



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-219

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Rye City School District**

### **Appearances:**

Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioner, by Kerry McGrath, Esq.

Ingerman Smith, LLP, attorneys for respondent, by Thomas Scapoli, Esq.

## **DECISION**

### **I. Introduction**

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

### **II. Overview—Administrative Procedures**

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

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

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

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

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. On March 4, 2022, the parent entered into an enrollment contract for the student's attendance at Windward for the 2022-23 school year (fourth grade) (Parent Ex. D).<sup>1</sup> A CSE convened on May 18, 2022, for an annual review of the student's educational programming for the 2022-23 school year (see generally Dist. Ex. 15). The May 2022 CSE recommended that the student receive integrated co-teaching (ICT)

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<sup>1</sup> Windward has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

services in English language arts (ELA) for 90 minutes daily and in math for 60 minutes daily, as well as three 60-minute sessions per six-day cycle of group (5:1) specialized reading instruction (Dist. Ex. 15 at pp. 1, 12-13). In addition, the May 2022 CSE recommended one 30-minute session per six-day cycle of group (5:1) occupational therapy (OT); one 20-minute session per six-day cycle of individual counseling, and one 30-minute session per six-day cycle of group (4:1) counseling (*id.* at pp. 1, 13). The May 2022 CSE also recommended program modifications and accommodations including refocusing and redirection, checks for understanding, visual supports for auditory information and during independent work, visual support of a tracker for reading, use of manipulatives for math, positive reinforcement, use of a graphic organizer, modified assignments, use of an editing checklist, assignments broken down into smaller parts, preferential seating, and modified homework assignments, as well as access to audio books (*id.* at pp. 13-14).

By letter to the district dated August 23, 2022, the parent disagreed with the recommendations contained in the May 2022 IEP, and asserted that ICT services in ELA and math, along with reading support, OT, and counseling, were insufficient to meet the student's fourth grade needs and not consistent with the weight of the information available to the CSE (Parent Ex. B at p. 3). As a result, the parent notified the district of her intent to unilaterally place the student at Windward for the 2022-23 school year and seek public funding for the placement (*id.* at pp. 1, 3). The CSE reconvened on September 15, 2022 to discuss the parental concerns raised in the August 23, 2022 letter (Dist. Ex. 18 at p. 1).

In a due process complaint notice, dated November 29, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (Dist. Ex. 1 at p. 1). In particular, the parent alleged that the CSE failed to adequately consider and rely on a private neuropsychological evaluation, the IEP inadequately described the student's needs and included insufficient or inappropriate management needs, annual goals, and program and service recommendations, and the district did not offer a school location with the capacity to implement the student's IEP (*id.* at pp. 2-4). For relief, the parent sought district funding for the costs of the student's tuition at Windward for the 2022-23 school year (*id.* at p. 4).

An impartial hearing convened on May 9, 2023 and concluded on July 13, 2023 after six days of proceedings (Tr. pp. 1-877).<sup>2</sup> In a decision dated September 5, 2023, the IHO determined that the district offered the student a FAPE for the 2022-23 school year (IHO Decision at pp. 14-18). Specifically, the IHO found that the district "complied with the procedural and substantive requirements of the IDEA" and developed an appropriate IEP for the student for the 2022-23 school year, including a statement of the student's needs based on current evaluative information and "reasonable annual goals and objectives that [we]re challenging to meet those needs" (*id.* at pp. 14, 17). In addition, the IHO found that, leading up to the CSE meeting at issue, the student had made progress during the 2021-22 school year in the district program, and, thereby, similar programming would likely continue to meet the student's needs and enable him to make progress for the 2022-23 school year (*id.* at pp. 15-16). The IHO found a nonpublic school, as preferred by the parent, "would be too restrictive" (*id.* at p. 16).

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<sup>2</sup> According to the IHO's decision, a prehearing conference was held on February 17, 2023 (IHO Decision at p. 4; *see also* Tr. p. 5). The IHO is reminded that State regulation requires the IHO to enter either a "transcript or written summary" of any prehearing conference into the hearing record (*see* 8 NYCRR 200.5[3][xi]).

