



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-197

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

Appearances:

Law Offices of Regina Skyer and Assoc., LLP, attorneys for petitioner, by Timothy Nelson, Esq., and Linda A. Goldman, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Winston Preparatory School (Winston Prep) for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

According to the hearing record, the parent obtained a private neuropsychological evaluation of the student to assess his then-current cognitive, academic and social/emotional functioning and to assist with educational and treatment planning (Dist. Ex. 10 at p. 1).¹ The

¹ The parent obtained a private neuropsychological evaluation in 2021 and a neuropsychological addendum in 2022. The parent merged both documents into a single exhibit and offered it as evidence at the impartial hearing (see Parent Ex. C). The district submitted the evaluations as separate exhibits (see Dist. Exs. 9-10). For the purposes of this decision, the district's exhibits will be cited.

student was assessed on May 26, 2021, June 1, 2021, June 8, 2021, and October 13, 2021 (*id.*).² A CSE convened on December 6, 2021 and developed an IEP for the student with a projected implementation date of December 13, 2021 (Dist. Ex. 3 at pp. 1, 13). At the time of the December 2021 CSE meeting, the student was attending fifth grade at a district school (Parent Ex. A at p. 2; Dist. Ex. 3 at p. 3). The December 2021 CSE noted the student's eligibility for special education and related services as a student with a speech or language impairment (Dist. Ex. 3 at p. 1).³ The December 2021 CSE recommended that the student receive ten periods per week of integrated co-teaching (ICT) services in English language arts (ELA), six periods per week of ICT services in math, five periods per week of ICT services in social studies, one 30-minute session per week of counseling services in a group of three, one 30-minute session per week of occupational therapy (OT) in a group of three, and two 30-minute sessions per week of speech-language therapy in a group of three (*id.* at p. 13).

On December 16, 2021, the parent signed an enrollment agreement for the student to attend Winston Prep for the 2022-23 school year (Parent Ex. D at p. 1). The parent obtained a private neuropsychological addendum, which was completed on May 2, 2022 by the same private evaluators who prepared the October 2021 neuropsychological evaluation (Dist. Ex. 9 at p. 1; compare Dist. Ex. 9 at p. 6, with Dist. Ex. 10 at p. 20).⁴ By email dated May 19, 2022, the parent wrote to the student's school stating that she was concerned about the student's lack of progress as he was approaching middle school and disclosed that she had obtained a private evaluation of the student (Parent Ex. B at p. 2). The parent further indicated that she had received the student's "middle school offer" and that "the [d]octors mentioned that the current program recommendation [wa]s inappropriate for [the student] and what he needs" (*id.*). The parent then requested a reevaluation of the student (*id.*). On May 20, 2022, a school staff person replied to the email and indicated that the parent's request would be forwarded to the "SBST team" (*id.* at p. 1). By email dated June 2, 2022, the parent provided a copy of the private neuropsychological evaluation to the school and indicated that she had received it the day before (*id.*).⁵

By prior written notice dated June 7, 2022, the district acknowledged receipt of the parent's request for a reevaluation and determined that no additional assessments were needed and that the district would consider the "results from outside/private evaluation" provided by the parent (Dist. Ex. 4 at pp. 1, 2). A CSE convened on July 20, 2022 to consider the parent's private neuropsychological evaluation and neuropsychological addendum, and to review the program recommended by the December 2021 CSE (Dist. Ex. 2 at pp. 1-6, 22-23). The July 2022 CSE

² The neuropsychological evaluation report is not dated. Therefore, the document will be cited by the final date of assessment, October 13, 2021, even though the report itself would likely have been completed at a later time.

³ 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]).

⁴ The neuropsychological addendum is also undated. Therefore, the document will be cited by the date of assessment, May 2, 2022, although once again, the report was likely completed at some point after the assessment.

⁵ It is not clear whether or not the parent shared both the October 2021 neuropsychological evaluation and the May 2022 neuropsychological addendum at this time. The December 2021 IEP did not include any evaluative information from the October 2021 neuropsychological evaluation. The July 2022 IEP included evaluative data from both the October 2021 neuropsychological evaluation and the May 2022 neuropsychological addendum.

continued to find the student eligible for special education and related services as a student with a speech or language impairment (*id.* at p. 1). The July 2022 CSE recommended that the student receive ten periods per week of ICT services in ELA, five periods per week of ICT services in math, four periods per week of ICT services in social studies, four periods per week of ICT services in sciences, one 30-minute session per week of individual counseling services, one 30-minute session per week of counseling services in a group of three, one 30-minute session per week of individual OT, one 30-minute session per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group of three (*id.* at pp. 22-23).

By prior written notice dated July 21, 2022, the district summarized the recommendations of the July 2022 CSE and indicated the student's placement would be in a district non-specialized school (Dist. Ex. 5 at pp. 1-2). By ten-day written notice dated August 22, 2022, the parent disagreed with the recommendations set forth in the July 2022 IEP, and alleged that the student had not been offered a public school placement for the 2022-23 school year (Parent Ex. I at pp. 1, 2). The parent further notified the district of her intent to unilaterally place the student at Winston Prep for the 2022-23 school year and to seek public funding (*id.*).

A. Due Process Complaint Notice

In a due process complaint notice, dated March 30, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (*see* Parent Ex. A). Specifically, the parent asserted that the student was not evaluated in all areas of suspected disability, including assistive technology; the CSE was improperly composed; the CSE failed to provide the parent with timely and adequate prior written notice; the district failed to offer the student a school location to attend; the parent was denied her right to meaningfully participate in the development of an appropriate program; and the program recommendation was inappropriate and not supported by the information provided to and available to the CSE (*id.* at pp. 4-5). The parent further claimed that the alleged procedural violations impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE and caused a deprivation of educational benefits (*id.* at p. 5). The parent also asserted that Winston Prep was an appropriate educational program and placement for the student and that equitable considerations favored reimbursement (*id.*).⁶ As relief, the parent sought reimbursement for the costs of tuition and transportation for the 2022-23 school year (*id.*).

B. Impartial Hearing Officer Decision

A prehearing conference was held on May 5, 2023 (May 5, 2023 Tr. pp. 1-14).⁷ An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on May 22, 2023 and concluded on June 14, 2023 after two days of proceedings (May 22, 2023 Tr. pp. 1-73; June 14, 2023 Tr. pp. 1-34). In a decision dated August 12, 2023, the IHO stated that

⁶ The parent's due process complaint notice included alleged violations of section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794[a]).

⁷ The transcripts were not paginated consecutively. As such, the transcripts will be cited by the hearing date and the corresponding pages in this decision.

she accepted the testimony of all of the district's witnesses, whom she found to be credible, "sufficiently qualified and experienced to express the opinions proffered, regarding the program developed and related services recommended for [the s]tudent" (IHO Decision at p. 6). The IHO further found that the parent's assertion that the district failed to develop IEPs that were reasonably calculated to confer educational benefit to the student for the 2022-2023 school year was not supported by the hearing record (*id.*). On that basis, the IHO determined that the district provided the student with a FAPE for the 2022-23 school year (*id.*). The IHO then stated that it was unnecessary to reach the remaining issues alleged in the parent's due process complaint notice (*id.*).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is presumed and, therefore, the allegations and arguments will not be recited here. The crux of the parties' dispute on appeal is whether the district offered the student a FAPE for the 2022-23 school year.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an

administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

⁸ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

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

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

VI. Discussion

At the outset, I note that the request for review does not reassert or advance the claims included in the due process complaint notice that the student was not assessed in all areas of suspected disability, including assistive technology; that the CSE was improperly composed; or that the district failed to offer a school location for the student to attend. The regulations governing practice before the Office of State Review require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Although the parent contends in her request for review that "[t]he IHO did not rule on the impact of [the] procedural errors that prevented the [p]arent from meaningfully participating" in the development of the July 2022 IEP (Req. for Rev. at p. 8), the use of broad and conclusory statements or allegations within a pleading does not act to revive any and all procedural violations the parents believe the IHO erroneously addressed or failed to address without the parents specifically identifying which procedural violations meet this criterion (M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [finding that "the phrase 'procedural inadequacies,' without more, simply does not meet the state's pleading requirement"]). Accordingly, I find the parent's claims that the district failed to evaluate the student in all areas of suspected disability, that the CSE was improperly composed, and that the district failed to offer the student a school location to attend have been abandoned and will not be further discussed.

A. Parent Participation and Prior Written Notice

Next, on appeal the parent argues that the IHO failed to rule "on the impact of procedural errors that prevented the [p]arent from meaningfully participating in the development of her son's 2022-2023 IEP and ultimate program recommendation" (Req. for Rev. at pp. 8-9). The parent further argues that the district did not demonstrate that the parent timely received or was apprised of the evaluations that the district intended to rely on in creating the IEP and that there was a

discrepancy between what was listed in the prior written notice and the district representative's testimony. The parent asserts that the prior written notice in this matter only listed a speech-language progress report and the parent's private neuropsychological evaluation. The parent claims that she did not know what documents were being discussed during the July 2022 CSE meeting and as a result she was denied the right to meaningfully participate in the development of the July 2022 IEP.

With regard to the parent's participation claim, the IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545 at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that "[a] professional disagreement is not an IDEA violation"]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

As indicated above, the parent requested a reevaluation of the student in an email dated May 19, 2022, and, on June 2, 2022, provided the district with a copy of the private neuropsychological evaluation (Parent Ex. B). The district provided the parent prior written notice dated June 7, 2022, stating its viewpoint that no additional assessments were needed; thereafter, the CSE convened on July 20, 2022 (Dist. Exs. 2; 4).

The district's school psychologist who participated in the July 2022 CSE meeting as the school psychologist and district representative testified by affidavit in lieu of direct testimony (Dist. Ex. 14 at ¶ 7; see May 22, 2023 Tr. p. 52).⁹ The school psychologist testified that the purpose of the July 2022 CSE meeting "was to perform a parentally requested reevaluation" of the student

⁹ The school psychologist testified that she was a "per session" school psychologist and district representative for seven weeks during summer 2022 (May 22, 2023 Tr. p. 52; Dist. Ex. 14 at ¶ 6). The phrase "per session" was repeatedly transcribed in the hearing record as "procession" (May 22, 2023 Tr. pp. 52, 56).

(Dist. Ex. 14 at ¶ 7). The school psychologist further testified that the July 2022 CSE included all required members and that the recommendations were based on teacher reports, a neuropsychological evaluation, related services progress reports, and parental input (id. at ¶ 8; see Dist. Exs. 2 at pp. 29-30; 6; 7; 9; 10; 11; 12). On cross-examination, the school psychologist testified that, in preparation for a CSE meeting, typically, she reviewed a student's complete file on the district's special education student information system (SEIS); specifically, in preparation for the July 2022 CSE meeting, she testified that she reviewed the private neuropsychological evaluation, the private neuropsychological addendum, the OT progress report, and the student's previous IEP (May 22, 2023 Tr. pp. 53, 56). The school psychologist also testified on cross-examination regarding what parental concerns were expressed during the July 2022 CSE meeting (May 22, 2023 Tr. p. 58). The school psychologist testified that the parent stated that the student was "not on grade level, [she] didn't feel like he was making the progress that they were expecting him to, and [she] w[as] really concerned with him socially" (id.). The school psychologist also testified that the parent stated that the student had low self-esteem (id.). The school psychologist further testified that, in response to the parent's concerns, the CSE indicated that the student would be supported through the IEP, that the student's attentional needs were addressed by ICT services and his self-esteem would be supported through counseling (id.). Also on cross-examination, the school psychologist acknowledged that the July 21, 2022 prior written notice did not list all of the evaluative information considered by the July 2022 CSE (May 22, 2023 Tr. pp. 60-61).

The parent testified by affidavit in lieu of direct testimony (Parent Ex. L). The parent testified that she attended the July 2022 CSE meeting and that the meeting began ten minutes late (id. at ¶ 7). The parent further testified that the other CSE members were not from the student's district school, that none of the student's teachers participated, and that no one knew the student (id.). The parent testified that she disagreed with the recommendation for ICT services, inquired about how many students would attend a sixth grade classroom, and expressed concern about the student being in a classroom of 30-to-33 students when the student had struggled in a classroom of 17 students (id. at ¶ 8). The parent also testified that she told the July 2022 CSE that the student would not make progress in a large middle school ICT setting, and that all the reports she was provided with supported this (id. at ¶ 9). The parent further testified that she was not provided with copies of the "teacher reports, progress reports, a speech report, and an OT report" that were used to develop the July 2022 IEP in advance of the meeting and that she "had no idea what teacher reports [the CSE was] referring to," noting that the discussion about the student at the CSE meeting did not reflect "what the school had been telling [her], or what [she] had been seeing [for] the past five years" (id. at ¶ 8). The parent also testified that she expressed concern over the number of pull-out sessions recommended in the July 2022 IEP (id. at ¶ 10).¹⁰

The hearing record and the parent's own testimony reflects that the district provided her the opportunity to participate in the July 2022 CSE meeting. The school psychologist testified that she reviewed the private neuropsychological evaluation and neuropsychological addendum provided by the parent and the parent's concerns were discussed and incorporated into the July

¹⁰ The parent asserted that, in response to her concern, the regular education teacher who participated in the July 2022 CSE meeting made callous and insensitive remarks (Parent Ex. L at ¶ 10). The parent's attorney asked the school psychologist about the comment the parent had attributed to the regular education teacher (May 22, 2023 Tr. pp. 58-59). The school psychologist testified that she did not recall the situation described by the parent's attorney (id.). The regular education teacher was not called as a witness by either party.

2022 IEP. Although the hearing record reflects parental disagreement with the school district's proposed IEP and placement recommendation that does not amount to a denial of the parent's meaningful participation in the development of the program (see E.H. v. Bd. of Educ. of the Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F., 2013 WL 4495676, at *17; DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18-*20 [S.D.N.Y. Jan. 2, 2013]; P.K., 569 F. Supp. 2d at 383; Sch. for Language & Commc'n Dev., 2006 WL 2792754 at *7).

The parent also alleges that the district failed to provide her with copies of all of the evaluative information considered at the July 2022 CSE prior to the CSE meeting and that there were discrepancies between the July 21, 2022 prior written notice and the testimony of the school psychologist. Among the procedural requirements in State and federal regulations is the requirement that parents must be afforded "an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student and the provision of a [FAPE] to the student" (8 NYCRR 200.5[d][6]; see 34 CFR 300.501; 300.613[a]).¹¹ In addition, a district must ensure that the parents of a student with a disability are provided with a copy of their child's IEP (see 34 CFR 300.322[f]; 8 NYCRR 200.4[e][3][iv]) and with prior written notice "a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a [FAPE] to the student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1]). A failure to provide a copy of the IEP, the prior written notice, or other educational records is a procedural violation that does not necessarily rise to the level of a denial of a FAPE (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). For example, evidence that the parent attended the CSE and had awareness of the programming recommended by the CSE may defeat a claim that such a procedural violation impeded a student's education (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 754-55 [2d Cir. 2018] [finding no denial of a FAPE where the parents attended every meeting "and did not allege that they were unaware of any programming selected" for the student]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 586 [S.D.N.Y. 2013] [finding that any failure to provide the parents with a copy of the student's IEP prior to the start of the school year did not impede their opportunity to participate in the decision-making process when the parents, among other things, attended the CSE meeting with their attorney and participated in the development of the student's IEP]; see also Cerra, 427 F.3d at 193-94; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).

Here, the parent alleges that her lack of knowledge of the evaluative information considered at the July 2022 CSE meeting affected her ability to meaningfully participate in the development of the July 2022 IEP. The July 2022 CSE meeting was held in response to the parent's request for a reevaluation in order to consider the parent's privately obtained neuropsychological evaluation and neuropsychological addendum. The June 7, 2022 prior written notice sent to the parent in advance of the July 20, 2022 CSE meeting indicated that no additional assessments were needed and that the district would consider the "results from outside/private evaluation" provided by the parent at the meeting (Dist. Ex. 4 at pp. 1, 2). The prior written notice also informed the

¹¹ Under IDEA, a district is only required to provide copies of education records "if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records" (34 CFR 300.613[b][2]).

parent, albeit not using the same exact wording as the school psychologist's testimony above, that "the [district] has reviewed [the student's] existing assessments and other materials, in other words that the existing materials already in the student's file would be reviewed (*id.* at p. 2). The hearing record indicates that the July 2022 CSE considered teacher reports and progress reports in addition to the parent's privately obtained evaluations. Several of the end of school year progress reports had not yet been completed at the time the June 7, 2022 prior written notice was sent to the parents (compare District Exs. 6; 7; 11; 12 with Dist. Ex. 4). While the prior written notices sent before and after the July 2022 CSE meeting did not list the teacher report or the OT progress report considered by the CSE, even if this amounted to a technical violation of federal or State regulation, the IEP itself described the CSE's consideration of these reports in more detail than a prior written notice would require (see, e.g., Dist. Ex. 2 at pp.6-10). The IEP also detailed the parent's primary concerns, indicating that the CSE was considering her input as well as that of the private evaluator. According to the IEP itself, "[the student's] mother indicated that although [the student] is lovely, warm and kind; however, after years of good interventions she feels he has not been successful socially and academically. She stated that he is not on grade level. Also, [the student's] mother stated that this is "eating away at his self-esteem year after year. She believes that he needs a smaller environment at a private school" (District Ex. 2 at p. 9). However, the hearing record also shows that the parent had already reached the decision to send the student to Winston Prep by December 2021 and had already entered into a contract with the private school before requesting the CSE to reconvene, but she nevertheless tried to convince the district staff one more time at the CSE meeting that the student should be placed in a private special school. While the parties may have been unsuccessful at resolving their differing viewpoints, it is also clear that the parent was an active and meaningful participant in the July 2022 CSE meeting; accordingly, there is no basis for a finding that such a procedural violation in this instance lead to a denial of a FAPE.

In addition, although the parent abandoned the majority of the procedural violations alleged in the due process complaint notice in her appeal, the request for review asserts a claim that "[p]rocedural [e]rrors [o]perated to [d]eprive [the student] of a FAPE" (Req. for Rev. at p. 8). To the extent the parent is asserting a claim that the number of procedural violations rose to the level of a denial of a FAPE, this claim is without merit. Under some circumstances, the cumulative impact of procedural violations may result in the denial of a FAPE even where the individual deficiencies themselves do not (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 123-24 [2d Cir. 2016]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 190-91 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541 [2d Cir. 2017] [noting that it will be a "rare case where the violations, when taken together," rise to the level of a denial of a FAPE when the procedural errors do not affect the substance of the student's program]).

While the IHO did not address any of the parent's claims of procedural violations of the IDEA, the parent's remaining claim—that the omissions in the district's prior written notice denied her meaningful participation in the July 2022 CSE meeting—does not individually or cumulatively rise to the level of a denial of a FAPE under these circumstances (see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *18 [S.D.N.Y. Feb. 14, 2017]).

B. Progress During the 2021-22 School Year

The parent alleges that the district failed to demonstrate the appropriateness of its program as recommended in the July 2022 IEP. Specifically, the parent argues that the student had failed to make appropriate progress in the 2021-22 school year with what was in her view the same program of ICT services, group speech-language therapy, group OT, and group counseling (see Dist. Ex. 3 at p. 13, 18). Additionally, the parent alleges that the student would not have been successful in a large sixth grade classroom during the 2022-23 school year and that all the reports she had received supported the recommendations of her private evaluators. In support of her position, the parent relies on the reports of the private evaluators who stated in the May 2022 neuropsychological addendum report that, since the October 2021 "comprehensive neuropsychological evaluation," the student "ha[d] not made appropriate academic, social, or emotional progress within his current placement with his current support plan" and that "a change in placement and increase in support [we]re clearly required at this time" (Dist. Ex. 9 at p. 5). The private evaluators opined that the student required "a structured and supportive class and school placement that offer[ed] small class sizes and specialized supports for students who also present with difficulties related to attention, academics, and social emotional functioning" (*id.*). The private evaluators further stated that the student "require[d] a class and school placement with small class sizes, structure, and support for his attention/executive functioning, academics, and socialization" (*id.*).

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 Aptakistic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

As discussed below, the evidence in the hearing record reveals that, contrary to the parent's claims, the student made appropriate academic and social/emotional progress 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.

The parent testified that the student struggled academically and with social/emotional skills throughout elementary school and that she consistently communicated her concerns to the school over the years and never received an appropriate response (Parent Ex. L at ¶ 3). The parent further testified that the student had received ICT services since kindergarten and that the classroom "size varied between 14 to maximum 17 students each year" (*id.* at ¶ 4). The hearing record reflects that the student received ICT services and related services in fifth grade during the 2021-22 school year pursuant to his December 2021 IEP, as well as receiving a multitude of supports and strategies to address his management needs within the classroom and testing accommodations (*see generally* Dist. Ex. 3). 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.

The December 2021 IEP included evaluative information related to the student's performance in ELA and mathematics (Dist. Ex. 3 at p. 1). With regard to ELA, a Fountas & Pinnell Reading Assessment administered in December 2021 indicated that the student's independent reading level was P, which was reportedly below grade level standards for fifth grade in December (*id.* at p. 1). The December 2021 IEP stated that the student was able to communicate his ideas about basic story elements (plot, setting and character), and he was able to answer literal comprehension questions (*id.*). However, when asked to develop inferential ideas about characters, he struggled to provide evidence from the text to support his thinking (*id.*). The IEP noted that the student was working on paying close attention to important details in order to synthesize and "make stronger evidence-based ideas" (*id.*). According to the December 2021 IEP, as measured by the Fountas & Pinnell Reading Assessment, the student's instructional level for reading was Q (*id.*).

Turning to the student's writing, the IEP indicated that the student's completion of the "Teacher[s] College Writing Published Piece[] (Narrative)" in October 2021 reflected that the student was approaching grade level standards (Dist. Ex. 3 at p. 1). Similarly, the student's completion of the "Teacher[s] College Published Piece (Informational)" in November 2021 indicated that the student's performance was approaching grade level standards (*id.*). The December 2021 IEP reflected that the student enjoyed writing when the topic was of interest to him, such as video games or his family (*id.*). The December 2021 IEP also noted that, although the student had "great thoughts and ideas" when it came to writing, he sometimes demonstrated difficulties with putting his thoughts/ideas on paper, and that when given a computer for writing, he felt most successful and able to get most of his ideas out (*id.*). In addition, the IEP stated that the student often struggled to write clear, organized and accurate paragraphs in response to teacher directed questions and, although he was able to make a statement, his evidence to support his thinking was often unrelated to his original statement or lacking (*id.*). The student struggled to accurately use the conventions of writing such as punctuation and capitalization (*id.* at pp. 1-2). The December 2021 IEP indicated that the student benefitted from the use of graphic organizers to help him organize his thoughts and ideas, and when he was required to handwrite instead of

using the computer, he benefited from "specific larger lined paper given to him by his OT teacher" (id. at p. 2).

In math, the December 2021 IEP indicated that on the "Investigations Assessment Unit 1 (Order of Operations)" administered in October 2021, the student was meeting grade level standards (Dist. Ex. 3 at p. 1). On the "Investigations Assessment Unit 2 (Volume)" administered in November 2021, the student was reportedly below grade level standards (id.). On the "Fast Fact Multiplication and Division Quiz" administered in October 2021, the student was meeting grade level standards (id.). The December 2021 IEP stated that the student was most successful when he used one specific strategy to problem solve (id. at p. 2). The IEP noted that the student had worked very hard to master the array strategy for multiplication and indicated that he should continue to use this when problem solving (id.). The December 2021 IEP noted that the student sometimes made computation mistakes when solving more challenging problems but was able to fix his work when it was brought to his attention (id.). According to the IEP, the student was still working on mastering a division strategy (id.). He was able to use the long division notation but sometimes made errors with subtraction (id.). The December 2021 IEP noted that repeated practice was very beneficial to the student in math; he was starting to show progress in showing his work rather than solving problems mentally (id.). The IEP noted that the student also benefitted from modified/more simplistic assignments/assessments that were clearly laid out and organized for him (id.).

The December 2021 IEP noted that the student received speech-language therapy two times per week in a small group, and that he received both remote and in-person therapy during the 2020-2021 blended school year (Dist. Ex. 3 at p. 2). The student reportedly regularly attended sessions and presented as a responsive and motivated learner (id.). According to the December 2021 IEP, the student had benefitted from visual organizers and verbal supports such as scaffolding questions and carrier phrases (id.). With support, he was able to initiate, maintain and complete short and extended verbal responses (id.). The student used a variety of sentence structures to express his ideas and was able to discuss information about characters, settings, unexpected/problematic events, action responses and relevant details (id.). The December 2021 IEP indicated that the student struggled to discuss internal responses of characters independently and required support to do so but noted his vocabulary while describing internal responses had expanded (id.). As an example, the December 2021 IEP noted that the student was able to use more complex emotional vocabulary words to describe positive/negative feelings and, when prompted, he was able to include internal responses in narrative discourse (id.). The IEP stated that the student would benefit from continued speech-language therapy that focused on his language organization while describing informational and narrative content and his inferential language comprehension pertaining to the perspectives of multiple characters (id.). According to the December 2021 IEP, therapy would specifically focus on helping the student generate a verbal response that included a main idea/initiating event, one inferential detail related to thoughts/feelings/actions of a character and two-to-three relevant supporting details (id.). In addition, speech-language therapy would also focus on helping the student generate inferences about the thoughts, feelings, and actions of multiple individuals in response to various unexpected scenarios presented in fiction, non-fiction, and semi-structured social contexts (id.).

Socially, the December 2021 IEP described the student as "kind hearted" and a cooperative and considerate member of the classroom community (Dist. Ex. 3 at p. 3). The IEP explained that

the student benefitted from organizational support throughout the day in order to keep track of his materials and to transition to the next activity (id.). The student was working on changing his behavior to match the social situation (id.). The student was also working on responding to verbal and nonverbal social cues when he was doing something unexpected socially (id.). In counseling, the December 2021 IEP reflected that the student was enthusiastic and energetic and knew how to use his time appropriately (id.). Specifically, the student used counseling "as a place to bring up social situations that [we]re bothering him, which result[ed] in him talking through the problem, what happened, what he ha[d] done so far, how he and the others [we]re feeling, getting feedback from his peers and talking through possible solutions" (id.). The December 2021 IEP noted that the student could be silly at times but that, when he was not being silly, he was able to make thoughtful statements (id.). The IEP stated that the student would continue to work on his social problem solving skills in counseling (id.).

With regard to physical development, the December 2021 IEP reflected that the student independently navigated the school environment including but not limited to the classroom, hallways, bathrooms, cafeteria, stairs and playground equipment (Dist. Ex. 3 at p. 3). The student was described as a sweet boy who was capable of taking in information but needed support with organizing the information prior to his writing or typing (id.). The student reportedly managed classroom materials adequately and had well-developed fine motor skills; however, his graphomotor skills were still a struggle (id.). According to the IEP, the student's inattention and disorganization made initiating, executing, and completing writing assignments difficult so it was important for him to have organizational support across his day/tasks (id. at pp. 3-4). It was recommended that the student continue to receive OT one time per week in a group no larger than three to support his organizational skills related to his written/typed production (id. at p. 4).

The December 2021 IEP included seven annual goals, as well as two progress reports for each goal (Dist. Ex. 3 at pp. 6-12). The annual goals targeted the student's ability to accurately answer inferential comprehension questions; write an organized, five paragraph essay of 15-20 sentences on a teacher directed topic; represent his mathematical thinking using equations and/or models; generate a verbal response that included a main idea, inferential idea related to the thoughts/feelings/actions of a character, and two to three supporting details; generate inferences related to the differing thoughts/feelings of two different characters in response to an unexpected/problematic event; create and follow a prewriting plan and type one to two pages with attention to sentence structure and capitalization/punctuation within teacher designated timelines; and identify his thoughts and feelings when faced with a challenging social situation and listen to others thoughts and feelings and identify a solution (id.). The second progress report, which was undated, indicated that for each goal progress had been made but the goal had not been met (id.). The progress report further indicated that it was anticipated that the student would meet all of his goals (id.).

The parent testified that during the 2021-22 school year, she was concerned that the student "wasn't focused, felt alone, was sad, and was losing friends" (Parent Ex. L at ¶ 4). She noted that the student was struggling academically, "and the school was making accommodations outside the IEP, like less homework" (id.). According to the parent, "in anticipation of [the student's] middle

school program," she had the student privately evaluated (id. at ¶ 5).¹² The parent testified that she attended the December 2021 CSE meeting and the CSE recommended the "exact ICT program [the student] was struggling in for years" (id.). She expressed concerns that the recommendations were not consistent with the private evaluation, however the December 2021 IEP indicated that the parent did not express any concerns at the time of the December 2021 CSE meeting (compare Parent Ex. L at ¶ 5, with Dist. Ex. 3 at pp. 3, 4). Next, the parent testified that the student continued to struggle through spring 2022 and she requested an update from her private evaluators (Parent Ex. L at ¶ 6). According to the parent, in May 2022 she requested " a reevaluation of the [the student's] program and upcoming middle school placement" but the district "did not hold the IEP meeting" (Parent Exs. B; L at ¶ 6).

However, the hearing record shows that the CSE reconvened at the July 20, 2022 meeting to consider the parent's private evaluations and to review the program recommended by the December 2021 CSE (Dist. Ex. 2 at p. 27). The July 2022 CSE incorporated the evaluative information from the October 2021 neuropsychological evaluation and the May 2022 neuropsychological addendum into the recommended July 2022 IEP (Dist. Ex. 2 at pp. 1-6).¹³ Specifically, the July 2022 IEP noted that the private evaluator had diagnosed the student with attention-deficit/hyperactivity disorder (ADHD), combined presentation, with impairment in executive functioning; social pragmatic communication disorder; and unspecified anxiety disorder (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 10 at pp. 17-18).¹⁴

The July 2022 IEP incorporated the background information from the May 2022 neuropsychological addendum, specifically noting that, although the student's overall cognitive abilities were within the average range, the student's working memory was assessed at the low end of the average range, while his processing speed was below average (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 9 at p. 1). In addition, the student demonstrated difficulties on measures of pragmatic communication, visual motor precision, and memory (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 9 at p. 1). The July 2022 IEP indicated that the student also struggled on tasks that assessed his ability to sustain attention, and his executive functioning skills were variable, ranging from average to below average (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 9 at p. 1).

¹² In her affidavit, the parent testified that she provided the October 2021 neuropsychological evaluation to the district prior to the student's December 2021 CSE meeting (Parent Ex. L at ¶5). As previously noted above, the December 2021 IEP does not include any evaluative information from the October 2021 neuropsychological evaluation. The hearing record reflects that an unspecified private evaluation was shared with the district via an email dated June 2, 2022 (Parent Ex. B at p. 1). The July 2022 IEP includes evaluative data from both the October 2021 neuropsychological evaluation and the May 2022 neuropsychological addendum (see Dist. Ex. 2 at pp. 1-6).

¹³ The May 2022 neuropsychological addendum summarized the results of the October 2021 neuropsychological evaluation and included the summary as background information in the addendum (Dist. Ex. 9 at pp. 1-2).

¹⁴ Although the district school counselor testified that the student had received a diagnosis of autism and the student's occupational therapist indicated that the student had a medical diagnosis of ASD (autism spectrum disorder) there is no evidence in the hearing record of the student receiving either diagnosis (May 22, 2023 Tr. pp. 32, 33; Dist. Ex. 12 at p. 2; IHO Ex. I at p. 5; see Dist. Ex. 10 at pp. 17-18).

With respect to academics, the May 2022 neuropsychological addendum, as reflected in the July 2022 IEP, noted that the student performed variably across, as well as within domains, notably, in reading, he displayed age-appropriate decoding, but his comprehension and fluency were weaker and below average (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 9 at p. 1). The July 2022 IEP also indicated that with respect to writing, the student spelled effectively and worked well when provided with structure and clear expectations, however, he struggled more when generating sentences or an essay on his own, and his writing fluency was below average (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 9 at pp. 1-2). In addition, the July 2022 IEP reflected that although the student's mathematic performances were consistently within normal limits, he was prone to inattentive errors (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 9 at p. 2).

With respect to social/emotional skills, the May 2022 neuropsychological addendum as recorded in the July 2022 IEP noted that the student's presentation and behavior rating scales suggested the presence of difficulties, and the student demonstrated difficulty regulating his attention, emotions, and behavior (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 9 at p. 2). In addition, the July 2022 IEP reflected that the student struggled with aspects of communication, socialization, and interpersonal functioning, and his adaptive skills were weaker than his peers (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 9 at p. 2). The July 2022 IEP also noted that, according to the May 2022 neuropsychological addendum, the student's own ratings suggested a very negative attitude towards school, that he did not feel in control of his life, that he became anxious in social situations, and that he struggled to navigate relationships with his parents as well as peers (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 9 at p. 2). The July 2022 IEP also included the teacher ratings obtained in October 2021—and summarized as background in the May 2022 neuropsychological addendum—which noted that the student demonstrated difficulties related to focus, poor independent work skills, trouble working in groups, and also that the student presented idiosyncratically and demonstrated some difficulty with academic content (id.). The July 2022 IEP included the private evaluator's statement that it was "clear that [the student] struggled with certain areas, and he did not have complete insight into his own functioning" and that while "he did not present as anxious in the classical sense, he likely experience[d] anxiety that manifest[ed] as rigidity, which [wa]s consistent with maternal report" (id.).

The July 2022 IEP continued to include some aspects of the student's present levels of educational performance from the December 2021 IEP (compare Dist. Ex. 2 at pp. 6-8, with Dist. Ex. 3 at pp. 1-3). As noted above, the July 2022 IEP also included end of year progress updates from a 2021-22 school year teachers' report, a June 15, 2022 OT clinical guide, a June 17, 2022 counseling progress report, and a June 23, 2022 speech-language therapy progress report (Dist. Ex. 2 at pp. 7-11; see Dist. Exs. 6; 7; 11; 12).

Turning to the June 2022 OT clinical guide, the student's needs as described in the guide were incorporated into the July 2022 IEP, which noted that the student needed help with organization and benefitted from pre-writing plans, particularly graphic organizers appropriate to whatever genre he was writing about (Dist. Ex. 2 at p. 7; see Dist. Ex. 12 at p. 5). The IEP noted that, although the student preferred to "free write," he required encouragement to plan in advance (Dist. Ex. 2 at p. 7; see Dist. Ex. 12 at p. 5). The July 2022 IEP also noted that the student was able to manage his classroom materials independently and follow logical sequences of activities to complete transitions (Dist. Ex. 2 at p. 8; see Dist. Ex. 12 at p. 4). The student was able to remember a multistep activity and execute it independently but at times was distractible when he

perceived that a task was difficult (Dist. Ex. 2 at p. 8; see Dist. Ex. 12 at p. 4). The student's activities of daily living were reportedly within normal limits (Dist. Ex. 2 at p. 8; see Dist. Ex. 12 at p. 4).

The July 2022 IEP further indicated that the student's fine motor, gross motor and range of motion were within normal limits, however, his visual-motor coordination continued to be an area of struggle as related to writing (maintaining line, margin, sizing, spacing) (Dist. Ex. 2 at p. 10; see Dist. Ex. 12 at p. 3). The IEP indicated that the student's visual perceptual skills (understanding visual differences and similarities) were well developed (Dist. Ex. 2 at p. 10; see Dist. Ex. 12 at p. 3). The IEP noted that the student's graphomotor coordination was adequate to perform all written activities across his day and that he assumed a dynamic tripod grasp with his pencil pressure within normal limits (Dist. Ex. 2 at pp. 10-11). The student's writing was reportedly large at times due to inattention to line, spacing, sizing and margin, most often when he was rushed or distracted (Dist. Ex. 2 at p. 11; see Dist. Ex. 12 at p. 3). The July 2022 IEP noted that the student would benefit from using graphic organizers prior to writing to keep his pacing consistent and that OT would focus on the student's organization of writing and typing skills (Dist. Ex. 2 at p. 11; see Dist. Ex. 12 at p. 4).

According to the July 2022 IEP, the student was receiving speech-language therapy two times per week in a group (Dist. Ex. 2 at p. 7; see Dist. Ex. 6 at p. 1). The July 2022 IEP included results from the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5), which was administered on June 14, 2022, and June 22, 2022 "to observe" the student's expressive and receptive language skills (Dist. Ex. 2 at p. 7). The speech-language progress report as incorporated into the July 2022 IEP reflected that the student was administered four subtests from the CELF-5 to derive his core language score (Dist. Ex. 2 at pp. 7-8; see Dist. Ex. 6 at pp. 1-2). According to the July 2022 IEP, the student scored within the average range for all subtests administered, except for the semantic relationships subtest (Dist. Ex. 2 at p. 8; see Dist. Ex. 6 at p. 2). The July 2022 IEP noted that the student struggled to identify two correct sentences as the sentences became more complex, and in narrative discourse, he benefitted from visual organizers (story grammar organizers) to help him generate verbal responses that maintained a topic and were cohesive and sequentially organized (Dist. Ex. 2 at p. 8; see Dist. Ex. 6 at pp. 2-3). Further, the July 2022 IEP indicated that the student required support in order to integrate inferential information related to the thoughts and feelings of characters in narrative discourse and, in social contexts, he required support to help him generate inferences related to the thoughts and feelings of his peers, particularly when unexpected actions occurred (Dist. Ex. 2 at p. 8; see Dist. Ex. 6 at p. 3). The IEP stated that during expository tasks (e.g., paragraph writing), he benefitted from visual organizers to help him sequence the steps involved to complete a task, sentence starters and carrier phrases to initiate and maintain responses, as independently, he deviated to tangential topics and struggled to keep his responses concise (Dist. Ex. 2 at p. 8; see Dist. Ex. 6 at p. 3).

According to the 2021-22 teachers' report, as incorporated in the July 2022 IEP, the student made progress at a gradual pace and at the beginning of fifth grade was reading at level Q (start of fourth grade level) as measured by the Fountas and Pinnell Reading Assessment (Dist. Ex. 2 at p. 9; see Dist. Ex. 7 at p. 1). By the end of fifth grade, the student was reading at level R (start of fifth grade level) (id.). The July 2022 IEP also noted that the teachers' report stated that the student wanted to be independent but had a hard time focusing on a task when a teacher was not right next to him (Dist. Ex. 2 at p. 9; see Dist. Ex. 7 at p. 1). The student could sometimes handle

responsibility but struggled in social settings (Dist. Ex. 2 at p. 9; see Dist. Ex. 7 at p. 1). According to the IEP, the student also struggled to stay organized and had a hard time keeping his materials in the correct folder and binders (Dist. Ex. 2 at p. 9; see Dist. Ex. 7 at p. 1). The student lacked time management skills, preferred consistency and struggled with change and adapting to new environments (Dist. Ex. 2 at p. 9; see Dist. Ex. 7 at p. 1). The student also had a hard time staying focused for the class period; however, he followed classroom rules and expectations (Dist. Ex. 2 at p. 9; see Dist. Ex. 7 at p. 1).

According to the July 2022 IEP, the student lacked self-confidence, sometimes seemed insecure in social situations with his peers, struggled with recognizing others' emotions and feelings, and wanted to be social and funny, but struggled with reading social cues that would tell him when to stop because his peers found "it too much" (Dist. Ex. 2 at p. 9; see Dist. Ex. 11). According to the IEP, the student struggled with perspective taking, sometimes had disagreements with peers that often stem from them misunderstanding his words or actions, and he was working on resolving disagreements by coming to an adult for help (Dist. Ex. 2 at p. 10; see Dist. Ex. 7 at p. 4). The July 2022 IEP stated that the student's challenges with perspective taking affected his self-esteem and that the student continued to need support making positive relationships with peers (Dist. Ex. 2 at p. 9; see Dist. Ex. 7 at p. 4).

According to the June 2022 counseling progress report, the student showed improvement in demonstrating age-appropriate social behaviors, participating in counseling discussions, striving to relate positively to peers, showing a capacity for empathy, persevering through frustrations and maintaining effort, and taking responsibility for actions and choices (Dist. Ex. 11 at p. 1). The student's fifth-grade school counselor testified that in elementary school the student "had developed his social, emotional abilities quite a bit, though he was still working on it" (May 22, 2023 Tr. pp. 20-21). She continued, "[a]nd even just in my year of counseling him in small groups . . . I saw him be able to be a little bit more flexible and at least understand what other perspectives students might, other students may be having, though it still might be hard for him to, to work in that group" (May 22, 2023 Tr. pp. 21-22). The June 2022 speech-language progress report indicated that the student made progress with regard to his language organization and narrative complexity (Dist. Ex. 6 at p. 3). The July 2022 IEP noted the student's improvement in language organization and stated that he made progress at a gradual pace (Dist. Exs. 2 at pp. 7-9; 7 at pp. 1, 3).

The parent's October 2021 neuropsychological evaluation included a record review, a classroom observation and input from the student's teachers with regard to behavior rating scales (Dist. Ex. 10 at pp. 2, 3-4, 15, 23-24, 25-26). The October 2021 neuropsychological evaluation stated that the student required "a small, structured, and supportive class and school environment with built-in opportunities for individualized support throughout the school day to address his academics, attention/executive functioning, and social emotional functioning" (id. at p. 18). However, the October 2021 neuropsychological evaluation also stated that "[i]f such a placement [wa]s not available, the most appropriate placement within a community school would be within an Integrated Co-Teaching (ICT) placement with ongoing related services and accommodations" (id.).

Notably, the May 2022 psychological addendum did not include a classroom observation or input from the student's teachers but focused on the psychoeducational testing asserted that the

student "has not made appropriate academic, social, or emotional progress within his current placement with his current support plan" and that "a change in placement and increase in support are clearly required at this time" (Dist. Ex. 9 at pp. 2, 5).¹⁵ But neither the October 2021 neuropsychological evaluation, the May 2022 neuropsychological addendum, nor the parent articulate what appropriate progress for the student should be. Neither the private evaluators, nor the parent alleged that the student was in danger of failing or that the student was not advancing from grade to grade.

The Supreme Court explained long ago that whether "children are receiving sufficient educational benefits . . . presents a . . . difficult problem" (Endrew 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 Endrew 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).

The parent very clearly wanted the student to be successful, that is, to be on grade level, and I can sympathize with the parent's desire in that respect. However, the IDEA provides a floor of opportunity and does not guarantee specific outcomes in terms of the level of educational benefit and has instead a somewhat more modest threshold. While the student was performing below grade level at the conclusion of fifth grade, the hearing record demonstrates that the student was nevertheless making progress and provides insufficient basis to overturn the IHO's decision. Here, despite the differing views about what constitutes appropriate 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 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]).

C. July 2022 IEP - Appropriateness of ICT Services

With the foregoing in mind, the next issue to address is whether the educational program offered to the student in the July 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

¹⁵ The evaluators reported that their updated testing "occurred over a single session" and included the re-administration of three assessments used in their original evaluation of the student (compare Dist. Ex. 9 at p. 2 with Dist. Ex. 10 at p. 2). Although the student's scores appeared to decline on several measures, the evaluators did not discuss the significance of the lower scores in their addendum report other than to opined that the student had not made appropriate progress (compare Dist. Ex. 9 at pp. 7-8 with Dist. Ex. 10 at pp. 22, 24-25). The evaluators did not testify at the impartial hearing.

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).

State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities receiving ICT services within a class may not exceed 12 (8 NYCRR 200.6[g][1]). In addition, State regulations require that the class in which students receive ICT services must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]).

The July 2022 CSE recommended that the student receive ten periods per week of ICT services in ELA, five periods per week of ICT services in math, four periods per week of ICT services in social studies, four periods per week of ICT services in sciences, one 30-minute session per week of individual counseling services, one 30-minute session per week of counseling services in a group of three, one 30-minute session per week of individual OT, one 30-minute session per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group of three (Dist. Ex. 2 at pp. 22-23). While the July 2022 CSE maintained its recommendation that the student receive ten periods per week of ICT services in ELA it recommended a change in frequency to the student's other ICT services (compare Dist. Ex. 2 at pp. 22-23, with Dist. Ex. 3 at pp. 12-13). More specifically, the CSE recommended a reduction in ICT services in math from six periods per week to five, and in social studies from five periods per week to four, and then added four periods per week of ICT services in sciences (compare Dist. Ex. 2 at pp. 22-23, with Dist. Ex. 3 at pp. 12-13). The July 2022 CSE also made changes to the student's related services recommendations, and as noted above the student's counseling recommendation was changed from one 30-minute session in a group of three to one group and one individual session, the student's OT recommendation was changed from one 30-minute session in a group of three to one individual session, and the student's speech-language therapy recommendation was changed from two 30-minute sessions in a group of three to one individual and one group session (compare Dist. Ex. 2 at pp. 22-23, with Dist. Ex. 3 at p. 13).

The July 2022 IEP included testing accommodations of extended time (double time), breaks (two-minute breaks every 20 minutes), separate location/room (group no larger than 12), minimal distractions (use of a study carrel), and tests read (all directions, questions, and passages read and re-read aloud) (Dist. Ex. 2 at pp. 24-25).

The July 2022 IEP stated that the student's needs affected his involvement and progress in the general education curriculum because his speech and language impairment inhibited his ability to clearly express his thinking and that influenced his ability to share information he had learned and to practice new academic concepts (Dist. Ex. 2 at p. 12). Further, the IEP indicated that the student's speech and language impairment also affected him socially in terms of how he interacted with his peers, and noted that he struggled with aspects of communication, had trouble reading social cues, exhibited variable focus and struggled with anxiety and rigidity (id.). In addition, the IEP indicated that the student struggled with aspects of reading comprehension, mathematics and written expression and that he required the support of a special educational teacher integrated in the general education classroom along with speech-language therapy, OT and counseling (id.).

As supports for the student's management needs, the July 2022 CSE recommended environmental, material and human resources including repeated directions, organizers, modified assignments/assessments, visual aids, redirection from adults, small group instruction, minimal auditory and visual distractions, and OT provided paper (large, bolded lines) (Dist. Ex. 2 at p. 11). The IEP included additional supports such as instructions broken down into "chunks," positive reinforcement, and repetition of material and directions, as well as student seating where both auditory and visual stimuli were openly received (id.). According to the IEP, other supports included prompts to help the student maintain focus, frequent breaks to help prevent fatigue and frustration, teacher check in on the student regularly, and support initially to develop better organizational habits until the skills became internalized (id.). In addition, the IEP noted that multimodal presentation to promote engagement and increase the student's comprehension was recommended particularly when the student learned new topics or was exposed to information for the first time and that the student should be provided with reminders or a schedule for upcoming assignments so that he was able to appropriately prepare (id.).

The July 2022 IEP included 11 annual goals that targeted the student's ability to accurately answer inferential comprehension questions, write an organized, complete five paragraph essay on a teacher-directed topic, and to accurately represent his mathematical thinking using equations and/or models (Dist. Ex. 2 at pp. 13-15). The IEP included additional goals that targeted the student's ability to self-edit his writing to include accurate punctuation and capitalization throughout a piece and to check his mathematical computation with a supplemental strategy and to show his work to check for accuracy (id. at pp. 15-16). Further, the IEP included goals that targeted the student's ability to use a graphic organizer to get his ideas down on paper and remain organized before he began writing, as well as a goal to continue work on solving division problems through repeated practice of the long division strategy (id. at pp. 17-18). Another annual goal targeted the student's ability to generate verbal and written responses that included a main idea/initiating event and one inferential idea related to the thoughts/feelings/actions of characters with supporting details; and another goal targeted the student's ability to generate inferences in response to an unexpected/problematic event presented from text, video clips, and/or semi-structured social situations (id. at pp. 18-19). The IEP included a goal that targeted the student's ability to create and follow a pre-writing plan and type one-to-two pages (5 paragraphs) with

attention to sentence structure, capitalization/punctuation within the time frames consistent with his teachers' expectations (*id.* at p. 20). Finally, the IEP included a goal that targeted the student's need to identify his thoughts and feelings, listen to others' thoughts and feelings and identify a solution when faced with a challenging social situation (*id.* at p. 21).

According to the IEP, the July 2022 CSE considered and rejected a general education classroom both with and without special education teacher support services (SETSS) as these options did not provide enough academic support and considered and rejected a 12:1 special class placement, as well as a State-approved nonpublic school, as these options were deemed to be too restrictive (Dist. Ex. 2 at p. 29; *see* Dist. Ex. 14 at ¶ 16).

As described above, the crux of the dispute in this matter relates to the views of the parent and the private evaluators that the student was not making appropriate progress and therefore required a more supportive (and more restrictive) 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]).

Further, the hearing record reflects that the July 2022 CSE considered the recommendations set forth in the October 2021 neuropsychological evaluation and the May 2022 neuropsychological addendum but had information before them demonstrating that the student was advancing from grade to grade and making academic progress in the district curriculum, albeit more modest progress than desired by the parent. 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 provided the content used in 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 an appropriate placement the student's LRE (*see*

T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 119-20), and the district was not required to place the student in a special class or in a specialized school.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's decision that 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 Winston Prep 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 DISMISSED.

**Dated: Albany, New York
October 20, 2023**

**JUSTYN P. BATES
STATE REVIEW OFFICER**