] simultaneously work on developing [the student’s] basic reading and spelling skills” (Parent Ex. M at pp. 1, 4).⁹

Regarding the student's expressive and receptive language, the November 2020 IEP described that, on the Listening Comprehension Test-Second Edition, the student exhibited "significantly below average" performance in her ability to identify the main idea of an orally presented narrative and in her ability to attend to a short, orally presented passage and recall information (Parent Ex. K at p. 4). The November 2020 IEP noted that during the evaluation the student demonstrated difficulty with word retrieval, weaknesses in syntax and immature narrative skills (*id.*). The September 2020 private speech-language evaluation report described that the student presented with mixed receptive-expressive language impairment and demonstrated "deficits in attention and auditory processing, semantic knowledge and word retrieval, language formulation, and narrative skills" (Parent Ex. O at p. 10). The October 19, 2020 Montefiore Kennedy Center team conference report offered a diagnosis of mild language disorder (Parent Ex. M at p. 1).

Speaking to the student's social/emotional development, the November 2020 IEP indicated that according to the student's parent and teacher she was social with peers and adults, worked well in small groups and enjoyed playing with friends during recess (Parent Ex. K at p. 6). The November 2020 IEP further noted that according to the parent the student "repeated verbatim" lengthy dialogues from programs watched multiple times and memorized entire books read to her when she was younger (*id.*). The student also engaged in "self-stimulatory behaviors" by "moving her hands back and forth in front of her face," but this behavior was not reported to occur in school (*id.*). The June 2, 2020 integrated evaluation report, completed by the Montefiore Kennedy Center documented that on the Childhood Autism Rating Scale-Second Edition, High Functioning Version (CARS2-HF), the student exhibited "minimal to no symptoms of autism" and further noted that the Diagnostic and Statistical Manual of Mental Health Disorders-Fifth Edition diagnostic criteria for autism and the results of the CARS2-HF "were discussed with [the parent], and scores were negative" (Parent Ex. T at pp. 5-6). The October 19, 2020 Montefiore Kennedy Center team conference report offered a diagnosis of unspecified anxiety disorder (Parent Ex. M at p. 1).

2. The Cardinal O'Connor School

The parent argues that, contrary to the IHO's findings, the hearing record contains sufficient evidence describing how the educational program at the Cardinal O'Connor School provided specially designed instruction designed to address the student's needs. Specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she

⁹ I note that a different person's name was intermingled with the student's name in the psychiatrist's evaluation report (*see* Parent Ex. M at p. 4).

can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

The evidence in the hearing record regarding the Cardinal O'Connor School consisted of the affidavit testimony of the parent and the student's grandmother (Parent Exs. B; X), a letter in support from the principal who began working at the Cardinal O'Connor School in August 2022, the contents of which were sworn to at the impartial hearing and subject to cross-examination (Tr. pp. 60-81; Parent Ex. C), as well as the student's fifth grade (2021-22 school year) report card (Parent Ex. W).

In her affidavit, the parent stated that she chose the Cardinal O'Connor School for her daughter because it was a special education school with small classes that had the Orton-Gillingham reading program for students with learning disabilities in reading (Parent Ex. X at ¶ 50). The student's grandmother testified that "[t]he [p]rincipal advised us that the whole school is a special education school and that they have teachers trained in the Orton-Gillingham reading system" (Parent Ex. B at ¶ 16). However, while the record supports that the Cardinal O'Connor School generally offered multi-sensory reading instruction, there is no evidence to show that specially designed instruction in reading was provided to the student. The Cardinal O'Connor School principal testified that the school curriculum followed "the New York State curriculum" (Tr. p. 67).¹⁰ In her letter of support, the Cardinal O'Connor School principal described that the student "[was] in a small class with ten other students around her age and grade level . . . [and] the teacher utilize[d] multisensory techniques for all instruction" (Parent Ex. C; see Tr. pp. 66-67). The principal reported that teaching took place in individual sessions, as well as small and large groups, and that "anchor charts and graphic organizers [we]re used often" (Parent Ex. C). She noted that the Cardinal O'Connor School "utilize[d] pieces of the Orton Gillingham [a]pproach and Hochman Method of Writing" (Parent Exs. C; X at ¶ 50); however, neither the parent nor the Cardinal O'Connor School principal testified that the student received such instruction, and it is not clear from the evidence that all students in the school received the same services or whether the services were individualized for each student. Although the principal testified that "[a]ccommodations and modifications t[ook] place throughout the day and when needed instruction [wa]s taught at slower pace and repeated," neither the principal nor anyone else provided evidence regarding the specific instruction provided by the Cardinal O'Connor School to the student (Parent Ex. C). As such, the hearing record was not developed with regarding to what specific instruction the student received from the Cardinal O'Connor School.

¹⁰ The principal testified that she began serving as principal of the Cardinal O'Connor School in August 2022 and was not present during the 2021-22 school year (Tr. pp. 61, 64). She reported that all of the students at the Cardinal O'Connor School had some form of learning disability and the students did not typically have the opportunity to interact with regular education students during the school day (Tr. p. 65). She noted that there were 51 students at the school, along with six certified special education teachers and a physical education teacher (Tr. p. 65). According to the Cardinal O'Connor School principal, the average class size at the school ranged between 5-11 students and each classroom was staffed by a teacher and teaching assistant (Tr. p. 66). The principal described her opportunity to observe the student in the classroom as "moderate" and indicated that she was in and out of the classrooms on a daily basis and spoke to the teachers regularly about the students (Tr. pp. 65-66). She later explained that by moderate she meant one hour every other day and indicated that she spoke with the teachers "probably 20 minutes each day" (Tr. pp. 74-75). The principal estimated that for the 2021-22 school year the Cardinal O'Connor School employed eight teachers for approximately 49-50 students (Tr. p. 74).

