



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-163

**Application of the BOARD OF EDUCATION OF THE WHITE
PLAINS CITY SCHOOL DISTRICT for review of a
determination of a hearing officer relating to the provision of
educational services to a student with a disability**

Appearances:

Keane & Beane, PC, attorneys for petitioner, by Ralph C. DeMarco, Esq.

Gina DeCrescenzo, PC, attorneys for respondents, by Gina DeCrescenzo, 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 the costs of the student's tuition at Eagle Hill School (Eagle Hill) for the 2022-23 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[a]). 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

According to the evidence in the hearing record, the student in this matter—who was continuously found eligible to receive special education as a student with a speech or language impairment—received integrated co-teaching (ICT) services in a general education placement within a district elementary school from kindergarten through fifth grade (2021-22 school year) (see Tr. pp. 839, 1216-21).¹ During fifth grade, the student also received related services

¹ The student's father testified at the impartial hearing that the student began receiving special education services through the Early Intervention Program (EIP) and the Committee on Preschool Special Education (CPSE) prior to receiving school-age services through the CSE (see Tr. pp. 1214-17). Generally, the student's EIP and CPSE services consisted of related services, such as OT, speech-language therapy, and physical therapy (PT) (see Tr.

consisting of speech-language therapy, occupational therapy (OT), and counseling services pursuant to IEPs dated June 2, 2021 (June 2021 IEP) and November 19, 2021 (November 2021 IEP) (see generally Dist. Exs. 3-6).

On June 2, 2021, a CSE convened, found the student eligible for special education services as a student with a speech or language impairment, and recommended a general education placement with ICT services (4 hours and 10 minutes daily), two 30-minute sessions of speech-language therapy in a small group, one 30-minute session of OT in a small group, and one 30-minute session of counseling services in a small group (see Dist. Ex. 4 at pp. 1, 11).² The June 2021 CSE also recommended the following as supports for the student's management needs and/or as supplementary aids, services, program modifications, and accommodations for the student: preferential seating, refocusing and redirection, checking for understanding, directions repeated for multistep directions, simplified directions, additional time to respond to questions, math tools, breaks as needed, chunking mnemonics, provision of a word bank, limited background noise when possible, use of visual aids, timers, checklists, breaking oral information down into short segments, provision of sentence starters, provision of additional examples, use of a graphic organizer, access to a school counselor, extra space or paper for math problems, and teacher models (see id. at pp. 8, 11-12). In addition, the June 2021 IEP included a recommendation for supports for school personnel on behalf of the student: one 60-minute quarterly team meeting with parents, teachers, and service providers (id. at p. 12). The June 2021 CSE recommended the following as testing accommodations for the student: tests administered in a location with minimal distractions, extended time (1.5), directions reread for each page of questions, breaks, and additional space or paper for math tests (id. at p. 13). The June 2021 IEP included approximately 10 annual goals targeting the student's study skills, reading, writing, mathematics, speech-language, and social/emotional/behavioral needs (id. at pp. 9-10).

Over the course of several dates in August through October 2021, the district completed the student's mandated three-year reevaluation, which included a September 2021 OT evaluation, a September 2021 speech-language evaluation, an October 2021 social history update, and an October 2021 psychological evaluation (see generally Tr. pp. 67-69; Dist. Exs. 16-20). On November 19, 2021, a CSE convened for the purpose of reviewing updated evaluations of the student and developed the student's November 2021 IEP (see Dist. Exs. 5 at pp. 1-2; 6 at pp. 3-5).

As a result of the information obtained from the reevaluation of the student and provider reports of the student's progress, the November 2021 CSE continued to recommend the same strategies and supports to address the student's management needs as in the June 2021 IEP, but added that the student should be provided with "clear routines and schedules to aid in his organization" (compare Dist. Ex. 6 at pp. 13-14, with Dist. Ex. 4 at p. 8). In addition, the November 2021 CSE continued to recommend the same annual goals; supplementary aids, services, program modifications, and accommodations; supports for school personnel on behalf of the student; and testing accommodations as in the June 2021 IEP (compare Dist. Ex. 6 at pp. 14-19, with Dist. Ex.

pp. 1214-15).

² According to the June 2021 IEP, all of the student's recommended special education and related services were delivered in a six-day cycle (see Dist. Ex. 4 at p. 11).

4 at pp. 9-13). Overall, the November 2021 CSE also continued to recommend a general education placement with ICT services (4 hours and 10 minutes), together with the same frequencies and durations of related services (speech-language therapy, OT, and counseling) as in the June 2021 IEP (compare Dist. Ex. 6 at p. 16, with Dist. Ex. 4 at p. 11).

Concurrent with the timing of the November 2021 CSE meeting, the parents privately obtained an auditory processing evaluation of the student (see Dist. Ex. 21 at p. 1). Thereafter, in December 2021 and January 2022, the parents privately obtained a neuropsychological evaluation of the student (see Dist. Ex. 22 at p. 1).

On April 1, 2022, the parents executed an enrollment contract with Eagle Hill for the student's attendance during the 2022-23 school year (see Parent Ex. C at pp. 1, 3).³

On May 6, 2022, a CSE convened to conduct the student's annual review and to develop an IEP for the 2022-23 school year (sixth grade) (see Dist. Exs. 7 at p. 1; 8 at p. 1).⁴ Shortly thereafter in an email to the district dated May 9, 2022, the parents notified the district of their intention to unilaterally place the student at Eagle Hill for the 2022-23 school year and to seek public funding for the student's tuition, transportation, and related costs from the district (see Parent Ex. A).

Following the May 2022 CSE meeting—and due to the parents' concerns about the student's decoding and encoding skills expressed at the CSE meeting—the student's teacher administered the Wilson Assessment of Decoding and Encoding (WADE) to the student (see Tr. pp. 424-25; see generally Dist. Ex. 23).

Subsequently, on June 1, 2022, a CSE reconvened to conduct a program review and revised the IEP developed at the May 2022 CSE meeting for the student's 2022-23 school year (sixth grade) (see Dist. Exs. 9 at p. 1; 10 at p. 1).⁵ Finding that the student remained eligible for special education as a student with a speech or language impairment, the June 2022 CSE recommended a general education placement with ICT services for instruction in English language arts (ELA), mathematics, science, and social studies; and related services consisting of two 30-minute sessions of speech-language therapy in a small group and one 30-minute session of OT in a small group (see Dist. Ex. 10 at p. 12).⁶ The CSE also recommended specially designed reading instruction

³ Eagle Hill has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

⁴ In the prior written notice issued by the district with respect to the May 2022 CSE meeting, the district noted that the CSE meeting had been moved up from May 19, 2022 to May 6, 2022 at the parents' request (see Dist. Ex. 7 at p. 1).

⁵ Since the June 2022 IEP superseded the May 2022 IEP, all references herein refer to the recommendations and information contained within the June 2022 IEP.

⁶ The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

(three 42-minute sessions per six-day cycle) and support for academic learning (three 42-minute sessions per six-day cycle) (id. at pp. 9-10, 14).

In addition, the June 2022 CSE recommended the same supports for the student's management needs and/or supplementary aids, services, program modifications, and accommodations as had been recommended in the student's November 2021 IEP, with the following additional supports: use of anchor charts, collaborative learning opportunities, reminders to use his tools, wait time, opportunities for pre-teaching and reteaching, repetition of skills, use of grid or graph paper, positive reinforcement, visualization strategies to support oral and reading comprehension, the provision of a copy of class notes, access to a computer, use of a calculator, modified homework assignments, modified class assignments, tasks broken down into manageable chunks, additional time to complete assignments, and a trial of an FM unit (compare Dist. Ex. 10 at pp. 9-10, 13-14, with Dist. Ex. 6 at pp. 9-10, 14-19).⁷ The June 2022 CSE also recommended supports for school personnel on behalf of the student, which included one 60-minute team meeting (parents, teachers, and services' providers) per quarter, a counseling consult to teachers to support the student's transition to middle school, as needed daily, and a speech-language consult to the teacher, as needed daily (id. at pp. 14-15). As testing accommodations, the June 2022 CSE recommended test administration in a separate location or setting, extended time (1.5), directions reread for each page of questions, breaks, access to a word processor for typed responses, use of a calculator, and redirection or refocusing (see Dist. Ex. 10 at pp. 15-16). The June 2022 CSE also included approximately 14 annual goals targeting the student's needs in the areas of study skills, reading, writing, mathematics, speech-language, and motor skills (id. at pp. 11-12).

