



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-087

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

**Appearances:**

Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, by Stephanie De Angelis, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail M. Eckstein, Esq.

### DECISION

#### I. Introduction

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

#### II. Overview—Administrative Procedures

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

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

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

### **III. Facts and Procedural History**

Much of the student's early history was reported by the parent as part of background information gathered for a January 2020 neuropsychological evaluation (Dist. Ex. 4). The student exhibited some delays in early developmental motor and language milestones and was evaluated for the Early Intervention Program (EIP) around the time of her second birthday (fall 2015); however, per parent report, the evaluators indicated that the student was "'on the cusp'" and "'would be fine'" (Dist. Ex. 4 at p. 2). Preschool reporting indicated that the student was friendly and cooperative and that there were no concerns regarding behavior or social skills (id.).

The January 2020 neuropsychological evaluation indicated that in fall 2018 the student transitioned to pre-kindergarten in a district school and, while it was conveyed that the student was

well-behaved and respectful and "loved attending school," it was also reported that the student had difficulty with recognizing and learning letters and struggled with "phonics in general" (Dist. Ex. 4 at p. 2). When the parents raised concerns about her early phonemic challenges, teachers indicated that she was "just a late bloomer" and "young for her age" (*id.*). The student's challenges with letter-learning and phonics continued in kindergarten and she had difficulty meeting many of the expected reading and decoding demands (*id.*). It was also noted in the neuropsychological evaluation that the student's early math skills were within grade expectations and that she remained well-behaved and positive in school (*id.* at p. 3). In spring 2019, in response to concerns about the student's lack of progress in reading and writing, the parents requested an evaluation through the CSE and enlisted the support of a private Orton-Gillingham tutor to help the student in the home two times a week (*id.*). The initial evaluation conducted by the district in May and June 2019 included cognitive testing, which found the student's overall intellectual abilities to be in the average range, and academic testing in the areas of spelling, math calculation and problem solving, and early reading skills, which yielded scores within or above age expectations (*id.* at pp. 3-4). As a result, the CSE did not find the student needed the full support of an IEP and instead recommended enrolling the student in the district's "Reading Recovery group intervention" the following year (Dist. Exs. 3 at p. 1; 4 at p. 3). A social history indicated that the student's Reading Recovery services were discontinued in December 2019 (Dist. Exs. 3 at p. 2; 4 at p. 3).<sup>1</sup>

In response to concerns "expressed primarily" about the student's issues with reading, phonics, and written work, the parents privately obtained the cited January 2020 neuropsychological evaluation (Dist. Ex. 4 at p. 1). The January 2020 neuropsychological evaluation report noted that, despite receiving small-group reading support at school and individualized Orton-Gillingham intervention at home, the student remained below grade level expectations in reading and spelling and was beginning to struggle with math (*id.* at pp. 1, 3, 13). While the student continued to receive tutoring in the home two times a week, at the time of the January 2020 neuropsychological evaluation she was not receiving any formal services in school (Dist. Exs. 3 at p. 2; 4 at pp. 3, 4).

The January 2020 neuropsychological evaluation included an assessment of the student's intellectual ability, which yielded a full-scale IQ of 118, placing her within the high average range of overall intellectual functioning (Dist. 4 at pp. 5, 21). The evaluating psychologist stated that, overall, the student's performances on attention and executive functioning tasks within the evaluation suggested a "solid capacity to sustain her attention and inhibit impulses under highly structured conditions" and that, while the student had some difficulty with attention regulation during periods of low arousal, she generally showed intact executive skills (*id.* at pp. 9, 14). The evaluation report stated that, while the parents and tutor reported some inattention during reading tasks, her teachers had not reported any issues with attention (*id.* at p. 4).

Regarding academic functioning, the student performed in the average range in the area of reading with weaknesses noted in the areas of word reading fluency tasks and in reading sight

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<sup>1</sup> The parent reported within an April 2020 social history update that she noticed that, when the student was meeting with their private tutor at the same time that the student was participating in the Reading Recovery group, they were "at odds in the style of learning" and that the student's progress quickened once Reading Recovery ended in December 2019 (Dist. Ex. 3 at p. 2).

words quickly and in isolation (Dist. Ex. 4 at p. 10). Specifically, the evaluation report noted that the student tended to flip or misplace letters with longer words, that she had difficulty with several of her isolated and blended vowel sounds, and that her reading rate was "somewhat" choppy and dysfluent (id. at pp. 10-11). According to the evaluation report, results of testing in the area of writing indicated that the student had difficulty with accessing visual representations of words, struggled to translate vowel sounds into writing, and that her issues with spelling, written mechanics (capitalization, punctuation, spacing), and organization impacted the clarity of her writing (id. at p. 11). The evaluation report stated that, overall, the student had "appropriately-developed" math skills (id. at p. 12).

With respect to social/emotional functioning, the private psychologist stated that the student was a social student who had no history of difficulty with establishing and maintaining peer relationships and that the student and her parents and teachers were not endorsing any clinically significant mood or anxiety symptoms (Dist. Ex. 4 at pp. 4, 12).

