



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 23-167

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:

Shebitz, Berman, & Delforte, P.C., attorney for petitioner, by Matthew J. Delforte, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Irene B. Dimoh, Esq. and Brian J. Reimels, 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 for direct funding for her daughter's tuition costs at the Pathway Elementary School (Pathway) for the 2020-21 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here.¹

¹ Any additional facts necessary to the disposition of the parties' arguments are set forth below to resolve the issues presented in this appeal.

Briefly, the student received a diagnosis of bilateral profound sensorineural hearing loss as an infant and received services speech-language therapy and later center-based services through the Early Intervention Program (EIP) (see Parent Exs. A at p. 1; L ¶ 19; Tr. pp. 209-10). The student wore hearing aids inconsistently (Dist. Ex. 5 at p. 1). Around age three the student was fitted for cochlear implants, supported by hearing aids (Parent Ex. L ¶ 19; Dist. Ex. 5 at p. 1). Shortly thereafter, she transitioned from the EIP to the Committee on Preschool Special Education (CPSE) and attended a center-based auditory/oral program for five days a week (Tr. p. 210).² Although the student aged out of CPSE services, the parent explained that she remained in the preschool center-based program for approximately two additional years at the parent's expense, after which time she transitioned to an in-district auditory/oral program in a 12:1+1 special class in a specialized school (Tr. pp. 213-14). The student attended the auditory/oral 12:1+1 special class for the 2017-18 school year (first grade) (Dist. Exs. 5 at p. 1; 6 at p. 1). The student attended the same auditory/oral 12:1+1 special class for the 2018-19 school year (second grade) and again for the 2019-20 school year when she repeated second grade (see Parent Exs A at p. 2; L ¶100).

A CSE convened on January 15, 2020 to formulate the student's IEP for the second half of the 2019-20 school year and the first half of the 2020-21 school year (see generally Dist. Ex. 1). The CSE recommended that the student attend a 12:1+1 special class that employed an auditory/oral teaching methodology for five periods a week in activities for daily living, fifteen periods per week in English language arts (ELA), five periods per week in math, three periods per week in social studies, three periods per week in science and one period per week in visual arts (id. at pp. 10, 28-29, 36). The CSE also recommended that the student receive one 30-minute session per week of individual occupational therapy (OT), five 30-minute sessions per week of individual speech-language therapy, 12-month services, assistive technology, and supports for school personnel on behalf of the student (id. at pp. 12, 29-30).

In a prior written notice dated January 16, 2020, the district summarized the recommendations made by the January 2020 CSE (Dist. Ex. 4).³

On or about September 8, 2020, the parent entered into a contract for the student's attendance at Pathway for the 2020-21 school year (Parent Ex. H).⁴ The student began attending Pathway in September 2020 (Parent Ex. L ¶ 16). Through her education advocate, the parent provided the district with a ten-day notice on November 20, 2020 that she was rejecting the district's recommended special education program and placement for the student for the 2020-21 school year (Parent Ex. C at p. 1).

² According to the hearing record, "the goal of any oral auditory program is to teach the students to maximize the use of their residual hearing through the utilization of hearing aids or cochlear implants in order to learn spoken language" (Parent Ex. L at ¶ 95).

³ On April 2, 2020, the district created and provided the student with a special education remote learning plan due to the COVID-19 pandemic and related school closures (Dist. Ex. 7). The remote plan contained service recommendations similar to those found in the January 2020 IEP but the services were to be provided remotely at home (id.).

⁴ The Commissioner of Education has not approved Pathway as a school with which school district may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

In a due process complaint notice dated December 28, 2021, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Parent Ex. A). Specifically, the parent asserted that the district failed to thoroughly evaluate the student and develop an appropriate IEP to meet her needs (id.).

An impartial hearing convened on January 9, 2023 and concluded on March 3, 2023 after four days of proceedings (Tr. pp. 72-355).^{5,6} In a decision dated June 30, 2023 the IHO determined that the district offered the student a FAPE for the 2020-21 school year (see IHO Decision). More specifically, the IHO found that the district met its burden to establish that the recommended 12:1+1 special class using the auditory/oral teaching methodology, along with the related services identified in the January 2020 IEP, were appropriate to address the student's special education needs (IHO Decision at pp. 8-13). Based on her findings, the IHO denied the parent's request for direct payment of the student's tuition costs at Pathway for the 2020-21 school year (id. at p. 14).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here.⁷ The essence of this appeal is whether the district failed to offer the student a FAPE for the 2022-23 school year by failing to address the student's unique needs as a student who is deaf.

The following issues presented on appeal must be resolved in order to render a decision in this case:

⁵ The parties also convened for a prehearing conference on May 6, 2022, and three separate status conferences spanning from August 4, 2022 to October 7, 2022 (see Tr. pp. 1-48). The parties convened on November 23, 2022 and then again on December 8, 2022 for a hearing on the merits, but such hearings were rescheduled (see Tr. pp. 49-71).

⁶ On May 1, 2023 the IHO issued an order denying the consolidation of this matter with another matter relating to the same student but for different school years (see IHO Interim Order).

⁷ The district correctly asserts, and the parent's attorney concedes, that the parent's request for review does not comply with the 10-page limitation and the pages are not consecutively numbered as required (8 NYCRR 279.8[b]). The parent's request for review was 11 pages, and viewing the request for review as a whole, it appears that the page limitations violation could have easily been avoided had the parent's attorney avoided quoting the IHO's decision at length (see Req. for Rev. ¶ 49). Additionally, the parent's submitted a 20-page memorandum of law which could have been 30 pages and utilized to further argue the relevant facts in the hearing record and legal authority to support the contentions raised in the request for review (8 NYCRR 279.4[g]; 279.8[b], [d]). While I decline to exercise my discretion to reject the parent's pleading on these grounds and given that the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that the district suffered any prejudice as a result, the parent's attorney is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a request for review, an SRO may be more inclined to do so after a party or an attorney's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 21-102; Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

1. whether the IHO erred in determining that the evaluations of the student before the CSE were sufficient to develop an appropriate IEP;
2. whether the IHO erred in determining that the present levels of educational performance in the January 2020 IEP were sufficient;
3. whether the IHO erred in determining that the goals in the January 2020 IEP were appropriate to address the student's needs;
4. whether the IHO erred in determining that the 12:1+1 special class using an auditory/oral teaching methodology, along with the related services listed in the January 2020 IEP were appropriate to address the student's needs;
5. whether Pathway was an appropriate program to address the student's needs; and
6. whether equitable considerations favor the parent's claim for tuition reimbursement.

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]).⁸

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

⁸ 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 board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. FAPE

The IHO determined that the January 2020 CSE complied with the procedural requirements of the IDEA in developing the student's IEP for the 2020-21 year and that the recommendations contained therein were appropriate to meet her special education needs (IHO Decision at p. 9). Before addressing the various claims raised by the parent challenging the IHO's finding that the district offered a FAPE to the student for the 2020-21 school year it is useful to review the interplay of state and federal law, regulations and guidance that is unique to students who are classified as deaf or hearing impaired and must be taken into account when assessing whether a district's provision of special education to a particular deaf student passes muster under the legal standards mandated by the IDEA and State education law.

1. Special Education for a Deaf Student

Although the student's eligibility for special education as a student with deafness is not in dispute (see 34 CFR 300.8[c][3]; 8 NYCRR 200.1[zz][3]), a discussion on the relevant State and federal regulations concerning special education for a student with a hearing disability is necessary.

Both the IDEA and State statute describe deafness as a hearing impairment that is so severe that the student is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a student's educational performance (34 CFR 300.8[c][3]; 8 NYCRR 200.1[zz][3]). Further, both the IDEA and State require a district to take into account special factors when developing an IEP, and in appropriate circumstances must:

Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode.

(34 CFR 300.324[a][2][iv]; see 8 NYCRR 200.4[d][3][iv]). The United States Department of Education has explained that not only the IDEA, but Title II of the Americans with Disabilities Act of 1990 (ADA) (Title II), and Section 504 of the Rehabilitation Act of 1973 (Section 504) all address the obligations of school districts to meet the communication needs of students with disabilities and that a school district needs to comply with all three laws, however compliance with one law does not necessarily mean compliance with another.

Specifically, regarding students who have a hearing, vision, or speech disability, while the IDEA requires a district to make available a FAPE consisting of special education and related services, Title II regulations have a specific effective communication requirement the district is obligated to meet (see 28 CFR 35.160). Though an SRO has no jurisdiction over disputes relating to Title II of the ADA, the background regarding Title II regulations regarding effective communication and its interaction with the IDEA requirements is relevant to the programming choices specified in the student's IEP in this case, as well as the IHO's comments regarding district personnel (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Thus, while I will neither hear nor resolve disputes under Title II, I will briefly describe the requirements as a backdrop before which this student's special education programming under IDEA was developed.

Regulations promulgated pursuant to Title II explicitly require that a district take appropriate steps to ensure that communications with persons with disabilities are "as effective as" communications with other persons (28 C.F.R § 35.160 [a][1]). Further, Title II regulations require that a district provide appropriate auxiliary aids and services where necessary to afford a student with a disability an "equal opportunity" to participate in and enjoy the benefits of the district's services, programs, or activities (see 28 C.F.R §§ 35.130; 35.160).

Under the IDEA, a FAPE must be individually designed to provide meaningful educational benefit to the student (see Rowley, 458 U.S. at 201). As written, the IDEA does not require that a district ensure that a student with a disability is afforded the opportunity to communicate within the school setting as effectively as his or her nondisabled peers; rather, the statute mandates the obligations of a district to identify a student's special education needs and provide appropriate educational programming and services to address his or her needs in order to afford the student an opportunity to progress in the general education curriculum (see Rowley 458 U.S. at 198-200). However, there is nothing in the IDEA that precludes districts from considering the effective communication requirements found in Title II as part of the IEP development process, especially when the needs of the student primarily relate to the student's ability to communicate. In some instances, the special education and related services that a student may receive under the IDEA will also ensure that communication with those students is as effective as communication with other persons, however, in other instances, the services, devices, technologies and methods for providing effective communication that are provided to a particular student as "auxiliary aids and services" under Title II may not necessarily be the same as those determined to be appropriate to meet the student's unique needs under the IDEA; however in general, the services, devices, technologies, and methods for providing effective communication that are "auxiliary aids and services" under Title II could also be provided under the IDEA as part of a FAPE (see "Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools" at pp. 8, 15, OCR and OSERS U.S.