A. Due Process Complaint Notice

By due process complaint notice dated August 31, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Dist. Ex. 1 at pp. 1, 10). As relevant to this appeal, the parents asserted that the district failed to recommend appropriate related services and failed to recommend sufficient "special education, supports, and services" to enable the student to make progress appropriate in light of his circumstances for the 2022-23 school year (id. at pp. 10-12). As relief, the parents requested an order directing the district to reimburse or to directly fund the costs of the student's tuition at Eagle Hill for the 2022-23 school year (id. at pp. 13-14).

B. Impartial Hearing Officer Decision

After prehearing conferences held on October 7, 2022 and November 15, 2022, the portion of the impartial hearing devoted to the merits of the parents' claims took place over seven hearing dates between January 4, 2023, and March 28, 2023 (see Tr. pp. 1-1355; see also IHO Ex. I at p.

⁷ According to the June 2022 IEP, all of the student's recommended special education and related services were delivered in a six-day cycle (see Dist. Ex. 10 at pp. 12-13). The evidence reflects that both the specially designed reading instruction and support for academic learning (SAL) would be incorporated into the student's class schedule so the student would not be pulled from any classes to receive those services (i.e., each as a separately scheduled class in his schedule) (see Tr. pp. 183-84). At the impartial hearing, the CSE chairperson described the SAL recommendation as an "opportunity for the special education teacher to work in a small group with their students" on the students' needs, such as reteaching concepts, working on individual goals, and supporting executive functioning skills for organization or long-term projects (Tr. pp. 111-12).

1; IHO Decision at p. 2). At the conclusion of the impartial hearing, both parties submitted closing briefs to the IHO for consideration (see generally IHO Exs. III-IV).

In a decision dated June 28, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year, Eagle Hill was an appropriate unilateral placement, and equitable considerations weighed in favor of the parents' requested relief (see IHO Decision at pp. 29-34). As relief, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at Eagle Hill upon proof of payment (id. at p. 34).

In finding that the district failed to offer the student a FAPE, the IHO concluded that although the annual goals in the June 2022 IEP were "ambitious, . . . the recommended program w[ould] not provide the student with sufficient services and support to enable him to make progress toward those goals, appropriate to his individual circumstances" (IHO Decision at p. 29). To support this conclusion, the IHO noted that, while the student "made some progress in reading and math in his elementary program, he received a level of support in his ICT class (reading instruction in groups of three to four students, and one-to-one support for writing assignments) which [wa]s absent" from the June 2022 IEP; the student would have "receive[d] the support of a special education teacher for only one of two ELA blocks"; the student's reading instruction in middle school would be delivered in a group of up to eight students; and the recommended program did not "adequately address the student's difficulty with attentional control and his need for reduction of competing noise" (id.).

Next, the IHO found that the student had not made "appropriate progress in his language development" during elementary school "[d]espite receiving ICT services and group [speech-language therapy]" and the June 2022 IEP did not "adequately address the student's significant language needs" (IHO Decision at p. 29). More specifically, the IHO determined that the recommendation for "only two sessions of group [speech-language therapy], every six-day cycle, with up to five students in the group" was not sufficient to address the student's "significant language weaknesses" and was not "reasonably calculated to enable the student to make appropriate progress toward his language goals (using complex sentences with correct grammar; summarizing test/story by paraphrasing key ideas)" (id. at p. 30). The IHO also noted that she "credit[ed] the father that the student's language impairment affect[ed] his ability to socialize" (id. at pp. 29-30). As a final point, the IHO noted that she did not "find it reasonable to believe that [the student] w[ould] make progress toward his writing goal of writing three complete paragraphs in sequential order, with the level of service and support which ha[d] been recommended" (id. at p. 30). In light of the foregoing, the IHO found that the district failed to sustain its burden to establish that it offered the student a FAPE for the 2022-23 school year (id.).

With respect to the parents' unilateral placement, the IHO determined that Eagle Hill provided the student with "intensive, language based instruction" to meet his unique needs (see IHO Decision at pp. 30-31). Specifically, the IHO indicated that Eagle Hill provided the student with "small classes (not greater than seven students per class) and intensive remedial instruction, twice per day for 40-minute sessions in language arts, in small group (initially four students, and then reduced to two students)" (id. at p. 31). The IHO further indicated that Eagle Hill provided the student with "daily instruction in writing, in a group of four students, which allow[ed] for one-to-one conferencing"; the student received a "daily class in literature"; and his mathematics instruction "focuse[d] on word problems and the language of math, which [wa]s the student's area

of weakness" (*id.*). Next, the IHO found that the student received one 40-minute session per week of speech-language therapy in a group of two students and participated in a "pragmatic language group" (*id.*). Additionally, the IHO indicated that Eagle Hill supported the student during lunch for socialization and that the student received "collaborative services in the classroom" (*id.*). Overall, the IHO found that Eagle Hill provided the student with an "intensive level of remediation in language arts, and that there [wa]s support for his language needs throughout the program"—and as a result, Eagle Hill was an appropriate unilateral placement (*id.*).

Turning to equitable considerations, the IHO concluded that the parents cooperated in all respects with the CSE, and contrary to the district's assertion, the parents' execution of the enrollment contract with Eagle Hill prior to the development of the student's IEP for the 2022-23 school year did not bar an award of tuition reimbursement (*see* IHO Decision at pp. 31-32).

Next, the IHO addressed the parents' request to be reimbursed for the costs of the privately obtained January 2022 neuropsychological evaluation of the student (*see* IHO Decision at pp. 32-33). Initially, the IHO deemed the parents' request withdrawn because the hearing record failed to contain any evidence of its cost and because the parents did not seek reimbursement for the evaluation in their closing statement (*id.* at p. 32).⁸ Alternatively, the IHO found that, even if the parents had continued to request reimbursement for the evaluation, the parents were not entitled to such relief (*id.* at pp. 32-33). Here, the IHO noted that the parents initially expressed their disagreement with the district evaluations in the due process complaint notice and the district—in its response to the due process complaint notice—placed this "issue of the appropriateness of the evaluations" squarely before the IHO (*id.* at p. 33). The IHO determined that the district "demonstrated the appropriateness of its evaluations" of the student (*id.*). To support this determination, the IHO first found that the "only evaluation challenged in this [impartial] hearing, was that portion of the [district's] psychological evaluation which relied upon the [Wechsler Intelligence Scale for Children -5th Edition (WISC-V)], in concluding that the student's IQ was in the very low range, (with notable variability)" (*id.*). The IHO noted that, although the January 2022 neuropsychological evaluation of the student "used a different test to measure the student's cognitive ability, the results of her evaluation were quite similar to the results obtained by the school district's psychologist" (*id.*). For example, the IHO indicated that both evaluations found that the student's "nonverbal abilities were in the average range; and that the student's ability to learn was negatively impacted by his language weakness" (*id.*). The IHO also indicated that the evaluator who conducted the January 2022 neuropsychological evaluation of the student opined in the report that the student's scores "suggest[ed] that the student ha[d] the ability to learn and acquire knowledge; and that his weaknesses in the areas of language w[ould] prevent him from performing to his potential and accessing his academic curriculum in a typical academic setting" and thereafter, recommended a "specific type of setting and interventions" (*id.*). As a result of the foregoing, the IHO found that although the January 2022 neuropsychological evaluation was "valuable to the parents, in formulating a plan for their student's education in the future," the district's evaluations were appropriate and the parents were not entitled to reimbursement for the neuropsychological evaluation (*id.*).

⁸ The IHO also deemed the parents' request for transportation or reimbursement for transportation costs to be withdrawn as well, noting that it was undisputed that the district had provided transportation and the hearing record lacked any evidence of expenditures by the parents for transportation (*see* IHO Decision at pp. 33-34).