The private psychologist found the student met the criteria for diagnoses of specific learning disorders with impairments in reading and written expression (Dist. Ex. 4 at p. 16). Recommendations from the January 2020 evaluation report included one-on-one teacher check-ins, scaffolded and differentiated instruction, regular academic interventions to address reading and writing issues, additional English language arts (ELA) and math support in a combination of individualized and small group settings, and additional classroom and testing accommodations and supports in order to minimize the impact of cognitive and academic challenges and the student's issues with language based learning including graphic organizers, multi-sensory instruction, chunking and breaking down multi-component tasks, preferential seating, and the use of guided notes or outlines (id. at pp. 17-19). The recommended testing accommodations included extra time (1.5x), testing in a quiet and non-distracting environment, test questions and directions read aloud and repeated, the opportunity to type or dictate responses to written exams, and no penalty for spelling errors (id. at p. 19).

The parents referred the student for "a CSE evaluation" because of concerns regarding reading, spelling, and written math and reportedly requested a social history as an update to one which was completed in May 2019 (Dist. Ex. 3 at pp. 1-2). According to the April 2020 social history update, the student and her family were living upstate "currently during the COVID-19 crisis" (Parent Ex. C at p. 2; Dist. Ex. 3 at p. 1). The parents shared that the student experienced less frustration than when she was in school and that "working from home during this time and spending more time together as a family ha[d] been good for everyone" (Dist. Ex. 3 at p. 2). The parents noted that getting to school was hard before schools were closed and that the student's excitement about rushing to school became less so as the first-grade year wore on and as the work became more difficult (id.). Additionally, the parents reported that the student needed a lot of one-on-one support and that while her writing was starting to improve, it was "hard to read because of the spelling" (id.2). The parents expressed concerns about the student's ability to progress across subjects without specific special education support at school (id.).

An update of the January 2020 neuropsychological evaluation that was dated April 2021 provided further background (Parent Ex. C). According to the parent, a May 2020 CSE found the student eligible for special education as a student with a learning disability and recommended special education teacher support services (SETSS) for ELA three times per week (Parent Ex. C

at pp. 1-2, 8). The parents also reported that during the May 2020 CSE meeting, they requested SETSS for math as well, but the district felt that the student's challenges in this subject area could be addressed in a general education setting (Parent Ex. C at p. 2).

The parents reported that the transition to remote learning was hard and the student made very little progress near the end of the year and therefore she met with her Orton-Gillingham tutor over summer 2020, two times per week, to remediate her ongoing reading and writing weaknesses (Parent Ex. C at p. 1).

For the 2020-21 school year the student was enrolled in the second grade in a district school and reportedly received remote instruction for the entire school year (Parent Ex. C at p. 2).

In March 2021 the parents executed an enrollment contract with Churchill for the 2021-22 school year (Parent Ex. E).

The private neuropsychological and educational evaluation update indicated that the student had a history of receiving formal support for her academic difficulties at home and in school, but the parents did not feel that she had made meaningful progress "in the last year" and that the update was sought in order to build a profile of the student's current functioning and to receive updated recommendations for necessary supports and educational planning (Parent Ex. C at p. 1).

As part of the background information gathered for the evaluation, the parents reported that, while the student's IEP mandated SETSS for ELA three times per week, she only received the services twice per week (Parent Ex. C at p. 2). The student continued to meet weekly with her Orton-Gillingham tutor (id.).

The parents noted that the student's reading "'seem[ed] a little better,'" and that she could recognize small, easy words, but also noted the process of reading was "'taxing'" for the student and she often seemed exhausted by the end of her SETSS and tutoring sessions (Parent Ex. C at p. 2). The parents also reported that writing remained a "profound challenge" and that the student was still behind in her math skills (id.). According to the parent the student was "not thriving" in school and the parent believed pulling the student out of the regular classroom to do her extra work was hard for her (id.). The parent also noted the student's overall mood was different this year and that she seemed "really down" when observed in her virtual classes (id.). The April 2021 evaluation report indicated that the student had begun to evidence symptoms of low self-esteem in the last year and school seemed to generate a good deal of sadness and frustration for the student (id.). According to the report the student's school report cards indicated that she had marks below grade level expectations in reading, writing, and math and struggled with decoding, spelling, writing mechanics, grammar, generating writing ideas, and word problems (id.).

The private psychologist reported that the student's energy flagged when working on writing tasks or attempting to read passages of text and noted that this was not the case during the evaluation in 2020 (Parent Ex. C at p. 3). The private psychologist also noted the student had not made meaningful or significant progress since the January 2020 evaluation (id. at pp. 4, 6-7). He noted that the district services the student received following the January 2020 neuropsychological

evaluation had been ineffective, and that the student had not made meaningful progress in the last year (id. at pp. 1, 8).

The private psychologist found that the student continued to meet the criteria for diagnoses of specific learning disorders in reading and writing (Parent Ex. C at p. 8). He recommended that the student receive instruction in a small, structured, highly supportive classroom with a low student to teacher ratio; targeted special education remediation of reading and writing difficulties throughout the day; and daily individualized instruction all within a special education school designed for students with language-based disabilities (id. at pp. 8-9).

In a May 2021 email to the district, the parents reported that the student continued to have a difficult year and they were seeing a growing gap between her and her peers (Parent Ex. D). Citing the April 2021 private neuropsychological re-evaluation, the parents noted that it was "obvious to all of us" that the student needed a small, highly specialized educational program and that continuation of "Gen Ed with SETS" was no longer appropriate and requested a "CSE/SBST/IEP review meeting" for the student (id.).

In a June 2021 teacher report, the student's second grade regular education teacher evaluation indicated that the student was reading below grade level but had made improvements in her sight word recognition and phonemic awareness, was writing below grade level, was not able to spell grade level words, was below grade level in math, had a below average expected rate of progress for acquiring new skills, needed a lot of adult support, and learned best with a multisensory approach in small groups and 1:1 (Dist. Ex. 5 at p. 1). The student's social/emotional functioning was described as "[u]sually appropriate," and the teacher noted that she was shy and rarely participated in whole/large groups and was more willing to participate in a small group or 1:1, that she seemed capable of demonstrating appropriate daily living skills, and that they were unable to observe her physical functioning through remote learning (id. at pp. 2-3). The teacher also stated that the student struggled in the remote learning environment and needed targeted intervention and more 1:1 and small group, in-person support (id. at p. 3). She noted that for the majority of the year the student had been attending a learning center where she received support from teachers and staff (id. at p. 1).

In June 2021 a CSE convened to conduct the student's annual review and develop her IEP for the 2021-22 school year (Dist. Exs. 1; 2 at p. 1). Finding the student eligible for special education as a student with a learning disability, the CSE recommended integrated co-teaching (ICT) services for math for five periods per week, for ELA for seven periods per week, and for social studies for three periods per week, as well as three periods per week of SETSS for ELA (Dist. Ex. 1 at pp. 1, 8-9, 14).

Subsequently, the district sent the parents a prior written notice, which detailed the program and services, listed above, which were recommended within the June 2021 IEP (Dist. Ex. 2 at p. 1).

In a letter to the district dated August 25, the parents stated their disagreement with the district's IEP, arguing that it was inappropriate and denied the student a free appropriate public education (FAPE) because, among other things, the district "had no justification to support the recommendation that [the student] attend a part-time ICT program with SETSS in a large, chaotic

community school," the IEP was silent regarding the CSE's recommendation for the remaining subjects in the school day including science, the CSE failed to consider the full breadth of the student's needs, and the IEP failed to provide support to address the student's social/emotional needs (Parent Ex. B at pp. 1-4). The parents shared their intention to place the student at Churchill for the 2021-22 school year and to seek funding for the placement from the district if the district did not cure the errors in the development of the IEP and offer the student an appropriate program and placement (id. at p. 1).

The student attended Churchill in a second-grade class for the 2021-22 school year (Parent Exs. F; H; J; L; M; N). Churchill reports indicated that the student received instruction in reading decoding/fluency/spelling/vocabulary, reading comprehension, writing, math, social studies, science, art, health, library, music, performing arts, physical education, STEAM (team building, problem solving, robotics, civil engineering), health and human relations and occupational therapy (OT) services three times 30 minutes per month (Parent Exs. J; L).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated November 22, 2021, the parents alleged that the district failed to offer the student a FAPE for the 2021-22 school year (Parent Ex. A at p. 1).

The parents alleged that the district failed to appropriately consider the recommendations of the private April 2021 neuropsychological evaluation update, failed to adequately consider or evaluate the student's need for assistive technology, and failed to consider the full range of programs available or any other programs, and denied the parents the opportunity to meaningfully participate in the development of the student's IEP (Parent Ex. A at pp. 2-6).

Next the parents argued that the district failed to consider the student's needs for full-time specialized instruction and a highly individualized program within a small, structured, intensive, and supportive educational environment (Parent Ex. A at pp. 3-4). In addition, the parents alleged that the IEP's present levels of performance were vague and did not adequately describe the student or note the parents' concerns, that the IEP was devoid of any meaningful academic and social/emotional management needs, and that the IEP did not recommend supports to address the student's math, social/emotional, and language-based needs (Parent Ex. A at pp. 4-5). The parent also claimed that the annual goals developed were insufficient, generic, and vague and did not contain a baseline from which to work and that they did not properly address all areas of the student's documented disability (id. at p. 5). According to the parents, the district's recommendation of "a part-time ICT program with SETSS" was not proper and served to deprive the student of educational opportunities and that a "general education classroom" for science and all "non-academic subjects" could not provide the support and individualized instruction required (id. at p. 3). Lastly, the parents alleged that the district would not have offered a suitable and functional peer group for instructional and social/emotional purposes and that the district was required to provide a peer group that did not have disruptive and externalizing behaviors, had average cognitive ability, and, but who have language based learning disabilities, citing to a State regulation for support that proposition (id. at p. 6).

As relief the parents sought funding for placement at, and transportation to and from, Churchill for the 2021-22 school year and claimed that the placement at Churchill was appropriate

and that there were no equitable considerations that would bar funding of the placement (Parent Ex. A at p. 6).

## **B. Impartial Hearing Officer Decision**

On April 5, 2022, the parties proceeded to an impartial hearing, which concluded on February 10, 2023, after five days of proceedings (see Tr. pp. 1-128). In a decision dated April 6, 2023, the IHO determined that the district met its burden to prove that it offered the student a FAPE for the 2021-22 school year and denied the parents' requested relief (IHO Decision at pp. 27, 36-37).

The IHO found that the parents were provided with the opportunity to fully participate in the development of the student's IEP and were "less than forthright at the meeting about [their] intentions" to send the student to Churchill and that, to the extent that the parents were not full participants, it was in their own self-interested effort to have their private school placement funded by the district (IHO Decision at pp. 27, 32). The IHO found that the parents' failure to share information about the fact that they had applied to and been accepted at Churchill prior to arranging for the private psychologist to conduct an updated assessment "an intentional attempt to obfuscate what was happening" during the 2020-21 school year (*id.* at p. 25). Additionally, the IHO did not find the parents' basis for the private April 2021 neuropsychological evaluation update credible given it was done after the student had been accepted at Churchill, and she found that the evaluation was needed, not to inform the parents of the student's needs, but to support a claim for tuition funding at Churchill (*id.* at pp. 25-26). The IHO determined that the parent's testimony was not credible and concluded that the parents intentionally withheld information from the district about the impact of the remote instruction on the student (*id.* at p. 32). The IHO found that the parents withheld information in an attempt to attribute the student's poor functioning during remote instruction to the special education services rather than on the fact that the parents had moved (*id.*).

The IHO determined that the CSE considered both private evaluations and that there was no indication that the CSE failed to consider the student's academic, social/emotional, physical, management, and special education needs when developing its recommendations (IHO Decision at pp. 29, 30). The IHO found that the management resources contained in the IEP appropriately addressed the student's needs identified by her teachers and determined there was no support in the record to find that the present levels of performance were vague (*id.* at pp. 29-31). The IHO concluded that the annual goals were developed at the CSE meeting where the student's regular education and special education teachers were present and found that the record supported a finding that the student needed to target her performance in the areas of decoding and encoding, spelling ability, math word problems, and basic computation skills (*id.* at p. 31).

Regarding the programming and placement recommendations of the June 2021 CSE, the IHO found that the evaluative information before the CSE, including the private evaluations, supported the programming recommendation and the evidence in the hearing record did not show that the student required a small, structured specialized school setting, notwithstanding the recommendation by the private psychologist for a small class in a specialized school, as the IHO found the psychologist's recommendations were only proposed as part of the parents' intention to seek funding for their private school placement (IHO Decision at pp. 27-29, 33). With respect to whether the district considered the "full gamut" of programs available, the IHO stated that the IEP



revealed that the CSE considered SETSS alone, a small class, and an approved private school and rejected those options as either not sufficiently supportive or too restrictive (id. at p. 32). The IHO determined there was no support in the hearing record to find that the CSE did not recommend individualized supports to address the student's language-based needs, that the CSE did not consider the student's level of functioning in math when it recommended ICT services for math, or that the student needed additional support to address her social/emotional needs (IHO Decision at pp. 30-31). The IHO found that the IEP reflected a discussion with the parent regarding assistive technology and noted that the parent intended to request an evaluation (id. at pp. 32-33). The IHO cited evidence that it was found that the need for assistive technology was not determinative in the recommendations for the student (id. at pp. 32-33).

Regarding peer grouping, the IHO determined that there was nothing in the record to support a finding that placement in a community school with her same aged peers of similar cognitive ability would not be suitable (IHO Decision at p. 33).

Although the IHO found that the district met its burden to prove that it offered the student a FAPE, the IHO went on to consider the appropriateness of the unilateral placement and equitable considerations (IHO Decision at pp. 33-37). The IHO found that the parents met their burden to demonstrate that their unilateral placement of the student at Churchill for the 2021-22 school year was appropriate; however, the IHO concluded that equitable considerations did not weigh in favor of an award of tuition reimbursement (IHO Decision at pp. 33-37).

#### **IV. Appeal for State-Level Review**

The parents appeal and challenge the IHO's determination that the district offered the student a FAPE. In particular, the parents argue that the IHO improperly shifted the burden to seek evaluative material onto the parents. The parents argue that, despite information before the CSE that the student needed an assistive technology evaluation, the IHO stated that the parent should have requested the assistive technology evaluation. The parents argue that this finding "violates settled legal principles" because the IDEA places responsibility for evaluations on the district.

Next the parents contend that the IHO erred in finding the annual goals were adequate and noted that no reading goals were specified for the student's deficits in accuracy, rate, fluency, comprehension, phonemic deficits and sight words; there was not a single substantive or mechanical writing goal; and there were no goals for most of the needs documented in the private psychologist's report. The parents allege the IHO erred in finding the management needs were adequate as the IEP was silent with respect to the student's need for small group and 1:1 adult support.

The parents argue that the IHO erred in finding the IEP and program recommendation was sufficient and that it was the district's obligation to justify its recommendation in the face of clinical findings that the student needed a smaller, full-time special education setting. The parents also argue that the IEP did not sufficiently address the student's math deficits and that contrary to the IHO's findings the CSE failed to evaluate, consider, or address the student's emotional needs.

Lastly, the parents argue that equitable considerations warrant full reimbursement and seek an order directing the district to fully reimburse them for tuition, transportation and related costs incurred in placing the student at Churchill for the 2021-22 school year.

In an answer, the district responds to the parents' material allegations and argues that the IHO's decision should be upheld in its entirety.

## **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]).<sup>2</sup>

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

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<sup>2</sup> 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).

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

## **VI. Discussion**

### **A. June 2021 CSE Process—Consideration/Sufficiency of Evaluative Information**

Turning to the parents' allegations about the sufficiency of evaluations before the CSE, 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]).

In his direct testimony by affidavit the school psychologist stated that the June 2021 CSE reviewed the following documents: the April 2020 social history report, the January 2020 "Psychoeducation Assessment," the April 2021 "Psychoeducational Evaluation," and the June 2021 teacher report and also took into consideration information and verbal reports provided by the parents, and team members, including the student's second grade teacher (Dist. Ex. 6 at ¶ 9).<sup>3</sup>

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<sup>3</sup> In referring to psychoeducation and psychoeducational assessments, it appears that the school psychologist mentioned a May 2020 assessment, however, as noted above the student had relocated outside of the district by May 2020 due to the COVID-19 pandemic and he appeared to be referencing the January 2020 and April 2021 private neuropsychological evaluations (see Parent Ex. C; Dist. Ex. 4). The hearing record contains no evidence suggesting that other psychoeducational evaluations were conducted. As noted above, there was a CSE meeting in May 2020.

According to the school psychologist, the IEP team had all necessary evaluative material, and no additional evaluations or information was necessary to develop an IEP for the student (id.).

In support of their position that the student needed an assistive technology evaluation, the parents point to the private neuropsychological evaluations and the testimony of the school psychologist and argue that information before the CSE should have alerted the district to the need for an assistive technology evaluation to address documented deficits including graphomotor weaknesses, writing speed issues, very slow response times to visual stimuli, and other reading and writing concerns.

Within the January 2020 neuropsychological evaluation report, the private psychologist noted that the student tended to complete graphomotor tasks at a "relatively slower pace" when compared to her speed of performance with other activities and that she evidenced "some moot [sic] planning weaknesses" while writing (Dist. Ex. 4 at pp. 5, 8).<sup>4</sup> However, the January 2020 report also stated that the student displayed a typical pencil grip and her handwriting was legible, that assessments of fine motor skills revealed that her manual motor dexterity was intact with both hands either individually or working in tandem, that she showed adequate precision on a measure of motor coordination and graphomotor control, that when integrating her visual and motor skills to copy increasingly complex figures the student scored in the high average range, and that, overall, her visual and motor skills were intact for her age despite a "relatively reduced speed" in writing (id. at pp. 5, 8). The January 2020 evaluation report did not include a recommendation for an assistive technology assessment or assistive technology services (see id. at pp. 17-20). However, noting the student's reduced speed of writing, the January 2020 private psychologist recommend the student receive reduced copy work from blackboards, smartboards, and texts and that she be provided with printed copies of such materials as well as guided notes or outlines (id. at p. 19).

The April 2021 neuropsychological evaluation update report stated that the student presented with impairment in all areas of writing, struggled to spell both common and uncommon words, had weaknesses in phoneme manipulation and deficits in orthographic processing, which impacted her utilization of consistent spelling strategies, still wrote letters and numbers backwards, and consistently made errors in spelling and written mechanics (Parent Ex. C at pp. 5, 7). However, this evaluation report again did not include a recommendation for an assistive technology evaluation or assistive technology services (see id. at pp. 8-9). Further, the private psychologist did not note within his testimony a need for assistive technology (see Tr. pp. 120-23; Parent Ex. Q).

The school psychologist testified that there was a discussion at the CSE meeting about the need for assistive technology but that an assistive technology evaluation was not conducted prior to the CSE meeting (Tr. p. 67). The school psychologist explained that, at the CSE meeting, "one of the sections on the IEP" asks about any concerns that the team has and that the parent and the teachers stated that it "might be beneficial to do an assistive technology evaluation" (Tr. pp. 80, 82-83). The school psychologist further testified that he did not recall who raised the potential for an assistive technology evaluation at the CSE meeting and that an assistive technology device was not recommended or mentioned in the teacher's report available to the CSE (Tr. pp. 85-86; see

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<sup>4</sup> The private psychologist likely meant "motor."

Dist. Ex. 5 at pp. 1-3). The school psychologist continued and explained that it did not necessarily make any difference regarding the team's recommendation and "it was not a determining factor regarding the overall program" and, though it would have been a determining factor regarding the recommendation for an assistive technology device, they moved forward since they had sufficient information from the private evaluation and teacher's report (Tr. pp. 80-81, 85). The school psychologist stated that, as a follow-up from the CSE meeting, "the parent would request a reevaluation to reopen the case for assistive technology" but that the district never received such request from the parent (Tr. p. 81). The June 2021 IEP present levels of performance included the notation that an assistive technology evaluation would be requested by the parent to determine eligibility for a technology device (Dist. Ex. 1 at p. 2).

Regarding the student's physical development, the IEP stated that the student was reported to be in good general health with vision and hearing within the normal limits, could participate in all school activities and that there were no major concerns in this area at the present time (Dist. Ex. 1 at p. 3). The IEP indicated that the student did not need a particular device to address her communication needs and did not need an assistive technology device and/or service (*id.* at p. 4).

Here the evidence shows that the parent identified her interest in assistive technology during the June 2021 CSE meeting; however, neither the school psychologist nor the private evaluator believed it was necessary. As further discussed below, I am not convinced that the CSE was required to conduct an assistive technology assessment based upon the information before it during that meeting; however, I note that the CSE nevertheless duly informed the parent that she could request a reevaluation if she wished, but there is no indication in the evidence that pursued the matter further.<sup>5</sup> Here, even assuming that the district's failure to conduct an assistive technology evaluation prior to the June 2021 CSE constituted a procedural violation, that does not rise to the level of a denial of a FAPE. Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP, one of which is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; *see* 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; *see also* Educ. Law § 4401[2][a]). Accordingly, the failure to evaluate the student for assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access her educational program (*see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121*).

That is not the case here. In addition to the recommendations for ICT services and SETSS, the June 2021 IEP identified the student's management needs as the following: extra time on tests, directions read and re-read aloud, questions read aloud for math assessments, multisensory approach to reading, visual and verbal reminders to remain on task, and frequent check-in from the teacher during independent work (Dist. Ex. 1 at pp. 3, 8-9). To aid in the student's writing and

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<sup>5</sup> If, hypothetically, the parent had requested a reevaluation of the student, the district would have been required to consider the request and issue a prior written notice that explained the district's determination (*see* 8 NYCRR 200.5[a]; 34 CFR 300.503, 300.305[d]). If the district declined to conduct a reevaluation, the parent would have the option of requesting an independent educational evaluation at public expense (*see* 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]).

spelling needs, the June 2021 IEP included annual goals targeting the student's ability to systematically encode one syllable words that contain digraphs: wh, sh, ch, th, and ck and her spelling ability by stretching out unknown words to include consonant, short vowel, blend and digraph sounds (*id.* at p. 5). Accordingly, although the IEP did not include a recommendation for assistive technology, it did set forth supports of the type that would address the student's graphomotor weaknesses, writing speed issues, and "very slow" response times to visual stimuli (*see* Dist. Ex. 1 at pp. 3, 5; *see also* *D.B. v. Ithaca City Sch. Dist.*, 690 Fed. App'x 778, 782 [2d Cir. May 23, 2017] [finding that although the district did not first pursue an evaluation to consider the benefits of assistive technology, the IEP addressed the student's needs). In sum, the evidence in the record does not show that the student's graphomotor weaknesses, writing speed issues, and "very slow" response times to visual stimuli were such that they necessitated the district conduct assistive technology assessments.

## **B. June 2021 IEP**

### **1. Annual Goals**

Turning to the parents' contentions about the annual goals, 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]).

As noted earlier, the April 2021 private neuropsychological evaluation and the June 2021 teacher report identified student needs in the areas of decoding, word reading and fluency, spelling, writing mechanics, generating writing ideas, math word problems, and fluency for simple addition and subtraction facts (*see* Parent Ex. C at pp. 4-7, 10-11; Dist. Ex. 5 at p. 1).

The June 2021 IEP included two ELA annual goals: one involving improving the student's ability to systematically decode/encode one syllable words that contain digraphs wh, sh, ch, th and ck using a multisensory approach, and another involving improving spelling ability by stretching out unknown words to include consonant, short vowel, blend and digraph sounds (Dist. Ex. 1 at pp. 5-6). The IEP also included two math annual goals targeting word problem solving and computation skills (*id.* at pp. 6-8).

The school psychologist stated that the annual goals included on the June 2021 IEP were created specifically for the student by her teachers based on the evaluations and reports provided to the CSE as well as the input from those present at the June 2021 meeting, were discussed with the parents, and were appropriate given the student's needs and abilities (Tr. p. 72; Dist. Ex. 6 at ¶¶ 20-22). He also testified that there was an annual goal which involved decoding and encoding "which leads to accuracy" but also acknowledged the annual goal did not specifically state "reading

accuracy" and that there were no annual goals addressing reading fluency, writing mechanics, or written organization (Tr. pp. 73-74).

However, the evaluations and reports also included notations that the student had made improvements in her reading, sight word recognition and phonemic awareness and that aspects of her phonological skills were developing (Parent Ex. C at pp. 2, 4; Dist. Ex. 5 at p. 1).

Further, even if I were to conclude that the CSE should have included additional annual goals targeting sight word reading, fluency and written organization and mechanics, inadequate goals in and of themselves are often unlikely to rise to the level of a denial of FAPE. Courts have explained that an IEP need not identify annual goals as the only vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]). In addition, courts generally have been reluctant to find a denial of a FAPE on the basis of an IEP failing to sufficiently specify how a student's progress toward his or her annual goals will be measured when the goals address the student's areas of need (D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*10-\*11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]; P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], *aff'd*, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). I do not find that the goals in the proposed IEP were so faulty that it would have prevented the student from making educational progress. Accordingly, there is insufficient basis in the hearing record to disturb the IHO's determination that the annual goals addressed the student's needs and the lack of additional goals did not deny the student a FAPE.

## **2. Integrated Co-Teaching Services and Special Education Teacher Support Services**

I turn next to the CSE's recommendation for ICT services and SETSS and the parents' contention that the student required a small class setting and small group and 1:1 adult support. State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students and that the school personnel assigned to each class shall minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]). SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district; therefore, unless the parties and the IHO take the time to develop a hearing record on the topic in each proceeding, it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the



student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047). Here, the hearing record indicates that the service would be delivered in a group size which could not exceed eight students (Tr. pp. 64-65).

Within the April 2021 neuropsychological evaluation update, the private psychologist recommended the student receive instruction in a small, structured, highly supportive classroom with a low student to teacher ratio and with targeted special education for remediation of reading and writing difficulties provided throughout the day and daily individualized instruction (Parent Ex. C at p. 8; see Parent Ex. Q at p. 4). In his direct testimony by affidavit, the private psychologist also stated that he believed the student needed more focused, individualized reading and writing remediation and 1:1 support and required a high level of 1:1, individualized support within a specialized environment in order to catch up (Parent Ex. Q at ¶¶ 25-28). The private psychologist acknowledged that he did not speak directly with anyone at the student's school as part of his evaluation update (Tr. pp. 122-23).

In noting the student's below average expected rate of progress, the student's teacher indicated within the June 2021 teacher report that, during a year of remote learning, the student needed a lot of adult support and that the student learned best 1:1 and in a small group with a multisensory approach (Dist. Ex. 5 at pp. 1, 3). The teacher report also stated that the student struggled in the remote learning environment, was shy and rarely participated in whole/large groups and was more willing to participate in a small group or 1:1, needed targeted intervention, and more 1:1 and small group, in-person support (id. at p. 3).

The June 2021 IEP present levels of performance stated that the student benefitted from the ability to work in a small group and that her difficulties with reading and writing required her to have the support of an "ICT classroom" (Dist. Ex. 1 at pp. 2-3). As detailed above, the IEP provided ICT services for math for five periods per week, for ELA for seven periods per week, and for social studies for three periods per week, in addition to SETSS for ELA for three periods per week (Dist. Ex. 1 at pp. 9, 14). The school psychologist added that in his professional opinion the recommendation was appropriate and would address the student's needs and that based on the support that was given in a classroom with ICT services, with small grouping sizes, and the added support of SETSS for ELA, the student would be able to access the curriculum and make appropriate progress in all areas (Dist. Ex. 6 at ¶ 14).

The school psychologist stated that the proposed SETSS group size was discussed with the parents at the CSE meeting and that it could not exceed eight students (Tr. pp. 64-65). The school psychologist indicated that the "ICT classes" could have 27 or more students (Tr. p. 52). However, the school psychologist disagreed with the suggestion that the IEP did not include small group instruction, even though it was not "explicitly" listed on the IEP and stated that in the student's academic classroom was where she was receiving "that small group in the ICT class with a special education teacher there" (Tr. pp. 68-69, 71). The school psychologist stated that an "ICT classroom" consisted of students who have IEPs and regular education students, and that the percentage of students that do have an IEP could be up to forty percent of the class (Tr. p. 77). He explained that the classroom would have two teachers based on the mandate of the student's IEP, with one certified special education and one certified "general education" teacher (Tr. pp. 77-78). He further explained that, throughout the day, when there was a mandate for ICT services, the special education teacher would be "differentiating the curriculum and modifying . . . throughout,"

which could include breaking into small groups, and that was explained to the parents at the CSE meeting (Tr. p. 78). The school psychologist indicated that this was the first time that the student was recommended for an "ICT classroom" (Tr. p. 78).

In sum, the school psychologist stated that an "ICT classroom" was appropriate for the student because it provided more support for her reading and writing than the previous recommendation in the 2020-2021 school year of "just SETSS for three periods a week" (Tr. p. 79). While the services recommended in the June 2021 IEP may not have provided the same level of individual support desired by the parent, ICT services for math, ELA, and social studies along with SETSS three times a week represents a significant increase in the level of services from the previous year's recommendation of SETSS alone (compare Dist. Ex. 1 at p. 9, with Parent Ex. C at p. 2).

Regarding individual instruction, the school psychologist acknowledged that the CSE did not recommend that the student receive 1:1 support in reading, writing or math (Tr. pp. 61-62). However, the June 2021 IEP identified management strategies to address the student's need for individualized attention such as directions read and re-read aloud, questions read aloud for math assessments, multisensory approach to reading, visual and verbal reminders to remain on task, and frequent check-ins from teacher during independent work (Dist. Ex. 1 at p. 3). The school psychologist stated these management strategies were appropriate because they provided specific support for the student's needs, while addressing the areas in which the student "has present weaknesses" (Dist. Ex. 6 at ¶ 19). Additionally, the school psychologist stated that these needs were indicated by the reports and evaluations provided as well as from the input of members of the CSE (id.; see Dist. Exs. 1 at pp. 2-3; 4 at pp. 17-19; 5 at pp. 1-3).

Considering the student received remote instruction during all of the 2020-21 school year, the district's recommended increase in services, though more modest than the parents desired, was appropriate as both the student's teachers and parents described the student's difficulties with remote instruction (see Parent Ex. C at pp. 1-2; Dist. Exs. 5 at p. 3).

In his direct testimony by affidavit the school psychologist stated that both the regular education teacher and the SETSS provider, who participated in the student's June 2021 CSE meeting, agreed that the student struggled during the remote learning that lasted for the entirety of the 2020-21 school year and that both also agreed that the student would benefit from the additional services of an ICT classroom and a return to in-person learning (Dist. Ex. 6 at ¶ 12).

With respect to the other programs considered, the school psychologist stated that the IEP team also considered a "General Education classroom," SETSS, a 12:1+1 special class in a community school, and a non-public school (Dist. Ex. ¶ 15; see Dist. Ex. 1 at p. 15). The IEP noted that the CSE considered "general education" with no services but determined that the student was eligible to receive special education services (Dist. Ex.1 at p. 15). According to the IEP, SETSS only was considered and tried but it was determined that the student required more support to address her academic needs (id.). A "small class" in a community school was considered but it was determined that the student's needs could be met with the support of ICT and SETSS at the

present time (id.).<sup>6</sup> Lastly, the IEP noted that a State-approved nonpublic school was considered but it was determined that it was too restrictive at the present time (id.).

The school psychologist stated that "in consideration of the least restrictive environment for the student, and a program that could provide the level of support the student need[ed]" the district recommended an "ICT classroom" in a community school with related services (Dist. Ex. 6 at p. 3). The school psychologist observation touches on an important point. The district was required to balance providing appropriate services while doing so in the student's LRE. The ICT services on the proposed IEP would have provided the student with regular access to her non-disabled peers.

Lastly, the parents argue that the IHO erred and they allege that the IEP did not sufficiently address the student's math deficits and that the CSE failed to evaluate, consider, or address the student's emotional needs.

Here, the record reveals that the June 2021 IEP adequately addressed the student's needs in the area of math by providing the support of ICT services for math five periods a week and two annual goals targeting solving word problems and computation skills, and by identifying the management need of having questions read aloud for math assessments (see Dist. Ex. 1 at pp. 7, 9, 14).

With respect to social-emotional development, the record does not demonstrate that the student exhibited behaviors which necessitated interventions. The June 2021 teacher report indicated that the student had good attendance, did not display disruptive or aberrant behaviors and that the student's social emotional functioning, including with respect to tolerating frustration, was "Usually appropriate" (Dist. Ex. 5 at pp. 1-2).

According to the January 2020 evaluation report the private psychologist found the student polite, thoughtful, cooperative, and pleasant to work with and noted that she tolerated frustration "very nicely" and proved able to persevere as test items grew increasingly challenging (Dist. Ex. 4 at p. 5). The report stated that, emotionally, while the student sometimes struggled with regulating her emotions when upset or frustrated, the student's teachers and parents were not endorsing any clinically significant mood or anxiety symptoms at this time (Dist. Ex. 4 at p. 12). Further, on self-report measures, the student acknowledged difficulties with reading and completing work on her own (as well as keeping her room clean) but endorsed confidence in many of her skills and personal qualities (Dist. Ex. 4 at p. 13). The evaluation report stated that despite some reduced confidence around reading, the student's overall self-image and self-esteem remained intact and additionally stated that although she struggled with aspects of academic work, she was diligent, optimistic, and confident about her capacity to overcome obstacles (Dist. Ex. 4 at p. 13).

The updated April 2021 evaluation report stated that the student remained polite and "pleasant to work with," was cooperative and respectful, tolerated frustration "very nicely," and "her mood was euthymic throughout" (Parent Ex. C at p. 3). According to the April 2021 evaluation report, the parents indicated that the process of reading was "taxing" for the student,

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<sup>6</sup> It appears that "small class" and "12:1+1 special class" were used interchangeably on that page of the IEP.

pulling her out of the regular classroom to do extra work was hard for her, she seemed "really down" when observed in her virtual class, and her overall mood was different during the 2020-21 school year (Parent Ex. C at p. 2).

The school psychologist stated the June "IEP team" discussed the student's social development at the meeting and that there were no concerns from the IEP team, nor the parent, regarding the student's social development (Dist. Ex. 6 at ¶ 16). The school psychologist acknowledged that at the time of the June 2021 meeting, the CSE was "on notice" of the student's academic-related anxiety but did not recommend counseling (Tr. p. 68). He explained that the anxiety that was mentioned in one of the reports was due to her academics and was not necessarily due to social or emotional delays and so the team felt that if her academics were being addressed through services then that would address any anxiety the student had (Tr. p. 81).

In this case the evidence in the hearing record does not provide a reason to disturb the IHO's findings with respect to the IEP's adequacy in addressing the student's math and social-emotional needs. I further conclude based upon the discussion above that the parents' arguments that the IHO erred in finding that the district failed to offer the student a FAPE are ultimately without merit.

## **VII. Conclusion**

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2021-22 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations weighed in favor of an award of tuition reimbursement.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
July 27, 2023**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**