Department of Education, 64 IDELR 180 [November 2014] available at <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf>.⁹ If the special education and related services provided under the IDEA are not sufficient to ensure that communication with the student are as effective as communication with "other persons," the Title II obligations have not been met (*id.*). Thus, depending on the circumstances, the services, and aids that a student receives under the IDEA may be the same as or greater than the services and aids that would be provided under Title II; in other circumstances, a student may receive more services and aids under Title II than those deemed sufficient under the IDEA standards (*id.*).¹⁰ The Ninth Circuit Court of Appeals has similarly described the IDEA's focus on communication "needs" and "opportunities for direct communications with peers and professional personnel in the child's language and communication mode" as distinct from the requirement in Title II that when providing aids and services a public entity must "give primary consideration to the requests of the individual with disabilities," a requirement that is not present in IDEA (*K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1101 [9th Cir. 2013]).¹¹

As an additional consideration in determining what a district's FAPE obligations are in terms of providing a student with appropriate services to address his or her communication needs, under the IDEA, the definition for related services does not include a medical device that is surgically implanted, or the replacement of such device, including cochlear implants (20 U.S.C. § 1404[26][B]; 34 C.F.R. § 300.34[b]). As such, the IDEA contains no explicit provision for mapping services for cochlear implants (*see* 20 U.S.C. §§1401[9], [26]; *Petit v. U.S. Dep't of Educ.*, 578 F. Supp. 2d 145, 148 [D.D.C. 2008]). A district court has addressed a similar issue finding that the regulations interpreting the IDEA excluded cochlear implant mapping from the definition of "related services" (*Petit*, 578 F. Supp. 2d at 154-60). This means that a district would not be responsible for maintaining any medical device that is implanted, including optimizing the device's functioning or mapping it (e.g., cochlear implants) although it may otherwise be obligated to provide the student with other aids or devices related to hearing services or audiology services dependent upon the nature of the student's need for support related to his or her hearing loss.

The communication needs of deaf or hard-of-hearing students has also been addressed by the U.S. Department of Education which issued its own guidance on deaf student education services; in relevant part, the guidance states that "[t]he Secretary believes it is important that State and local education agencies, in developing an IEP for a child who is deaf, take into consideration

⁹ The Title II regulation lists examples of some, but not all, of these kinds of auxiliary aids and services (28 CFR 35.104). For a person who is deaf, deaf-blind, or hard of hearing, some examples of auxiliary aids and services are interpreters, note takers, exchange of written materials, real-time computer-aided transcription services (CART), assistive listening systems (FM), accessible electronic and information technology, and open and closed captioning (*id.*).

¹⁰ In this case, the district has not argued that the student was receiving more services and aids under Title II than the IDEA. Based on the evidence, it appears that the CSE recommendations contained in the January 2020 IEP comprised the totality of the special education aids and services offered to the student by the district for the 2020-2021 school year (*see generally* Dist. Exs. 1-8; Tr. pp. 88-192).

¹¹ The Ninth Circuit further described that a public agencies' defenses were different under the two statutes and that Title II provides defenses that are not available with regard to claims brought under IDEA (*K.M.*, 725 F.3d 1088, 1101 [9th Cir. 2013]).

such factors": (1) communication needs and the child's and family's preferred mode of communication; (2) linguistic needs; (3) severity of hearing loss and potential for using residual hearing; (4) academic level; and (5) social, emotional, and cultural needs including opportunities for peer interactions and communication (see "Deaf Students Education Services" OCR U.S. Department of Education, 57 Fed. Reg. 49,274 [Oct. 30, 1992] available at <https://www2.ed.gov/about/offices/list/ocr/docs/hq9806.html>).

Additionally, state regulations require a district to provide each student a hearing screening within six months of admission to a district school and in grades pre-kindergarten or kindergarten, 1, 3, 5, 7 and 11, and at any other time deemed necessary (8 NYCRR 136.3[e][iii]). Such hearing screening shall include, but not be limited to, pure tone screening (id.). However, this regulation does not apply to districts located in New York City (see 8 NYCRR 136.3[b][1]).

Taking the above into consideration, while recognizing that a CSE operates under the authority of the IDEA, there is certainly some support for the notion that a CSE would be well served to consider the Title II requirements concerning the provision of effective communication to individuals with disabilities consonant with those provided to "other persons" when developing an IEP for a student for whom communication needs are paramount, including those with a classification of deafness, in order to ensure that such a student's communication and related language needs will be addressed with appropriate special education recommendations. That is, a CSE that integrates the student's communication needs into the IEP process will ensure that the program recommendations and related services are more likely to meet the unique needs of a student who is deaf or hard of hearing.

2. Evaluative Information and the Student's Needs

Turning to the first issue on appeal, the parent claims that the evaluations the district used to assess the student were inappropriate and the evaluative information relied on by the January CSE was insufficient. The parent argues that the appropriateness of the speech-language evaluations used by the January 2020 CSE were disputed by her witness; that the speech-language evaluations only assessed the student's vocabulary skills; and that the student should have been evaluated using a multidimension assessment for deaf and hard-of-hearing children.

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]). School districts shall ensure that assessments and other evaluation materials used to assess a student under an initial evaluation or a reevaluation ". . . include those tailored to assess specific areas of educational need and not merely those which are designed to provide a general intelligence quotient" (8 NYCRR §200.4[b][6][iii]; see 34 CFR 300.304[c][2]).

According to a prior written notice dated January 16, 2020, when developing the student's IEP, the January 2020 CSE relied on a psychoeducational evaluation dated January 30, 2018 and a speech-language evaluation dated February 5, 2018 (Dist. Ex. 4 at p. 2).¹² The January 2020 IEP also indicated that the CSE considered the student's special education teacher's observations and included the results of teacher testing (see Dist. Ex. 1 at p. 4).

The January 2018 psychoeducational evaluation was conducted by the district and included a parent interview, student interview, and administration of the Stanford-Binet Intelligence Scales - Fifth Edition (SB-V), the Test of Nonverbal Intelligence- Fourth Edition (TONI-4), the Wechsler Individual Achievement Test - Third Edition (WIAT-III), and the Vineland Adaptive Behavior Scales - Second Edition (Vineland-II) (Dist. Ex. 5 at p. 1).¹³

According to the January 2018 psychoeducational evaluation report, the student spoke mostly using single word utterances and her speech intelligibility was inconsistent due to articulation errors (Dist. Ex. 5 at pp. 2, 7). The evaluator reported that "[s]implification and paraphrasing of directions and instructions was needed, as well as lots of modeling and use of gestures for [the student] to understand task directions and instructions" (id.). In addition, the student required multiple repetitions of directions and presentation of task instructions and directions in small steps (id.).

With regard to the student's cognitive abilities, the evaluator indicated that administration of the Stanford-Binet Intelligence Scales - Fifth Edition (SB-V) revealed statistically significant discrepancies between the student's verbal and nonverbal cognitive abilities, suggesting that her abilities were not equally developed, and the full scale IQ might not be an accurate representation of her overall cognitive potential (Dist. Ex. 5 at p. 7).¹⁴ According to the evaluator, the student's

¹² Although the speech-language evaluation assessments were administered over three days in September 2017, the completed speech-language evaluation report was dated February 5, 2018, almost five months later and will be cited to as the February 2018 speech-language evaluation (Dist. Ex. 6 at pp. 1, 4).

¹³ Although the January 2018 psychoeducational evaluation report indicated that the student was assessed using the Vineland-II, the reported scores are from the Vineland Adaptive Behavior Scales-Third Edition (VABS-3) Comprehensive Teacher Form Report (Dist. Ex. 5 at pp. 5-6).

¹⁴ The evaluator noted that the results of cognitive testing should be interpreted with caution as some of the

nonverbal IQ (standard score [SS] 66, mildly delayed) was significantly greater than her verbal IQ (SS 49, moderately delayed) and the student performed better on tasks that relied heavily on visual stimuli as opposed to language-based tasks (*id.* at pp. 6, 7). The evaluator noted that while the nonverbal test items relied heavily on visual cues, visual prompts and manipulatives, oral language was used to present test directions and instructions, therefore, the test was not free of language demands (*id.* at p. 7). The evaluator reported that quantitative reasoning was an area of relative strength for the student and relative strengths were also noted in nonverbal visual spatial reasoning (seeing patterns, relationships, and spatial orientations), and nonverbal working memory (recalling visual presented information) (*id.* at pp. 2, 6, 7). The evaluator found that fluid reasoning was student's poorest area of performance suggesting that the student may have difficulty solving verbal and nonverbal problems using inductive and deductive reasoning (*id.* at pp. 3, 6, 7). The evaluator noted that the student had difficulty using specific information to make generalizations and/or using general information to form a specific conclusion (*id.* at p. 7). In addition, the student exhibited delays in verbal and nonverbal knowledge, verbal visual spatial reasoning (understanding spatial terminology and verbally describing spatial arrangements) and verbal working memory (recalling sentences or portions of information presented orally) (*id.* at pp. 2-3, 6, 7).

Administration of the Test of Nonverbal Intelligence-Fourth Edition (TONI-4) revealed the student attained an overall score within the "Average" range of intellectual functioning and at the 48th percentile (index score: 99), suggesting that the student had reasoning and problem solving skills consistent with same-aged peers (Dist. Ex. 5 at p. 7). The evaluator reported that the student could form meaningful associations between designs, saw abstract relationships, and could reason without words (*id.*). In addition, she noted that when language demands were minimized, the student's performance significantly improved (*id.*).

Next, the January 2018 psychoeducational evaluation report indicated that the student's performance on the WIAT-III yielded scores ranging from the low to the average range (Dist. Ex. 5 at pp. 6, 7). The evaluator noted that the student's reading readiness skills were delayed when compared to grade peers (*id.*). According to the evaluator, the student was able to identify the letters of the alphabet by name but did not consistently match individual letters and letter groups with their corresponding sounds (*id.* at pp. 3, 7). The student's sight word recognition skills were emerging, and she was able to identify high frequency sight words paired with visual aids (*id.*). The evaluator reported that the student's phonemic awareness skills were also delayed, more specifically, that the student's ability to understand of the concept of rhyming, discriminate beginning/ending sounds and blend individual sounds into whole words was not yet up to par with grade peers (*id.*). The evaluator reported that the student's decoding skills were also delayed and she struggled significantly to apply knowledge of letter patterns and letter sound relationships to decode a list of unfamiliar and familiar one and two-syllable words (*id.*). Assessment of the student's reading comprehension was attempted but had to be discontinued as she was not able to read any of the grade-level passages presented (*id.*).

As measured by the WIAT-III, with respect to math, the student was able to identify numbers in isolation from 1-10 and use simple graphs/charts to solve problems (Dist. Ex. 5 at pp.

assessments were not normed on students with hearing impairments or deafness (Dist. Ex. 5 at p. 2).

4, 7). The evaluator reported that the student's understanding of quantitative concepts such as "more or less" was inconsistent (id.). Additionally, the student had difficulty demonstrating understanding of vocabulary words such as "in all," ordering numbers in ascending order from the smallest to the largest, and placing items in sequential order (id.). The evaluator noted that compared to the student's overall math scores, computation was an area of relative strength for the student (id.). She was able to identify numbers in isolation and match numbers with their corresponding quantities (id.). Additionally, she was able to identify mathematical symbols for addition/subtraction and solved single digit addition problems (id.). According to the evaluator, the student's understanding of the concept of subtraction was delayed (Dist. Ex. 5 at pp. 7-8). In addition, the student's automaticity with basic addition facts and speed in solving basic addition problems was delayed (Dist. Ex. 5 at p. 8).

Turning to writing, the evaluator reported that when assessed using the WIAT-III the student could write the letters of the alphabet from memory (Dist. Ex. 5 at pp. 4, 8). She indicated that the student's spelling and writing skills were beginning to emerge (id.). The evaluator reported that the student used capitalization at the beginning of each sentence and punctuation (id.). The student was able to match orally presented sounds with their corresponding letters but was not able to correctly encode sounds to write words and formulate complete sentences using proper sentence structure, spelling and grammar (id.).

The evaluator indicated that based on teacher responses on the VABS-3, the student obtained an adaptive behavior composite score in the moderately low range (SS 73, 4th percentile) (Dist. Ex. 5 at pp. 6, 8). Communication was identified as an area of significant weakness for the student and her daily living skills and motor skills were also reported to be delayed (id.). The evaluator noted that as measured by the teacher responses to the VABS-3, socialization was an area of strength for the student (id.).

The February 2018 speech-language evaluation was conducted by the student's then-current speech-language therapy provider (Dist. Ex. 6 at p. 1). As an initial matter, the evaluation report indicated that several of the assessments used were not norm-referenced on students who were deaf and hard of hearing and should be interpreted with caution (Dist. Ex. 6 at p. 1).¹⁵ The speech-language evaluator reported that during testing the student was seated across the table from the provider for lip reading, wore bilateral processors and an FM unit to increase the signal to noise ratio, and was in an environment with minimal visuals and auditory distractors (id.). The evaluation included an assessment of the student's oral motor skills, articulation, rate of speech, voice, pragmatics, receptive and expressive vocabulary, listening skills, and auditory perception (Dist. Ex. 6). With respect to oral motor skills, the speech-language evaluator reported that "an informal observation of the [student's] oral peripheral mechanism revealed structures adequate for speech production" (id. at p. 1). While the evaluator indicated that the student presented with full range of motion of the tongue and lips, she noted that the student's diadochokinetic rate or ability to engage in rapid progression of ("pataka") was decreased (Dist. Ex. 6 at p. 1). With regard to articulation, the speech-language evaluator reported that, based on the Goldman Fristoe Test of Articulation (GFTA) the student's production at the word level yielded phonological processes

¹⁵ It is not especially unusual for evaluators to utilize assessments that are not normed for the population of deaf children (see Application of Application of a Student with a Disability, Appeal No. 19-075).

consisting of final consonant deletion, weak syllable deletion, cluster reductions, gliding, fronting, and labialization (id. at pp. 2, 3). The speech-language evaluator opined that the student's speech was intelligible to trained listeners in known contexts but could be unintelligible to untrained listeners (id.). With regard to rate, the speech-language evaluator reported that the student was informally observed through conversation and noted that her conversational speech rate was slow due to motor delays (id. at p. 2). The speech-language evaluator reported that the student spoke at a moderate vocal volume in school and that "vocal parameters were judged to be within normal limits for size, age, and gender" (id.). Turning to pragmatics, the speech-language evaluator suggested that as the student continued to expand her lexicon by increasing her receptive and expressive vocabulary, her pragmatic language skills would become stronger (id.). Next, the speech-language evaluator assessed the student's receptive and expressive language skills using the Receptive One Word Picture Vocabulary Test (ROWPVT), the Expressive One Word Picture Vocabulary Test (EOWPVT), and the Preschool Language Scales - Fifth Edition (PLS-5) (Dist. Ex. 6 at pp. 2-3). According to the speech-language evaluator, receptively the student understood qualitative and quantitative concepts and recalled some details when presented with a short story (id. at p. 2). Given four pictures, the student was able to select the picture that began with a specific letter (id.). The speech-language evaluator reported that receptively the student needed to work on pronouns, identifying "advanced" body parts, emergent literacy through book handling, and concepts (id.). In terms of expressive language, the speech-language evaluator reported that the student could answer what and where questions with simple one-word responses, name a described object, name categories, and name letters (id.). She opined that expressively the student needed to work on using pronouns, formulating simple sentences, the use of "er" to indicate "one who," produce words that rhyme, blend and delete syllables, and repeat sentences containing five words (id.).

The speech-language evaluator described the student as a verbal communicator who was beginning to communicate through phrases and simple sentences (Dist. Ex. 6 at p. 2). She noted that the student continued to have "difficulty with listening for targeting perception production," attention, vocabulary, syntax, and receptive/expressive language (id.). According to the speech-language evaluator, the student's performance on the Cottage Acquisition Scales for Listening, Language, and Speech: Simple Sentence Level (CASLLS) suggested that the student's listening skills scattered from a 36- to 42-month-old level and her use of verbs and modals scattered from the 24- to 30-month-old level (id. at p. 3).¹⁶ On the Auditory Perception Test for the Hearing Impaired (APT/HI) the student attained a "developed" score in the areas of auditory awareness, duration, intensity, and pitch identification and an "emerging" score on the identification of the intensity of three speech sounds, two varied patterns auditory alone, prosodic perception tasks, and vowel perception tasks (id. at p. 4). The student attained a "missing" score on the other segmental tasks, where attention to task may have impeded her performance, and the consonant perception tasks (id.).¹⁷

¹⁶ The speech-language evaluator described the Cottage Acquisition Scales for Listening, Language, and Speech: Simple Sentence Level as "a developmental scale based on language sampling. . . designed for the Deaf and Hard of Hearing" (Dist. Ex. 6 at p. 3).

¹⁷ The speech-language evaluator described the Auditory Perception Test for the Hearing Impaired as a criterion-based test designed for children with hearing loss three years and older that "enable[d] the accurate determination

In addition to the evaluations listed in the January 16, 2020 prior written notice, the January 2020 IEP indicated that the district conducted classroom assessments and updated speech-language testing of the student, as well as reviewed the student's progress toward the annual goals in her prior IEP (Dist. Ex. 1 at pp. 1-9). With regard to classroom assessments, the January 2020 IEP stated that the student was assessed using Go Math, the Fountas & Pinnell Reading Assessment, the Dolch Sight Word List, and teacher observation/assessment (Dist. Ex. 1 at p. 1). The IEP indicated that the student was administered the Fountas & Pinnell Reading Assessment on January 2, 2020 at which time she "show[ed] little progress from B/C (since last year's IEP) to currently, Level D/E which is equivalent to a beginning of first grade level" (*id.* at p. 3). The IEP stated that in order to obtain a more accurate assessment of the student's comprehension skills, questions were simplified and re-phrased and the student was provided with gestural and visual prompts (*id.*). According to the IEP the student "scored on average 92 percent accuracy decoding kindergarten-beginning of first grade leveled books" (*id.*). With regard to recognizing high-frequency sight words, the IEP indicated that the student "scored 97 percent for Pre-Primer and Primer level taken from the Dolch Word List on [January 2, 2020]" (*id.*). In terms of spelling, the IEP indicated that with support the student was "beginning to use spelling patterns and rules used from Wilson Foundations program (Level 1 and 2) to help her spell unfamiliar words" (*id.* at p. 4). Turning to mathematics, the January 2020 IEP stated that "[b]ased on Go Math class assessments, [the student] mastered basic skills taught at [the] first grade level and began to develop skills for [the] second grade level (Dist. Ex. 1 at p. 4).