Based on the IHO's findings, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at Eagle Hill for the 2022-23 school year upon proof of payment (see IHO Decision at p. 34).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by finding that the district failed to offer the student a FAPE, that Eagle Hill was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' requested relief. The district contends that, in finding that the district failed to offer the student a FAPE, the IHO erred by improperly failing to consider evidence explaining how the district implemented its ICT services program. The district also contends that the IHO erred by finding that the June 2022 IEP failed to recommend sufficient supports and services to enable the student to make progress toward his annual goals and that the absence of a special education teacher in one of two periods of ELA was not sufficient to meet the student's needs. In addition, the district argues that the IHO erred by finding that the student had not made progress in his language skills under previous IEPs. The district also argues that the IHO erred by finding that the June 2022 IEP did not adequately address the student's difficulty with attentional control and his need for reduced competing noise and failed to include sufficient speech-language therapy services. The district further contends that the IHO failed to consider the district's obligation to educate the student in the least restrictive environment (LRE).

With regard to IHO's finding that Eagle Hill was an appropriate unilateral placement, the district asserts that the IHO erred by relying on the school's small class size to conclude that Eagle Hill provided the student with intensive remediation. The district also asserts that the IHO improperly weighed evidence and ignored evidence that the student was working on lower skills and received social skills work that was not individualized to the student, but instead, was provided to all students at Eagle Hill. The district contends that Eagle Hill was overly restrictive for the student, and the IHO ignored this as part of her analysis of the appropriateness of Eagle Hill.

Finally, the district asserts that the IHO erred by finding that equitable considerations weighed in favor of the parents' requested relief. The district argues that the parents predetermined the student's unilateral placement at Eagle Hill, executed the enrollment contract with Eagle Hill, and inquired about payments all prior to the development of the student's IEP for the 2022-23 school year.

As relief, the district seeks to reverse the IHO's findings that the district failed to offer the student a FAPE for the 2022-23 school year, that Eagle Hill was an appropriate placement, and that equitable considerations weighed in favor of the parents' requested relief.

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's decision in its entirety.⁹ With respect to the IHO's finding that the district failed to offer

⁹ To the extent that the parents do not appeal the IHO's findings adverse to them—namely, that the district's evaluations were appropriate, the parents were not entitled to reimbursement for the January 2022 neuropsychological evaluation of the student, and the parents' request for transportation or reimbursement thereof was deemed withdrawn—those determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see *M.Z. v. New York City Dep't of Educ.*,

the student a FAPE, the parents allege that the IHO found their witnesses credible, and question whether the district, on appeal, has demonstrated that such credibility determinations must be set aside. In a reply to the parents' answer, the district asserts that, contrary to their allegations, the IHO did not make credibility determinations in her decision.¹⁰

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

2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

¹⁰ Review of the IHO's decision reflects that, rather than making specific credibility findings about the witnesses' testimony, the IHO weighed the evidence before her (see S.W. v. New York City Dep't of Educ., 2015 WL 1097368, at *15 n.6 [S.D.N.Y. Mar. 12, 2015] [noting that an IHO's decision to discredit portions of a document was not based on a credibility determination of a witness and that the SRO had the same ability to weigh the evidence]; see, e.g., Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 429 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20 [2d Cir. Aug. 19, 2008]).

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]).¹¹

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.

¹¹ 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).

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

Generally, a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year, courts have been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]; N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at *9 [D.D.C. July 30, 2021]; James D. v. Bd. of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

With this as backdrop and as explained more fully below, the evidence in the hearing record reveals that the student made progress in his reading, writing, and language skills during the 2021-22 school year, and, thus, the district's recommendation for a similar program for the 2022-23 school year, with modifications responsive to the student's needs and transition to middle school, was reasonably calculated to enable the student to make appropriate progress in light of his circumstances and offered the student a FAPE in the LRE.

A. Progress During the 2021-22 School Year

As the evidence in the hearing record demonstrates, the student received ICT services and related services during fifth grade in the 2021-22 school year pursuant to his June 2021 and November 2021 IEPs, as well as receiving a multitude of supports and strategies to address his management needs within the classroom; the provision of supplementary aids, services, program modifications, and accommodations; testing accommodations; and supports on behalf of school personnel (see generally Dist. Exs. 4; 6). Overall, the evidence in the hearing record demonstrates that the student made progress, and more specifically, made progress toward his annual goals during fifth grade with the implementation of these services.

As reported in the June 2021 IEP, the student presented with delays in his language and communication skills, reading comprehension skills, distractibility and organization, and fine motor skills, which inhibited his progress in the general education curriculum (see Dist. Ex. 4 at p. 8). The June 2021 IEP reflected that the student had been "fully remote" for the 2020-21 school year (fourth grade), and he participated via Zoom on a daily basis in both "small group and whole group lessons and discussions" (id. at p. 6). The IEP noted that the student completed his assignments on time, asked for help "when needed," and benefitted from "reminders to use the teacher models and tools as a guide to complete tasks independently" (id.).¹² With respect to reading, the June 2021 IEP indicated that the student's reading level had improved according to Fountas & Pinnell testing from a level K (early second grade) in fall 2020 to a level N (early third grade) when retested in May 2021 (id.). The IEP further indicated that the student had "strong decoding skills," and had increased his ability to self-correct words with '-ed' endings" (id.). The student, at that time, could "summarize a text by retelling the character, problem, and solution," and he benefitted from the use of "visuals and graphic organizers during independent practice of reading skills" (id.). According to the June 2021 IEP, the student was working on "identifying the overall lesson or message of a story," and he could "identify how a character contribute[d] to the problem and solution of a story" (id.). However, the IEP noted that the student needed to "identify character traits supported by text evidence" and to "identify the theme or central message of a text" (id. at pp. 6-7). The IEP reflected the parents' concerns, specifically that they wanted to see "continued growth in [the student's] reading comprehension skills," but noted that they otherwise agreed with the student's "areas of growth and areas of need" as described (id. at p. 7).

Turning to writing, the June 2021 IEP noted that the student was a "passionate and enthusiastic writer," with "many ideas to draw upon for a variety of writing purposes and [that he] enjoy[d] bringing his ideas to life" (Dist. Ex. 4 at p. 6). At the time of the IEP, the student could

¹² At the impartial hearing, the district's CSE chairperson—who chaired the student's CSE meetings held to develop his fifth grade (2021-22 school year) and sixth grade (2022-23 school year) IEPs—testified that the district offered parents the option of fully remote instruction during the 2020-21 school year, and the parent in this matter chose that option for the student (see Tr. pp. 21-22, 26; Dist. Exs. 4 at p. 1; 6 at p. 1; 8 at p. 1; 10 at p. 1). As a fully remote student during the 2020-21 school year, the student did not participate in virtual counseling sessions or virtual OT sessions (see Dist. Ex. 4 at pp. 7-8). In addition to chairing some of the student's CSE meetings, the chairperson—while previously working in the district as a learning facilitator—had administered the Dynamic Indicator of Basic Early Literacy Skills (DIBELS) screener to the student when he was in a second grade ICT classroom and readministered the DIBELS to the student, who attended a third grade ICT classroom (see Tr. pp. 22, 25-26, 31-34). The chairperson testified that he was certified in Wilson level 1, a reading support he also provided to students as a learning facilitator in the district (see Tr. pp. 25-26, 28-29).

"include key elements such as character, setting, feelings, and some dialogue" in his narrative writing" (*id.*). He could also "write a persuasive or opinion essay that state[d] a claim and ha[d] at least two supporting pieces of evidence" (*id.*). The IEP noted that the student benefitted from the use of "transition word lists and sentence starters to help him organize and structure his writing effectively," and he "implement[ed] feedback quickly to revise his work" (*id.*). With respect to the student's writing needs, the June 2021 IEP noted that the student needed to "use details to elaborate his writing" and to "revise and edit his writing for clarity, effect, and purpose" (*id.* at pp. 6-7).