The principal testified that the Cardinal O'Connor School reported growth in reading and math by using the i-Ready program (Tr. p. 68). She explained that i-Ready is a computer-based program that is used to conduct a diagnostic test in the fall, winter and spring that informs staff of the students' approximate grade level, as well as their areas of strengths and weaknesses (*id.*). According to the principal, Cardinal O'Connor School staff then "assign[ed] lessons based on [the i-Ready results], both on the computer, and the teacher also use[d] that to group the students in smaller groups of two or three students, and also to find out what they need to do individually with the child" (*id.*). She explained that the Cardinal O'Connor School staff addressed student deficits by working "with the individual student, either individually or in a small group or in whole-group-instruction" (*id.*). To track student progress, the principal reported that, in addition to i-Ready, the Cardinal O'Connor School used "the typical report card piece of teacher made testing and assessments and students are given grades" (Tr. p. 76). She noted that, because the student had an IEP, information about how she was performing academically and socially was provided at her annual review (Tr. pp. 76-77). However, to the extent the hearing record suggests that i-Ready results were used by the Cardinal O'Connor School to ascertain this student's level of functioning in reading and math, diagnose her strengths and weaknesses, and individualize her instruction, the parent did not actually enter the results into evidence.

The record establishes that the student was receiving speech-languages services for the 2022-23 school year at the Cardinal O'Connor School and that she most likely received speech-language services during the 2021-22 school year at the Cardinal O'Connor School; however, those services were provided not by the Cardinal O'Connor School but by the Irvington Union Free School District at public expense pursuant to an IESP developed in accordance with the State's dual enrollment statute (Tr. p. 68; *see* Tr. pp. 77, 79-80; Educ. Law § 3602-c). The principal reported that for the 2022-23 school year the student's speech-language therapy was provided through a combination of pull-out and push-in services (Tr. pp. 668-69). She explained that "[m]ost often the student [wa]s taken out depending on her need" but also noted that "at times the . . . related service provider d[id] come in the classroom" (Tr. p. 69).

The hearing record does include a copy of the student's 2021-22 school year (fifth grade) Cardinal O'Connor School report card (Parent Ex. W). Her 2021-22 school year (fifth grade) report card reflects the student's grades averaged in the high nineties, but the quarter comments do not discuss any special teaching strategies the Cardinal O'Connor School was providing and state that "all grades are based on the student's current instructional level" without specifying the student's then-current instructional level (*id.* at p. 2).¹¹ The parent did not have access to the student's 2022-23 school year (sixth grade) report card because of the outstanding tuition owed to the Cardinal O'Connor School, therefore it was not included in the hearing record (Tr. p. 78; Parent Ex. B at ¶

¹¹ The student's 2021-22 school year (fifth grade) report card reflects that she is doing well at the Cardinal O'Connor School (*see* Parent Ex. W); however, progress alone, while a relevant factor, is not dispositive of the appropriateness of a unilateral placement (*Gagliardo*, 489 F.3d at 115, citing *Berger*, 348 F.3d at 522 and *Rafferty*, 315 F.3d at 26-27; *see Frank G.*, 459 F.3d at 364 [holding that, although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]). Here, without evidence that the Cardinal O'Connor School offered the student specially designed instruction, the student's achievement of good grades is insufficient to establish the appropriateness of the unilateral placement based on the totality of the circumstances.

19).¹² The student's grandmother testified that her family was unable to receive "any report cards for the 2022-2023 school year" but noted that the family was "able to meet with the teachers and receive information on [the student's] performance that way" (Parent Ex. B at ¶ 19) Still, neither the grandmother, mother, nor principal provide a description of the student's specific instruction or performance at the Cardinal O'Connor School.

The IHO noted that there was a "very limited record to support" the appropriateness of the unilateral placement and that she did "not find that the Parent established that the placement of the [s]tudent in [the Cardinal O'Connor School] provides educational instruction specially designed to meet her unique needs, supported by such services as [we]re necessary to permit her to benefit from that instruction" (IHO Decision at pp. 9-10). The IHO is correct that the evidence in the hearing record is severely limited with respect to the details of the student's special education program and services at the Cardinal O'Connor School and whether it was tailored to meet the student's unique needs. After considering the totality of the circumstances, there is insufficient basis in the hearing record to overturn the IHO's determination that the parent failed to meet her burden to prove the appropriateness of the Cardinal O'Connor School.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the parent failed to sustain her burden in establishing the appropriateness of the student's unilateral placement at the Cardinal O'Connor School for the 2021-22 and 2022-23 school years, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations supported the parent's requested relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
May 10, 2023**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

¹² The Cardinal O'Connor School principal testified that, if a student has outstanding tuition, they do not have access to the Cardinal O'Connor School report cards or the i-Ready data but do have access to their IEP (Tr. pp. 78-79, 80), and it appears that the principal was referring to the student's IESP from Irvington Union Free School District. During the impartial hearing, when discussing whether a particular witness from the Cardinal O'Connor School would have "authorization" from the school to testify, the IHO informed the advocate that she would consider any request for a subpoena (Tr. pp. 21-23). An IHO has the authority to issue a subpoena for witnesses or documents if necessary (see 8 NYCRR 200.5[j][3][iv]). However, there is no indication in the hearing record that the parent or her advocate requested a subpoena either for further witness testimony from a representative from the Cardinal O'Connor School or for documentation that the school may have been withholding.