In addition to classroom assessments, the January 2020 IEP included the results of updated speech-language testing conducted in September and October 2019 as part of an initial intake process to the district auditory/oral program (Dist. Ex. 1 at p. 2). The IEP noted that the test results should be viewed with caution as the instruments were not standardized on the hearing impaired or deaf population (*id.*). The IEP further noted that the student used hearing assistive technology during the evaluations to increase the signal to noise ratio (*id.*). According to the IEP, the student attained a standard score of 55 on the ROWPVT and a standard score of 60 on the EOWPVT (*id.* at pp. 2, 6). The IEP indicated that the student was also assessed using the PLS-5 but noted that the assessment was standardized on younger children and was used to identify areas of strength and weakness as the student was unable achieve a basal level on age-appropriate assessments (*id.* at pp. 2, 6-7) The IEP also reflected the results of an administration of the GFTA which indicated that the student was able to produce velars, bilabials, and alveolars in alternating repetitions with short vowels, but at the word level exhibited final consonant deletions, consonant cluster reductions, deaffrication, and devoicing (*id.* at pp. 2, 7). The IEP stated that the student demonstrated an inability to execute the motor sequences necessary for the production of intelligible speech (*id.*). Lastly, the IEP indicated that the student's listening skills, as measured by the CASLLS were generalized at the 36- to 42- month-old level (*id.*).

Turning to the January 2020 CSE's review of the student's IEP goals from the prior school year, the January 2020 IEP indicated that the student had not mastered academic goals related to reading all pre-primer through second grade Dolch sight words with fluency, reading CVC words with fluency given visual and verbal prompts, answering "wh" questions given visual and verbal prompts, writing complete sentences (5-7 words) by saying and repeating the sentences before

of [a child's] discrete auditory perception abilities by profiling sixteen different skill areas" (Dist. Ex. 6 at p. 4).

transferring to paper given visual and verbal prompts, spelling CVC words given visual and verbal prompts, choosing the correct operation sign and solve math word problems given visual and verbal prompts, and using "I" statements to advocate for her hearing needs (Dist. Ex. 1 at p. 1). With respect to speech and language, the IEP indicated that the student met annual goals related to producing consonant sounds /m ,b, p, t, d/ in all positions of words, listening to and verbally repeating 10 sentences (5-7 words in length) given picture cues, and following one-step commands with advanced prepositions (Dist. Ex. 1 at p. 2). The student did not master speech-language goals related to identifying time sequences, story sequences, or recalling 2-3 details when presented with a story orally, or OT goals related to drawing complex pictures and geometric shapes independently and making one and three dimensional figures independently (id.).

To the extent that the parent's assertion that the evaluations used by the district to assess the student's needs were inappropriate stems from the affidavit and testimony of the speech-language pathologist from Pathway the evidence in the hearing record does not convince me that the IHO's decision must be overturned on this basis.¹⁸ In her affidavit the Pathway speech-language pathologist stated that "the speech and language evaluations reported in the IEP. . . used testing materials that are, at best, questionable" (Parent Ex. L ¶ 92). She further went on to state that the EOWPVT and ROWPVT "are disallowed in multiple school districts across the United States because of their cultural bias" (id.), however, there is no evidence in the hearing record to support that assertion and the parent's expert pointed to no State authority challenging the validity of those assessments in this jurisdiction.¹⁹ The Pathway speech-language pathologist noted that the tests only measured vocabulary skills (id.). In addition, she indicated that it was "questionable that these assessments are at all applicable for the hard of hearing" and cited to a scholarly article on vocabulary assessment of deaf and hard-of-hearing children from infancy through preschool which reportedly suggested that hearing loss significantly affected vocabulary development and therefore a multidimensional assessment may be useful for understanding student strengths and weaknesses (id.). The Pathway speech-language pathologist went on to state that had the district administered an appropriate multidimensional assessment other than the PLS-5, which was standardized and normed for younger children, the assessment might be considered valid (id.). In addition, the Pathway speech-language pathologist indicated that the PLS-5 administered to the student when she was nine years old was normed and standardized on children three to seven years old (Tr. p. 322). She opined that the three tests administered by the district to assess the student's language were all inappropriate (Tr. p. 322). The Pathway speech-language pathologist asserted that "there are at least 8, 10, 12 tests that are created for nonverbal children, and they are standardized and normed for children who are barely able to produce words and students who are profoundly disabled at producing speech sounds" (Tr. p. 325). She stated that the tests were developed over time by specialists and could have been administered (Tr. p. 325).

¹⁸ The Pathway speech-language pathologist did not participate in the January 2020 CSE meeting (see Dist. Ex. 2 at p. 1).

¹⁹ The number seemed to grow during her testimony when she further stated that "In almost every school district across the United States, these two tests are not acceptable, only as a supplement, because they are very culturally biased" (Tr. p. 321). There is no claim in the due process complaint notice that the assessments or programming was culturally biased or why that affected the student in this particular circumstance.

Contrary to the testimony of the Pathway speech-language pathologist, the district conducted some evaluations which, according to staff descriptions, were designed for non-verbal or deaf or hard-of-hearing students. The district's January 2018 psychoeducational evaluation included the administration of the Test of Nonverbal Intelligence- Fourth Edition, which the evaluator described as "a test of cognitive ability using nonverbal formats and pointing responses to measure general intelligence" (Dist. Ex. 5 at p. 2). In addition, the district's February 2018 speech-language evaluation included two assessments that were described as being for the deaf and hard of hearing, namely the CASLLS and the APT/HI, described above (Dist. Ex. 6 at pp. 3-4). The CASLLS was also used to evaluate the student in September/October 2019 (Dist. Ex. 1 at p. 2). With regard to the Pathway speech-language pathologist's assertion that the PLS-5 was normed and standardized on children younger than the student, the district acknowledged that fact in the January 2020 IEP and indicated that the student was unable to achieve a basal level on age-appropriate tests and therefore the PLS-5 was used identify areas of strength and weakness (id.).

The Pathway speech-language pathologist correctly pointed out that the January 2020 IEP indicated both that the student's reading was at a kindergarten level and a first-grade level (Tr. pp. 322-23; Parent Ex. L ¶¶ 90, 91; Dist. Ex. 1, 3, 34). The student's special education teacher testified that based on standardized assessment the student was reading at the kindergarten level (Tr. p. 108). However, she stated that she felt that the student "kn[ew] more inside her head" and suggested the student would perform better with a different response modality (see Tr. pp. 108-09). The special education teacher indicated that based on her informal testing the student was reading at a first-grade level but noted "I have to teach those vocabulary words to her" (Tr. p. 109).

According to hearing record, the student underwent bilateral cochlear implant surgery just before her third birthday (Dist. Ex. 5 at p. 1). As explained by the parent, a cochlear implant does the job of a person's cochlea; it translates sounds from the outer ear and vibrations from the middle ear into electric current then passes to the auditory nerve and then to the brain and translates all of that input as sound (Tr. p. 212). The parent stated that the student would always be deaf and noted that she did not become a hearing child when she received cochlear implants (Tr. p. 212). She explained that the cochlear implant was a tool to help the student hear and that "if [the student] is not wearing the implants, she is a deaf person" (Tr. p. 212). The parent indicated that the student could only hear if the outer device was working and charged (Tr. pp. 212-13). She further explained that a cochlear implant is "map[ped]" by an audiologist who individualizes each implant to the wearer according to how they feel the most comfortable perceiving the electrical current as sound (Tr. p. 213).

As indicated in the January 2020 IEP, the student knew when her cochlear implant processors were in working condition or if the batteries needed to be charged and showed independence in maintaining her processor by changing batteries without support from adults (Dist. Ex. 1 at p. 9). Further, the IEP indicated that the student understood how the HAT worked in school and knew how to connect herself to the speaker's transmitter (id.). In September 2020, within the student's first weeks at Pathway, the staff at Pathway noticed that the student was not responding to sounds around her and that the student was not able to hear "anything" (Tr. pp. 310-11). According to the Pathway speech-language pathologist, the student was evaluated at that time by her "audiological team" who found her cochlear implants were "faulty" and the student's implants were "remap[ped]" (Tr. pp. 310, 313). As stated above, the district was not required to determine if the student's implants needed remapping; however, the January 2020 IEP does not

indicate if the student exhibited any residual hearing or how the cochlear implants effected the student's hearing (see Dist. Ex. 1). Moreover, I am concerned that the student's January 2020 IEP did not include a section for hearing education services and instead, the components of what would be provided to the student as hearing education services was placed under the student's management needs section of the IEP (see Dist. Ex. 1 at p. 10).

Based on the above, the hearing record supports a finding that the evaluative information before the January 2020 CSE was sufficiently comprehensive to identify the student's special education and related service needs, whether or not commonly linked to the disability category of deafness (see 34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Although the Pathway speech pathologist critiqued the district's evaluations and may have utilized different evaluations to assess the student at Pathway, the district nonetheless demonstrated that it used a variety of formal assessments as well as input from the student's special education teacher who had worked with her extensively in order to develop the IEP. While, as discussed further below, the CSE ultimately recommended a program that did not afford the student the opportunity to make progress in light of her unique needs and particular circumstances, there is not an adequate basis in the hearing record to disturb the IHO's findings that the CSE had sufficient evaluative material from which to develop an IEP.

3. Present Levels of Educational Performance

I will turn next to the parent's remaining issues on appeal relating to the student's present levels of education performance, the annual goals and the program recommendations in the January 2020 IEP. According to the parent, the IHO should have addressed the student's present levels of educational performance as indicated in the January 2020 IEP and found them inappropriate because they did not include any mention of the student's cognitive abilities; however, that claim was not raised in the parent's due process complaint notice, but later by a parent witness during the impartial hearing (Parent Ex. L at ¶ 88).

Even if it had been raised, the evidence shows that in addition to the evaluative information discussed above, much of which was included in the January 2020 IEP (see Dist. Ex. 1 at pp. 1-7) the student's district special education teacher who was present during the January 2020 CSE meeting, testified that she drafted the description of the student with respect to the ELA, writing, math and social sections of the student's IEP (Tr. pp. 85, 110-11; see Dist. Ex. 2).