In mathematics, the June 2021 IEP noted that the student's "confidence in math ha[d] grown th[at] year," and the student exhibited "good number sense" (Dist. Ex. 4 at p. 6). At that time, the student knew "most of his multiplication facts and [could] use a strategy such as drawing equal groups or skip counting to solve unknown multiplication facts" (*id.*). The IEP reflected that the student could add and subtract multidigit numbers with "regrouping using a standard algorithm"; he also used "visuals and drawings to represent fractions and solve simple addition and subtraction of fractions" (*id.*). In addition, the June 2021 IEP noted that the student benefitted from "having math tasks broken down into simple steps and [he could] use those steps to solve" problems (*id.*). The IEP further reflected that the student could "solve two step word problems with the support of graphic organizers, key word charts, and a teacher model" (*id.*). According to, the IEP the student needed to solve multistep problems with the "option to use tools such as a graphic organizer, anchor charts, and keyword charts," as well as needing to "check his answers for reasonableness and accuracy" (*id.*).

In the area of speech-language skills, the June 2021 IEP noted that the student was an "active participant in speech therapy sessions" and consistently attended while on remote instruction for the 2020-21 school year (Dist. Ex. 4 at p. 6). The IEP also noted that the student participated in sessions by "engaging in conversations and engaging in the more structured activities" (*id.*). According to the June 2021 IEP, the student made "good progress" on his speech-language goals, noting that he could "identify and express multiple responses to a mistake or problem"; he could "independently advocate for items to be repeated or cl[arified] during sessions when he misse[d] something or d[idn't] understand s[omet]hing"; he made "steady progress in developing his abi[ility to m]ake predictions and inferences"; he was able to "make simple predictions and inferences based on verbally presented paragraphs and short stories"; and he continued to "improve his knowledge and use of vocabulary related to math and ELA concepts" (*id.* at pp. 6-7). Additionally, the student could "identify and define key concepts related to ELA, such as problem, solution, characters, and setting" (*id.* at p. 7). The IEP noted that, while the student did not "consistently define concepts such as inference and prediction, he [could] apply his knowledge of these concepts appropriately" (*id.*). The IEP indicated that the student "displayed improvement in his ability to retell stories by including the problem and solution," and he benefitted from using a "graphic organizer to help him plan his thoughts and retell" a story (*id.*). Moreover, the student could "identify the problem of a story and c[ould] formulate his own story by including a problem and solution with minimal supports" (*id.*). According to the IEP, the student needed to "improve his ability to identify and retell the main idea of presented passages," as well as needing to "improve his ability to use grammatically correct sentences, including correct verb tense, when retelling information" (*id.*).

Similar to the June 2021 IEP, the November 2021 CSE reported that the student presented with delays in his language and communication skills, reading comprehension skills, distractibility and organization, and fine motor skills, which inhibited his progress in the general education curriculum (compare Dist. Ex. 6 at p. 8, with Dist. Ex. 4 at p. 8). A comparison of the student's June 2021 IEP with the November 2021 IEP shows that the November 2021 IEP included all of the same information concerning the student's present levels of academic achievement, functional performance and learning characteristics as the June 2021 IEP (compare Dist. Ex. 6 at pp. 8-13, with Dist. Ex. 4 at pp. 6-8). In addition to reviewing and adding information gleaned from the reevaluations to the student's November 2021 IEP, the November 2021 CSE also included information reported by the student's then-current fifth grade special education teacher (teacher) and related service providers on his progress, to date, as well as information regarding supports provided to the student that assisted him in accessing the curriculum (compare Dist. Ex. 6 at pp. 8-13, with Dist. Ex. 4 at pp. 6-8).

With respect to progress in reading during the 2021-22 school year, the evidence reflects that, to measure the student's reading skills, the district administered the Fountas & Pinnell reading assessment to him at the beginning of the 2021-22 school year and he scored at a level N; upon the district's re-administration of the Fountas & Pinnell in January 2022, the student had improved to a level O (see Dist. Ex. 10 at p. 6). The evidence also reflects that, while the student improved his performance on this assessment, both level N and level O were considered to be demonstrative of an "early third-grade reading level" (id.; see also Parent Ex. H). In May 2022, the district readministered the Fountas & Pinnell reading assessment to the student, and at that time, the student's performance improved to a level P, which was considered to be an "end of third-grade, beginning of fourth-grade reading level" (see Dist. Ex. 10 at p. 6; Parent Ex. H).¹³ At the impartial hearing, the student's teacher explained that using the Fountas & Pinnell assessment allowed her to observe the student's progress and that, here, the student's performance demonstrated that he was decoding more complex texts at "97 [or] 98 percent accuracy"—which indicated that the student's "skills [we]re increasing . . . because he[wa]s able to decode those harder words" (Tr. p. 504).

The evidence also reflects that the district administered the Scholastic Reading Inventory (SRI) assessment to the student in fall 2021, and then again in both January and May 2022 (see Dist. Ex. 10 at p. 6). On this assessment, the student's performance improved from fall 2021 to January 2022—receiving, respectively, a quantile score of 472 and then a quantile score of 548; however, when the district readministered the SRI in May 2022, the student received a quantile score of 452 (id.).¹⁴ At the impartial hearing, the student's fifth grade special education teacher

¹³ The hearing record includes the recording sheets used by the student's fifth grade special education teacher who administered the Fountas & Pinnell Benchmark Assessment System 2, Third Edition, to the student in September 2021, January 2022, and May 2022 (see Tr. pp. 343-367 [explaining the student's performance as reflected in the Fountas & Pinnell recording sheets in evidence]; see generally Dist. Ex. 28). The teacher testified that Fountas & Pinnell was a "research-based reading program," which assessed the student's "decoding level and comprehension" (Tr. p. 345). She explained that a student could not "pass levels unless [the student] g[ot] both the decoding and the comprehension piece[s]," and as a student moved through the levels, the "words g[ot] more complex; the text g[ot] longer; it g[ot] more challenging to pass that level decoding-wise; and also, the "questions g[ot] more complex and g[ot] more difficult" (id.).

¹⁴ The evidence indicates that end-of-year, grade-level benchmark for the SRI assessment was a quantile score

agreed during cross-examination that the SRI assessment was considered to be "another baseline test" and a "screening and a diagnostic measure" (Tr. p. 508). She also characterized the SRI scores as a "point of data" (*id.*). According to the testimony, although the SRI assessment was "aligned with . . . the grade level instructional program," the quantile scores were "not correlated to [a] grade level" (Tr. pp. 508-10). Upon further questioning, the teacher explained that, although the student's SRI scores were "important," it was just one piece of information that made "up the puzzle of [the student's] education" (Tr. p. 511). She also testified that, while the student's final quantile score was lower than his initial quantile score, the SRI assessment is administered on the "iPad; and he [wa]s a student with attentional issues, and it [wa]s known that students with attentional issues d[id not] perform well on the iPad" (Tr. p. 512). The teacher also noted that it was a "moment in time," "one day of [the student's] life," and that the student's SRI score, as one data point, could not be used to establish a baseline for the student's reading (*id.*). The teacher emphasized that one had to "look at all of the data to get a more comprehensive view of this student" (*id.*).

At the impartial hearing, the fifth grade special education teacher testified that she documented the student's progress on his annual goals in the areas of study skills, reading, writing, and mathematics, which was reflected in her progress monitoring data (*see* Tr. pp. 316-17; *see generally* Dist. Exs. 24-27).¹⁵ She described her process for collecting data; for example, with respect to the progress monitoring data for reading, the teacher testified that the first column on her data collection sheet represented the student's text level, which was based upon his independent reading level at the time, as determined by the Fountas & Pinnell assessments given in class (*see* Tr. p. 319; Dist. Ex. 25 at p. 1). The second column listed the first IEP goal (answer an inferential question), the next column listed the "next piece of that goal" (include two pieces of evidence) (Tr. pp. 319-20; Dist. Ex. 25 at p. 1). Included in the annual goal columns were the trials administered by the teacher, and the results of the trials designated as "yes", "no", or the level of teacher support (graphic organizers, reminders, scaffolding) the student required to perform the tasks (Tr. pp. 320-22, Dist. Ex. 25 at pp. 1-4). With respect to the first annual goal, the teacher noted that by the end of the 2021-22 school year, the student could answer inferential questions with teacher support; with respect to the second annual goal (describe verbally two key ideas or concepts), the student performed this independently by the end of the school year (Tr. pp. 322-23; Dist. Ex. 25 at pp. 1-4). The teacher testified that she broke down the student's annual goals, marked the annual goals if they were completed, and the noted the date of completion as part of the progress monitoring data (Tr. pp. 316-17; *see generally* Dist. Ex. 25).

Consistent with the teacher's progress monitoring data, the IEP progress report indicated that the student had achieved one of two reading annual goals during the 2021-22 school year (*compare* Dist. Ex. 25 at pp. 1-4, *with* Dist. Ex. 33 at p. 3). With respect to the remaining annual goal, the June 2022 progress report indicated that the student progressed gradually during the December 2021 and March 2022 marking periods but was making less than anticipated progress (*see* Dist. Ex. 33 at p. 3). The comments for the June 2022 marking period indicated that the

ranging between 830 and 1010 (*see* Dist. Ex. 10 at p. 6).

¹⁵ The teacher explained that, if the student completed a task five times in a row without teacher support, then the student had achieved the annual goal (Tr. p. 317).

student was able to complete the goal with teacher support and would continue to work on completing the goal, independently (id.).

In addition, the fifth grade special education teacher testified that, with respect to the student's fifth grade report card, he was assessed—and thus, received grades—based on the fifth grade standards (see Tr. p. 467). The teacher explained that, while the student received "mostly 1's and 2's," he also received "some 3's and 4's" because the student made a lot of progress on his annual goals but his "learning impairment/his speech impairment, kind of held him back from reaching the fifth grade level" (Tr. p. 466; see Dist. Ex. 32 at pp. 1-2). Furthermore, with respect to reading, the teacher testified that they knew the student read below grade level and he had been "working at that level during the year"; however, the student was "making progress with his decoding, with his comprehension, but it wasn't quite fifth grade level" (Tr. pp. 466-67). The teacher agreed that the student made progress during his fifth-grade year (see Tr. p. 467). Further, the teacher explained that she had graded the student as "approaching standard" because he was able to read fifth-grade level text aloud with appropriate rate and expression, but he was still working on accuracy (see Tr. pp. 539-40; Dist. Ex. 32 at p. 1).

With respect to the student's progress in writing during the 2021-22 school year, the fifth grade special education teacher testified that she initiated the student's progress monitoring by having the student complete a writing sample baseline, which was completed at the start of the school year when the student was asked to write about his summer (see Tr. pp. 323-24; Dist. Ex. 26 at p. 1).¹⁶ With respect to data collection, the teacher testified that her progress monitoring for writing was broken down based on the "unit [they] were teaching," and, as the class moved through the units, she "work[ed] on these different skills with [the student]" (Tr. p. 324). The teacher explained "teacher support," as reflected in the student's progress monitoring, meant that the teacher would "model how to break [the skill] up" and then she "would help [the student] break up his story into paragraphs, or he would be given the graphic organizer already split up into the paragraphs" so that "when he transferred [his independent writing], he was able to do that" (Tr. pp. 324-25; Dist. Ex. 26 at pp. 1-4). In addition, the teacher explained that for the second column in the progress monitoring data—i.e., "Did they include [three] sensory details?"—the "teacher support" notation meant that she used "guided questions . . . with a checklist with question words," and that, by the end of the year, the student still required teacher support for the first annual goal targeting his ability to write three paragraphs, but further noted that the student was "doing better including more details" (Tr. pp. 325-26; Dist. Ex. 26 at pp. 1-2). The teacher also testified that, by the end of the school year, the student "had a really good foundation to be able to work on this in sixth grade, to be able to write a multi-paragraph essay" (Tr. p. 326). With respect to the second annual goal in writing, the teacher testified that by the end of the year, the student was able to revise and edit using a rubric or checklist (Tr. pp. 326-28; Dist. Ex. 26 at pp. 3-4).

Consistent with the teacher's progress monitoring data, the district's June 2022 IEP progress report noted that the student had achieved one of two writing annual goals during the 2021-22 school year (compare Dist. Ex. 26 at pp. 1-4, with Dist. Ex. 33 at p. 4). With respect to the student's remaining annual goal for writing, the progress report indicated that the student progressed

¹⁶ The teacher clarified that she considered the student's baseline to be what he could independently write at the start of the year (see Tr. p. 324).

gradually during the December 2021 and March 2022 marking periods (see Dist. Ex. 33 at p. 4). The comments included in the progress report for the June 2022 marking period indicated that the student was able to write a one paragraph narrative using three concrete and sensory details and would continue to work on writing three paragraphs independently during the next school year (id.).

In addition, the student's fifth grade report card reflected that he improved in between the first term and the third term in writing opinion pieces on topics or texts; conducting research and using notes to summarize and effectively present findings; demonstrating command of the conventions of standard English grammar, punctuation, and capitalization; and he was developing and strengthening his writing by planning, revising, editing, or trying a new approach (see Dist. Ex. 32 at p. 1).

With respect to progress monitoring in mathematics for the 2021-22 school year, the fifth grade special education teacher testified that word problems were very challenging for the student based on his "language barriers," but that he was "really strong" computationally (Tr. pp. 335-36). Because of his strength in computational skills, the teacher opined that the student became much more confident "attacking the word problems when they were hard for him," which was a "major improvement from the start of the school year" when he would "sometimes present as teary-eyed or [with] a lot of negative self-talk" when he "made mistakes" (Tr. p. 337). The teacher testified that mathematics progress monitoring began with a baseline established with "addition and subtraction," and she noted that the student was able to "do a multistep word problem with addition and subtraction" (Tr. p. 337; see Dist. Ex. 27 at p. 1). The teacher explained that "teacher support" within the progress monitoring data meant that she chunked the problem "into smaller pieces" and that the student always "had the CUBES chart with him" (Tr. p. 338; Dist. Ex. 27 at pp. 1-4). In addition, she noted that by the end of the year, with respect to the student's first annual goal for mathematics, the student still required teacher support with helping him break down word problems (see Tr. pp. 338-39; Dist. Ex. 27 at pp. 1-2). With respect to the second annual goal, the teacher testified that, by the end of the year, the student was able to use the checklists and CUBES independently to achieve the goal of checking his work for reasonableness and accuracy (see Tr. pp. 339-40; Dist. Ex. 27 at pp. 3-4).

Consistent with the teacher's progress monitoring data, the district's June 2022 progress report noted that the student had achieved one of two mathematics annual goals during the 2021-22 school year (compare Dist. Ex. 27 at pp. 1-4, with Dist. Ex. 33 at p. 5). With respect to the student's remaining annual goal, the progress report indicated that the student progressed satisfactorily during the December 2021 and March 2022 marking periods (see Dist. Ex. 33 at p. 5). The comments for the June 2022 marking period indicated that the student would continue to work on completing multistep word problems during the next school year (id.).

Regarding the student's performance in mathematics reflected in his fifth grade report card, the teacher testified that the majority of the fifth grade mathematics was word problems, which were difficult for the student (see Tr. pp. 466-67; Dist. Ex. 32 at pp. 1-2). According to the report card, the student improved in between the first term and the third term, and he met the fifth grade standard in using appropriate mathematical models and strategies, in adding and subtracting fractions with unlike denominators, and otherwise maintained an "approaching standard" level in all other mathematics areas (see Dist. Ex. 32 at p. 1).

With respect to the student's speech and language development, the June 2022 IEP indicated that the student was making progress in his ability to retell stories, he had made progress in his ability to use verb tenses consistently, and he was progressing in his ability to provide the main idea and corresponding details of presented passages (see Dist. Ex. 10 at p. 7).

The district's June 2022 IEP progress report noted that the student had achieved one of two speech-language annual goals during the 2021-22 school year, related to retelling orally presented information using grammatically correct sentences and correct verb tense (see Dist. Ex. 33 at p. 6). With respect to the student's remaining annual goal, the progress report indicated that the student progressed satisfactorily during the December 2021 marking period and progressed gradually during March 2022 marking period (id.). The comments for the June 2022 marking period indicated that the student would continue to work on expressing the main idea and details during the next school year (id.).

The district middle school's bilingual speech-language pathologist (speech-language pathologist) testified that she first learned of the student during the district's fifth-to-sixth grade "articulation process," and by reviewing all of the student's documentation, including evaluation reports and IEPs, in preparation for the impartial hearing (Tr. pp. 747-50). More specifically, the speech-language pathologist testified that, in June 2022, she reviewed the student's IEP recommendations for the 2022-23 school year, and, in preparation for the impartial hearing, she reviewed the student's 2021-22 IEPs, his speech-language evaluations from 2018 (second grade) and 2021 (fifth grade), two auditory processing evaluations, the October 2021 psychological evaluation, and the January 2022 neuropsychological evaluation (see Tr. p. 750). The speech-language pathologist testified that, upon review of the September 2021 speech-language evaluation, she noted that it included some comparative analyses from his 2018 evaluation from second grade (see Tr. pp. 753-54; Dist. Ex. 17 at p. 6). The speech-language pathologist explained that the growth scale value chart in the September 2021 speech-language evaluation demonstrated the student's performance growth as compared to the student himself, whereas the chart at the top of the page compared his performance to typical-age peers (see Tr. pp. 754, 814; Dist. Ex. 17 at p. 6).¹⁷ She further explained that, when reviewing the chart, she noted areas of growth not only in word classes (his ability to identify semantic relationships), but also in following multistep directions and in recalling sentences when he was asked to listen to a sentence of increasing length and complexity and repeat back that sentence using the correct grammatical form (see Tr. p. 754; Dist. Ex. 17 at p. 6). The speech-language pathologist added that the student also demonstrated growth in formulating sentences by creating a novel sentence utilizing a variety of forms, such as conjunctions and adverbs, related to the picture (see Tr. pp. 754-55; Dist. Ex. 17 at p. 6). She emphasized that "in all of those areas," the student's scaled scores reflected continuing areas of

¹⁷ The speech-language pathologist testified that the scaled score on the Clinical Evaluation of Language Fundamentals (CELF) and differed from the "growth scale value" and stated that, for example, in word classes, the student had a scaled score in 2021 of a seven which is in the borderline range (Tr. pp. 824-25; Dist. Ex. 17 at p. 6). She noted that the scaled score was a performance comparison to typical-aged peers living in the United States according to the normative sample of the CELF-5 (id.). In addition, she testified that the growth scale value was a measure in the manual that was formulated to compare the student's performance compared to himself over time on the same subtest or skill set, that both the CELF-5 and the growth scale value were standardized, and that the growth scale value has a mean of 500 and a standard deviation of 25 (Tr. pp. 825-26; Dist. Ex. 17 at p. 6).

need but that he had "made growth compared to his previous performance on those same subtests" (Tr. p. 755; Dist. Ex. 17 at p. 6). The speech-language pathologist testified that she believed the student had the "capacity to grow" and that those deficits were crucial to understand who he was as a "learner in order to remediate and mitigate access to the curriculum and progress towards his goals" (Tr. p. 820). With respect to the scaled score and comparing the student to same-age peers, the speech-language pathologist explained that, for the scaled score to stay the same from the 2018 evaluation to the 2021 evaluation, the student had to achieve a higher raw score on the 2021 evaluation, which indicated that the student made growth (see Tr. pp. 826-29, 832-34; Dist. Ex. 17 at p. 6).

According to the student's June 2022 IEP progress report the student achieved 6 out of 10 IEP annual goals for the 2021-22 school year (see Dist. Ex. 33 at pp. 1-7). As detailed above, the student achieved annual goals that targeted study skills, reading, writing, mathematics, speech-language skills, and social/emotional skills (id. at pp. 2-7). With respect to the remaining annual goals, the progress report reflected that the student made gradual or satisfactory progress during the December 2021 and March 2022 marking periods (id. at pp. 3-6). Additionally, the comments included in the IEP progress report indicated that the student would continue to work on the annual goals that targeted answering inferential questions about character traits in two pieces of text evidence, writing three paragraphs independently, solving mixed operations multistep word problems, and identifying the main idea in a text (id.).

Regarding the student's potential for progress, the results of cognitive testing administered as part of the district's October 2021 psychological evaluation and the January 2022 neuropsychological evaluation became a point of contention (Dist. Exs. 16; 22). Administration of the WISC-V as part of the district's October 2021 psychological evaluation yielded a full scale IQ score of 76 that fell in the very low range; however, the subtest scores were variable ranging from extremely low to average with "quantitative reasoning [being] a notable area of strength" and working memory an area of difficulty and the district school psychologist cautioned that it was "important . . . to consider [the student's] profile of strengths and weaknesses when interpreting th[e] score" (Dist. Ex. 16 at pp. 2-4, 6-7). The January 2022 neuropsychological evaluation also included cognitive testing (see Dist. Ex. 22). Similar to the district's testing, administration of the Differential Ability Scales - Second Edition (DAS-II) yielded variable results on subtests with scores on subtests of nonverbal fluid reasoning skills falling in the average range (id. at pp. 5, 18). Within the January 2022 neuropsychological evaluation, the neuropsychologist noted that the student's "cognitive profile suggest[ed] that he ha[d] adequate ability to learn and acquire knowledge, evidenced in large part by his Average nonverbal fluid reasoning skills" and opined that the student exhibited weaknesses in several areas that were "alarming given his age-appropriate cognitive abilities and the fact that he has received special education services throughout his educational career" (Dist. Ex. 22 at pp. 5, 11). In her written testimony, the neuropsychologist further opined that " [g]iven [the student's] cognitive potential, he should not be falling further and further behind his peers" and that he "absolutely ha[d] the ability to close the gaps that exist[ed], with appropriate support and targeted instruction" (Parent Ex P ¶ 42).

The middle school learning facilitator acknowledged that, over the prior few years, the student had fallen further behind his nondisabled peers but clarified that the district looked at the growth the student was "making as an individual" rather than comparing him to his peers (Tr. pp. 734-75). Regarding the neuropsychologist's characterization of the student's abilities, the

facilitator opined that the student "still ha[d] deficits" that would "affect his ability to close the gap in a certain amount of time" (Tr. pp. 735-36). The district school psychologist also testified that the student had strengths but that cognitive testing results did not show that the student had overall average cognitive ability and that "[g]iven his weaknesses in language, executive functioning, working memory, and processing speed, it will be very difficult over time for him to close that gap."(Tr. pp. 884, 886-87).

The Supreme Court explained long ago that whether "children are receiving sufficient educational benefits . . . presents a . . . difficult problem" (Andrew F., 580 U.S. at 399, quoting Rowley, 458 U.S., at 192). However, the Court in Rowley explicitly rejected the idea that a FAPE required a district to ensure that a student's full potential be realized (id. at 198-99). The Court in Andrew F. reaffirmed some of the points articulated in Rowley, such as the fact that, for a student fully integrated in the general education classroom, an IEP would be appropriately ambitious if it was "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade" (137 S. Ct. at 992, quoting Rowley, 458 U.S. at 204).

Here, despite the differing views about the student's capacity for additional progress, the hearing record as a whole, including both objective and subjective descriptors of the student's progress, as summarized above, reveals that the student achieved passing marks, advanced from grade to grade, achieved or made progress towards achieving annual goals, and, overall, demonstrated meaningful progress during the 2021-22 school year (see E.S. v. Katonah-Lewisboro Sch. Dist., 487 Fed. App'x 619, 622 [2d Cir. July 6, 2012] [holding that, in determining whether a student made progress, the SRO must examine the record for objective evidence]).

B. June 2022 IEP

With the foregoing in mind, the next issue to address is whether the educational program offered to the student in the June 2022 IEP, which recommended a similar program and related services as delivered to the student during the 2021-22 school year, was reasonably calculated to enable the student to receive educational benefits.

As alluded to above, "[a]lthough past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (S.H., 2011 WL 6108523, at *10, citing Thompson R2-J Sch. Dist., 540 F.3d at 1153; see also F.L. v. Bd. of Educ. of Great Neck U.F.S.D., 274 F Supp 3d 94, [E.D.N.Y. 2017] [finding a substantially similar program appropriate in light of the student's progress in the preceding school year]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 413-15 [S.D.N.Y. 2017] [examining carryover of goals and services from a student's IEP from a previous school year and noting that, "[w]here a student's needs and objectives remain substantially the same, '[i]t is especially sensible that [an IEP] would reflect continuity with [a student's] needs and objectives as of [previous years,]'", quoting L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *11 [S.D.N.Y. Sept. 27, 2016]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011] [determining that evidence of likely progress was "the fact that the [challenged IEP] was similar to a prior IEP that generated some progress", aff'd, 506 Fed. Appx. 80 [2d Cir. Dec. 26, 2012]; J.G., 777 F. Supp. 2d at 650 [finding that when the student made some progress under a previous IEP, it was not unreasonable for the CSE to propose an IEP "virtually identical to" the previous one]; M.C., 2008 WL 4449338, at *16 [determining that when the IEP

at issue mirrored a past IEP under which the student "demonstrated significant progress," the IEP at issue was reasonably calculated to afford the student educational benefit]; see generally Application of a Student with a Disability, Appeal No. 12-064; Application of the Bd. of Educ., Appeal No. 11-128).

The IHO acknowledged that the student "made some progress in reading and math in his elementary school program," however, she attributed that progress to the level of support delivered to the student in the fifth grade ICT class, which the IHO found absent from the June 2022 IEP (IHO Decision at p. 29).

As summarized above, the June and November 2021 IEPs recommended ICT services for 4 hours and 10 minutes daily, as well related services in small groups on a six-day cycle consisting of: two 30-minute sessions of speech-language therapy, one 30-minute session of OT, and one 30-minute session of counseling, along with supports and accommodations (Dist. Ex. 4 at p. 11; 6 at p. 16). The June 2022 IEP set forth the recommendations for the student's first year of middle school and listed ICT services differently, identifying the subject matter classes in which the student would receive the services; specifically, the IEP provided that the student would receive four 42-minute periods per day of ICT services, one each in ELA, math, science, and social studies (compare Dist. Ex. 10 at p. 12, with Dist. Exs. 4 at p. 11; 6 at p. 16).¹⁸ The June 2022 IEP continued the recommendations for speech-language therapy and OT but did not recommend counseling services (compare Dist. Ex. 10 at p. 12, with Dist. Exs. 4 at p. 11; 6 at p. 16).¹⁹ In addition, compared to the IEPs for the 2021-22 school year, the June 2022 IEP added three 42-minute sessions of specialized reading instruction per six day cycle and three 42-minute sessions of a support for academic learning class per six day cycle (compare Dist. Ex. 10 at p. 14; with Dist. Exs. 4 at pp. 11-12; 6 at pp. 16-18).

The student's fifth grade special education teacher testified about the manner in which the ICT program was implemented in her classroom during the 2021-22 school year, including the degree to which the student received small group reading instruction and one-to-one support in writing assignments (Tr. pp. 259-60, 264-65, 267-68, 270). While the IHO attributed the student's progress to the manner in which the fifth grade ICT class was conducted, it is impossible to parse the student's progress in this manner and ascribe it to the specific way that the fifth grade ICT class was conducted; rather, as summarized above, the evidence shows that the student made progress under the June and November 2021 IEPs that recommended ICT services, related services, and other supports and accommodations such that the May and June 2022 CSEs reasonably recommended a similar program for the student for the 2022-23 school year. Moreover, the CSE chairperson and the assistant superintendent for special education and pupil services (assistant

¹⁸ The assistant superintendent for special education and pupil services (assistant superintendent) testified that the middle school services were divided by subject and minutes, whereas, for elementary school, the ICT services included times that the student spent in morning and closing meetings, transitions around the building, and movement breaks in the classroom, such that amount of direct instruction to be delivered through ICT services set forth in the June 2022 IEP was "about the same" (Tr. pp. 906-07).

¹⁹ According to the hearing record, the parents and district members of the CSE agreed that the student no longer required counseling but recommended access to the counselor for check-ins and a counseling consult during the student's transition to middle school (see Tr. pp. 1293-95; Dist. Ex. 10 at pp. 9, 12, 14-15).

superintendent) described the manner in which the ICT services would be delivered to the student in sixth grade and similarly identified that the services provided opportunities for small group instruction and independent practice (Tr. pp. 237, 907-09, 931).²⁰

The IHO also found that the June 2022 IEP was problematic because it recommended ICT services for ELA one period per day, whereas the student would have received a double block of ELA if he attended the district middle school program (see IHO Decision at p. 29). The CSE chairperson described that the sixth grade schedule included nine periods, five of which devoted to "core instruction," and included math, science, and social studies, and a "double block" of ELA (Tr. pp. 183-84). The CSE chairperson indicated that the student would receive ICT services for four out of five of those periods devoted to core instruction (Tr. p. 184). The chairperson further explained that the double block of ELA was "a continuous period" but that for one block of ELA, the student would not be in a class with a special education teacher (Tr. pp. 184, 237). The assistant superintendent testified that, for the first block of ELA, direct instruction would take place with the special education teacher, and, for the second block, the student would receive accommodations and modifications from the regular education teacher or would engage in independent work (Tr. pp. 907-08, 931).²¹

In finding that the IEP was inadequate due to the lack of support from a special education teacher for the second block of ELA, the IHO cited the testimony of the fifth grade special education teacher that the student would struggle in an ELA class with just a regular education teacher (IHO Decision at p. 29; see Tr. pp. 492, 494). However, the question posed to the special education teacher was whether the student would struggle "if there was only the regular education teacher for ELA" (Tr. pp. 492-93). The special education teacher responded that, yes, the student would struggle, because "he benefited from the ICT model" and that was "why he ha[d] ICT on his IEP" (Tr. p. 493). The fifth grade special education teacher was not asked whether the student would struggle if he received ICT services for the first block of ELA but not the second; however, she did testify that she agreed with the recommendations in the June 2022 IEP (Tr. pp. 422-24). Given that the student would receive ICT services for one block of ELA on a daily basis, the hearing record does not support the IHO's finding that the lack of ICT services for second block of ELA would result in the student's inability to make progress in the recommended program. This

²⁰ Although the Second Circuit has held that a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP," testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'"] [internal citations omitted]; P.C., 232 F. Supp. 3d at 416 [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]). Review of the testimony of the district staff shows that, for the most part, it described how the ICT and other recommended services would be implemented in the district middle school without indicating any difference, for example, in staffing or class size to accomplish the supports described. To the extent that testimony went beyond mere explanation of the services and supports set forth in the June 2022 IEP, it has not been relied upon.

²¹ The sixth grade middle school facilitator testified that, based on the student's reading level, it was her "understanding" that he would be assigned to the "Read 180 class" for ELA, which, within the two-period block, was broken into four categories consisting of a whole group lesson, a small group lesson, a software component, and an independent reading component (Tr. pp. 699-705).

is particularly so in light of other recommendations included on the June 2022 IEP for the small group specialized reading instruction and support for academic learning class (Dist. Ex. 10 at p. 14).

The IHO also indicated that, for the 2022-23 school year, specialized reading instruction "could take place in groups of up to eight students" and that the "recommended program d[id] not adequately address the student's difficulty with attentional control and his need for reduction of competing noise" (IHO Decision at p. 29). However, the June 2022 IEP included several supports and accommodations to address these needs. The private neuropsychological evaluation recommended supports to address the student's "executive functioning and attentional weaknesses," including graphic organizers, outlines and class notes, breaks during tasks and assignments, visual and verbal aids and cues, and access to a daily schedule (Dist. Ex. 22 at p. 14). The June 2022 IEP included all such supports, as well as, among others, refocusing and redirection, checks for understanding, directions repeated, simplified directions, additional time to respond to questions, breaking down of oral information into shorter segments and of tasks into manageable chunks, modified assignments, and additional time to complete assignments (Dist. Ex. 10 at pp. 13-14). Specific to the IHO's concern about competing noise, the June 2022 IEP provided that background noises would be limited when possible and further, consistent with the recommendations in the November 2021 auditory processing evaluation, provided that the student would trial an FM unit (Dist. Ex. 10 at pp. 13-14; see Dist. Ex. 21 at p. 10)

Finally, regarding the IHO's finding that the recommendation for two sessions of group speech-language therapy every six day cycle was insufficient to enable the student to make progress towards his language goals (IHO Decision at p. 30), as described above, the student was making progress on achieving his speech-language annual goals during the 2021-22 school year when receiving two sessions per six day cycle of group speech-language therapy (see Dist. Ex. 33 at p. 6). Further, the hearing record does not indicate that the student would work on achieving the language goals only during speech-language therapy. On the contrary, the June 2022 IEP included a recommendation for a speech-language consult, which was a service added to the student's IEP compared to the 2021-22 school year (compare Dist. Ex. 10 at p. 15, with Dist. Exs. 4 at p. 11; 6 at p. 16). The fifth grade special education teacher testified that the speech-language consult was added to the student's IEP because the student's "biggest weakness [wa]s his speech and language impairment" and it was "really important for . . . his special education teacher and general education teacher to be in contact with the speech teacher, so he [wa]s using the same strategies across the board to really support him" (Tr. p. 440). Further, the hearing record does not reflect any information that was available to the CSE that the student required an increased duration or frequency of speech-language therapy services. The private neuropsychological evaluation recommended that the student receive "individualized and evidence-based speech and language interventions specifically targeting" his "deficits in foundational language (e.g., rapid naming), expressive language, and receptive language skills" but did not recommend a particular intensity, frequency, or duration for such services (Dist. Ex. 22 at p. 13).²²

²² The IHO also made a finding about the student's ability to achieve a writing annual goal (IHO Decision at p. 30). Although the student did not achieve an annual goal targeting his ability to write three paragraphs during the 2021-22 school year, the hearing record shows that he made gradual progress toward meeting the objective and, therefore, the hearing record does not support the IHO's finding that it was not reasonable to believe that the

Overall, the testimony of the district witnesses during the impartial hearing offered "a cogent and responsive explanation for their decisions that shows that the [June 2022] IEP [wa]s reasonably calculated to enable the [student] to make progress appropriate in light of his circumstances" (Endrew F., 580 U.S. at 404). District witnesses testified that the student's needs—including the student's language, working memory, processing speed, and executive functioning needs—could " be met by a special education teacher in the ICT model, with the addition of the Support For Academic Learning period and specially designed reading instruction," along with supports and accommodations, and explained that the ICT program allowed the student to be "exposed to a lot of different types of learners" (Tr. pp. 136, 138-39, 447, 854, 858-59, 861).

The assistant superintendent opined that the ICT program was appropriate for the student because he had made progress within the program (Tr. pp. 898, 915). She opined that the student required "access to high level information and high level peers so that he c[ould] hear those role models speak, how they answer questions, how they organize their thoughts" (Tr. p. 915).²³ She suggested that the student could " learn from the people around him especially when they're in a small group" (Tr. p. 915). The assistant superintendent further suggested that by being in a smaller group the student would be " able to answer questions more regularly" and the teacher would be able to assess where he was in his understanding of the material very rapidly in order to . . . intervene with any misunderstandings" (Tr. 915). She noted that the student was also a "good citizen of [his] classroom" and served as a role model to other children (Tr. p. 916).

The CSE chairperson testified that, with respect to the student's core academic classes, the ICT model provided the student with "an opportunity to have access to the general education curriculum," as well as "opportunities for small-group and whole-group instruction in four academic areas"(Tr. pp. 138-39). In addition, he noted that the special education teacher was available to modify the curriculum and address the student's goals (Tr. p. 139). The CSE chairperson opined that the IEP was appropriate for the student and explained that the CSE "had a lengthy and robust discussion about [the student's] needs, with participation by all committee members. Collaboratively, we came up with this plan and made the recommendation" (Tr. p. 148). The CSE chairperson disagreed with the neuropsychologist's recommendation that the student be placed in a smaller setting (Tr. pp. 233-34). He noted that within the ICT program there were

student would make progress during the 2022-23 school year on a writing goal requiring that the student write three complete paragraphs in sequential order given the supports and accommodations recommended in the IEP (Tr. pp. 324-26; Dist. Exs. 26 at pp. 1-4; 33 at p. 4).

²³ Similarly, the fifth grade special education teacher noted that the student was "weaker in vocabulary and language" and that he would be exposed to "higher-level vocabulary, higher-level language, and higher-level thinking" by being exposed to "higher-level learners" (Tr. pp. 447-48). She also noted that the student would be working with "lower-level learners" which would allow him to be a leader and to show off his strengths (Tr. p. 448). She opined that the student had "the best of both worlds" because "not only does he get the exposure to what he needs, to what he's working on, but he's also able to build his confidence and practice his skills and become a leader as well" (Tr. p. 448).

The teacher testified that the SAL class was "really great for the student's executive functioning," because, as the teacher noted, "they work[ed] on how to chunk specific assignments into manageable pieces" (Tr. pp. 450-52). In addition, she stated that "they work[ed] on projects" and she opined that "they would help him to be successful in sixth grade" (Tr. p. 452).

opportunities for the student to be in a small group within the general education curriculum, as well as two periods in his day, every other day, for the student to be in a small group that would allow teachers to address his executive function needs (Tr. pp. 233-34). He disagreed with the neuropsychologist that the student's "whole program needed to be smaller" (Tr. p. 234). With regard to the CSE's decision to recommend supplemental reading instruction every other day, as opposed to every day as recommended by the neuropsychologist, the CSE chairperson testified that the CSE "reviewed the data points that [the district] had from [its] testing, from the prior testing, and from the teacher" and "as a committee felt that three out of six days was what we would recommend to meet [the student's] needs" (Tr. p. 219). He explained that in looking at the "Real Words" data point on the WADE the student demonstrated a solid level of decoding skills and that students who were struggling to "crack the code" would be recommended for daily instruction while student's who demonstrated knowledge of the code but still exhibited some weaknesses were recommended for reading services three days in a six day cycle (Tr. pp. 224-25).

As described above, the crux of the dispute in this matter relates to the views of the parents and the private neuropsychologist that the student had the capacity to make more progress if he was placed in a more supportive setting, versus the district's opinion that the student was making progress commensurate with his abilities and, therefore, could receive meaningful educational benefit while attending a general education class placement with ICT services, related services, and supports and accommodations within a district public school. Generally, district staff may be afforded some deference over the views of private experts (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]).

The May and June 2022 CSEs considered both views but had information before them demonstrating that the student was advancing grade to grade and making academic progress in the district curriculum, albeit modest progress. However, the district was not required to maximize the student's potential (Rowley, 458 U.S. at 189, 199). Further, the CSEs were not obligated to adopt the recommendations of the private evaluator in this instance (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]). This is particularly so given that the district staff who contributed to the IEP development had been working directly with the student and that, in addition to considering what supports and services the student needed in order to receive educational benefits, the district was mandated to consider placing the student with his nondisabled peers in light of the IDEA's LRE requirements. Where, as here, the student could be educated satisfactorily in a general education classroom with supplemental aids and services, the placements recommended in the

June 2022 IEP represented the student's LRE (see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 119-20).²⁴

VII. Conclusion

Having determined that the evidence in the hearing record establishes that, contrary to the IHO's decision, the district offered the student a FAPE in the LRE for the 2022-23 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether Eagle Hill was an appropriate unilateral placement for the student or whether equitable considerations weigh in favor of an award of tuition reimbursement (Burlington, 471 U.S. at 370).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated June 28, 2023 is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2022-23 school year and ordered the district to reimburse the parents for the costs of the student's tuition at Eagle Hill for the 2022-23 school year.

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

SARAH L. HARRINGTON
STATE REVIEW OFFICER

²⁴ In their answer and memorandum of law, the parents also allege that the annual goals set forth in the June 2022 IEP were inappropriate and that the CSE failed to recommend appropriate methodology. The parents did not cross-appeal from the IHO's finding that the annual goals in the June 2022 IEP were ambitious (see IHO Decision at p. 29) or from the IHO's failure to address any claims raised for review at the impartial hearing (see 8 NYCRR 279.8[c][2], [4]; see also Dist. Ex. 1). In any event, while the parents point to testimony of the private neuropsychologist that the June 2022 IEP should have included additional annual goals to target specific skills (see Tr. p. 1183; Dist. Ex. P ¶ 47), an IEP does not need to identify annual goals for each and every need in order to offer the student a FAPE (J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]; see also P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting the general reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress], *aff'd*, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). In addition, although the private neuropsychologist the private neuropsychologist recommended "targeted language-based learning support, with evidence-based reading intervention . . . embedded in all content classes," the neuropsychologist did not recommend a specific methodology, and, generally, the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). Accordingly, even if properly raised, these additional arguments would not support a finding that the district denied the student a FAPE for the 2022-23 school year.