Although the IHO found that the district offered the student a FAPE for the 2022-23 school year, she did note that Windward offered "no opportunity for the [s]tudent to interact with non-disabled peers" (IHO Decision at p. 18). In terms of equitable considerations, the IHO stated that the parent cooperated with the CSE and provided timely notice of her intention to unilaterally place the student in a nonpublic school (id.). Ultimately, the IHO denied the parent's request for tuition reimbursement at Windward for the 2022-23 school year (id.).

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

The parent appeals, alleging that the IHO erred in finding that the district offered the student a FAPE for the 2022-23 school year. More specifically, the parent asserts that the IHO's decision did not address whether the recommendation for ICT services for only a portion of the school day was appropriate, including whether the general education portions of the student's day would meet the student's needs. The parent also contends that the student's reading deficits could not be addressed in a "general education class with a [regular] education teacher." The parent further asserts that the student required multisensory or Orton-Gillingham instruction throughout the entire school day and that the IHO erred in finding that the IEP was appropriate without specifying this methodology.

In addition, the parent argues that the IHO erred in finding that the student made progress during the 2021-22 school year based on a teacher's running record assessment. The parent argues that the IHO should have considered the entire hearing record and given "appropriate weight to the standardized, non-teacher assessments," which would have supported a finding that the student needed a "more intensive program for the 2022-[23] school year." Further, the parent contends that the program offered by the district for the 2022-23 school year failed to address the student's social/emotional needs including anxiety and low self-esteem.

The parent also alleges that the IHO erred in considering the September 2022 IEP as it was developed after expiration of the 10-day notice period, triggered by the parent's August 23, 2022 letter. Regardless, the parent contends that the September 2022 IEP denied the student a FAPE as it also failed to recommend a small class and instruction using an Orton-Gillingham methodology throughout the school day.

Finally, the parent asserts that the IHO should have found that Windward was an appropriate unilateral placement for the student for the 2022-23 school year. As relief, the parent seeks an award of tuition reimbursement for the 2022-23 school year.

In an answer, the district responds to the assertions raised in the request for review, denying the parent's material allegations, and asserts that the IHO's decision should be upheld in its entirety.

#### **V. Applicable Standards**

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

T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (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]).<sup>3</sup>

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

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE for the 2022-23 school year (IHO Decision at pp. 14-18). The IHO accurately recounted the facts of the case (id. at pp. 5-12), identified the issues to be resolved (id. at pp. 6-7), set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2022-23 school year (id. at pp. 12-13), and applied that standard to the facts at hand (id. at pp. 14-18). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by

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<sup>3</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

both parties and, further, that she weighed the evidence and properly supported her conclusions. Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is not a sufficient basis presented on appeal to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while I will briefly discuss some the parent's allegations on appeal, particularly where the parent asserts IHO error related to over reliance on certain evidence or a failure to consider specific evidence, the conclusions of the IHO are hereby adopted.

### **A. Operative IEP**

Initially, I will briefly address the issue regarding the operative IEP. The parent asserts that the IHO erred in reviewing the appropriateness of the September 2022 IEP; however, to the extent the IHO erred in examining the appropriateness of the September 2022 IEP, such error is harmless insofar as the hearing record supports the IHO's determination that the May 2022 IEP was also appropriate and offered the student a FAPE.

The Second Circuit has emphasized that "[t]he ten-day notice requirement gives school districts an opportunity to discuss with parents their objections to the IEP and to offer changes to the IEP designed to address those objections—all before the parents enroll their child in a private school and file a due process complaint" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d 152, 171 [2d Cir. 2021]; see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]; Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004] [noting that the statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools"]). During the ten-day notice period, a district "may seek to correct the IEP" after it has been given notice of the parents' objections and "may defend against a claim for tuition reimbursement by pointing out that parents did not cooperate in the revision of the IEP, or that the corrected IEP, if accepted by the parents, would have provided the child with a FAPE" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171). The Second Circuit has also made clear that parents are entitled to rely on an IEP "as written when they decide to [unliterally] place" their child before the beginning of a school year (Bd. of Educ. of Yorktown Cent. Sch. Dist., 990 F.3d at 173; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]).<sup>4</sup>

Here, the parent expressed disagreement with the May 2022 IEP in a letter dated August 23, 2022 (Parent Ex. B). According to the evidence in the hearing record, a CSE meeting was

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<sup>4</sup> There is some authority that indicates that a later-developed IEP is operative that has arisen from circumstances where a school district attempts to defend an IEP developed later (usually after the beginning of the school year) that includes additional recommendations in line with a course of action discussed with the parents at an earlier date (McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at \*8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP" where it "incorporate[d] recommended classes, accommodations, and goals that were presented to Parent prior to her unilateral decision to enroll" the student in a private school]; see also M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at \*25 n.3 [S.D.N.Y. Sept. 28, 2018] [finding the later developed IEP to be operative even though it was developed during the first weeks of school]; Application of the Dep't of Educ., Appeal No. 12-215). However, this is not the scenario at issue in the present matter.

scheduled for September 2, 2022, within 10 business days after the parent's August 23, 2022 letter, but was cancelled by the district the day before (Tr. p. 788; Parent Exs. B; CC). In this instance, a review of the hearing record shows that the parents entered into an enrollment agreement with Windward in March 2022, prior to the May 2022 CSE meeting, and that the parent was obligated for the full amount of tuition as of July 1, 2022, prior to the parent sending the August 2022 letter to the district (Parent Ex. D; see Parent Exs. B; Dist. Ex. 15). The student's first day at Windward was September 8, 2022 (Tr. p. 740; Parent Exs. Y at p. 1; Z). The CSE meeting was then rescheduled and held on September 15, 2022, beyond the expiration of 10 business days from the parent's August 2022 letter, and after the student began attending Windward (Tr. p. 762; Dist. Ex. 18 at p. 1). Although it is unclear from the hearing record, the meeting may have been rescheduled to ensure the attendance of certain members of the CSE (Tr. pp. 733, 788). Nevertheless, considering all of the above, in line with the prospective analysis required by the Second Circuit, the May 2022 IEP was the operative IEP at the time of the parent's placement decision (see Bd. of Educ. of Yorktown Cent. Sch. Dist., 990 F.3d at 173; R.E., 694 F.3d at 187-88). Therefore, the May 2022 IEP was the operative IEP to be reviewed in connection with determining whether the district offered the student a FAPE for the 2022-23 school year.

## **B. May 2022 IEP**

### **1. Progress during 2021-22 School Year**

Turning to the next issue, the parent asserts that the student did not make sufficient progress in the district's program during the 2021-22 school year, third grade. 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]).

According to the parent, the district's use of running records to determine progress was inappropriate and the IHO should have relied on standardized testing results from prior evaluations to assess the student's progress during third grade and, based thereon, the IHO should have determined that the May 2022 IEP, which recommended similar programming, was inappropriate. Similar to the May 2022 IEP, the April 2021 IEP, developed for the 2021-22 school year, recommended ICT services for ELA and math, specialized reading instruction, OT, and program



modifications and accommodations (compare Dist. Ex. 11 at pp. 11-12, with Dist. Ex. 15 at pp. 12-14).<sup>5</sup>

A February 2022 private neuropsychological evaluation, which was available to the May 2022 CSE, opined that "[d]espite remedial intervention, [the student] [wa]s not making the progress that his cognitive profile and emotional status indicate[d]" and that, in the evaluator's opinion, the student's "[then-]current placement [wa]s not appropriate" (Dist. Ex. 14 at 27).<sup>6</sup> During the impartial hearing, the neuropsychologist elaborated that, given the student's "average intelligence," the services he received, and his motivation to succeed, the student remained at the "7th percentile or the 8th percentile, which [wa]s low" and "indicated he was not making progress" (Tr. pp. 555-56). However, despite the neuropsychologist's view about the student's lack of progress, the hearing record as a whole, including both objective and subjective descriptors of the student's progress, reveals that the student, overall, demonstrated meaningful progress during the 2021-22 school year (see E.S. v. Katonah-Lewisboro Sch. Dist., 487 Fed. App'x 619, 622 [2d Cir. July 6, 2012] [holding that, in determining whether a student made progress, the SRO must examine the record for objective evidence]).

The present levels of performance in the May 2022 IEP included results from the Teachers College Assessment for Independent Reading Levels administered in May 2022, which indicated the student read "at an independent Level J" and "instructional [l]evel K" (Dist. Ex. 15 at p. 8). The student's third grade regular education teacher clarified that an instructional level K meant the student "could do the work with some support" and that at level J "he was fully independent" (Tr. p. 372). The student's third grade special education teacher testified that a running record assessment was administered to all students "at certain points throughout the school year to assess their reading levels" (Tr. p. 817). She testified that the running record was "used as a progress monitoring tool" and it was a "helpful tool," but it was not a "precise tool" and was not the same as the "evaluation testing for special education services" (Tr. pp. 852-53). The district's director of pupil personnel services and special education (director) testified that the student's third grade reading level was assessed based on "the TC running records" and that because the student entered

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<sup>5</sup> The May 2022 IEP added counseling services and several modifications/accommodations that had not been included in the April 2021 IEP, including modified assignments, use of an editing checklist, breaking assignments into smaller parts, preferential seating, and visual supports (compare Dist. Ex. 11 at pp. 11-12, with Dist. Ex. 15 at pp. 12-14).

<sup>6</sup> The student was evaluated by a private neuropsychologist in January 2022 and a report was issued on February 3, 2022 (see generally Dist. Ex. 14). The private neuropsychologist determined that the student met the criteria for diagnoses of a specific learning disorder in reading and a specific learning disorder with weakness in written expression (id. at p. 26). In addition, the private neuropsychologist offered a diagnosis of ADHD, combined presentation with a rule out pending the results of certain rating scales from the student's teachers (Tr. pp. 544-45; Dist. Ex. 14 at p. 26).

the year on level F and ended it on level K, it meant the student had made progress in reading (Tr. p. 48; Dist. Ex. 15 at p. 1).<sup>7, 8</sup>

The district's director testified that, at the May 2022 CSE meeting, the teachers reported the student "made a lot of progress" and that "they were actually really impressed with the progress that he made" (Tr. p. 44). She went on to state that the student "require[d] some accommodations and modifications to make that progress" and those were described at the May 2022 CSE meeting (*id.*). She further testified that the student's specialized reading teacher believed that the specialized reading instruction helped him progress with decoding (*id.*).<sup>9</sup> Within the May 2022 IEP, teachers noted the student demonstrated improved fluency, was more receptive to guidance, tools, and prompts, and showed "increased effort at independent reading times" (Dist. Ex. 15 at p. 8). In particular, the student's third grade special education teacher testified that the student made progress and demonstrated beginning independence with the strategies and supports provided (Tr. p. 177). She indicated "he needed encouragement to use . . . the tools and strategies that were provided to him but once he started doing those things, we saw more progress" (*id.*). The student's third grade regular education teacher testified that the student made progress in her classroom, including that the volume of his writing increased and that his reading and math skills improved (Tr. pp. 341-45, 357). The student's third grade specialized reading teacher described the student as "resistive" in the beginning of the year and reported that she established a behavior chart with "little prizes" he could earn if he put in the effort after a few sessions (Tr. p. 403). She testified that once the student "bought into it he started to really make progress and seemed to feel better about himself" (Tr. pp. 403-06). Furthermore, the student's third grade specialized reading teacher testified that the student had mastered both the IEP and Wilson reading program goals she addressed (Tr. p. 473-75).

Based on the foregoing, I agree with the finding of the IHO that the evidence in the hearing record demonstrated that the student made progress during the 2021-22 school year, third grade, with the support of ICT services together with specialized reading and related services (IHO Decision at pp. 16-17). The Supreme Court explained long ago that whether "children are

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<sup>7</sup> The district's director acknowledged that the running records were not a standardized measure (Tr. pp. 93, 132, 139).

<sup>8</sup> In addition to the information obtained from the running records, the hearing record shows that the district was also tracking the student's progress using the Wilson Reading System (Dist. Exs. 23; 24). The hearing record includes copies of Wilson Language Training materials that reflect the student's work on reading and spelling along with teacher notes (Dist. Ex. 24). The special education teacher testified that this exhibit showed the student's "data points" through the year in "the specialized reading block" (Tr. pp. 836, 837). She stated that in the beginning of the year the student worked on reading and spelling "high frequency word lists" and that it was "an assessment of the words that he need[ed] to continue to practice and work on in order to learn" (Tr. p. 836). The special education teacher testified that as measured by this document, the student had to read words, identify base words and endings, and spell words (Tr. p. 837). She stated that the specialized reading teacher indicated in the document the words the student read correctly, his accuracy rate, and automaticity (Tr. p. 838).

<sup>9</sup> The director recalled that, at the May 2022 CSE meeting, "the parents stat[ed] that they noticed the progress [the student] had made" and one parent "said he was impressed with . . . pleased with the progress in his reading and impressed with it" (Tr. p. 45; *see* Dist. Ex. 15 at p. 2). She noted that the parents were concerned that the student was not making enough progress and they wanted him to make more progress than had been reported (Tr. pp. 46-47).

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

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

## **2. ICT Services and Specialized Reading Instruction**

Directing attention now to the parent's contention that the student's needs could not be met with ICT services and specialized reading instruction during the 2022-23 school year, according to the testimony of the district's director, the recommendation for ICT services in ELA and math only was based on the information presented at the May 2022 CSE meeting including information that the student made progress during the 2021-22 school year with similar ICT services and specialized reading instruction (Tr. pp. 61-62; see Dist. Ex. 15 at pp. 1, 12). The district's director confirmed that, for science and social studies, the student would be in general education classes with one regular education teacher (Tr. p. 111). She noted that the student's third grade report card indicated that he demonstrated understanding of content area concepts in science and social studies and was "independently meeting expectations and standards" in both areas in the general education environment (Tr. pp. 111, 151-52, 183; Dist. Ex. 16 at pp. 1-2). The student's third grade special education teacher, who was present at the May 2022 CSE meeting, testified that ICT services for ELA and math were appropriate for the student because the "ICT class" provided "supports throughout the entire school day" and together with the related services addressed the student's fine motor and reading deficits, and self-esteem issues (Tr. p. 198).

Further, the May 2022 CSE recommended numerous program modifications and accommodations to be provided to the student throughout the day (Dist. Ex. 15 at p. 13). More specifically, the CSE recommended that the student be provided with modified assignments to match his instructional level; multistep assignments that were broken down into smaller parts; preferential seating that was in close proximity to instruction; the use of a tracker as a visual support when reading; and homework assignments modified to match instructional content (id. at p. 14). The CSE also recommended that the student be provided with positive reinforcement throughout the school day in the form of verbal praise and encouragement to motivate him to complete tasks (id. at p. 13). In addition, the CSE recommended that, during instructional time, the student be provided with refocusing and redirection, described as subtle verbal cues or non-verbal cues to refocus to the student to instruction or independent work; checks for understanding, described as subtle questions or non-verbal cues to ensure the student understood directions and initiated tasks independently; and the use of manipulatives, such as counters, a place value chart

or number line to assist with computation and place value in math (*id.*). The CSE further recommended that, during writing assignments, the student be provided with a graphic organizer to break down assignments and organize his thoughts and an editing checklist to promote independence and editing skills (*id.* at pp. 13-14). The CSE also recommended that, during independent work, the student be provided with visual supports for auditory information and references such as an alphabet chart or topic specific graphic organizer (*id.* at p. 13). The IEP indicated that the student should be provided with near point copies to eliminate far point copying from the board (*id.*). Lastly, the CSE recommended that the student be provided with audiobooks during independent reading due to his weaker decoding skills (*id.* at p. 14).

With respect to the student's reading deficits, the school psychologist testified that ICT services would address the student's needs and described ICT services as having a special education teacher working side-by-side with a regular education teacher to address the student's goals and support him during reading, writing, and math instruction (Tr. p. 290). The psychologist explained that the addition of the specialized reading was "specifically designed to address the reading goals, the phonics, [and] the phonetic processing" (Tr. pp. 290-91). The psychologist stated that to address the student's difficulties with attention and executive functioning, in addition to the special education teacher, the classroom teacher would implement the modifications and accommodations on the student's IEP throughout the day (Tr. p. 291). The student's third grade regular education teacher testified that ICT services were appropriate for the student because she saw that during the third grade with similar ICT services, the student's reading improved, he was writing more "volume," and his math skills were strengthening (Tr. pp. 356-57).

Based on the foregoing, there is no basis in the hearing record to disturb the IHO's determination that the recommendations in the May 2022 IEP for ICT services in ELA and math and specialized reading instruction were specially designed to enable the student to make progress in light of his circumstances.

Another issue raised by the parent was that the student required multisensory and Orton-Gillingham instruction throughout the school day and the district's failure to recommend such instruction in the May 2022 IEP resulted in a denial of a FAPE.<sup>10</sup> The parent relies on the recommendation of the private neuropsychologist who evaluated the student in January 2022, which indicated that the student needed a "specialized program" in which the student "would receive Orton-Gillingham/multisensory methods throughout the entire school day." While the parent is correct that the May 2022 IEP did not include Orton-Gillingham instruction to the extent recommended in the February 2022 neuropsychological evaluation report, the evidence in the hearing record shows that the totality of the program offered in the May 2022 IEP appropriately

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<sup>10</sup> 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).

addressed the student's special education needs and Orton-Gillingham instruction was not required in order to offer the student a FAPE.<sup>11</sup>

Lastly, in connection with the parent's argument that the May 2022 IEP failed to address the student's social/emotional needs, I find that the IHO correctly reached the conclusion that the addition of individual and group counseling and annual counseling goals addressed the student's needs (IHO Decision at p. 14). The evidence in the hearing record demonstrated that the May 2022 CSE discussed, and the May 2022 IEP included information regarding the student's self-esteem, including the concerns of the parent regarding the student's anxiety and "negative self-talk" (Dist. Ex. 15 at pp. 2 9, 12). To address the student's needs, the director reported that the May 2022 CSE recommended individual counseling to give the student the opportunity to use the skills "within a smaller group before generalizing those skills to the larger setting" (Tr. p. 60; see Dist. Ex. 15 at p. 13). She testified that the group counseling would allow him "to connect and see that [there were] other students that also [were] struggling" in school (id.). Additionally, the May 2022 IEP included two goals to address in counseling (Dist. Ex. 15 at p. 12). The first goal targeted the student's ability to "reflect on his strengths and weaknesses" and identify his positive qualities so that he might "verbalize how they impact his successful accomplishment of tasks;" and the second goal was designed to assist the student with identifying his feelings and emotions, their intensity, "and strategies for dealing with those emotions/feelings" (id.).

As described above, the crux of the dispute in this matter relates to the views of the parent and the private evaluator that the student was not making appropriate progress and therefore required a more supportive (and more restrictive) setting, versus the district's opinion that the student was making progress commensurate with his abilities and, therefore, could receive meaningful educational benefit while attending a general education class placement with ICT services, related services, and supports and accommodations within a district public school. Generally, district staff may be afforded some deference over the views of private experts (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at \*16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at \*6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]).

Further, the hearing record reflects that the May 2022 CSE considered the recommendations set forth in the February 2022 neuropsychological evaluation but had information before them demonstrating that the student was advancing from grade to grade and

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<sup>11</sup> For the student's fourth grade year, the district's director testified that the district used SPIRE, an Orton-Gillingham based reading program, and that "the same special education teacher in the co-taught classroom also provide[d] the specialized reading" services (Tr. pp. 56, 62-63). The director indicated that the district's special education teachers were provided with five days of Orton-Gillingham training during the 2021-22 school year (Tr. p. 111). She indicated that she was able to relay this information to the parents at the May 2022 CSE meeting (Tr. pp. 111-12).

making academic progress in the district curriculum, albeit more modest progress than that desired by the parent. However, the district was not required to maximize the student's potential (Rowley, 458 U.S. at 189, 199). Further, the CSEs were not obligated to adopt the recommendations of the private evaluator in this instance (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]). This is particularly so given that the district staff who provided the content used in the IEP development had been working directly with the student and that, in addition to considering what supports and services the student needed in order to receive educational benefits, the district was mandated to consider placing the student with his nondisabled peers in light of the IDEA's LRE requirements. Where, as here, the student could be educated satisfactorily in a general education classroom with supplemental aids and services, the placement recommended in the May 2022 IEP represented an appropriate placement in the student's LRE (see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 119-20), and the district was not required to place the student in a special class or in a specialized school.

Accordingly, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE for the 2022-23 school year.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2022-23 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Windward was an appropriate unilateral placement for the student or whether equitable considerations weighed in favor of the parent's request for relief.

**THE APPEAL IS DISMISSED.**

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

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**STEVEN KROLAK  
STATE REVIEW OFFICER**