Regarding ELA, the January 2020 IEP indicated the student could answer WH questions with the support of picture cues and she read primarily in two-word phrases and some word-by-word reading, which affected her comprehension (Dist. Ex. 1 at p. 3). With respect to decoding and reading fluency, the IEP indicated that the student had weaknesses in speech production and articulation (id.). In writing, the IEP indicated that the student showed growth and independence in her writing skills since the last IEP was developed; she required less 1:1 support; and was able to draft simple sentences, 4 to 5 words in length, using a graphic organizer (id.). She used inventive spelling to write the beginning and ending sounds of words (id.). According to the IEP, the student's drawings matched her writing and when the student was reminded, she was able to label her drawings and add details to make the illustration more interesting (id. at p. 4). Further, with support, the student was beginning to understand editing skills and was able to correct capitalization and end punctuation (id.).

Regarding the student's math skills, the January 2020 IEP indicated that the student had mastered basic skills taught at the first-grade level and was beginning to develop skills for the second-grade level (Dist. Ex. 1 at p. 4). More specifically, the student was able to add and subtract numbers within 20; count numbers by ones to 100 independently; count numbers by fives and tens with the support of a 100 chart; compare 2-digit numbers; compare using comparing symbols; read and write three-digit numbers; interpret simple data using charts and graphs up to three categories; make a pattern and understand the repeating pattern rule; and name basic shapes (id.). The IEP stated that the student's strength was basic computation, and her weakness was in the area of math language and vocabulary (id.). It further stated that word problems remained a challenge for the student (id.).

The January 2020 IEP indicated that the student's instructional/functional level for reading was kindergarten and for math was second grade (Dist. Ex. 1 at p. 34).²⁰

Regarding the student's adaptive behavior needs, the January 2020 IEP indicated that since the 2018-19 IEP, the student showed "tremendous growth" in maturity when it came to staying on task, her participation in the class was no longer limited to only a 1:1 setting, and she was able to participate in group discussions when a topic interested her and with support (Dist. Ex. 1 at p. 4). However, the IEP noted that despite this growth, the student showed signs of auditory fatigue and was easily distracted when visual supports were not readily available during instruction (id.). The IEP further noted that the student needed reminders to practice proper eye contact when having a conversation or listening for directives (id.).

The January 2020 IEP also indicated that the student transitioned well between subjects but finished classwork at a slower pace than her peers (Dist. Ex. 1 at p. 4). The IEP stated that, despite the slower pace, the student was "resilient and manage[d] to complete all assigned tasks in the end if she [was] interested in the given topic" or understood what was expected of her (id.). The IEP noted that the student also benefited from having extended time to complete class projects or assignments (id.).

Consistent with the parent's complaint about cognitive abilities, the January 2020 IEP did not include the score results of intelligence testing or include a section that specifically discussed the student's cognitive abilities (see Dist. Ex. 1), there is no specific mandate that the testing results be delineated with specificity in an IEP. As noted previously, an IEP must include a "statement of the student's present levels of academic achievement and functional performance" and, furthermore must indicate "[h]ow the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children)" (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see also, 8 NYCRR 200.1[ww][3][1][a]). While a CSE may often times choose to set forth evaluation scores in an IEP because the drafters may view it as helpful, it is not a procedural error if the scores are omitted.

In this case, the IEP indicated that the student had a strong visual memory that assisted her with reading but noted that she needed to strengthen her auditory memory skills (Dist. Ex. 1 at pp. 3, 4). The IEP also noted that the student could become easily distracted when visual supports

²⁰ In a different part of the January 2020 IEP the student's teacher indicated that the student's reading ability, as measured by Fountas & Pinnell, was at a beginning first grade level (Dist. Ex. 1 at p. 3).

where not available during extended instruction (id. at p. 4). The IEP described the student's learning style (id. at p. 5). Specifically, according to the teacher observations noted in the January 2020 IEP, the student was a visual and tactile learner who, due to the nature of her hearing loss, worked best when the room was quiet with minimal background noise and visual distractions (Dist. Ex. 1 at p. 5). The teacher noted that the student retained new information easier with hands-on learnings and when auditory information was presented along with picture cards (id.). When the student was asked questions auditorily or without a visual prompt, she would often need the questions or directions repeated or rephrased (id.).

According to the January 2020 IEP, in the area of OT, the student was working on visual motor/ visual perceptual skills and was "about to accomplish" her then current goals in such areas (Dist. Ex. 1 at p. 9). Further the occupational therapist noted that "[e]xcept for her hearing impairment, [the student] present[ed] with optimal sensory integration development, and she [wa]s able to process sensory input in an efficient manner" (id.).

Regarding the student's speech abilities, the January 2020 IEP indicated that the student's speech production was characterized by an "inability to execute the motor sequences necessary for the production of intelligible speech." (Dist. Ex. 1 at p. 2).²¹ Further, IEP indicated that the PLS-5 Expressive Communication Subtest revealed that the student was able: to code present progressive verb censes and use plural ending; to respond to "Where?", "What...doing" and "What?" questions; to generate the same questions and responses to questions in a logical manner; to generate attributes of objects using adjectives of color, size and texture and, as such, was able to describe the objects; and to use prepositions, name categories, and used modifying noun phrases, (id. at p. 5). The IEP stated that the PLS-5 Auditory Comprehension Subtest revealed the student was able to: understand qualitative concept such as "one, same, rest, and all"; understand negatives in sentences; understand complex sentences; and when presented with a story orally, was able to recall details, identified story sequence, identified the main idea, made an inference and made a prediction (id.).

The January 2020 IEP indicated with regard to the effect of student needs on involvement and progress in the general education curriculum that,

[The student] participates in the general education curriculum with accommodations to gain access to the curriculum. She requires a highly specialized educational program that facilitates the acquisition, application and transfer of skills across natural environments. In addition to [the student]'s academic needs, she requires direct instruction in such areas as community safety, self-advocacy, and activities of daily living in relation to her hearing loss and hearing needs. She needs a small group instruction where she can have support in the areas of auditory, expressive and

²¹ The student was formally diagnosed by Pathway during the student's initial intake in July 2020 with childhood apraxia of speech (CAS), or speech sound disorder (Parent Ex. L ¶ 21). According to Pathway's speech-language pathologist a student with CAS has trouble saying what he or she wants to say correctly and consistently (id.). This definition of CAS is consistent with the January 2020 CSE's description of the student's inability to execute motor sequences necessary for the production of intelligible speech (compare Parent Ex. L ¶ 21, with Dist. Ex. 1 at p. 2).

receptive language skills. She is presently working on a functional academic curriculum in a specialized 12:1:1 auditory/oral program to help her to be more independent post-completion. She requires a higher language model program with a licensed special education teacher for the deaf and hard-of-hearing and related services including speech[-]language therapy and occupational therapy to address her current hearing needs

While the parent might have preferred to incorporate more information about the student in the present levels of performance, I am not convinced that the present levels of performance in the January 2020 IEP were so infirm that the IHO's decision should be overturned on this basis.

4. IEP Goals

With regard to the issue of whether the annual goals were appropriate, the IHO determined that the January 2020 CSE designated appropriate annual goals for the student (IHO Decision at p. 12). The parent alleges on appeal that the student's annual goals listed in the January 2020 IEP were "retreads of unsuccessful goals from earlier IEPs" regarding the 2018-19 and 2019-20 school years (Req. for Rev. ¶ 21). The district argues that the goals were specifically formulated to give the student the best chance to learn and progress in the least restrictive environment.

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]).

A review of the annual goals in the January 2020 IEP shows that they generally targeted the student's needs as identified in the present levels of performance. For example, with respect to reading, the IEP indicated that the student needed to enhance her ability to read Dolch sight words with fluency, read CVC words with fluency, answer "wh" questions, and ask "wh" questions with sentence starters (Dist. Ex. 1 at pp. 1, 6). The IEP included annual goals that addressed each of these skills (id. at pp. 12-16). Next, the IEP indicated that the student needed to enhance her writing skills by writing complete sentences of 5-7 words after saying and repeating them and by spelling CVC words (id. at pp. 3-4, 6). The IEP included a goal related to spelling CVC words and writing a complete sentence of 6-9 words after saying and repeating it (id. at pp. 16-18). With regard to mathematics, the IEP indicated that the student needed to improve her ability to choose the correct operation sign and solve math word problems and included an annual goal to address this skill (id. at pp. 4, 6, 19). The IEP also noted the student's need to self-advocate for her hearing needs using "I" statements and included an annual goal that target this skill (id. at pp. 4, 6, 20). As acknowledged by the district in the IEP, these goals were carried over from the student's 2018-19 IEP because they were not mastered by the student (id. at p. 1). The January 2020 IEP included additional goals that targeted the student's ability to retell a story presented orally; use pronouns and respond using spoken language to "why" questions during a structured speech activity; follow

multistep orally presented commands during a structured speech activity; produce affricates, fricatives, and sibilants in all positions of words; copy/draw complex pictures and geometric shapes independently; and make one and three dimensional figures independently (*id.* at pp. 21-27). With the exception of pronoun use, all of these goals corresponded to student weaknesses identified in the present levels of performance (*id.* at pp. 2, 6, 7).

The parent does not appear to take issue with the skills addressed by these annual goals, rather she appears to disagree with the goal conditions, or circumstances under which the student was expected to perform the skills. More specifically, the parent alleges that out of the 15 goals listed on the January 2020 IEP, 12 required receptive language skills that the student simply did not have. For example, one of the annual goals stated "[g]iven modeling and practice, [the student] will spell 15 CVC (consonant-vowel-consonant) words using verbal prompts (e.g. What sounds did you hear? Look at the picture, what did you see?) and visual prompts (e.g. Sounds in motion hand gesture cues, draw lines for each sound heard, etc.)" (Dist. Ex. 1 at p. 18). The parent argues that such an auditory "prompt and response" goal would be impossible for the student to achieve given that her receptive language index score was in the 0.3 percentile (*see* Parent Ex. L ¶ 101).

Next, the parent alleges the January 2020 CSE did not recommend a goal to address the student's childhood apraxia of speech. The Pathway speech-language pathologist noted that the student's IEP included only one goal related to increasing her intelligibility and opined that because the student "presented with apraxia and not simplistic articulatory errors" the recommended mode of remediation would have been ineffectual (Parent Ex. L at ¶102). She stated that there were no IEP goals related to apraxia (*id.*). According to the present levels of performance in the January 2020 IEP, the student was unable to coordinate the motor movement sequences necessary for intelligible speech output and had difficulty with the production of fricatives ("f" and "v") as well as affricates and sibilants (i.e. "ch" and "sh") (Dist. Ex. 1 at p. 7). The January 2020 IEP included a goal for the student to produce affricates, fricatives and sibilants in all positions of words and phrases (Dist. Ex. 1 at p. 23). The district special education teacher did not testify regarding this goal and the district speech pathologist, who was the student's speech-language therapist for the 2019-20 school year and the author of the speech-language section of the January 2020 IEP, including the annual goals, did not testify (*see* Tr. p. 111; Dist. Ex. 2). It is unclear if this goal would have addressed the student's inability to execute the necessary motor movements to demonstrate the language skills detailed in the January 2020 IEP and which the parent reported to be an area of concern with regard to the student's communication and language (*see* Dist. Ex. 1 at p. 7; Parent Mem. of Law at pp. 9-11).

The annual goals contained in the January 2020 IEP included criteria, methods, and schedules for measurement, but the student was not mastering the goals nor was she making the progress necessary to advance to the next grade.²² Accordingly, for purposes of this appeal, the evidence showing that progress toward the annual goals was minimal, when considered together with the analysis of the proposed programming described below, is sufficient to find that the student was denied a FAPE.

²² The January 2020 IEP contained progress reports for each goal, however, the date of each progress report therein was not indicated in the IEP (*see* Dist. Ex. 1 at pp. 12-27).

5. Program Recommendation

The parent alleges that the district failed to provide the student a FAPE because the January 2020 CSE recommended the same programming for the 2020-21 school year that the student had attended during the previous two school years and the student had already repeated second grade once and continued to make little progress in the recommended program.²³ The parent argues that the district did not provide a program designed to enable the student to make meaningful progress and advance to the third grade (see Parent Memo. of Law at p. 1). The IHO determined that the CSE considered the full continuum of services that could provide the student with an educational benefit and developed an IEP after giving due consideration to the student's present levels of performance and her individual needs (IHO Decision at pp. 9-10). In so finding, however, the IHO noted that the parent had been advised by the CSE at both the January 2020 CSE meeting and during the prior school year that the sign support program was the most appropriate recommendation for the student based on "the observations and the assessments of the educational staff who worked with [the] [s]tudent" (IHO Decision at p. 9). Accordingly, while the IHO found that the student's "learning profile" was "accommodated" in the management needs section of the IEP, she also determined that the program was appropriate, despite admissions by the student's special education teacher that "something more" was needed than the recommended program and the student's prior demonstrable lack of progress in the same program, seemingly because she construed that the district was constrained to recommend the auditory oral program once the parent expressed her preference for the program and rejected the sign support program (IHO Decision at pp 10-11). However, merely respecting a parent's preferred communication mode while placing the district's objections to the parent's choice "on the record" at an IEP meeting does not necessarily fulfill the district's FAPE obligations to a deaf or hard-of-hearing student. Rather, while acknowledging the nuances and different standards inherent in the interaction between Title II, the IDEA, State law and federal and state guidance, as discussed above, it is clear that any program recommended for a deaf student must provide appropriate programming, within the parent's preferred communication mode, to address the communication and language needs of a deaf or hard-of-hearing student so that he or she can make appropriate progress in the curriculum in light of his or her unique circumstances. Accordingly, I will assess the district's program recommendations in light of the aforesaid legal standards and guidance.

A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. Jun. 24, 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how a subsequent IEP could be appropriate if it was simply a copy of the IEP which failed to produce

²³ The hearing record shows that the student attended first grade for the 2017-18 school year and second grade for the 2018-19 and 2019-20 school years (see Dist. Ex. 1 at p. 1; 5 at p. 1).

any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

To address the student's needs as identified above, the January 2020 CSE recommended that the student attend a 12:1+1 special class that used an auditory/oral teaching methodology for five periods a week for ADLs, fifteen periods per week for ELA, five periods per week for math, three periods per week for social studies, three periods per week for science and one period per week for visual arts (Dist. Ex. 1 at p. 28-29). The CSE also recommended that the student receive one 30-minute session per week of individual occupational therapy (OT), five 30-minute sessions per week of individual speech-language therapy, 12-month services, assistive technology, and supports for school personnel on behalf of the student (id. at pp. 29-30).

According to the January 2020 IEP, the CSE considered but rejected a general education placement, a 12:1+1 special class in a community school, and an 8:1+1 special class in a specialized school (Dist. Ex. 1 at p. 36). As indicated in the IEP, the general education placement and the 12:1+1 special class in a community school were deemed insufficient to provide the "language enriched environment and auditory oral methodology" that student needed during core academic classes (id.). The CSE determined the 8:1+1 special class in a specialized school was too restrictive for the student at the time the IEP was developed (id.). The IEP indicated the student would continue to benefit from the 12:1+1 special class "standardized auditory/oral program in a specialized school with higher language model program with a licensed special education teacher for the deaf and hard-of hearing" along with related services of OT and speech-language therapy (id.).

To address the student's management needs, the January 2020 CSE recommended: (1) directions and concepts repeated, simplified and/or clarified as needed while maintaining appropriate eye contact between the student and the speaker; (2) preview of unfamiliar vocabulary words before lessons, visual aids such as pictures, charts, check lists, and graphic organizers to support understanding and organizational skills; (3) use of hearing assistive technology (HAT) to improve signal-to-noise ratio and to maximize speech understanding; (4) flexible preferential seating (U shape, circle, etc.), light at her back away from window glares and noise distraction (by the door, air conditioner, etc.), full visual access to speaker's face and lips (teachers and peers) to pick up cues like facial expressions and body language; (5) provide a program with closed captions or subtitles if available to assist in listening comprehension; (6) break time for auditory fatigue; (7) classroom buddy for support in note-taking, prompting or clarification; (8) use of a divider to reduce visual distractions; (9) on task focusing prompts; (10) services from the audiological department, if needed; (11) special education teachers (12) 12:1+1 AO (auditory/oral) program with standardized assessment, in a specialized school; (13) classroom paraprofessional; (14) adult supervision 100 percent of the school day; and (15) a regular physical education program in a 12:1+1 ratio (Dist. Ex. 1 at p. 10).²⁴

Review of the January 2020 IEP indicates the student was recommended to receive unspecified HAT in the classroom, all day except during gym and lunch (Dist. Ex. 1 at p. 29).

²⁴ The January 2020 IEP noted that the student should be positioned in the classroom where she could have a full view of the class, the teacher, and the board so she knew who was talking or the topic being discussed during a whole group discussion (Dist. Ex. 1 at p. 10).

Supports for school personal on behalf of the student included "Audiology: Fit, dispense, maintain equipment," "Auditory/Oral Classroom Teacher: Monitor Equipment," and Auditory/Oral Classroom Teacher and Audiologist: Training in care and use of equipment" (*id.*). Testimony by the student's special education teacher indicated the district had a department of audiology and that an audiologist came to school one day per week to check on all the students in the program (Tr. p. 120). The special education teacher testified that all the teachers for the deaf and hard of hearing were well trained to troubleshoot problems with equipment and get technology restored but that sometimes the teachers needed to reach out to the audiologist (i.e., for more batteries) (Tr. p. 121). The teacher also indicated that the audiologist provided her with training about changes in technology, including (cochlear) implants and processors or hearing aids (Tr. p. 121). The teacher reported the audiologist was there for emergencies, for example if a teacher's microphone needed to be sent out for repair or a student's receiver was not working and needed to be sent out or swapped (Tr. pp. 121-22).

The hearing record indicates that the January 2020 CSE wanted to recommend the student for a special class that used sign-support as an instructional methodology, and which the CSE indicated might help facilitate the student's production of expressive language and cognitive development (Dist. Ex. 1 at p. 7). According to the January 2020 IEP, the parent had observed the sign-support program during the 2017-18 school year and did not believe the program would be appropriate for the student (*id.*). As a result, the CSE chose not to recommend sign support program on the January 2020 IEP (Dist. Ex. 1 at p. 7). The parent testified that that she asked the student's special education teacher and speech pathologist if modifications could be done to the student's curriculum to "catch her up to the language level" used in class, but that their recommended modification was to put her in the sign-support program (Tr. p. 219). The parent stated that both the district special education teacher and district speech-language pathologist told her that if she wanted the student to "gain academically and linguistically" the student would have to attend the sign-support program (*id.*). According to the parent, district staff told her that there had been studies conducted on deaf individuals that claimed to prove that the use of sign language increased the possibility of deaf individuals developing spoken language (Tr. pp. 221-22).²⁵ However, the parent reported that when she observed the sign-support program, she was "very turned off" by it because it did not appear that sign language was improving the deaf students' speech in the classroom (Tr. pp. 221-26). Based on this evidence, it appears the district has honored the communication preference of the parent but has not yet fully considered the student's language and communication needs nor considered what may be provided further to ensure effective communication for the student.

The student's district special education teacher testified that student's auditory/oral program employed a hand-movement program called Sounds in Motion in which every letter had a sound, and every sound had a hand movement associated with it (Tr. pp. 96, 97-98). She noted that because the student had challenges with speech production staff used "lots of Sounds in Motion to help her with speech" but noted that "even [with] that [program,] we felt like she need[ed] more" (Tr. p. 96). The special education teacher stated that staff felt the student would be more successful "if there[] [wa]s another modality for her to learn" (Tr. pp. 96-97). She further stated that she

²⁵ The parent reported that the sign support program used Signed English as opposed to American Sign Language (ASL) (Tr. p. 223).

suggested to the parent that the student "need[ed] something else" like signing support, to help her feel more successful with communication, with reading and writing" (Tr. p. 97). The district special education teacher testified that she wanted to give the student "something else so she c[ould] be more successful" rather than try to force her to talk when she struggled with words and further opined that she felt the student needed more than "listening and speaking" and needed to work with her hands and try communicating not just with her mouth (Tr. pp. 99-101). The special education teacher noted the student struggled with words but did not indicate whether it was due to her being deaf or because of her CAS (Tr. p. 99). Further, the special education teacher indicated that the student needed more than what she was being offered in the program recommended by the January 2020 CSE, yet provided no other options to other than the sign-support program that was already rejected by the parent. The special education teacher testified that because the auditory/oral program was about listening and talking, the only tools she could use were "talk, speech, do speaking and listening, and the support of Sounds In Motion" (Tr. p. 99).

According to the January 2020 IEP, the student showed " a little progress" in her ability to read independently, moving from a Fountas & Pinnell level B/C at the time her prior IEP was developed to a level D/E at the time the January 2020 IEP was developed (Dist. Ex. 1 at p. 3).²⁶ The January 2020 IEP also indicated that, despite the student's delay in speech production, when given a mini lesson to preview vocabulary words before reading a text, the student would "compensate[] her speech production with a strong visual working memory in recognizing words and [wa]s able to match" the vocabulary words with their respective pictures (Dist. Ex. 1 at p. 3). When asked why the student was reading on a kindergarten level as indicated on the January 2020 IEP when she was in second grade program, the district special education teacher answered "I don't know. [When s]he came to us... in 1st grade, I believe[d] she was even lower than that" and that at the time she began working with the student on "basic" sight words at a pre-kindergarten level (Tr. p. 105). The special education teacher testified that the class used Wilson Foundations for phonics to facilitate phonetic skills for decoding (Tr. p. 130).

The January 2020 IEP indicated that the student "needed a particular device or service in consideration of [her] language and communication needs, opportunities for direct communication with peers and professional personnel in the student's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the student's language and communication mode" (Dist. Ex. 1 at p. 11). The CSE recommended HAT for the student to use daily in the classroom and audiology supports to fit, dispense and maintain equipment, monitor the equipment, and to train the student's teacher and audiologist how to care and use the equipment (*id.* at p. 29). The IEP indicated that the use of HAT was recommended to improve signal to noise ratio and maximize the student's understanding of speech (*id.* at p. 10). The IEP noted the parent's concern that due to the student's limited vocabulary for listening and speaking the student had difficult time engaging in conversations with family members and close friends, and that people tended to "shy away" from her because they did not know how to communicate with her (Dist. Ex. 1 at pp. 8, 36). The January 2020 IEP does not specifically indicate how the student had been progressing towards her preferred mode of communication (see Dist. Ex. 1).

²⁶ The date of the prior IEP is unknown.

However, during the impartial hearing, the district special education teacher testified that the student made a "big improvement" from her first year in the auditory/oral program to her second year because she was able to sit for group instruction rather than receive all her instruction one-to-one (Tr. pp. 103-05). However, she noted that the student was only able to participate in group instruction when there was a visual available for her to look at and that if instruction was given without a picture she "would lose her [attention] right away" (Tr. pp. 104). Thus it appears that the student was in fact missing some of the instruction in the district's programming as designed.

Underscoring that is the testimony by the student's teacher that the student needed "something more" to make meaningful progress toward her goals and access the curriculum (see Tr. p. 99). An option that was not explored by the January 2020 CSE was to make modifications to the student's curriculum (see Dist. Ex. 1). According to the special education teacher, the district 12:1+1 auditory/oral special class followed New York State learning standards and used standardized assessments (Tr. pp. 105, 130). The January 2020 CSE recommended the following testing accommodations for the student: extended time (time and a half); separate location with a group no larger than 12 students; use of HAT; all test directions read aloud two times; and questions read aloud two times for math tests only (Dist. Ex. 1 at p. 31). The CSE did not recommend any supplementary aids and services, program modifications in the January 2020 IEP (see Dist. Ex. 1 at p. 29), and I am not convinced by the district's reasoning that because the programming in the auditory/oral program was standardized for the other student's, the district was therefore precluded from modifying the curriculum for the student in order to further individualize the program to her unique needs. The programming must fit the student, and although it appears to be a very good program in general with a caring staff, I am concerned in this instance that the student was being shortchanged to a degree in order to fit the available program.

Based on the evidence in the hearing record, it appears that the student needed more than what was being provided by the district to have effective communication and to address her language needs as a deaf student. It seems that the district, rather than identifying other ways to meet the student's needs through the variety of special education services at the CSE's disposal to recommend, is arguing that the sign support program was the next program the CSE would have recommended for the student due to her lack of progress but because the parent's preferred modality for the student was the auditory/oral program, the district could not recommend such support and thus the lack of progress the student was making was not due to any underlying problems in the recommended 12:1+1 special class in the auditory/oral program but due to the fact that the parent would not allow the student to be placed in the sign support program (see Tr. pp. 97, 99-101). Instead of focusing on what the district could provide to the student within the auditory oral program that would ensure the student's access to effective communication sufficient to meet her unique learning and social needs, the IHO instead appeared to partially fault the parent's preferred communication mode. However, that is not a valid line of reasoning due to the Title II requirements discussed above.

Rather than supporting a finding that the district met its burden in providing the student with a FAPE, the evidence in the hearing record demonstrates that the district continued to recommend the same program that had resulted in minimal progress toward the student's annual goals, rather than modify the program with further supports aimed at the parent's preferred auditory oral communication mode for the student. The totality of the hearing record shows that despite

the January 2020 CSE's recommendations the student was unable to sufficiently access the curriculum and make progress. Having determined that the district did not sufficiently address the student's needs, I find it did not offer the student a FAPE for the 2020-21 school year. Accordingly, I must next address whether the parent's unilateral placement of the student at Pathway was an appropriate program.

B. Unilateral Placement

The parent alleges that Pathway provided the student a program that was designed specifically for her unique needs which enabled her to make meaningful progress academically, socially and behaviorally. The district did not raise an argument to the contrary in its answer and the IHO did not issue a determination on the matter in her decision (see IHO Decision).

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).

With regard to the parties dispute over whether the program at Pathways was appropriate to address the student's needs, the evidence shows that Pathway identified the student's needs and provided a program that was reasonably calculated to enable the student to receive educational benefits.

According to the Pathway speech-language pathologist, Pathway is an ungraded coeducational school, founded to help students with language-based learning disabilities (Parent Ex. L ¶ 7). During the 2020-21 school year, 54 students attended Pathway (id.). Students enrolled at Pathway share common learning disabilities and social-emotional challenges (Parent Ex. L ¶ 8). All Pathway students have IEPs (Parent Ex. L ¶ 8). Pathway's student population includes children with language processing disorders, dyslexia, attention deficit hyperactivity disorder ("ADHD"), deafness/hard of hearing, auditory processing disorder, executive function disorder, and other challenges (Parent Ex. L ¶ 8). Most Pathway students have been classified by the district as having a speech or language impairment, learning disability, or other health impairment (Parent Ex. L ¶ 8). According to the Pathway speech-language pathologist, Pathway's curriculum is based on New York State Common Core standards, with accommodations developed for each student's needs (Parent Ex. L ¶ 9).²⁷ A multidisciplinary approach is used, and modifications are made for each student based on his or her educational, emotional, and functional levels. (Parent Ex. L ¶ 9). Pathway also provides training for the students' parents/guardians, to enable carryover of skills and support to the home and community (Parent Ex. L ¶ 13).

The Pathway speech-language pathologist indicated Pathway's teachers were trained in and use the Orton-Gillingham approach (Parent Ex. L ¶ 10). Pathway teachers used other instructional methodologies, including but not limited to The Wilson Reading System, Reading A-Z, The Lindamood Phoneme Sequencing (LIPS) program and Verbalizing & Visualizing (Parent Ex. L ¶ 11). According to the speech-language pathologist, Pathway teachers provided direct and systematic instruction in small groups, 1:1 instruction when needed, behavior interventions, multi-modality input (with visual/auditory/tactile methods), review and repetition, incremental teaching, scaffolding, mnemonics, and feedback (Parent Ex. L ¶ 11).

Further, when grouping students into classrooms, Pathway considered each student's age, academic and behavioral needs, and social and emotional development (Parent Ex. L ¶ 15). Also,

²⁷ The Pathway speech-language pathologist also indicated that she served as Pathway's language curriculum coordinator and director of related services (Parent Ex. L ¶ 1).

the speech-language pathologist indicated that a student's abilities within a given subject was also considered in making decisions concerning class grouping and that students may be regrouped during the course of the school year based on individual performance as measured against that of their classmates, as reported by the student's teachers and therapists (id.).

The Pathway speech-language pathologist' reported that each new student in their program was assessed using the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-5), coupled with the Goldman Fristoe Test of Articulation when necessary (Parent Ex. L ¶ 14). Results of the CELF-5 objectively revealed that the student had severely limited language abilities as she achieved a core language score below the first percentile (Parent Ex. L ¶ 27).

The speech-language pathologist stated that she was familiar with the student as she met her in July 2020, prior to the student entering Pathway in September 2020 (Parent Ex. L ¶ 16). She indicated that she was familiar with the programming the student received at Pathway during the 2020-21 school year because she provided the student with speech-language therapy twice a week and from regular communication and collaboration with the student's teachers, other therapists, review of the student's work, and her observations of the student in class, at recess, and during the lunch period (id.).

According to the speech-language pathologist, during the student's intake evaluation for Pathway in July 2020, the student was initially diagnosed with an auditory processing disorder (APD), and was also found to have CAS (Parent Ex. L ¶¶ 20, 21). According to the speech-language pathologist, the student's speech sound production was generally unintelligible and inconsistent (Parent Ex. L ¶ 21). The student also exhibited oral groping of the tongue, lips and/or jaw when trying to produce words (Parent Ex. L ¶ 21).

In addition, the speech-language pathologist indicated the student presented with phonological processes that, developmentally, should have been inhibited in the preschool period (Parent Ex. L ¶ 22). These phonological deficits included: initial consonant deletion, final consonant deletion, vowel distortions, idiosyncratic productions, epenthesis (the insertion of a letter within a word), stopping, stridency deletion, fronting, backing, cluster reductions, liquid simplification, alliteration, voicing and devoicing (id.). Further, the speech-language pathologist indicated the student's vocal intensity, pitch, prosody and intonation patterns were highly inconsistent, and were generally challenging and/or disconcerting to the listener (id.).

According to the speech-language pathologist, because of the student's auditory processing deficits, she would often shut down when presented with only auditory input and could not process conversations that were produced in the school yard or the lunch area, because her FM unit could not direct the multitude of auditory information to her in a functional manner, and she also struggled to use her language skills to express her wants and needs effectively (Parent Ex. L ¶ 31). It was further indicated that the student often became withdrawn when others, both children and adults, did not or could not understand her (id.).

According to the speech-language pathologist, to have a more objective and definitive understanding of the student's ability to process auditory information the Comprehensive Test of Phonological Processing-2 (CTOPP-2) was administered (Parent Ex. L ¶ 32). Results of this assessment revealed that the student's phonological awareness, phonological memory and rapid

symbolic naming skills were at or below the first percentile and below the kindergarten level (Parent Ex. L at ¶32).

The speech-language pathologist reported that for the 2020-21 school year at Pathway, the student was placed in a cohort group of eight students, which broke down into smaller groupings for individual subjects, based on the students' respective abilities in each subject (Parent Ex. L ¶ 38). The student's classmates all were within two chronological years of each other in age and had similar learning challenges (*id.*). According to the speech-language pathologist, the Orton-Gillingham Approach was successfully implemented for the student's reading and that lessons and materials in all classes were provided at the student's skill level (Parent Ex. L ¶ 38). Further, instruction provided to the student was paced to accommodate her abilities, with the introduction of new materials geared to take into consideration her individual strengths and difficulties (Parent Ex. L ¶ 40).

In addition, the student was provided with small, supportive classes, individualized strategies to address her attentional and functional challenges, one-to-one paraprofessionals throughout the day, an individualized behavior plan, phonological and phonemic awareness drills, an individualized sensory diet, and sensory input for regulation, attention, and focus (Parent Ex. L ¶ 41; *see also* Parent Ex. L ¶¶ 42-45). The speech-language pathologist testified that Pathway developed a behavior plan to ensure that student had the "best possible attitude" during the first few weeks of school (Tr. p. 307). The student was also provided with a personalized writing program based on her individual challenges (i.e., difficulty with crossing the midline, poor hand manipulation, difficulty with finger opposition, inability to perform many fine motor tasks and visual motor challenges) (Parent Ex. L ¶ 46).

According to the speech-language pathologist, at the beginning of the 2020-21 school year, the student struggled with reading, had difficulty with elision (the omission of a sound or syllable), blending words, phoneme isolation, and non-word repetition, and because she had difficulty with onset and rhyme, the student was unable to isolate initial and final sounds in words (Parent Ex. L ¶ 37). According to the student's 2020-21 end of the school year progress report, she made "significant reading progress" and acquired all letter sounds and learned the short vowel sounds; could decode CVC words; and mastered 30 sight words and could apply such words to read controlled text (Parent Ex. F at p. 1). The progress report further indicated that the student advanced in a range of auditory skills as well and could isolate and manipulate sounds in a given word, encode with greater proficiency and completed dictation exercises (*id.*).

Further, the speech-language pathologist reported the student's math skills were notable for poor memory for digits, and inability to process the language of math and, as a result, solve word problems (Parent Ex. L ¶ 37). During the fall semester of the 2020-21 school year, the student worked on building knowledge of place value, developing fluency of addition and subtraction computation; understanding how to write numbers in standard and expanded form, and counting numbers of greater value (Parent Ex. E at p. 2). According to the fall 2020 progress report, the student could write and read numbers 1-1000, line up number problems, add correctly, and identify place values of a number represented, among a number of other skills (*id.*). To support "an ideal rate of learning" the student was instructed using 1:1 instruction, hands-on learning, multi-modality presentation, systematic instruction, constant review, and the use of visuals and manipulatives to attain targeted math skills during the school year (Parent Exs. E at p. 2; L ¶ 56).

The Pathway speech-language pathologist indicated that the student participated in a guided social skills club and supervised recess (Parent Ex. L ¶ 59). Targeted skills included transitioning, sportsmanship, developing esprit de corps, turn taking, using politeness markers, and theory of mind (*id.*). According to the 2020-21 end of the school year progress report, the student could made "remarkable gains. . . specifically in the language and communication realm" (Parent Ex. F at p. 4). She could communicate and express her thoughts and ideas with confidence, perseverance and accuracy; was willing to self-correct and apply learned strategies when speaking to others; and was better able to socialize and interact with her peers (Parent Ex. F at p. 4).

A comparison of the student's Pathway progress reports from the beginning to the end of the 2020-21 school year reveals that the student made gains in academic, social and behavioral development but also appeared to perform more poorly on several specific skills during the second term (compare Parent Ex. E, with Parent Ex. F).

Consistent with all of the above, Pathway documentation and the speech-language pathologist's testimony show that for the 2020-21 school year, Pathway identified the student's deafness as well as her academic, sensory-motor, speech-language (including needs related to apraxia), and social needs and provided the student with a specially designed instruction targeted to meet her needs (see Parent Exs. E; F; I; L). Moreover, the documentary evidence shows that the student made important gains throughout the 2020-21 school year (see Parent Exs. E; L ¶109).

C. Equitable Considerations

The IHO did not address whether equitable considerations weigh in favor of the parent's request for reimbursement and direct funding for the student's tuition at Pathway (see IHO Decision). The district did not put forth an argument that if equitable considerations was addressed it does not favor the parents.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The parent alleges that she fully participated in the CSE and IEP process, cooperated with the evaluation requests and visited several programs considered by the CSE (Parent Ex. A at p. 4). Further, the attendance page of the January 2020 IEP confirms that the parent was present for the CSE meeting and the January 2020 IEP notes the parent's concerns expressed during the CSE meeting (Dist. Exs. 1 at pp. 9, 36; 2). There is no indication in the hearing record that the parent impeded the district's ability to meet its obligations under the IDEA (see Tr. pp. 72-355; Parent Exs. A-L; Dist. Exs. 1-8). Moreover, the district does not point to any evidence showing that the parents were uncooperative in the development of the student's IEP.

Although not raised by the district, a review of the hearing record demonstrates that the parent failed to submit to the district 10-business-days notice of the unilateral placement prior to her daughter's enrollment at Pathways. The evidence in the hearing record indicates the parent entered into a tuition contract with Pathway for the 2020-21 school year on September 8, 2020 and student began attending Pathway in September 2020 (Parent Exs. H; L ¶ 16). According to the contract, the parent agreed to pay the cost of Pathway's tuition of \$135,850 which included the cost of any related service or paraprofessional the student may require during such school year (Parent Ex. H at p. 1). Then on November 20, 2020, the parent sent a letter to the district's CSE entitled "10-Day Notice Letter and Request for Settlement for the 2020 - 2021 School year" which indicated that the parent was enrolling the student at Pathway for the 2020-21 school year and would be requesting an impartial hearing to obtain district funding for such placement (Parent Ex. C).

Similarly, the evidence in the hearing record also fails to demonstrate that the parents informed the district during the most recent CSE meeting of the student's placement at Pathway prior to the student's placement there for the 2020-21 school year (see Dist. Ex. 1).

Based on the foregoing, the equitable considerations do not weigh in favor of full tuition reimbursement or full direct payment of the remaining balance for the cost of the student's tuition at Pathway for the 2020-21 school year. Had the parent notified the district of her rejection of the IEP and intent to unilaterally place the student in a timely manner, the district may have offered to reconvene the CSE at a time when the student's program could have been effectively amended to

address the parent's concerns before the commencement of the 2020-21 school year. By failing to communicate with the district in the manner contemplated by the IDEA, the parent deprived the district of the opportunity, before the student was removed "to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]).

Accordingly, considering the lack of notice 10 business days prior to the student's removal from the public school, I will exercise my discretion under the particular circumstances in this case to reduce reimbursement for the student's unilateral placement by 10 percent of the tuition at Pathway. Accordingly, the parent's requested reimbursement for up to \$250 for the amount she already paid to Pathway will be reduced by 10 percent (\$25) and the requested direct payment for the remaining \$135,600 will be reduced by 10 percent (13,560).²⁸

VII. Conclusion

The evidence in the hearing record demonstrates that the district failed to offer the student a FAPE for the 2020-21 school year, that the parent's unilateral placement of the student at Pathway was appropriate, and that equitable considerations favored the parent to the extent indicated above, accordingly, the IHO's decision denying the parent's relief must be reversed.

THE APPEAL IS SUSTAINED.

²⁸ There is sufficient evidence that the parent incurred a financial obligation to pay for the student's program at Pathway for the 2020-21 school year but lacked sufficient financial resources to make tuition payments (see Parent Exs. G; H; K). It has been held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]). Thus, in this case, direct payment is an appropriate form of relief in addition to tuition reimbursement.

IT IS ORDERED that the IHO's decision, dated June 30, 2023, is modified by reversing that portion which found that the district offered the student a FAPE for the 2020-21 school year;

IT IS FURTHER ORDERED that the district is ordered to reimburse the parent for the payments made towards the cost of the student's tuition at Pathway for the 2020-21 school year but reduced by 10 percent; and

IT IS FURTHER ORDERED that the district is ordered to directly pay the remaining cost of the student's tuition at Pathway for the 2020-21 school year, less 10 percent.

Dated: **Albany, New York**
 October 6, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER