



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-209

Application of the BOARD OF EDUCATION OF THE KATONAH-LEWISBORO 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:

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, by Steven L. Banks, Esq., and Cassidy Allison, Esq.

Littman Krooks, LLP, attorneys for respondents, by Kevin Pendergast, 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') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Windward School (Windward) for the 2019-20 and 2020-21 school years. The parents cross-appeal from the IHO's determination which denied their request to be reimbursed for their daughter's tuition costs at Windward for the 2021-22 and 2022-23 school years. The appeal must be sustained. The cross-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

The student was initially found eligible for special education as a student with a learning disability in June 2018, at the end of first grade (see Parent Ex. F; Dist. Ex. 6). During the 2018-19 school year (second grade), the student was enrolled in the district and received special education services of three 45-minute and two 30-minute sessions of group (5:1) resource room services per week and two 30-minute sessions of direct consultant teacher services per week (Dist.

Ex. 6 at p. 8).¹ Subsequent to the student's initial eligibility meeting, the CSE convened three times during the 2018-19 school year to modify aspects of the student's IEP but continued to recommend that the student receive resource room and consultant teacher services (see generally Dist. Exs. 22; 23; 24).^{2, 3}

In July 2018 the parents submitted an admission packet to Windward (see Dist. Ex. 82). They subsequently signed an enrollment contract with Windward on February 28, 2019 for the student's attendance for the 2019-20 school year (see Dist. Ex. 84).

A CSE convened on May 21, 2019 to develop an IEP for the student for the 2019-20 school year (third grade) (see Dist. Ex. 1). The CSE found that the student remained eligible for special education and recommended that she receive one 40-minute session of group (5:1) resource room services per day (id. at p. 12).

On June 17, 2019, the parents sent a letter to the district notifying it of their intent to unilaterally place the student at Windward for the 2019-20 school year and to seek reimbursement for tuition and related expenses (see Dist. Ex. 46).⁴ The student attended Windward for the 2019-20 school year (Dist. Exs. 47; 70; 84).

A CSE convened on March 9, 2020 for an annual review of the student's program and to develop an IEP for the student for the 2020-21 school year (fourth grade) (see Dist. Ex. 2). The CSE recommended that the student receive 90 minutes of direct consultant teacher services per day in English-language arts (ELA) and 40 minutes of small group reading services per day (id. at p. 8). The CSE also recommended additional supports for the student including assistive technology, supplementary aids and services, and testing accommodations (id. at pp. 8-10). On May 14, 2020 the parents sent a letter to the district notifying it of their intent to unilaterally re-enroll the student at Windward for the 2020-21 school year and to seek reimbursement of tuition and related expenses from the district (see Dist. Ex. 78). The student attended Windward for the 2020-21 school year (Dist. Exs. 34; 49).

¹ The student's eligibility for special education as a student with a learning disability for all school years at issue is not in dispute (see 34 CFR 300.8[c][10]; 8NYCRR 200.1[zz][6]).

² The CSE convened in September 2018, November 2018, and February 2019 (see Dist. Exs. 22; 23; 24). At the September 2018 CSE meeting the district suggested "a scheduled team meeting every 4-6 weeks, to review data, progress and respond to parents[] questions and concerns surrounding [the student's] performance" (Dist. Ex. 22 at p. 2). In addition to the CSE meetings, the parents and the district met to discuss the student's progress in October 2018, December 2018, January 2019 and April 2019 (see Dist. Exs. 53, 54, 55, 56).

³ The parents obtained a psychoeducational independent educational evaluation (IEE) during summer 2018 (Dist. Exs. 6 at p. 2; 21; 22 at pp. 1-2). The clinical psychologist who evaluated the student diagnosed her as having a "Specific Learning Disorder with weakness in reading (dyslexia) with deficits in reading decoding, reading accuracy, reading rate and fluency" (id. at p. 12). The CSE convened to discuss the results of the evaluation on September 20, 2018 (Dist. Ex. 22 at pp. 1-2).

⁴ There was a subsequent CSE meeting held on June 25, 2019 at which time the district clarified that the student was not recommended for 12-month services (Dist. Ex. 25 at p. 1). The parents expressed confusion in their June 17, 2019 letter regarding 12-month services (Dist. Ex. 46 at p. 2).

As part of a mandated three-year reevaluation of the student, in October and November 2020, the district conducted a social history, psychoeducational reevaluation, and educational reevaluation (Dist. Exs. 26; 27; 28; 29; 30). By letter dated March 31, 2021, the parents disagreed with district's reevaluation and requested a neuropsychological evaluation as an IEE at public expense (Dist. Ex. 37). The district proposed performing its own additional evaluations of the student, with the understanding that if the parents continued to disagree with the results, it would grant the parents' request for an IEE (Dist. Ex. 38). In May 2021 the district conducted a speech-language evaluation; an OT reevaluation; additional psychological testing of the student's memory, executive functioning, attention, and social/emotional skills; and additional educational testing of the student's reading (Dist. Exs. 32; 35; 36; 79). By letter to the district dated May 25, 2021 the parents reiterated their request for a neuropsychological IEE (Dist. Ex. 40).

The CSE convened again on May 26, 2021, to review the student's program, as well as the evaluations conducted by the district, and to develop an IEP for the student for the 2021-22 school year (fifth grade) (Dist. Ex. 3). Based on its review, the CSE revised the student's IEP and recommended that she receive 45 minutes of direct consultant teacher services in ELA per day, 45 minutes of direct consultant teacher services in math per day, 40 minutes of group (5:1) resource room services per day, 40 minutes of small group reading services per day and one 30-minute session of individual counseling per week (id. at p. 14). Additionally, the CSE recommended assistive technology, supplementary aids and services, and testing accommodations (id. at pp. 14-16). Following the CSE meeting, on June 1, 2021 the parents again requested a neuropsychological IEE at public expense, which the district approved on June 18, 2021 (Dist. Ex. 42).

On August 18, 2021 the parents sent a letter to the district notifying them of their intent to unilaterally place the student at Windward for the 2021-22 school year and to seek reimbursement for tuition and related expenses (see Dist. Ex. 50). The student attended Windward for the 2021-22 school year (Dist. Exs. 51; 75).

In summer 2021 the student underwent a neuropsychological IEE that resulted in a written report dated November 19, 2021 (Dist. Ex. 45; see Tr. pp. 947, 963; 1011; Dist. Ex. 44).⁵ The evaluating neuropsychologist offered a diagnosis of specific learning disorder with an impairment in written expression (spelling accuracy, grammar and punctuation accuracy and clarity/organization of written expression) and made several recommendations for the CSE (id. at pp. 14-17).

During the 2021-22 school year, the CSE met for a second time on December 21, 2021 in order to review the results of the neuropsychological IEE (see Dist. Ex. 4). The CSE continued to recommend that the student receive daily consultant teacher services in ELA and math, daily resource room services, daily reading services, and weekly counseling services but recommended that the student's resource room and reading services be provided in a group of three students to

⁵ The evaluation report was undated but indicates that the student was seen over two testing sessions, the latter of which occurred on August 6, 2021 (Dist. Ex. 45 at p. 1). The neuropsychologist indicated that she believed she sent the report to the district "past October" 2021 and before the CSE's review of the report; a district witness indicated that the district received it in November 2021 (Tr. pp. 159, 963; see Dist. Ex. 44). Accordingly, the date of transmittal to the district is used as a reference herein, although the evaluation report itself was likely completed sometime between October and November 19, 2021.

one teacher instead of a group of five students to one teacher (id. at p. 17). Further, the CSE updated the student's annual goals and present levels of performance as well as added access to headphones and audiobooks to the student's assistive technology recommendations (id. at pp. 6-14, 16-17). Although the proposed IEP was updated, the student continued to attend the unilateral placement at Windward.

The CSE convened on May 6, 2022 for an annual review to and to develop an IEP for the student for the 2022-23 school year (sixth grade) (see Dist. Ex. 5). To address the student's educational needs, the CSE revised the student's IEP and recommended that the student receive 60-minutes of integrated co-teaching services (ICT) in ELA daily, 60-minutes of ICT services in math daily, 40 minutes of group (3:1) resource room services daily, 40 –minutes of group (3:1) reading services daily and one 30-minute session of counseling per week (id. at p. 15). The CSE also recommended that the student be provided supplementary aids and services, assistive technology services, and testing accommodations (id. at pp. 15-17).

By letter dated August 21, 2022 the parents notified the district of their intent to unilaterally place the student at Windward for the 2022-23 school year and to seek reimbursement for tuition and related costs (see Dist. Ex. 52). The student attended Windward for the 2022-23 school year (Tr. pp. 815, 821, 874).

The parents filed an amended due process complaint notice dated August 21, 2022 (see Parent Ex. NN).⁶ The parents asserted that the district denied the student a free appropriate public education (FAPE) for the 2019-20, 2020-21, 2021-22, and 2022-23 school years (id. at pp. 24-26). For all school years at issue, the parents claimed that the district failed to test the student for dyslexia and failed to conduct a functional behavioral assessment (FBA) (id. at pp. 25-26). In addition, the parents asserted that the district used inappropriate instructional methodologies and failed to prepare staff to address the student's needs (id.). Specific to the 2019-20 school year, the parents generally asserted that the May 2019 IEP did not address the student's deficit in decoding, the annual goals were not appropriate, the student had not made progress in the prior school year, and the CSE's recommendations were not appropriately ambitious to meet the student's needs (id. at pp. 11-12, 24). Regarding the March 2020 IEP, the parents argued that recommendations made by the CSE were insufficient as they lacked intensive reading instruction and the district's staff had insufficient training in the Wilson Reading System (Wilson) (id. at pp. 13-14, 25). As for the 2021-22 school year, the parent generally contended that the May 2021 IEP was essentially the same as the prior school year and that the recommendations for reading instruction were vaguely worded leaving it unclear what the CSE recommended (id. at pp. 14, 25). The parents also argued that the December 2021 IEP failed to include the recommendations of the November 2021 IEE, noting in particular the lack of recommendations to address the student's writing needs or specific recommendations for reading instruction (id. at pp. 20-21, 25). Regarding the 2022-23 school year, the parents generally asserted that the May 2022 IEP was not appropriate as the goals were insufficient, the CSE copied the prior year's IEP, and the recommendations failed to address the student's writing and reading needs (id. at pp. 21-23, 25, 26). The parents asserted that Windward

⁶ The parents original due process complaint notice was dated February 2, 2021 (see IHO Ex. VII). The hearing record includes duplicative copies of the amended due process complaint notice (compare Parent Ex. NN, with IHO Ex. VII). For purposes of this decision, only the parent's exhibit is cited.

was appropriate for all of the school years in question and that equitable considerations favored their request for reimbursement (id. at pp. 15-18, 26-28).

After four prehearing conferences held between March and July 2022, the parties proceeded to impartial hearing, which concluded on April 27, 2023, after six hearing dates (Pre-Hr'g Conf. Tr. pp. 1-28; Tr. pp. 1-1132).⁷ In a decision dated August 31, 2023, the IHO found that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years; however, the IHO found that the district offered the student a FAPE for the 2021-22 and 2022-23 school years (IHO Decision at pp. 30-31, 34). With regard to 2019-20 school year (third grade), the IHO reviewed the training of the student's teacher and a private psychoeducational evaluation completed in September 2018 and concluded that the district had failed to use a "multisensory, intensive curriculum" as recommended by the private evaluator and that 40 minutes of resource room was insufficient support for the student and therefore denied the student a FAPE (IHO Decision at p. 13). In finding a denial of a FAPE for the 2020-21 school year (fourth grade), the IHO found that Windward had recommended that the student be placed in a small class with intensive language support in all subject matter areas, but that it was "undisputed that the IEP recommendations only provided daily support in English/Language Arts in a general education classroom" (IHO Decision at p. 14). The IHO further reasoned that the March 2020 IEP had removed two accommodations listed on the student's IEP previously, a slant board and an alphabet reference, and that the IEP did not provide for support outside of the student's English class (id. at pp. 14-15). As to the student's fifth grade school year and the IEP developed in May 2021 for the 2021-22 school year, the IHO found that "the increased targeted consultant teacher, resource room and counseling represent a program of instruction individually tailored to meet the [s]tudent's unique needs" (id. at pp. 15-17). The IHO reviewed the November 2021 neuropsychological IEE and noted the December 2021 CSE made revisions to the student's IEP such as a lower student-to-staff ratio and access to audiobooks, headphones and assistive technology services and that the revised IEP continued to be appropriate for the student (id. at pp. 17-20). Turning to the May 2022 IEP for sixth grade, the IHO reasoned that the revised IEP remained appropriate for the student because a change from a direct consultant teacher model to ICT services was "less restrictive" and there was an increase in "special instruction" over the amount in the prior IEP for the student (id. at p. 21). The IHO found that Windward was appropriate for all four school years at issue and that the parents fully cooperated with the CSE (id. at pp. 32-34). Based on her findings regarding the appropriateness of the student's IEPs, the unilateral placement, and equitable considerations, the IHO granted the parents' requested reimbursement relief for the 2019-20 and 2020-21 school years, but denied their request for the 2021-22 and 2022-23 school years (id. at p. 34).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in concluding that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years, arguing among other things, that the May 2019 CSE was permitted to rely on more recent information from the student's performance over the 2018-19 school year than the recommendations in the September 2018

⁷ The April and June 2021 prehearing conferences were transcribed; the transcripts thereof are consecutively paginated separately from the remainder of the hearing transcript volumes, and citations thereto will reflect this (see Pre-Hr'g Conf. Tr. pp. 1-38). The hearing record also includes written summaries of the March and July 2021 prehearing conferences (see IHO Exs. I, II).

private psychoeducational evaluation to formulate the student's IEP. With regard to the 2020-21 school year, the district alleged that the IHO misapprehended the combined nature of the district's general education settings in its elementary schools and that the information available to the CSE supported the level of intensity of special education services offered in the student's March 2021 IEP. In their cross-appeal, the parents contend that the IHO erred in failing to give sufficient weight to the opinion in the November 2021 IEE that the student should remain in a private school. With regard to the 2022-23 school year, the parents argue that the IHO's reasoning was lacking, pointing out that the consultant teacher and ICT settings both have nondisabled students and therefore the LRE rationale was unclear. The parents also argue that "the 15 minute increase would apply to the very ICT service that the IHO had found inadequate elsewhere in her [d]ecision, not to the reading and writing services that [the student] still needed."

The parties also dispute the IHO's findings regarding Windward and whether it was an appropriate unilateral placement for the student and whether equitable considerations favor the parents. The parties' familiarity with the particular fact arguments for review on appeal as raised in the district's request for review, the parent's answer with cross-appeal, and the district's answer to the cross-appeal is presumed; therefore, the allegations and arguments will not be recited here in further detail. Instead they will be addressed below as necessary to address the parties disputes in the following areas:

1. Whether the IHO erred in finding that the district failed offered the student a FAPE for the 2019-20, 2020-21, school years;
2. Whether the IHO erred in concluding that the district offered the student a FAPE for the 2021-22, and 2022-23 school years;
3. Whether the unilateral placement of Windward was appropriate for the student for the above school years; and
4. Whether equitable considerations favor the parents' request for tuition reimbursement for the above school years.

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" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by 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

I will turn first to the parties' disputes related to the first Burlington/ Carter criterion and the IEPs that were created by the district. In the instant case, the parents do not dispute the accuracy of the student's present levels of performance, and the parties do not differ substantially in their identification of the student's needs.⁹ The crux of the parties' dispute for each school year at issue is largely focused on the extent to which the programming recommended in the district IEPs was appropriate to address the student's needs.

As summarized above, during the four school years at issue, the CSEs recommended different programming for the student that included, at various times, ICT services, resource room services, consultant teacher services, and/or small group reading services along with other supports and accommodations. By way of background, State regulation defines ICT services as "specially designed instruction and academic instruction provided to a group of students with disabilities and

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" (Endrew F., 580 U.S. at 402).

⁹ The CSE's description of the student's needs in the present levels of performance were not disputed in either the request for review or the cross-appeal for any of the school years in question.

nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving [ICT] services in a class shall not exceed 12 students" and school personnel assigned to such a classroom shall "minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][1]-[2]). State guidance issued in November 2013 elaborates that ICT services provide for the delivery of primary instruction to all of the students attending such a setting ("Continuum of Special Education Services for School-Age Students with Disabilities," at 14-15, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>). The State's continuum of special education also includes direct consultant teacher services, which consist of instruction provided by a certified special education teacher for the purpose of adapting the content, methodology, or delivery of instruction to aid a student to benefit from general education classes, and resource room services, which provide supplemental instruction by a special education teacher (8 NYCRR 200.1[m][1]; [rr]; see 8 NYCRR 200.6[d], [f]; "Continuum of Special Education Services for School-Age Students with Disabilities," at 10, 14-15).

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via consultant teacher services, resource room services, a special class, or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>). In addition, the guidance specifies that the CSE should "consider what prior instructional methods and strategies have been utilized with the student to avoid reinstating programs that have not proven effective in the past" and further indicates that "[i]nstructional methodology may be discussed at the [CSE] but is not specified on an IEP" (*id.*).

More 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). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (*R.B.*, 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and *R.E.*, 694 F.3d at 192-94). However, when the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., *R.E.*, 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology,

but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology)).¹⁰

A. 2019-20 School Year

1. Student's Needs

As noted above the description of student's needs are not fundamentally in dispute and the dispute over the special education programming is further discussed below; however, a brief discussion of the student's needs is necessary to frame the issue to be determined, namely the appropriateness of the recommended program.

The May 2019 IEP reflected that, when making their recommendations, the CSE relied on a May 2019 interim report, an April 2019 educational evaluation, and the student's March 2019 report card (Dist. Ex. 1 at p. 4).¹¹ The May 2019 IEP included assessment scores and information from the initial evaluation conducted by the district in spring 2018, the September 2018 independent psychoeducational evaluation, and the September 20, 2018 CSE's discussion of the independent psychoeducational evaluation report (*id.* at pp. 4-7; *see* also Dist. Exs. 19, 21). The May 2019 IEP further reflected the student's dyslexia diagnosis (Dist. Ex. 1 at pp. 4, 10).

A review of the hearing record shows that the student exhibited average cognitive abilities. On a May 2018 psychological evaluation, the student received a full-scale IQ of 116 (86th percentile) on the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), which was noted to be in the "high average" range (Dist. Ex. 19 at p. 3; *see* Dist. Ex. 1 at p. 9). The student received scores in the "[a]verage" range on the fluid reasoning and processing speed subtests, in the "[h]igh [a]verage" range on the verbal comprehension, and working memory subtests, and in the "[v]ery [h]igh" range on the visual spatial subtest (Dist. Ex. 19 at p. 3). On a September 2018 administration of the Kaufman Assessment Battery for Children-Second Edition (KABC-II), administered as part of an independent psychoeducational evaluation, the student received a global learning scale standard score of 94 (34th percentile) (Dist. Ex. 21 at p. 4). The student further

¹⁰ If the evaluative materials before a CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and a school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (*A.M. v. New York City Dep't of Educ.*, 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (*R.E.*, 694 F.3d at 194).

¹¹ The May 2019 interim report is not included in the hearing record.

exhibited average fine motor, visual motor, visual perceptual, memory and phonological processing skills (see Dist. Exs. 20; 21).^{12,13}

Despite the student's average cognitive, memory, and phonological processing skills, she exhibited uneven development of reading skills. On the April 2018 educational evaluation, the student performed in the average range on all subtests of the Woodcock-Johnson IV Tests of Achievement (W-J IV TOA); however, the evaluator noted that, during the comprehension subtest, the student sounded out words phonetically while decoding and demonstrated reversals of letters "b" and "d" (Dist. Ex. 13 at pp. 1-2). The student's performance on the Weschler Individual Achievement Test-Third Edition (WIAT-III), administered as part of the September 2018 private psychoeducational evaluation, showed that, while the student's score was in the 42nd percentile for early reading skills 32nd percentile for spelling, and 21st percentile for reading comprehension, she struggled with word reading (14th percentile), pseudoword decoding (14th percentile), and oral reading fluency (first percentile) (Dist. Ex. 21 at pp. 5, 9-10). The evaluator noted that the student presented with deficits in reading decoding and relied on sounding out and then "blending words together in a series of letters" (id. at p. 9). The evaluator further indicated that, on the reading comprehensions subtest the student had so much difficulty with decoding that the meaning of what she had read was lost; the evaluator further noted that the student's score on this subtest was higher because of her good guessing abilities (id. at p. 10). On the WIAT-III supplemental subtests, the student's score for oral reading accuracy was in the 21st percentile but her oral reading rate was below the first percentile (id. at p. 5).

A May 2018 reading evaluation revealed that student was struggling with all aspects of oral reading (see Dist. Ex. 14). On the Gray Oral Reading Test-Fifth Edition (GORT-5), the student received the following scaled scores: rate 5 (5th percentile); accuracy 7 (16th percentile); fluency 6 (9th percentile); comprehension 7 (16th percentile); and an oral reading index scaled score of 13 (10th percentile) (id. at p.1). The evaluator noted that the student's reading rate was very slow because she had to sound out nearly every word, and her reading was still at such a developing stage that the student was unable to self-correct her errors (id.).

Disparity in the student's reading performance on the KABC-II was noted in the September 2018 independent psychoeducational evaluation report (Dist. Ex. 21 at p. 10). On the Atlantis subtest, the student mastered the names of pictures without difficulty and received a score in the 75th percentile (id. at pp. 4, 11). However, on the rebus learning subtest, the student received a

¹² The May 2018 psychological evaluation included administration of the Conners-3 teacher rating scale, which showed elevated concern for attention and learning problems; however, the September 2018 psychoeducational evaluation, completed by a licensed psychologist, noted that the results of the May 2018 Conners-3 were "inconclusive" for an attention deficit hyperactivity disorder (ADHD) diagnosis (Dist. Exs. 19 at pp. 7-9; 21 at p. 7).

¹³ According to the independent psychoeducational evaluation report, the student scored in the average or above average range on different standardized measures of memory (Dist. Ex. 21 at pp. 1, 4, 5, 7). However, the evaluator noted that the student had not developed adequate mental orthographic images (MOIs) which she defined as mental images of words stored in long-term memory after repeated exposure to them in print (id. at p. 9). The evaluator stated that she was not concerned about the student's short-term auditory memory, visual memory, or long-term memory recall but that she was concerned about her memory for spatial memory and visual symbolization (id. at p. 11).

score in the ninth percentile and demonstrated difficulty with visual representations, often reversed information, and had difficulty with left/right directionality and spatial orientation (*id.*). The evaluator noted that the student's pattern of low scores in reading decoding, oral reading fluency, and reading rate were consistent with dyslexia and offered a diagnosis of specific learning disorder with weakness in reading (dyslexia) and deficits in reading decoding, reading accuracy, reading rate, and fluency (*id.* at pp. 11, 12).

Review of the evaluative information available to the May 2019 CSE reveals that the results on the student's spring 2018 district evaluations and the September 2018 independent psychoeducational evaluation were not dissimilar (*see* Dist. Exs 13; 21). The April 2018 educational evaluation report noted that on the GORT-5, the student's performance on subtests measuring comprehension and accuracy was in the 16th percentile, while her score on fluency was in the 9th percentile and she scored in the 5th percentile for reading rate (Dist. Ex. 14 at p. 1). The evaluator noted that the student had to sound out most words, including basic sight words, and thus, her reading rate was "very slow" (*id.* at p. 1). Similar patterns in the student's reading rate were evident on the September 2018 independent psychoeducational evaluation, where the student's performance on the WIAT-III word reading subtest was in the 14th percentile while her word reading speed was in the 5th percentile, and her pseudoword decoding was in the 14th percentile while her pseudoword reading speed was in the 1st percentile (Dist. Ex. 21 at pp. 5-6, 9). The 2018 psychoeducational evaluation further noted that the student presented with deficits in reading decoding and could not analyze and blend phonemes, notice familiar spelling patterns, demonstrate a reliable sight word vocabulary, make comparisons to other words she already knew, or use context clues (*id.* at p. 9).

The district interim director of special services testified that, in developing the student's present levels of performance, the May 2019 CSE reviewed updated testing and input from the student's classroom teacher, special education teacher, and parents which showed that, while the student had made progress, she needed "continued growth" in decoding, reading fluency, and encoding (Tr pp. 522-23). Additional information used by the May 2019 CSE included a May 2019 interim report, April 2019 educational evaluation, and March 2019 report card, and scores from the April 2019 i-Ready Math, April 2019 i-Ready Reading, and April 2019 Word Identification and Spelling Test (WIST) (Dist. Ex. 1 at pp. 6-7).¹⁴ The May 2019 IEP reflected that on the April 2019 i-Ready the student scored in the average range for "[h]igh-[f]requency [w]ords" but was "slightly below grade level in phonics, vocabulary and reading comprehension" (*id.* at p. 1). The student was able to master all of the phonological awareness skills (*id.*). On the April 2019 administration of the WIST, the student demonstrated average sound-symbol knowledge, spelling, and fundamental literary ability but her word identification skills were "slightly below average" (*id.* at p. 8). The May 2019 IEP further stated that the student continued to demonstrate reversal of letters "b" and "d" and exhibited difficulty reading with fluency (*id.* at p. 9). The May 2019 IEP noted that the student appeared to enjoy writing and was "at or above" grade level in her ability to include a beginning, middle, and ending in her writing, used correct

¹⁴ Concerning the student's math skills, the April 2018 educational evaluation showed that the student was functioning in the average range in all areas (Dist. Exs. 13 at pp. 1-2). In addition, the student's special education teacher reported that the student's i-Ready testing showed that she was on grade level in all areas of math (Dist. Ex. 1 at pp. 2, 6). The May 2019 IEP noted that the student was meeting grade level expectations in math and that if the student had difficulty reading a word problem she would ask for assistance (Dist. Ex. 1 at p. 9).

punctuation, took notes, organized her thoughts, and completed writing tasks at grade level expectations (*id.*). The May 2019 IEP related that the student had difficulty with spelling but used strategies such as looking at the "word wall," asking a teacher to help, or sounding the word out (*id.*). According to the May 2019 IEP, the student's ability to "encode words in isolation" continued to improve and her spelling of regular and irregular words on the WIST was in the average range (*id.*).

2. Resource Room Services

The IHO found that the 2019-20 IEP failed to offer the student a FAPE because it failed to include a "a multi-sensory, intensive curriculum" appropriate to address the student's reading needs, the IEP was not individually tailored to meet the student's needs or appropriate in light of the student's circumstances, and was not likely to produce academic and functional progress (IHO Decision at pp. 12-13, 30). The district in its request for review argues that the IHO erred as a FAPE was offered because the student was making progress during the prior 2018-19 school year and the goals were linked to the student's individual needs. As such, the district contends that it offered the student an IEP that was reasonably calculated for the student to receive educational benefit.

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/IEPgguideDec2010.pdf>).¹⁵

Review of the student's IEPs for the 2018-19 school year shows that the student's program consisted of three 45-minute sessions and two 30-minute sessions of resource room per week, as well as two 30-minute sessions of direct consultant teacher services per week in the general education classroom (Dist. Exs. 6; 22; 23; 24). According to the interim director of special services, the 40 minutes per day of resource room recommended in the student's May 2019 IEP

¹⁵ 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 Aptakasic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

represented a change from the student's February 2019 IEP (Tr. p. 525). He noted that the May 2019 CSE made this recommendation because the student was "making a great deal of progress," and based on teacher report was "functioning at or above grade level" in many areas (id.). The interim director stated that, although the student still had writing deficits that needed to be addressed through resource room, there were no areas where the student was "significantly behind her peers" (id. at pp. 525, 530).¹⁶ The interim director indicated that, based on information presented at the annual review meeting, the student was, "in many respects . . . operating at least at grade level on a functional basis within the classroom" (Tr. p. 530). The student's special education teacher testified that direct consultant teacher services were not included in the May 2019 IEP because the student was a "bright young lady who was making it, [and was] learning in class," and the CSE "felt that she did not need another adult in the room at that time" (Tr. p. 322). She added that there was a switch between second and third grade where the student is "reading to learn and not learning to read" and the support the student needed with learning to read would be provided in the resource room and she would spend more time with her peers in the regular classroom "without another adult in the room" (Tr. p. 322).

Consistent with the view of the interim director, the evidence in the hearing record shows that the student made progress in developing reading skills during the 2018-19 school year. The student's special education teacher testified that the student's results on the WIST showed "great improvement" over the course of the school year, and she noted that the student went from the 3rd percentile to the 23rd percentile in word identification, from the 9th percentile to the 30th percentile in spelling, from the 3rd percentile to the 25th percentile in foundational literacy, and from the 2nd percentile to the 60th percentile in sound-symbol relationships (Tr. p. 312; compare Dist. Ex. 66, with Dist. Ex. 67). She also related that the information provided to the student's parents in a monthly report showed the student's progress in reading (Tr. pp. 303-09; see Dist. Exs. 53-55, 58). A comparison of reports from these parent meetings during the 2018-19 school year showed that the student had progressed from Wilson Reading System level 1.3 to level 2.3 and was reading independently at level J in the classroom (compare Dist. Ex. 53 at p. 1, with Dist. Ex. 56 at p. 1). In addition to reflecting the student's progress with Wilson reading, the April 29, 2019 meeting report noted that, according to the student's teacher, the student was able to read the text in her math workbook and on tests, and, with regard to writing, the student took notes and wrote about all the planets from the perspective of being on the planet and met grade level expectations on this task (Dist. Ex. 56). The student's IEP goal progress reports for the 2018-19 school year indicated that the student achieved a goal related to reading sight words and was progressing satisfactorily toward goals related to reading rate (correct words per minute), decoding decodable words, and spelling phonetic words (Dist. Exs. 59-61). The student's report card for the 2018-19 school year indicated that the student had moved from "approaching secure" to "secure" on numerous skills related to understanding literature and informational texts and writing mechanics (Dist. Ex. 62). The report further indicated that the student's foundational reading skills and spelling were developing (id.).

The hearing record also supports the district's assertion that the May 2019 IEP addressed the student's continued difficulties in reading. The interim director testified that the May 2019

¹⁶ The interim director disagreed with the parents' assertion that the student was "lag[ging] significantly behind her peers" (Tr. pp. 529-30; see Dist. Ex. 46 at p. 1).

CSE developed an IEP to address the areas where the student continued to struggle, including decoding, encoding and fluency, and felt that those needs would be appropriately addressed by daily resource room (Tr. pp. 525-56). He noted that the student continued to have deficits in decoding and opined that the May 2019 CSE developed goals to address those needs (Tr. p. 531). A review of the May 2019 IEP shows that it included reading goals to address the student's fluency, decoding, sight word recognition and encoding, which were areas of need identified in both the May 2018 reading evaluation and September 2018 psychoeducational evaluation, as well as the student's May 2019 i-Ready reading assessment, and April 2019 WIST (compare Dist. Ex. 1 at p. 1 with Dist. Exs. 14 at p. 1; 21 at pp. 5-6; 65 at p. 1; 67 at p. 1). The student's special education teacher testified that these goals were based on the student's "present level of function," and her academic needs and weaknesses identified by testing or demonstrated in the classroom (Tr. pp. 318-19). She noted that the goals represented an increase in academic expectations for the student and pointed to an increase in words per minute related to fluency and changing from first grade sight words to third grade sight words as examples of increased performance expectations (id.). The special education teacher testified that with regard to writing, spelling was the student's area of difficulty at the time and the IEP prepared by the CSE included an "encoding" goal to address this weakness that could be considered either a reading or writing goal (Tr. p. 320).

The May 2019 IEP also included accommodations such as clarification of directions, pairing of visual and auditory supports, additional time for assignments, use of a graphic organizer for writing assignments, breaking down directions and tasks, checking for understanding, an alphabet reference for the student's desk, preferential seating, and the use of a slant board (Dist. Ex. 1 at pp. 12-13). The May 2019 IEP also included access to an iPad and a quarterly assistive technology consultation and testing accommodations including allowing portions of tests to be read to the student and a separate testing location (id. at p. 14).

3. Multisensory Instruction

In her decision, the IHO additionally found that, even though a reading goal in the May 2019 IEP "contemplate[d]" multisensory instruction, nothing in the IEP suggested that the curriculum was intensive or contained the amount of multisensory instruction necessary to address the student's dyslexia (IHO Decision at pp. 13, 30). While the district asserts on appeal that it was not obliged to follow the September 2018 psychoeducational evaluation report recommendation for "multisensory, intensive curriculum," the IHO overlooked that the district was already providing the student with an educational program using multisensory based instruction during the 2018-19 school year as well as evidence that the May 2019 CSE contemplated the continued use of the same for the 2019-20 school year.

In the September 2018 psychoeducational evaluation report, the evaluator recommended that the student be provided with "an educational program utilizing a multi-sensory, intensive and sequential phonetically-based curriculum" to "teach the basics of word formation in a sequential and predictable fashion utilizing the cumulative acquisition of symbolic relationships" (Dist. Ex. 21 at p. 12). The district interim director testified, and the May 2019 IEP noted that during the 2018-19 school year, the student was receiving multisensory instruction using the Wilson Reading System during resource room (Tr. p. 526; Dist. Ex. 1 at pp. 1, 2,9). The student's special education teacher confirmed that she provided the student with the "Wilson remediation specialized program" in resource room and noted that the May 2019 CSE recommended 40 minutes per day

of resource room to provide the student with "solely reading support and a multi-sensory approach to address her reading needs" (Tr pp. 306, 321-22). The student's special education teacher reported that she utilized multisensory reading and writing programs during the 2018-19 school year that included providing Wilson Reading System instruction in the resource room and provided direct consultant teacher services for the Foundations instruction provided in the student's regular classroom (Tr. p. 297).^{17, 18}

The interim director further confirmed that the May 2019 CSE "anticipated that [the student] would continue with multisensory reading instruction" during the 2019-20 school year (Tr. p. 526). When asked if the CSE was required to specify methodology, such as a multisensory reading program on a student's IEP, the interim director testified that identifying a methodology was not required in regulation, however, the CSE was required to identify the student's needs and provide services to address the specific learning needs of the student (Tr. p. 533). The interim director noted that, although not required, the May 2019 IEP "include[d] in the minutes that [the district] [was] going to continue with the Wilson methodology" (compare Tr. p. 533 with Dist. Ex. 1 at p. 2). The May 2019 IEP reflected use of the Wilson Reading System and identified that the student's special education teacher was then-currently working with the student on "Wilson 2.4" and would continue using "Wilson" with the student during the 2019-20 school year (Dist. Ex. 1 at pp. 1, 2). The May 2019 IEP also noted the impact of the student's dyslexia on her performance in the classroom and identified the use of multisensory reading instruction during resource room to support the student's reading needs (id. at p. 10). The use of multisensory instructional methods was additionally reflected in one of the student's reading goals which specified the use of a controlled reading passage "from a multi-sensory instruction program" (id. at p. 11). Moreover, in a letter to the district following the CSE meeting the parents, albeit making further inquiries, acknowledged that "[a]t the CSE meeting it was suggested that the school was going to use a Wilson program to teach [the student] in the [r]esource [r]oom" (Parent Ex. I at p. 5).

¹⁷ The student's special education teacher noted that Foundations was used for whole class instruction in encoding and decoding skills (Tr. p. 294).

¹⁸ In her decision, the IHO noted that the student's special education teacher for the 2018-19 school year was not certified in Wilson Reading level one (IHO Decision at p. 12); however, State regulations do not require that teachers have certification in a specific reading methodology, such as Wilson Reading. Rather, reading teachers are expected to be "knowledgeable about developmentally appropriate and well-balanced instructional methodologies in reading" ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About "Lack of Instruction" in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>). State regulation provides the qualifications for who may provide specially designed reading instruction (8 NYCRR 200.6[b][6]; see 8 NYCRR 52.21[b][3][xi], 80-2.7, 80-3.3, 80-3.7[a][3][iv]). Additionally, when "[w]hen a remedial service is included in the individualized education program, such service shall be provided by appropriately certified or licensed individuals" (8 NYCRR 200.6[b][1]). Here, while not certified at Wilson level one by the Wilson Reading program, the student's special education teacher held State certificates in elementary education and special education and was trained in Wilson, Preventing Academic Failure, Foundations, and Just Words (Tr. pp. 292-94). She had also completed the Wilson Reading "two day" (18 hour) training, albeit "quite some time ago," and took a two day "refresher" course in September 2019 (Tr. p. 295; Parent Ex. N at p. 1). Further, while the student's special education teacher did not become certified in Wilson level one until 2020, she was enrolled and taking coursework during the 2019-20 school year (Tr. p. 296).

While the IHO found that the special education services offered by the district were not sufficiently intensive and did not contain the amount of multisensory instruction necessary to address the student's dyslexia, neither the September 2018 psychoeducational evaluation report nor any other documentation available to the May 2019 CSE actually specified a minimum threshold of multisensory instruction the student required to appropriately address her delays in reading or indicated that the program recommended by the CSE offered insufficient multisensory instruction (Dist. Ex. 21 at pp. 12-14). As the district points out and the IHO acknowledged, the student was in fact showing meaningful progress even if it was uneven, and the May 2019 IEP called for a multisensory approach.¹⁹ While I can certainly appreciate that the parents might have wished for more intensive services in a special class in a private school, in my view that trends to closely to a notion of maximization of the student's potential, which was not required. I am convinced that the district offered the student an IEP that was reasonably calculated to enable her to make educational benefit in light of her circumstances and accordingly the IHO must be reversed on this point.

B. 2020-21 School Year

1. Student's Needs

The second IEP in dispute between the parties was developed after the student had been unilaterally placed by the parents for approximately one school year. For the 2019-20 school year the student attended Windward, where her classes ranged from seven to ten students, with two teachers providing instruction (Tr. pp. 923-28). Preventing Academic Failure, an Orton-Gillingham based reading program, was embedded in all of her classes (Tr. pp. 819-20). The Windward CSE liaison testified that students at Windward are grouped homogeneously for language arts and math (Tr. p 832). Each student received three periods per day of language arts instruction: a reading class, a writing class and a skills class (Tr. p. 833).

The hearing record shows that the March 2020 CSE relied on the May 2019 IEP, progress reports from Windward, and a Windward "test grid" when developing the student's IEP for the 2020-21 school year (Tr. pp. 102, 107, 326; Dist. Ex. 2 at p. 1).²⁰ The district director of special services testified that the parents, the CSE liaison from Windward, and the student's language arts teacher from Windward provided additional information on the student's performance (Tr. p. 107).

A review of the evaluative information used by the March 2020 CSE shows that the student continued to demonstrate delays in reading decoding and fluency. On the September 2019 IOWA language arts assessment, the student scored in the 26th percentile for vocabulary and in the 12th

¹⁹ The IHO found that a "multisensory, intensive curriculum" was required in the IEP, but the IDEA more modestly calls for the IEP to provide services that allow the student to "be involved in and make progress in the general education curriculum" (34 CFR 300.320[a][4][ii] 8 NYCRR 200.4[d][2][v][2]), which it appears the district was doing in the least restrictive environment, but the district was not required to place a different "intensive curriculum" in a student's IEP.

²⁰ The "test grid" referred to in the March 2020 IEP appears to be a single page document that included the results of the student's September 2019 IOWA assessment in ELA and math, and the results of a November 2018 Windward Coding Test in reading and September 2019 Windward Coding Test in spelling (Parent Ex. W; see Tr. p. 864; Parent Ex. LL).

percentile for reading (Parent Ex. W). The student's quarter two Windward progress report for the 2019-20 school year showed that the student "frequently demonstrated decoding abilities, "occasionally" read fluently, and benefitted from explicit instruction in word attack strategies (Dist. Ex. 70 at pp. 2-3). The student "frequently" demonstrated literal comprehension and continued to work on strategies to answer high-level comprehension questions and summarize a story (id. at pp. 3). The Windward progress report noted that the student "frequently" used capitalization and punctuation correctly and composed complex sentences more independently but only "occasionally" demonstrated the writing skills listed in the report (id.). On the IOWA math assessment, the student scored in the 99th percentile for computation and the 64th percentile for mathematics (Parent Ex. W). The Windward progress report related that the student was a conscientious math student who used various strategies to solve multistep word problems (Dist. Ex. 70 at p. 4). In science and social studies, the student was "frequently" or "consistently" meeting classroom expectations and demonstrating concepts and skills (id. at p. 5).²¹

The student's strengths and needs were reflected in the minutes of the March 2020 CSE meeting, which stated that the student's reading decoding was slow, and she needed instruction to decode unfamiliar words, but was starting to apply strategies independently which was helping her to become more accurate (Dist. Ex. 2 at p. 1). According to the CSE meeting minutes, the student's literal comprehension was good, and she could make connections and answer high-level questions but sometimes needed support to do so (id.). The March 2020 IEP noted that the student could decode short vowels consistently, and frequently decoded words with consonant blends, r-controlled vowels, suffixes, two or more vowels, and irregular words (id. at p. 5). She frequently identified story components, the main idea of a story, and made logical inferences, and occasionally summarized information (id.). The March 2020 CSE meeting minutes indicated that the student wrote beautifully but at a slower pace and had benefitted from instructional strategies for creating more complex sentences (id. at p. 2). The IEP noted that the student was consistently able to spell words with short vowels and frequently spelled words with consonant blends, common suffixes, two or more syllables, and irregular words (id. at p. 5). In addition, the student was frequently able to capitalize and punctuate correctly, as well as write sentences using conjunctions, combine sentences, and use precise and varied vocabulary (id.). According to the IEP, the student occasionally generated paragraphs that included a topic sentence, supporting details and a concluding sentence (id.). The March 2020 CSE meeting minutes related that in math, the student struggled most with word problems and noted that the student's teacher broke down the language of the problems for the class, with multi-step problems being completed mostly as a group (id. at p. 2). The IEP indicated that the student demonstrated strength in all math domains, but at times needed assistance attending to a task, retrieving multiplication and division facts, and solving multistep word problems (id. At p. 5). The student's social and physical development were reported to be age appropriate (id. at p. 6).

²¹ While the results of a September 2019 Windward Coding Test for spelling was included in the test grid, analysis of this information is difficult, as the test grid included two sets of numbers for the same date, and in her testimony, the Windward liaison indicated that she was unsure why the grid included two sets of scores (Tr. p. 857; Parent Ex. W; Dist. Ex. 2 at p. 2).

2. Consultant Teacher and Reading Services

I will next turn to the district's challenge to the IHO's finding that the 2020-21 IEP recommendations failed to offer the student a FAPE because the IEP only supported the student's reading and writing needs in her English class and failed to address the student's need for intensive reading intervention throughout the school day (IHO Decision at pp. 13-15, 30). The IHO also found that the IEP failed to account for the student's progress at Windward in a small classroom with reading support in all content areas (id. at pp. 30-31).

The hearing record shows that the March 2020 CSE recommended that the student receive 90 minutes per day of direct consultant teacher services in ELA for the 2020-21 school year to address the increased writing demands in fourth grade and the expectations of the "more challenging" curriculum (Tr. pp. 109-10, 328-29; Dist. Ex. 2 at p. 8). The director of special services testified that the March 2020 CSE added daily pull-out reading services to address the student's decoding and encoding goals (Tr. p. 110). She noted that the student's reading services were added as a related service rather than a special education service because related services were intended to "help students build skills that help them access the general education program," and this was a targeted session to work on the recommended goals (id.). According to the district special education teacher, the March 2020 CSE recommended 90 minutes per day of direct consultant teacher support for ELA because the student's writing was slow, her spelling was weak, and she needed adult assistance to write, and the consultant teacher would help the student with the increased demands of returning to the district (Tr. pp. 328-29). In response to the district's recommendation for daily reading instruction and consultant teacher services in a general education setting, the Windward CSE liaison opined that the student needed intensive language-based support in all subject areas, was responding very well to the small class size at Windward, and was not ready for anything less supportive than her Windward program or something comparable (Tr. p. 113; Dist. Ex. 2 at p. 2). The director of special services reported that the district had very small classes but that they were special education classes (Tr. p. 114). She stated that she felt "academic instruction only with disabled peers in such a small class" was overly restrictive based on the student's needs and recommended goals (id.). The director opined that the IEP developed by the March 2020 CSE would have enabled the student to make educational progress and noted that the March 2020 CSE reviewed all the information available, discussed the student's needs with representatives of Windward and the student's parents, and developed goals that were aligned with the student's identified needs (Tr. pp. 114-15). The director further opined that "all of that together produced an IEP that described who [the student] was as a learner with her strengths and her needs and "recommended a program that would enable her to make progress on those areas that [were] difficult for her" (Tr. pp. 114-15).

To address the student's reading needs, the March 2020 IEP included goals for decoding a list of 50 decodable words, encoding a list of decodable words, and summarizing literary or informational texts in writing by creating a bulleted list (Dist. Ex. 2 at p. 7). The hearing record shows that the goals were based on information provided by Windward and the results of the student's September 2019 IOWA assessments (Tr. p. 327; Dist. Ex. 2 at p. 2). The district special education teacher testified that the March 2020 IEP included a reading comprehension goal based on information from Windward included in the comment section of the March 2020 IEP which

noted that the student's literal comprehension was good, but she needed assistance with answering higher level questions (Tr. p. 327). She related that the writing goals in the March 2020 IEP were added based on the Windward staff's report that the student was "occasionally" using a graphic organizer for writing and "occasionally" producing a five sentence paragraph, so goals were added to address these skills (Tr. p. 328).

While the IHO found that the student made progress at Windward "in small classrooms with reading support in all content areas to address her dyslexia" (IHO Decision at pp. 30-31), the CSE was not required to duplicate the identical setting used in the private school in order to offer a FAPE to the student (see, e.g., M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). Although the March 2020 IEP does not specifically describe how the student's reading and writing needs would be met in content areas other than ELA, the student's February 2020 Windward progress report showed that the student was "frequently" or "consistently" meeting expectations in math, science, and social studies (Dist. Ex. 70 at pp. 4-5). Thus, the evidence does not tend to show that the student required the same level of support in all subjects. Further, the March 2020 IEP also provided for the student's use of an iPad and included accommodations for clarified directions, pairing of visual and auditory supports, additional time for assignments, use of graphic organizers for writing, directions and tasks broken into smaller components, checks for understanding, and preferential seating, as well as testing accommodations allowing certain portions of tests to be read to the student and a separate testing location (Dist. Ex. 2 at pp. 8-9). The assistive technology and classroom accommodations were to be implemented daily, throughout the day (id.).

Therefore, the evidence does not show that the district failed offer the student a FAPE for the 2020-21 school year, and the IHO's finding to the contrary must be reversed. The programming recommended by the CSE for that school year was reasonably calculated to enable the student to receive educational benefit in light of her circumstances, and beyond the direct reading instruction and consultant teacher services listed in the IEP, the evidence does not show that she required placement in a more specialized setting in order to make meaningful progress.

C. 2021-22 School Year

1. May 2021 IEP

a. Student Needs

As noted above, the student continued to attend Windward for the 2020-21 school year. In May 2021 the CSE met and developed an IEP that reflected updated assessment of the student conducted by the district that included an October 26, 2020 psychoeducational evaluation and May 5, 2021 psychoeducational evaluation addendum, November 16, 2020 educational evaluation and May 5, 2021 educational reevaluation addendum, May 18, 2021 speech-language evaluation, and May 19, 2021 occupational therapy evaluation (Dist. Ex. 3 at pp. 1-2, 5-10). The May 2021 IEP reflected that the May 2021 CSE relied on additional information from the parents, including a May 12, 2021 Windward progress report and a May 12, 2021 Windward "standardized test report" (id. at p. 5). A review of the results of the district reevaluation showed that the student was

functioning within the average range in fine and visual motor skills, expressive and receptive language, memory, behavior, attention, executive functioning, and social/emotional skills (Dist. Exs. 32 at pp. 12-16; 35; 36).²² Results of the November 2020 and May 2021 educational evaluations showed that the student continued to demonstrate deficits in reading decoding and reading fluency, but her broad reading, broad mathematics, and broad written language cluster standard scores on the W-J IV TOA were in the average range (Dist. Exs. 30 at pp. 8-9; 79 at p. 3). The Windward standardized test report showed that on a November 2020 administration of the IOWA reading assessment the student's performance placed her in the 51st percentile for vocabulary and the 37th percentile for reading (Dist. Ex. 33). On the IOWA math assessment, the student received scores in the 98th percentile for computation and 88th percentile for mathematics (id.).

The May 2021 IEP identified the student's present levels of performance based on the student's April 2021 Windward progress report and noted input from the Windward liaison (Dist. Ex. 3 at pp. 1-4; see Dist. Ex. 34). The May 2021 IEP noted that the student's Windward progress report showed the student was proficient in her ability to read accurately in connected text, understand literal information, identify story components, and make logical inferences (Dist. Ex. 3 at p. 10; see Dist. Ex. 34 at p. 2). She had demonstrated progress applying decoding and spelling strategies, reading fluently, and summarizing information (Dist. Exs. 3 at p. 10; 34 at p. 2). In addition, the IEP indicated that the student was proficient in writing grammatically correct sentences and used precise and varied vocabulary (id.). In addition, the student demonstrated progress in applying strategies to write linguistically complex sentences, use an outline to organize and sequence information, and produce a cohesive written composition (id.). Consistent with the Windward April 2021 progress report, the IEP noted that the student was proficient in most areas of number sense and computation, could solve basic word problems and had demonstrated progress in solving multistep word problems (Dist. Exs. 3 at p. 7; 34 at p. 3). The May 2021 IEP additionally indicated that, while the student's scores on assessments of behavior and social/emotional skills were within average expectations, she benefitted from occasionally meeting with the Windward school psychologist to address social/emotional needs and would benefit from transitional counseling services upon her return to the district (Dist. Ex. 3 at p. 12).

b. Consultant Teacher, Resource Room, and Reading Services

The IHO found that the district offered the student a FAPE for the 2021-22 school year because the CSE increased the targeted program of instruction and included writing goals in the May 2021 IEP that were tailored to the student's needs (IHO Decision at pp. 15-17, 31). Moreover, the IHO found that the general education setting recommended for the 2021-22 school year was the student's LRE (id. at p. 31).²³ In their cross-appeal related to the 2021-22 school year, the

²² Responses by the student's mother to the BASC-3 yielded a clinically elevated score on the conduct disorder symptoms scale; however, the evaluator reported that, according to the parent, the student experienced only 2 of 15 symptoms of conduct disorder (Dist. Ex. 32 at pp. 5, 12). The evaluator noted that the student's mother expressed concern regarding the student's emotional regulation, especially when the student was held accountable for her actions (id. at pp. 5, 10).

²³ The IHO held that the neuropsychologist who conducted the IEE did not explain why such a restrictive program was recommended considering the "great strides in the reading" made by the student (IHO Decision at p. 31).

parents focus on the December 2021 IEP and their view that the CSE failed to incorporate the recommendations made by the November 2021 neuropsychological IEE; however, they do not grapple with the IHO's findings regarding the May 2021 IEP, which was the operative IEP in place at the time the parents made their decision to continue the student's unilateral placement at Windward for the 2021-22 school year. In any event, review of the hearing record supports the IHO's findings related to the May 2021 IEP.

To meet the student's educational needs, the May 2021 CSE recommended that the student receive 45 minutes per day of direct consultant teacher services in ELA, 45 minutes per day of direct consultant teacher services in math, and 40 minutes per day of resource room services (Dist. Ex. 3 at p. 14). The May 2021 CSE also recommended the related services of 40 minutes per day of small group reading instruction in a separate location and, for the period from September 9, 2021 through November 5, 2021, 30 minutes per week of individual counseling (*id.*). The district director of special services testified that the recommendations of the May 2021 CSE were based on the evaluative information before the CSE which identified the student as having difficulties with decoding, fluency, summarizing information, written expression, and multi-step mathematical word problems (Tr. p. 138). The student's April 2021 Windward progress report showed that the student was "proficient" in reading accurately in connected text and "demonstrate[ed] progress" in applying spelling and decoding strategies and reading fluently (Dist. Ex. 34 at p. 2). The director explained that the May 2021 CSE recommended consultant teacher services for the 2021-22 school year with a portion of those services to be provided in math as the student would be transitioning to a math class with less support (Tr. p. 146).²⁴ She noted that the CSE recommended reading services and thought that the student would benefit from more time in a resource room with small group instruction focused on her writing goals (Tr. pp. 146,148). According to the director, the May 2021 CSE also recommended six weeks of "transitional" counseling services to support the student as she transitioned to the district (Tr. p. 147).

The May 2021 IEP included reading goals focused on decoding, summarizing text, and a new goal focused on reading fluency (compare Dist. Ex. 3 at p. 13, with Dist. Ex. 2 at p. 7). To address the student's writing needs, the May 2021 CSE added two new writing goals focused on using reference materials and writing a three-paragraph essay and continued the goal related to the use of a graphic organizer that was included in the March 2020 IEP (compare Dist. Ex. 3 at pp. 13-14, with Dist. Ex. 2 at pp. 7-8). The May 2021 CSE also added a math goal related to solving two-step word problems and a social/emotional goal for fostering positive relationships with adults at school (compare Dist. Ex. 3 at p. 14, with Dist. Ex. 2 at pp. 7-8). The May 2021 IEP continued the accommodations from the March 2020 IEP and included two new accommodations for scaffolding to support comprehension of text, and "review and reinforcement" (compare Dist. Ex. 3 at p. 15, with Dist. Ex. 2 at p. 8). According to the director of special services, these

²⁴ The director explained that due to COVID protocols the student's math group was the same during the 2020-21 school year as her language arts group, even though prior and then-current testing revealed that the student had a lot of strengths in math (Tr. p. 145). She noted that the district understood that the student had been in a very supportive math class and did not want the student to feel anxious about being in a different setting because she had so much math support at Windward (Tr. pp. 145-46). The director explained that she "wanted to make sure we put support in the math class both for sort of socially-emotionally and she would be transitioning to a new school as well as to address the math goal" (Tr. p. 146).

accommodations were added because they were supports the student was benefiting from at Windward (Tr. p. 149).

2. December 2021 IEP

a. Student's Needs

The CSE reconvened on December 2, 2021 to review the results of the November 2021 neuropsychological IEE, a July 2021 abbreviated Windward Coding Test for reading, a Windward "test grid," and July 2021 WIST scores (Tr. p. 162; Dist. Exs. 4 at p. 1; 72). The December 2021 IEP noted that the private neuropsychologist participated in the December 2021 CSE meeting, and the CSE discussion of the results and recommendations of the November 2021 neuropsychological IEE were reflected in the IEP (Tr. pp. 164-68; Dist. Ex. 4 at pp. 1-2, 6-8, 12-13).

Review of the results of the evaluative information relied upon by the December 2021 CSE showed that on the July 2021 WIST the student performed in the average range on the word identification (63rd percentile), spelling (25th percentile), fundamental literacy ability (39th percentile), and sound-symbol knowledge (68th percentile) subtests (Dist. Ex. 68 at p. 2). On the November 2021 neuropsychological IEE, the student's scores on measures of phonological processing, visual-spatial/motor functioning, attention and executive functioning, and learning and memory function were all within the average range (Dist. Ex. 45 at pp. 9, 18, 19). The evaluating neuropsychologist reported that the student had demonstrated "significant growth in her ability to convert letter combinations into sounds," as exemplified by her average performance on the WIAT-III pseudoword decoding subtest, and "remarkable relative gains" in her general phonemic decoding speed, which was now falling in the "lower limits" of the average range (*id.* at pp. 13-14). The neuropsychologist noted that while the student's decoding and fluency had improved, she exhibited "unevenly developed" written expression skills (*id.* at p. 10). On the WIAT-III, the student's subtest score for sentence composition fell within the average range, but her standard score on the sentence building component of this subtest was 73 (4th percentile), which was in the "very low" range (*id.* at p. 20). On the Test of Written Language-Fourth Edition, the student attained a standard score of 81 (10th percentile) on the spontaneous writing composite (*id.*). The neuropsychologist noted that the student "showed emerging challenges in written expression" and that her challenges in writing mechanics, as well as generating, organizing, and clearly expressing her thoughts and ideas in written format, supported a diagnosis of specific learning disorder with impairment in written expression (spelling accuracy, grammar and punctuation accuracy and clarity/organization of written expression) (*id.* at p. 14). The neuropsychologist recommended that the student remain in a "full-time, specialized education program that provide[d] intensive reading and writing intervention" that was integrated throughout the curriculum, which she testified was warranted based on "some residual challenges related to [the student's] dyslexia" (Tr. pp. 959-61; Dist. Ex. 45 at p. 15).

b. Consideration of IEE

For the December 2021 IEP, the IHO found that the CSE considered the recommendations set forth in the November 2021 neuropsychological evaluation, "refined" the student's program by recommending "more-intense reading interventions," and added writing and social/emotional goals that were tailored to the student's individual needs (IHO Decision at pp. 17-20, 31). The

parents, in their cross appeal, argue that the IHO erred in finding the district offered the student a FAPE. The parents argue the IHO erred in finding the December 2021 IEP appropriate in light of recommendations of the private neuropsychologist that the student remain in a special education school, even given her improvement, because she continued to require intensive reading and writing intervention throughout the curriculum.

Regarding the parents' assertion that the CSE failed to adopt the findings and recommendations of the November 2021 neuropsychological IEE, a CSE must consider IEEs obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakistic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., Mr. P., 885 F.3d at 753; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]).

Here, a review of the evidence in the hearing record, including the meeting minutes and present levels of performance in the December 2021 IEP (see Dist. Ex. 4 at pp. 1-3, 6-14), shows that the CSE considered the November 2021 neuropsychological IEE.

To meet the student's needs related to her diagnosis of specific learning disorder with impairment in written expression, the December 2021 IEP included two additional writing goals related to using correct capitalization and correct punctuation (Dist. Ex. 4 at p. 16). According to the director of special services these goals were developed "based on information that [the neuropsychologist] reviewed with [the CSE] on the finding of her evaluation" (Tr. p. 168). The director noted that, to meet the student's social/emotional needs identified by the neuropsychologist and the student's mother, the December 2021 CSE recommended weekly counseling services and added a goal focused on managing the student's anxiety in school (Tr. p. 168-70; Dist. Ex. 4 at p. 2). The director noted that this was a change from the May 2021 IEP, which included six weeks of transitional counseling (Tr. p. 170). The May 2021 IEP noted that the CSE asked the neuropsychologist about the previously recommended goals and the new proposed goals, and she "stated that they were appropriate" (Tr. p. 170; Dist. Ex. 4 at p. 2). Based on input from the neuropsychologist, the December 2021 IEP changed the teacher-to-student ratio in the resource room and reading services from 5:1 to 3:1, added assistive technology in the form of audiobooks and headphones, and changed the student's extended time on tests to double time (Tr. pp 172-73; Dist. Ex. 4 at pp. 18-19).

During her testimony, the neuropsychologist stated that there had been "vast improvements" in the student's reading speed, but her writing "[was] not progressing" and noted that the student now met the criteria for a "co-occurring disorder in written expression" (Tr. p. 960). She opined that it was "really important that [the student was] placed in a specialized school" because she needed "very intensive and frequent reading and writing intervention that [was] occurring concurrently," and in a multisensory, language-based program that allowed intervention services to be integrated throughout the content areas by teachers who were specially trained to work with children with language disabilities (*id.*).

Notwithstanding the neuropsychologist's view that the student required a private school, generally, district staff responsible for formulating the student's IEP 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]). Moreover, 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, but the private neuropsychologist was not bound to adhere to the same mandates as the district personnel in formulating recommendations for the student, and her evaluation report reveals little to no consideration of the benefits of access to nondisabled peers during her assessment when she recommended continued full-time placement in a special class and/or private school. Where, as here, the student could be educated satisfactorily in a general education classroom with supplemental aids and services, the placements recommended in the December 2021 IEP represented the student's LRE for the 2021-22 school year (*see T.M.*, 752 F.3d at 161-67; *Newington*, 546 F.3d at 119-20).

Here, the evidence in the hearing record supports the IHO's determination that the program and annual goals recommended by the district for the 2021-22 school year were individually tailored to meet the student's needs (IHO Dec. at pp. 15-20). In addition to the findings made by the IHO, the hearing record further shows that, contrary to the parent's assertion, the December 2021 IEP identified the student's diagnosis of specific learning disorder with impairment in written expression and noted that her weakness in reading and writing skills impacted her progress in the general education classroom (Dist. Ex. 4 at p. 15). As such, there is no reason to disturb the IHO's finding that the district offered the student a FAPE for the 2021-22 school year as the two IEPs created by the district CSE for that year were reasonably calculated to enable the student to receive educational benefit in light of the student's circumstances.

D. 2022-23 School Year

1. Student's Needs

The CSE convened on May 6, 2022 for the student's annual review and to develop the student's IEP for the 2022-23 school year (Dist. Ex. 5 at p. 1). While there were no new evaluations of the student for the May 2022 CSE to review, the hearing record shows that the CSE relied on reports from the parents and Windward CSE liaison, the student's April 2022 Windward progress report and April 2022 Windward report card, and the September 2021 Windward "test grid" (Tr. pp. 175-76; Dist. Ex. 5 at p. 4; see Dist. Exs. 73-75).

The September 2021 test grid indicated that on a May 2021 administration of the IOWA assessment the student scored in the 84th percentile for vocabulary and 96th percentile for reading (Dist. Ex. 73). In addition, the student scored in the 94th percentile for computation and 86th percentile for mathematics (id.). The student's Windward 2021-22 winter progress report showed that the student was "demonstrating progress" or "approaching proficiency" in all reading skills (Dist. Ex. 74 at p. 2). The progress report noted that the student had made steady progress in decoding and reading with expression (id.). Regarding writing, the student was "approaching proficiency" in all areas with the exception of "[w]rit[ing] syntactically accurate sentences" where she was "demonstrate[ing] progress" (id.). According to the progress note, proofreading remained an area of difficulty for the student, and she was encouraged to carefully read written work aloud to locate and revise errors (id.). The progress report went on to indicate that the student was "proficient" in most math skills and "approaching proficiency" on most tasks in social studies and science (id. at pp.3-5). The student's 2021-22 third-quarter report card indicated that the student was performing "good" to "very good" in all areas with the exception of "understanding grammatical concepts" where her performance was rated as "G-" (good minus) (Dist. Ex. 75).

2. ICT, Resource Room, and Reading Services

The IHO found that the special education services recommended by the district for the 2022-23 school year were tailored to meet the student's individual reading and writing needs and would be delivered in the LRE for the student (IHO Decision at pp. 21, 31). The parents, in their cross-appeal, contend that the IHO offered insufficient reasoning to support the finding that the May 2022 IEP met the student's needs, noting in addition that it was unclear why the IHO deemed ICT services to be less restrictive than consultant teacher services given that both services occurred in the general education classroom. Further, the parents argue that the extra 15 minutes of instruction was insufficient to meet the student's needs.

To meet the student's special education needs, the May 2022 CSE recommended that the student participate in a one-hour ICT class for ELA per day, a one-hour ICT class for math per day, 40 minutes of resource room in a group (3:1) per day, 40 minutes of reading services in a group (3:1) per day, and 30 minutes of individual counseling per week (Dist. Ex. 5 at pp. 2, 15). The May 2022 CSE also recommended that the student receive the support of a teaching assistant two times per day for 40 minutes in science and social studies (id. at pp. 3; 16; see Tr. pp. 182-83). The May 2022 IEP included goals to address the student's needs related to decoding, summarizing literary or informational text, and increasing reading fluency (id. at p. 14). Goals for writing included using reference materials to proofread and correct spelling in written work, writing a

three-paragraph essay, using a graphic organizer to develop a writing piece with an introduction, supporting information and conclusion, and using correct punctuation (*id.*). The May 2022 IEP also included a goal for solving two-step word problems and two social-emotional goals (*id.*). With regard to the removal of a goal for capitalization in the May 2022 IEP, the district special education teacher testified that the parents and the Windward CSE liaison reported that the student was more consistent in applying the rules of capitalization in writing however she was still "not consistent" with using punctuation (Tr. p. 344).

The May 2022 IEP included management needs that specified that the student required visuals to support instruction and review and reinforcement of information taught, language broken down, checks for understanding, graphic organizers to support writing, teacher scaffolding to support comprehension of text, and encouragement to ask to have tests read to her if needed (Dist. Ex. 5 at p. 13).²⁵ The student's diagnoses of dyslexia and specific learning disorder with impairment in written expression were noted in the May 2022 IEP as affecting the student's progress in the regular education curriculum (*id.*). The May 2022 IEP also included assistive technology for the student in the form of access to an iPad, audio books, and headphones as well as a 30-minute assistive technology consultation each quarter to support the teacher and the student's access to technology (*id.* at p. 16).

The director of special services testified that the May 2022 CSE recognized that the student still had needs related to decoding, reading fluency, summarizing information, essay writing, and solving multi-step word problems, as well as social/emotional needs related to coping with anxiety (Tr. p. 180). She noted that the student was moving to middle school for the 2022-23 school year and the "model" at the middle school was ICT services in ELA and math (Tr. p. 181). The director related that the May 2022 CSE continued to recommend reading services, resource room, and individual counseling (*id.*). Speaking to changes to the accommodations and supplementary services included in the May 2022 IEP, the director testified that the CSE added an accommodation to address the student's need for wait time before responding, and also recommended a teaching assistant to support the student in science and social studies (Tr. pp. 182-83). The district special education teacher testified that the student was coming from a "very structured" class at Windward, where they were just starting to read chapter books and the recommended ICT in ELA would help her with the increased academic demands (Tr. p. 344). She noted that the May 2022 CSE recommended ICT in math to help the student with learning to solve word problems, particularly as she was coming from Windward, where the students were solving word problems together (Tr. pp. 344-45). The district special education teacher further testified that resource room "would support everything" (Tr. p. 345).

Here, while the parents argue that the May 2022 CSE should have followed the neuropsychologist's recommendations, as noted above, verbal report from the student's parents and Windward staff, Windward progress and testing reports, and the results of the student's November

²⁵ In their due process complaint, the parents asserted that the May 2022 IEP noted the need for the student to have someone read tests to her but did not include a corresponding testing accommodation (Parent Ex. NN at p. 23). However, in her testimony the director of special services clarified that, at the May 2022 CSE meeting, the Windward liaison reported that Windward was not reading entire tests to the student, but rather encouraging her to ask if she needed clarification or a portion of the test read to her (Tr. p. 183). According to the director the May 2022 IEP reflected "something very similar" to this (Tr. p. 184).

2021 neuropsychological IEE showed that the student's reading and writing skills were largely in the average range. The hearing record supports the IHO's determination that the instructional program of ICT class for ELA and math, daily resource room, reading services in a group of three students, individual counseling, and support from a teaching assistant in science and social studies recommended in the May 2022 IEP was tailored to the student's individual reading and writing needs.

With respect to the parents' contention that the IHO erred in finding the ICT services less restrictive, the parents are correct that the IHO's statement was inaccurate insofar as direct consultant teacher services and ICT services are not distinguishable from an LRE perspective on the continuum of special education placements as they both consist of services provided to a student attending general education classes with nondisabled peers (see 8 NYCRR 200.6[d], [g]). However, the IHO's error is harmless in this instance as the parents are not arguing that the student lacked access to non-disabled peers and, in fact, were seeking a far more restrictive placement in a special class in a nonpublic school.

Based on the foregoing, I decline to disrupt the IHO's determination as the hearing record supports the finding that the May 2022 IEP was reasonably calculated to enable the student to make progress in light of her circumstances.

VII. Conclusion

Having determined that the evidence in the hearing record supports a finding that the district offered the student a FAPE for each IEP and school years at issue, the necessary inquiry is at an end and there is no need to reach the issues of whether Windward was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.²⁶

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated August 31, 2023 is modified by reversing those portions which found that the district denied the student a FAPE for the 2019-20 and 2020-

²⁶ Although, it is unnecessary to address equitable considerations, I will note that the district argument regarding the timing of the enrollment contract is without merit (Req. for Rev. at ¶¶ 56-58). This argument is in direct contravention of the controlling law found in the holdings of the Second Circuit Court of Appeals, which explain that so long as the parents cooperate with the district, and do not impede the district's efforts to offer a FAPE, even if the parents had no intention of placing the student in the district's recommended program, it is well-settled that their plan to unilaterally place a student, by itself, is not a basis to deny their request for tuition reimbursement (see *E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 461 [2d Cir. 2014]; *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 840 [2d Cir. 2014] [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]).

21 school years and ordered the district to reimburse the parents for the costs of the student's tuition at Windward for the 2019-20 and 2020-21 school years.

Dated: **Albany, New York**
 November 9, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER