



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-120

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

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

The Law Offices of Steven L. Goldstein, attorneys for respondents, by Steven L. Goldstein, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for part of their son's tuition costs at The Lang School (Lang) for the 2021-22 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

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. The parent sent a 10-day notice of unilateral placement to the district by letter dated August 27, 2021, which included an allegation that the district had failed to identify the student as a student with a disability and which notified the district of the parents' intent to unilaterally enroll the student at Lang for the 2021-22 school year and seek reimbursement from the district for that placement (Parent Ex. C at pp. 1-3).¹ The student attended fifth grade at Lang beginning in September 2021 (Parent Exs.

¹ The Commissioner of Education has not approved Lang as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

V; Y at p. 5). A CSE convened in November 2021 to conduct an initial review of the student's eligibility, found the student eligible for special education as a student with an other health impairment, and formulated an IEP for the student with a projected implementation date of December 7, 2021 (see generally Dist. Ex. 1).²

The parents disagreed with the recommendations contained in the November 2021 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2021-22 school year and, as a result, notified the district of their intent to continue the student's placement at Lang (see Parent Exs. H; I; J). In a due process complaint notice, dated January 25, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (see Parent Ex. A).

An impartial hearing convened on June 27, 2022 and concluded on March 23, 2022 after seven days of proceedings (Tr. pp. 1-172). In a decision dated May 16, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2021-22 school year, that Lang was an appropriate unilateral placement, and that equitable considerations weighed partially in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 25-33). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Lang in the amount of \$30,000 for the 2021-22 school year (id. at pp. 32-33).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parents' answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The gravamen of the parties' dispute on appeal is whether the district fully and timely evaluated the student in all areas of suspected disability, whether the November 2021 IEP was appropriate for the student, and whether equitable considerations favored tuition reimbursement.³

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.

² There is conflicting information in the hearing record regarding the date of the CSE meeting. Several exhibits in the hearing record indicate that the meeting occurred on November 23, 2021 (see Tr. p. 73; Parent Ex. G at pp. 1-2; Dist. Exs. 1 at p. 35; 2 at p. 1; Dist. Post-Hr'g Br. at p. 4). However, the parents asserted that the meeting occurred on November 30, 2021 (see Tr. p. 159; Parent Exs. A at p. 4; H at p. 3; Parent Post-Hr'g Br. at p. 4).

³ In the request for review, the district asserts that the parents did not pursue all of the issues raised in the due process complaint notice during the impartial hearing, and therefore, the parents waived their right to pursue these arguments and they should not be considered. In the answer, the parents deny this allegation and argue that the district did not pursue a defense on these issues. As discussed further below, the parents did not file a cross appeal of the IHO's decision.

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" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v.

Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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]).⁴

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

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

VI. Discussion

A. Scope of Review

The regulations governing practice before the Office of State Review are explicit and require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served within the time permitted by section 279.5 of this Part. A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding,

⁴ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f] [emphasis added]). Furthermore, the practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4] [emphasis added]). If a respondent wishes an SRO to address one or more claims that went unaddressed by an IHO, the practice regulations require the respondent to serve and file a cross appeal with respect to such claims that references to the evidentiary record supporting such claims, that the petitioner may then answer (8 NYCRR 279.5[b]) or the SRO is to deem them abandoned.

The parents have not filed a cross-appeal alleging that the IHO erred in his findings or in failing to address any of the other claims raised in the parents' due process complaint notice. While the parents were not aggrieved by the IHO's determination that the district failed to offer the student a FAPE for the 2021-22 school year, when State regulations governing appeals before the Office of State Review were last amended, it was specifically contemplated that a prevailing party would be chargeable with the knowledge that they may have to defend themselves in an appeal and that this might require an appeal of any underlying determinations made by the IHO (or failures to rule) that were unfavorable to the prevailing party (see N.Y. State Register Vol. 38, Issue 26, at p. 49 [June 29, 2016]; Application of a Student with a Disability, Appeal No. 18-131). Here, through the district's service of the notice of intention to appeal and case information statement, the parents were on notice that the district intended to appeal from the IHO's determination that the district failed to offer the student a FAPE for the 2021-22 school year (see Dist. Notice of Intention to Appeal; see also 8 NYCRR 279.2[d]). Therefore, it was incumbent upon the parents to assert in a cross-appeal, any alternative bases in support of the allegation that the district failed to offer the student a FAPE (8 NYCRR 279.8[c][4] [providing that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]).⁵ As the parent did not avail herself of the

⁵ At least one district court has held that, notwithstanding the explicit language in the regulation, "a non-aggrieved party's failure to cross-appeal an unaddressed issue does not constitute a waiver" (G.S. v Pleasantville Union Free Sch. Dist., 2020 WL 4586895, at *16 [S.D.N.Y. Aug. 10, 2020]). While the district court in G.S. summarized several court cases supporting the view that a non-aggrieved party need not appeal unaddressed issues, the authority cited pre-dated the amendment to the State regulations, effective January 1, 2017, which added the language explicitly requiring an appeal of unaddressed issues and providing that issues not appealed would be deemed abandoned, and it is unclear whether or not this regulatory history was available to the court (2020 WL 4586895, at *16, citing NB & CB v. New York City Dep't of Educ., 2016 WL 5816925, at *4 [S.D.N.Y. Sept. 29, 2016], aff'd sub nom., 711 Fed. App'x 29 [2d Cir. Oct. 10, 2017], W.W. v New York City Dep't of Educ., 2014 WL 1330113, at *15 [S.D.N.Y. Mar. 31, 2014], T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 337-38 [S.D.N.Y. 2013], FB v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 588 [S.D.N.Y. 2013], and J.M. v. New York City Dep't. of Educ., 2013 WL 5951436, at *21 [S.D.N.Y. Nov. 7, 2013]; see N.Y. State Register Vol. 38, Issue 39, at pp. 37-38 [Sept. 28, 2016]; N.Y. State Register Vol. 38, Issue 26, at pp. 49-52 [June 29, 2016]; N.Y. State Register Vol. 38, Issue 4, at pp. 24-26 [Jan. 27, 2016]). Among the intentions of the amendments to the regulations was to ensure that parties articulated all aspects of the IHO's rulings or failures to rule that they intended to pursue so that the State Review Officer would not be tasked with reviving every claim asserted in the due process complaint notice on a parent's behalf or further prolonging proceedings by remanding matters to impartial hearing officers if avoidable. Further the mechanism of the notices of intention to appeal and cross-appeal were contemplated to, among other things, give each party notice of the other party's intentions early on in the process to allow proper contemplation of which claims needed to be asserted if it became necessary to argue, for example, that alternative grounds supported the IHO's ultimate decision (see 8 NYCRR 279.2).

opportunity to cross-appeal from the IHO's failure to address claims raised in the due process complaint notice, those claims are not a proper subject of this appeal. Accordingly, as no cross-appeal challenging any portion of the IHO's decision was filed by the parents in this matter, the claims asserted in the due process complaint notice but not addressed by the IHO relating to child find, prior written notices, the lack of a functional behavioral assessment, and remote learning are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).⁶

B. FAPE

1. Timeliness of Evaluations and CSE Meeting

The district appeals the IHO's decision that the district did not timely evaluate the student and convene a CSE (IHO Decision at p. 27). In particular, the IHO found that "it should not have taken the District until late November" 2021 to convene the CSE after the parents' August 27, 2021 letter (*id.*).

Upon written request by a student's parent, a district must initiate an individual evaluation of a student (*see* Educ. Law § 4401-a[1], [3]; 8 NYCRR 200.4[a][1]-[2]; [b]; *see also* 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). Once a referral is received by the CSE chairperson, the chairperson must provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; *see also* 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).⁷

Where a district fails to adhere to the requisite timelines for evaluating a student and creating an educational program post-referral, relief for such a procedural violation of the IDEA is warranted only if the violation affected the student's right to a FAPE (*J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 69 [2d Cir. 2000]; *see A.H. v. New York City Dep't of Educ.*, 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; *Jusino v. New York City Dep't of Educ.*, 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016]; *A.M. v. New York City Dep't of Educ.*, 840 F. Supp. 2d 660, 688 [E.D.N.Y. 2012], *aff'd*, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]; *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282, 294, 300 [S.D.N.Y. 2010]; *M.M. v. New York City Dept. of Educ. Region 9* (Dist. 2), 583 F. Supp. 2d 498, 501; [S.D.N.Y. 2008]; *Warton v. New Fairfield Bd. of Educ.*, 217 F. Supp. 2d 261, 279 [D. Conn. 2002]).

⁶ Moreover, even if these issues were not deemed abandoned, they would not warrant relief. Any violation of child find or improper prior written notices are procedural violations that, in this instance, would not rise to the level of a denial of FAPE because the process of referral of the student for special education began prior to the start of the 2021-22 school year, the district had a program in place in December 2021, and the parent knew what that program entailed. Further, the hearing record demonstrates why the district did not consider an FBA (Tr. pp. 58-59). Finally, the student was not remote during the 2021-22 school year (Dist. Post-Hr'g Br. at p. 24).

⁷ A "school day" is defined as "any day, including a partial day, that students are in attendance at school for instructional purposes" (8 NYCRR 200.1[n][1]).

The parents' first communication with the district was set forth in a notice of their intention to unilaterally place the student on August 27, 2021 (Parent Ex. C). The district responded by email on September 22, 2021, suggesting an appointment to conduct a social history and requesting additional information and consent to evaluate the student (Parent Ex. F). The parent responded to the district's request for consent and other information on September 24, 2021, and September 27, 2021 (see Parent Exs. X; Y).⁸ The district conducted a social history on September 29, 2021, a speech-language evaluation on October 4, 2021, and an occupational therapy (OT) evaluation on October 8, 2021 (see Parent Exs. Z; AA; Dist. Exs. 3, 5).⁹ The CSE convened in November 2021 (Tr. p. 159; Dist. Ex. 1).¹⁰ The prior written notice and school location letters were both dated December 14, 2021 (see Dist. Ex. 2).

The district entered into the hearing record the 2021-22 school year district school calendar (see Dist. Ex. 7). The school calendar reflected that the first day of school was September 13, 2021 and that the district schools were closed on September 16, 2021, October 11, 2021, November 11, 2021, and November 25 and 26, 2021 (id. at p. 1).

To the extent the parents' August 2021 letter was treated as a request for an initial evaluation, it was made on August 27, 2021, prior to the start of the 10-month portion of the school year. While there was some delay in the district reaching out to the parent to obtain consent, ultimately, the parents' consent was obtained within 30 days of the receipt of referral (see Parent Ex. X at p. 77). Thereafter, the process moved forward expeditiously. As noted above, the district conducted evaluations between September and October 2021, well within 60 days of receipt of the parents' consent (8 NYCRR 200.4[b]) and convened the CSE meeting at the end of November 2021. The CSE meeting, prior written notice, and notice of assigned public school location were all dated within 60 school days of the receipt of the parents' consent to evaluate.¹¹ As such, the IHO erred in finding that the district failed to fulfill its obligation to timely evaluate the student and convene the CSE.

Moreover, even if the district failed to timely evaluate the student and arrange for appropriate special education, any such delay was modest, as the district had a placement and program for the student by December 14, 2021. Thus, any failure to comply with the timelines for the completion of an initial evaluation was, at most, a procedural violation that did not deprive the student of a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of

⁸ Parent exhibit X included forms for the parents to complete to consent for an initial evaluation and for use of electronic mail (Parent Ex. X at pp. 76-77). The packet of information also included reports from the student's prior school, a 2019 neuropsychological evaluation, and an undated behavioral intervention plan (Parent Ex. X at pp. 6-61, 67-72).

⁹ On October 8, 2021 the district conducted an OT evaluation of the student, the results of which were reflected in a report dated November 15, 2021 (see Dist. Ex. 5 at pp. 1, 9).

¹⁰ As noted above, the evidence in the hearing record demonstrates that the CSE may have occurred on either November 23 or November 30, 2021; for purposes of discussion, I will use the later date cited by the parents.

¹¹ For that matter, the CSE convened within 60 school days of the parents' August 27, 2021 letter.

educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

2. Evaluative Information

Turning next to whether the student was evaluated in all areas of suspected disability, the district asserts on appeal that, contrary to the IHO's findings, the November 2021 CSE relied upon "sufficient and appropriate" evaluative materials during the development of the student's IEP.

Under federal and State regulation, a school district is responsible to conduct a "full and individual initial evaluation" before the initial provision of special education and related services to a student with a disability (34 CFR 300.301[a]; see 8 NYCRR 200.5[b][1]). Under federal regulation, an evaluation must assess the student "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (34 CFR 300.304[c][4] [emphasis added]). Under State regulation, an initial evaluation must include at least:

- (i) a physical examination . . . ;
- (ii) an individual psychological evaluation, except when a school psychologist determines after an assessment of a school-age student . . . that further evaluation is unnecessary;
- (iii) a social history;
- (iv) an observation of the student in the student's learning environment (including the regular classroom setting). . . ; and
- (v) other appropriate assessments or evaluations, including a functional behavioral assessment [(FBA)] for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities.

(8 NYCRR 200.4[b][1]).¹² 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], [B], 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically

¹² Federal requirements do not prescribe specific types of assessments that must be conducted as part of an initial evaluation except that a classroom observation is a federal requirement for students with specific learning disabilities. The terms psychological evaluation, social history, and FBA are not defined in federal law or regulation.

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]). Whether it is an initial evaluation or a reevaluation of a student, 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]; see Application of the Dep't of Educ., Appeal No. 07-018).

The evidence in the hearing record indicated that a district social worker reached out to the parents by email on September 22, 2021 requesting various paperwork and evaluative information, and that the parent subsequently provided the district with information about the student including a copy of the student's September 2019 neuropsychological report and completed September 27, 2021 teacher reports (Parent Exs. F; X; Y).¹³ The district completed the student's social history on September 29, 2021, followed by the October 4, 2021 speech-language evaluation and the October 8, 2021 OT evaluation (Parent Ex. AA; Dist. Exs. 3; 5). As reflected in the prior written notice, dated December 14, 2021, the district considered all of the aforementioned evaluative information to develop the student's November 2021 IEP, as well as additional information that included the third and fourth grade report cards from the student's prior private school, an April 2021 psychological consultation, a May 2021 physical examination, and an October 20, 2021 letter from the student's "[c]linician" (Dist. Ex. 2 at pp. 1, 2).

At the outset of the discussion regarding the sufficiency of the evaluative information available to the November 2021 CSE, I note that generally, the IHO was correct in his finding that the district failed to conduct all evaluations required by State regulation as no psychoeducational evaluation or classroom observation was conducted (8 NYCRR 200.4[b][1]) although the parent had provided consent for those evaluations (Parent Ex. X at pp. 74-77). However, as described below, the CSE had before it the type of information that would have been obtained had the district conducted the classroom observation and psychoeducational evaluation; therefore, the district's failure to conduct these evaluations represents a procedural violation that in this instance does not rise to the level of a denial of a FAPE.

At the impartial hearing, the district school psychologist who participated as the district representative at the November 2021 CSE meeting testified that she reviewed the 2019 neuropsychological report and "determined that there was no need to reassess levels of cognitive functioning" as "the cognitive test scores [we]re within three years, that [wa]s sufficient" (Tr. pp. 49-50, 76; Dist. Ex. 1 at p. 35). A review of the November 2019 neuropsychological evaluation report reflected multiple assessments of the student's cognitive functioning, as well as assessments of attention and executive functioning, academic, social/emotional, and adaptive skills (see Parent Ex. X at pp. 39-61). Additionally, the November 2019 neuropsychological evaluation included

¹³ The 2019 neuropsychological evaluation report was entered into the hearing record as both part of a parent exhibit and a district exhibit (see Parent Ex. X at pp. 39-61; Dist. Ex. 6). As Parent Ex. X includes an appendix of the student's 2019 standardized testing results, it will be cited to within this decision (compare Parent Ex. X at pp. 39-61, with Dist. Ex. 6 at pp. 1-18).

reports of the student's familial, medical, developmental, educational, and social history, as well as behavioral observations and clinical interviews with the parent and with the student's second grade teacher (id. at pp. 40-43).

Specifically, the private 2019 neuropsychological evaluation report included scores obtained from administration of: the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V); NEPSY: A Developmental Neuropsychological Assessment Test-Second Edition (NEPSY-II), selected subtests; the Woodcock-Johnson IV Tests of Achievement (WJ IV ACH); the House-Tree-Person (H-T-P); Kinetic Family Drawing (KFD); Child Sentence Completion; Thematic Apperception Test (TAT); Behavior Assessment System for Children-Third Edition (BASC-3) with Parent Rating Scales – Child (PRS-C) and Teacher Rating Scales – Child (TRS-C); Behavior Rating Inventory of Executive Function-Second Edition (BRIEF-2) with completed Parent Rating Scale and Teacher Rating Scales; along with administration of a clinical parent interview and teacher interview (Parent Ex. X at p. 39).

The November 2021 CSE reviewed the 2019 neuropsychological evaluation results that showed the student demonstrated average cognitive and academic functioning, and presented with difficulties related to impulse control, sustained attention, and sustained physical regulation consistent with a diagnosis of attention deficit hyperactivity disorder (ADHD) (Parent Ex. X at pp. 52-53). The 2019 neuropsychological evaluation also indicated that given the student's history of anxious behaviors, thoughts and feelings that interfered with his sleep and daily functioning, together with ratings provided by his mother and teachers, the student met the criteria for a diagnosis of generalized anxiety disorder, with a rule-out diagnosis of autistic disorder deemed appropriate at that time (id.).¹⁴ Additionally, before the CSE were the neuropsychological evaluation recommendations supporting the student's executive functioning and social/emotional needs (id. at pp. 53-54). Specifically, the clinical recommendations of the neuropsychological report addressed supporting the student's attention and executive functioning weaknesses in the classroom by providing an environment with structured routines for everyday activities, providing visuals when available and external prompting such as supportive signals or cues to transition and initiate activities, and using natural cues from peers in social and academic situations (id. at p. 53). Additional executive functioning supports included providing clear directions, frequent repetition and reminders, providing physical activities with group interactions and short motor break activities to increase engagement, as well as interactive, hands-on activities rather than desk work (id.). Further recommendations for the CSE's consideration included teaching self-monitoring skills such as editing, creating lists and note-taking, as well as permitting use of sensory modulating equipment at school such as noise reducing headphones, fidgets or stress balls and desk dividers (id.). Other recommendations included outside tutoring to support completion of homework, an OT evaluation, and regular counseling in a small group at school to support social skills, as well as parent-child therapy sessions for the family (id. at pp. 53-54).

Next, the November 2021 CSE reviewed the September 29, 2021 social history report, in which the parent requested that the student be evaluated for special education support services due to his struggles with social/emotional functioning, behavior at home and in school, and difficulties with attention, focus and impulse control (Dist. Ex. 5 at p. 1). The social history detailed the

¹⁴ According to the evaluators, should the student's "cognitive rigidity and social deficits persist or worsen despite interventions," a diagnosis of autism spectrum disorder may be warranted (Parent Ex. X at p. 53).

student's family composition, school history, medical history, developmental milestones, and the student's strengths, weaknesses, and interests (id. at pp. 2-4). The parent reported that the student struggled with peer relationships in third and fourth grade and with peers thinking his behaviors were childish (id. at pp. 2-3). The parent reported that teachers stated to her, that the student was a "great child," but they reported he had difficulty staying focused, was easily distracted, forgetful, and struggled with organization and transitions (id. at p. 2). At the time of the social history, the student attended fifth grade and enjoyed reading, math, drawing maps, and watching documentaries (id. at p. 3). The student struggled with organizing his writing, and producing the "th" sound (id.). Further, the student had difficulty with organization, planning, impulse control, starting tasks, and keeping focused (id.). The student was often anxious and exhibited social difficulties; the parent reported that he began seeing a therapist in second grade, which "did not help" and subsequently he attended a social skills group (id.). The parent reported that the student had friends at school, although he had different interests than his peers; at home she reported the student's behavior was challenging but had recently improved (id. at p. 4).

Additionally, the November 2021 CSE considered the speech-language assessment completed on October 4, 2021; according to testing, the student demonstrated age appropriate receptive and expressive language and reading comprehension skills, with further development needed with writing (Parent Ex. AA at pp. 1, 3). The evaluator noted that the student initially struggled with transitioning to the assessment; however, subsequently the student cooperatively completed all tests, sat throughout testing, followed directions, demonstrated appropriate eye contact, turn-taking skills, comments, and humor, and "easily engaged in conversational topics" (id. at p. 2). Following the speech-language assessment, the evaluator recommended speech-language therapy to correct production of the voiced and voiceless "th" sound and to support the student's writing skills as testing revealed his written sentence responses required further development (id. at pp. 3, 6).

Further, the November 2021 CSE considered the October 8, 2021 OT assessment (see Dist. Ex. 3). The evaluator reported that the student cooperated throughout testing, completed all tasks, and demonstrated low frustration tolerance when writing (id. at p. 3). The student did not have difficulty following multi-step directions and was not distracted by auditory or visual stimuli in the one-on-one environment (id. at p. 3). Although the evaluator observed that the student demonstrated poor self-regulation skills as he "was constantly moving during testing," she concluded that the student's poor attention was not attributable to his sensory motor processing skills, which were typical for his age (id. at pp. 3, 7-8). The evaluator reported that the student did not exhibit hyperactive behaviors, had efficient fine motor skills as related to his tripod grasp with legible and neat writing, and functional life skills as related to independent fine motor dressing skills, feeding skills and toileting tasks (id. at pp. 4, 6-8). The evaluator did not recommend OT services, however noted that "[the student] would benefit from consistent movement breaks to increase attention in class" (id. at p. 8).

Regarding the student's social/emotional and behavior needs, the November 2021 CSE reviewed information from the student's April 2021 initial psychiatric consultation report (Parent Ex. X at pp. 12-13). The provider reported that the student had a history of attention and anxiety symptoms and social difficulties with some traits of autism spectrum disorder (ASD) that had decreased over time as the student matured (id. at p. 13). The student reported liking school and having friends, with the parent noting that the student did not spend time with those friends outside

of school, to which he "express[ed] loneliness at times" (*id.* at p. 12). Further, the report noted that the student's impulsivity and ADHD as possibly contributing to his social presentation making him appear younger, although, he did well academically (*id.* at p. 13). The student's May 2021 physical examination completed by his physician reported diagnoses of ADHD and generalized anxiety disorder (*see* Parent Ex. BB at pp. 3-5).

The November 2021 CSE also reviewed the more recent October 20, 2021 letter from the student's clinical health providers who provided mental health care services to the student and his family (*see* Parent Ex. CC). The clinicians reported that the student had received diagnoses of attention deficit disorder (ADD) and oppositional defiant disorder (ODD) and described his "asynchronous development" as "twice exceptional" (*id.* at p. 1). Although highly intelligent, the student struggled with executive functioning, focusing on non-preferred activities, and interacting with peers (*id.*). The clinicians opined that children who present like the student typically require a school environment with higher adult-to-child ratios, prompts to stay on task, and professionals trained in promoting social/emotional functioning, along with skill-based therapeutic intervention such as cognitive behavioral therapy (CBT) provided in a group format at school (*id.* at p. 2).

As to a classroom observation, State regulation requires that an observation take place "in the student's learning environment" for the purpose of "document[ing] the student's academic performance and behavior in the areas of difficulty" (8 NYCRR 200.4[b][1][iv]). Although the district did not conduct a classroom observation of the student, the November 2021 CSE reviewed September 2021 reports prepared by two of the student's teachers from Lang, which included information related to the student's first two weeks of fifth grade (*see* Parent Ex. Y; Dist. Ex. 2 at p. 2).¹⁵ In reading, the student's special education teacher reported that the student chose grade appropriate texts, could read aloud in class, and talked about and summarized text chapters, noting that the student might need support using evidence from text to support his thinking (Parent Ex. Y at p. 5). In math, the special education teacher reported that the student solved word problems that included multiplying by 10, 100, and 1,000 and could talk about numbers through one billion (*id.* at p. 6). His special education teacher reported that the student's "academic stamina seem[ed] appropriate," and although the student sometimes complained when initiating work, he did complete his work with teacher prompting (*id.*). The special education teacher additionally reported that the student seemed on grade level socially, made several new friends and interacted with all of his classmates; at times he became so focused on play and socialization that when it was time for transitions, it took several prompts from teachers (*id.* at p. 7). Additionally, the special education teacher indicated that the student's motor skills were reportedly appropriate as the student manipulated all classroom materials without issue (*id.*).

The regular education teacher at Lang also reported that during the student's first two weeks of fifth grade during the 2021-22 school year, he read grade appropriate books and in the area of writing he demonstrated the ability to add details when asked to revise information he wrote; however, he needed support in planning and organization (Parent Ex. Y at pp. 8-9). The regular

¹⁵ One of the student's teachers during the 2021-22 school year testified that she is certified in "general" education and that, if she recalled correctly, the student's other teacher was certified in special education (*see* Tr. pp. 121-22). The school psychologist testified that the teacher certified in special education was also "credentialed" in "general education" (Tr. p. 77). To distinguish between the Lang teachers, one will be identified as the regular education teacher, and one will be identified as the special education teacher in this decision.

education teacher described the student as easily distracted and talkative at inappropriate instances impacting his ability to access the curriculum at times; however, he had quickly made friends within the first few weeks of school and seemed to have positive relationships with adults and peers (id. at pp. 9-10).

Further, the November 2021 IEP included information from the November 9, 2021 Lang teacher report reflecting the student's reading skills in the areas of decoding, reading comprehension, fluency, and listening comprehension all at the fifth grade level; Fountas and Pinnell scoring at a "beginning of [fifth] grade level"; "speaking," grammar and punctuation at the fourth grade level; written organization at the fifth grade level; and math computation and problem solving both at the fourth grade level (compare Dist. Ex. 1 at pp. 3-4, with Dist. Ex. 4 at pp. 1-2).¹⁶ Further, the CSE included specific academic information from the student's special education teacher at Lang, as stated in the November 9, 2021 teacher report, such as that during the Fountas and Pinnell assessment the student added/inserted several words and had difficulty "with questions thinking beyond the text," the student had "trouble with capitalization, punctuation, and spelling," the student needed teacher support and visual methods and standard algorithms for math, noting the student's struggle with confidence in his work (compare Dist. Ex. 1 at p. 4, with Dist. Ex. 4 at pp. 1, 2). The CSE included some of the academic management needs from the November 2021 Lang teacher reports in the November 2021 IEP (compare Dist. Ex. 1 at pp. 4-5, with Dist. Ex. 4 at pp. 2, 5). The social development present levels of performance in the November 2021 IEP reflected the November 2021 Lang teacher report that the student had adjusted to Lang and made friends with everyone, he seemed to go with the group's choices and interests until he got to know people, he was concerned with how he appeared engaging in educational challenges, and that he was uncomfortable with new challenges until he understood the expectations (compare Dist. Ex. 1 at pp. 5-6, with Dist. Ex. 4 at p. 3). The November 2021 IEP reflected the November 2021 Lang teacher report that regarding the student's physical development, the student enjoyed physical education and that there were no "major" noticeable skill deficits (compare Dist. Ex. 1 at p. 7, with Dist. Ex. 4 at p. 3).

In addition, the student's special education teacher and a school psychologist from Lang participated in the November 2021 CSE meeting (Dist. Ex. 1 at p. 35). The school psychologist testified that those individuals were permitted to provide information about the student during the CSE meeting (Tr. p. 54).

Based on the foregoing and contrary to the IHO's finding, the evidence in the hearing record shows that the November 2021 CSE had sufficiently comprehensive evaluative information about the student and a clear understanding of the student's needs in order to develop his IEP without conducting its own psychoeducational evaluation and classroom observation. The evidence does not show that the lack of evaluations "deprived [the parents] of evaluative material so critical and insufficiently substituted at the CSE meeting that [they were] significantly hindered in [their] ability to advocate" for the student (A.A. v. New York City Dep't of Educ., 2015 WL 10793404, at *11 [S.D.N.Y. Aug. 24, 2015]). While the parents continue to contend that the district did not conduct all required evaluations, the evaluative information available to the CSE, even if not

¹⁶ Review of the November 2021 Lang teacher report reflected that the student's spelling skills were at a fourth grade level; the November 2021 IEP's notation regarding the student's "speaking" skills, rather than spelling, may have been a typographical error (compare Dist. Ex. 1 at p. 4, with Dist. Ex. 4 at p. 1).

meeting every procedural requirement for an initial evaluation, provided sufficient information regarding the student (see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *16-17 [S.D.N.Y. Feb. 14, 2017]; S.Y. v. New York City Dep't of Educ., 210 F. Supp. 3d 556, 567 [S.D.N.Y. 2016] [holding that procedural violations, including untimely evaluations and the failure to obtain required evaluations, did not rise to the level of a denial of a FAPE where the CSE had adequate information about the student's needs]; K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *7-8 [S.D.N.Y. Mar. 31, 2016] [holding that where evaluative materials provided detailed information regarding the student's needs, the procedural violation of not conducting required evaluations did not rise to the level of a denial of a FAPE]; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *7-8 [S.D.N.Y. Mar. 30, 2016]; M.T. v. New York City Dep't of Educ., 165 F. Supp. 3d 106, 116 [S.D.N.Y. 2016]; N.M. v. New York City Dep't of Educ., 2016 WL 796857, at *5 [S.D.N.Y. Feb. 24, 2016]).

3. Program Recommendation – ICT Services

Turning next to the district's appeal of the IHO's finding that the November 2021 CSE's program recommendations were not appropriate, the district argues that the IEP's present levels of performance informed the CSE's recommendations for ICT services with counseling and speech-language therapy, which would have provided an educational benefit to the student and met his special education needs.

For the 2021-22 school year, the IHO found that the district did not provide the appropriate placement for the student, stating that "it [wa]s highly doubtful" that the student's IEP could have been successfully implemented in a classroom where ICT services were delivered, as it did not provide the student with the level of support needed in relation to the student's diagnoses and due to the large class size (IHO Decision at pp. 26-27). As explained more fully below, a review of the evidence in the hearing record does not support the IHO's finding. Instead, the evidence supports a finding that the November 2021 CSE's recommended program consisting of ICT services, speech-language therapy, counseling services, as well as program supports, and management needs was reasonably calculated to enable the student to receive educational benefit.

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]).

The November 2021 CSE recommended that the student receive five periods per week of ICT services in math, ELA, social studies and science (Dist. Ex. 1 at p. 26). The school psychologist described ICT services as "a general education type of program" with classrooms where services are delivered consisting of two teachers; one certified in general education and one certified in special education, who "work in tandem to meet the needs of all the kids in the class" (Tr. pp. 61-62). According to the school psychologist, "most" of the students in a classroom where ICT services are delivered are nondisabled, with "a smaller portion of students" identified as students with educational disabilities who have IEPs (Tr. p. 62). She testified that the special

education teacher worked with the students in the classroom who were classified to meet their IEP goals (id.).

As related to the November 2021 CSE recommendations, the school psychologist testified that, due to the student's "history of diagnoses," and difficulties with focusing and peer relationships, a classroom where ICT services were delivered would be appropriate for this student as he needed "more than one credentialed adult, specifically a special educator" in the classroom who had the "credentials and expertise to deal with students who . . . ha[d] educational disabilities" (Tr. p. 63). Further, the school psychologist testified that having a regular education teacher and special education teacher in the classroom would "be a good fit" for the student, as he did not demonstrate significant delays, and his academics were "on par" with the exception of an approximate one-year delay in an area of his writing and in his math development (Tr. p. 66). Additionally, the school psychologist noted that due to the student having some social/emotional difficulties with peers, exposure to neurotypical/nondisabled peers would provide the student with good models "both academically as well as socially" (id.).

At the November 2021 CSE meeting, the parent indicated concerns regarding the "size of the school building and the size of the class" and preferred the student to stay at Lang (Dist. Ex. 1 at p. 5). During testimony, the school psychologist identified class size as a "probable issue for the parent" since the November 2021 CSE did "not recommend[]" a ratio similar to what the student had at Lang" (Tr. p. 81). The school psychologist testified that the November 2021 teacher report indicated that the class size at Lang was "eight students;" however, she did not know if there were nondisabled students at the school (Tr. 87-88; see Dist. Ex. 4 at p. 1). The psychologists who conducted the 2019 neuropsychological evaluation of the student did not recommend a smaller class setting and despite the parent's concerns about the size of the district's class, the school psychologist testified that the November 2021 CSE did not have information indicating "that the student would not be able to handle the ICT classroom setting" (Tr. p. 87; see Parent Ex. X at pp. 53-55).¹⁷

In conjunction with ICT services, the November 2021 CSE recommended a number of supports to address the student's management needs (Dist. Ex. 1 at pp. 8, 26). Review of the November 2021 IEP reflects that the CSE included most of the executive functioning supports recommended for the student in the 2019 neuropsychological evaluation report such as use of visuals, cues, prompts, frequent repetition, motor breaks, and creating lists to support self-monitoring (compare Parent Ex. X at p. 53, with Dist. Ex. 1 at p. 8). Specifically, the 2019 neuropsychological report recommended executive functioning supports that included providing structured routines, use of visuals, external prompting to transition and initiate activities, use of natural cues from peers in social and academic situations, clear directions, repetition, teaching of self-monitoring skills such as editing, creating lists and notetaking as well as permitting use of sensory modulating equipment (Parent Ex. X at p. 53). Similarly, the student's November 2021

¹⁷ According to the September 2021 social history, prior to Lang the student attended a general education private school and received speech-language therapy and "worked with a learning specialist and psychologist" (Dist. Ex. 5 at p. 2; see Parent Ex. X at p. 42). The hearing record does not provide additional information about the frequency, duration, and focus of the supports the student received at the private school. Additionally, the April 2021 initial consultation clinical note stated that at the general education private school the student was not receiving "academic supports such as 504 or IEP" (Parent Ex. X at p. 12). The parent testified that prior to attending Lang, the student had not received instruction from certified special education teachers (Tr. p. 160).

IEP recommended management needs that included teacher conferences for feedback, review of assignment expectations with provided examples, verbal and visual prompts, cue reminders, use of a visual schedule, preview schedule daily, timer for transitions, modeling, step by step instructions, checklists, visual aids and opportunities for repeated practice (Dist. Ex. 1 at p. 8). Additional strategies for addressing the student's management needs within the November 2021 IEP included use of positive praise and encouragement, clear limit setting, review of behavioral expectations, assistance when navigating social situations, redirection and refocusing and movement breaks (*id.*).

Next, the November 2021 IEP included approximately 19 annual goals to support the student's social/emotional, executive functioning, and academic needs to be addressed by the teacher or related services providers (Dist. Ex. 1 at pp. 10-25). Specifically, the IEP included five goals in the area of counseling addressing flexible thinking/problem solving skills during social conflicts, identifying/understanding verbal and non-verbal social cues, identifying emotional responses, rehearsing adaptive coping skills, and managing unexpected events using visuals and scripts (*id.* at pp. 10-13). In the area of advocacy, the IEP listed one goal supporting the student asking for help, with three goals recommended to address speech-language needs including using graphic organizers in writing, producing short narratives, and correcting the production of the "th" sound (*id.* at pp. 14-16). In the area of reading the IEP included three goals addressing comprehending and answering questions and three goals in writing addressing using resources to correctly spell fifth grade words, writing three paragraph essays with correct punctuation, capitalization and spelling, and using calming strategies and pre-writing strategies to increase his confidence when writing (*id.* at pp. 17-20). In the area of math, the IEP listed four goals addressing using visual methods to solve multiplication equations, division equations, solving problems by drawing graphs related to measurement and data, and solving word problems involving masses or volumes (*id.* at pp. 22-25).

In addition to ICT services, management needs, and annual goals, the November 2021 CSE recommended that during the 2021-22 school year, the student receive one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, one 30-minute session per week of individual counseling, and one 30-minute session per week of counseling within a group (Dist. Ex. 1 at pp. 26-27). The school psychologist testified that this service model for both counseling skills and speech-language therapy benefited the student as he could practice specific skills with the clinician during the one-to-one session, and within the group "second session of the week, he could actually put into practice what he learned with the clinician in a group of his peers" (Tr. pp. 67-69). Additionally, the IEP included testing accommodations of extended time, separate location/room with no more than 12 students, on-task focusing prompts and directions read and re-read (Dist. Ex. 1 at p. 28).

Further, the hearing record shows that the November 2021 CSE considered other programs for the student including related services only, and a special class in a community school; the CSE determined that a general education setting with a single teacher did not provide enough support due to the student's needs, and a special class would be "too restrictive," as it did not take into account the student's cognitive skills or LRE (Tr. p. 70; Dist. Ex. 1 at p. 33). The school psychologist testified that the least restrictive environment that the November 2021 CSE "could see being beneficial for [the student] would be an ICT class, not a self-contained classroom" as the self-contained classroom would not have any general education students in it (Tr. pp. 70-71).

As a final note, it is worth explaining that while the parent expressed disagreement with the programming recommended at the November 2021 CSE meeting, and the parent's desire for the student to be placed in a smaller setting with more individualized attention is understandable, the CSE was required to take into consideration the restrictiveness of the recommended placement and its place on the continuum of services when recommending an educational program for the student. Accordingly, it was reasonable for the CSE to reject a placement for the student based on his academic ability, concerns that a special class placement would be too restrictive for the student, and the view that the student's executive functioning and social/emotional needs could be addressed through the related services of speech-language therapy and counseling, and the support of a special education teacher and a regular education teacher within the classroom where he received ICT services and supports to meet his management needs. Given that a student's recommended program must also be provided in the LRE, the CSE should not be faulted in making LRE considerations a part of the CSE's deliberations (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, 489 F.3d at 108; Walczak, 142 F.3d at 132).

As discussed in detail above, the evidence in the hearing record does not support the IHO's finding that the November 2021 IEP failed to offer the student at FAPE, as it appears he neglected to consider the totality of the recommended programming that not only included ICT services, but also speech-language therapy and counseling services, annual goals and management needs directed at the student's academic, executive functioning and social/emotional deficits, which would have enabled the student to receive an educational benefit.

VII. Conclusion

Having determined that the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2021-22 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Lang was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision dated May 16, 2023 is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2021-22 school year and ordered it to fund the costs of the student's attendance at Lang.

Dated: **Albany, New York**
 August 11, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER