



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-223

**Application of the BOARD OF EDUCATION OF THE
GARDEN CITY UNION FREE 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:

Guercio & Guercio, LLP, attorneys for petitioner, by Rachel N. Roth, Esq.

Law Offices of Susan J. Deedy and Associates, attorneys for respondents, by S. Fahad Qamer, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Windward School (Windward) for the 2020-21 and 2021-22 school years. The appeal must be sustained.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student was found eligible for special education in kindergarten (2017-18 school year) as a student with a speech or language impairment (see Dist. Ex. 1). He received speech-language therapy in kindergarten and first grade to address articulation difficulties (Dist. Exs. 1 at pp. 4, 6; 2 at p. 7; 22 at pp. 4-5).

In January and February 2019 (first grade) the district conducted a psychoeducational evaluation and educational evaluation of the student (Dist. Exs. 2 at pp. 3, 5; 19). On a measure

of cognitive functioning the student attained a full-scale IQ of 116, which was in the high average range (Dist. Ex. 19 at p. 6). The evaluator cautioned that due to the disparity between the student's performance on subtests his full scale IQ might underrepresent his cognitive abilities (*id.*). With regard to academics, the results of achievement testing indicated that the student demonstrated skills that were average or above (Dist. Ex. 2 at pp. 3-4, 5). On May 13, 2019, the CSE convened and determined that the student should be declassified as of June 28, 2019 (see Dist. Ex. 3).

For second grade (2019-20 school year) and third grade (2020-21 school year), the student received academic intervention services (AIS) for reading and writing (Dist. Ex. 22 at p. 4). In a November 17, 2020 email to the district's elementary school psychologist, the parent requested that the student be reevaluated due to concerns regarding his reading, spelling, and auditory processing (Dist. Ex. 35 at pp. 1-2). Between January and March 2021, the district solicited information from the parents to complete a social history and conducted a speech-language evaluation, educational evaluation, and psychoeducational evaluation of the student (Dist. Exs. 21; 24; 25; 26). The speech-language evaluation showed that the student's receptive and expressive language skills were in the average range with some noted weaknesses in phonological skills and his ability to use descriptive language and all story grammar elements (Dist. Ex. 24 at p. 5). The educational evaluation showed that the student was performing below average in written expression, silent reading fluency, and reading accuracy and comprehension (Dist. Ex. 25 at p. 8). The psychoeducational evaluation indicated that completion of behavior scales by the student's teacher yielded elevated scores in the areas of hyperactivity and inattention (Dist. Ex. 21 at p. 5). Around this same time, the parents obtained several private evaluations of the student including an auditory processing evaluation, a developmental vision evaluation, and a neuropsychological evaluation (Dist. Exs. 22, 22A, 23, 27). The auditory processing evaluation indicated that the student presented with an auditory processing disorder as well as a phonological processing disorder and weak listening comprehension skills (Dist. Ex. 27 at p. 8). The developmental vision evaluation indicated that the student showed "severe binocular and accommodative vision deficits" as well as severe visual processing delays that would significantly interfere with his ability to perform academic tasks at his potential (Dist. Ex. 23 at p. 3). The neuropsychological evaluation indicated that the student presented with language processing and executive function difficulties and offered diagnoses of language disorder, specific learning disorders in reading and written expression, and a provisional diagnosis of attention deficit activity disorder, combined type (Dist. Ex. 22A at p. 3).

On March 3, 2021, a CSE met for an initial eligibility determination meeting and found the student eligible for special education as a student with a learning disability (Dist. Ex. 4 at pp. 2-3).¹ The CSE recommended that for the remainder of the 2020-21 school year the student receive group (5:1) resource room services daily for 40 minutes and group speech-language therapy services twice weekly for 30 minutes (*id.* at p. 12).

The CSE reconvened on June 1, 2021 to create an IEP for the student for the 2021-22 school year (fourth grade) (Dist. Ex. 5). The CSE continued the same service recommendations as those found in the March 2021 IEP (compare Dist. Ex. 4 at p. 12, with Dist. Ex. 5 at p. 11). By

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

email dated October 5, 2021 the student's mother notified the elementary school principal that the student was attending Windward (Dist. Ex. 61; see Dist. Ex. 60 at p. 3).² The parent indicated that she was sure that the principal was aware that the student has transferred schools as she had left her message at the beginning of the school year and they had recently spoken in person (id.).

The parties' familiarity with the procedural history of this matter is presumed and, therefore, the allegations contained in the due process complaint notice and the contents of the IHO's decision will not be recited here in detail. Briefly, in a due process complaint notice, dated February 17, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 and 2021-22 school years (see Parent Ex. A). For the 2020-21 school year, the parents alleged that the district failed in its child find obligations up until the March 2021 CSE meeting (id. at pp. 4-5). In addition, the parent raised allegations pertaining to the sufficiency of evaluations, their opportunity to participate in the CSE process, and the sufficiency of the present levels of performance, the lack of behavioral strategies or plans, and the appropriateness of the annual goals and services recommendations included in the March 2021 and June 2021 IEPs (id. at pp. 5-8). For relief, the parent requested compensatory educational services to remedy the district's failure to provide a FAPE for the 2020-21 school year, reimbursement for the costs of the student's placement at Windward for the 2021-22 school year along with transportation, and reimbursement for the costs of the independent educational evaluations (id. at pp. 8-9).

An impartial hearing convened on April 22, 2022 and concluded on April 27, 2023 after 22 days of proceedings (Tr. pp. 1-2061). In a decision dated September 8, 2023, the IHO determined that the district failed to meet its burden to prove that it met its child find obligations or offered the student a FAPE for the 2020-21 and 2021-22 school years, that the parents met their burden to prove that Windward was an appropriate unilateral placement, and that equitable considerations weighed in favor of awarding the parents tuition reimbursement and transportation costs but denying the parents' request for compensatory education (IHO Decision at pp. 5-6, 18, 30, 41, 43-47). The IHO denied the parents' request for reimbursement for the costs of the independent educational evaluations (id. at p. 6). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition and transportation at the Windward School for the 2021-22 school year (id. at p. 47).

IV. Appeal for State-Level Review

The following issues presented on appeal must be resolved in order to render a decision in this matter:

1. Whether the IHO erred in finding the district violated its child find obligations to the student for the 2020-21 school year;
2. Whether the IHO erred in finding that the May 2021 IEP did not offer the student a FAPE for the remainder of the 2020-21 school year;

² 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).

3. Whether the IHO erred in finding that the June 2021 IEP did not offer the student a FAPE for the 2021-22 school year;
4. If the district did not offer the student a FAPE for the 2021-22 school year, whether the IHO erred in determining that the Windward School was an appropriate unilateral placement for the student; and
5. If the district did not offer the student a FAPE for the 2021-22 school year, whether the IHO erred in awarding the parents tuition reimbursement notwithstanding the parents' failure to serve the district with a 10-day notice.

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]).³

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

³ 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).

F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Scope of Review

For those aspects of the parties' dispute relating to the March 2021 and June 2021 CSEs and IEPs, it is necessary to address which t claims are properly before me on appeal.

The regulations governing practice before the Office of State Review are explicit and require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served within the time permitted by section 279.5 of this Part. A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f] [emphasis added]). Furthermore, the practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4] [emphasis added]). If a respondent wishes an SRO to address one or more claims that went unaddressed by an IHO, the practice regulations require the respondent to serve and file a cross appeal with respect to such claims that references to the evidentiary record supporting such claims, that the petitioner may then answer (8 NYCRR 279.5[b]) or the SRO is to deem them abandoned.

The IHO determined that the March 2021 IEP denied the student a FAPE for the 2020-21 school year because "[w]ithout serious explanation, the [d]istrict adopt[ed] the proposed classification (by the Neuropsychologist) of Learning Disability but reject[ed] the recommended strategy (by the Neuropsychologist) to address the identified deficits" (IHO Decision at p. 30). Regarding the June 2021 IEP and FAPE for the 2021-22 school year, the IHO held that "the District failed to demonstrate that they met their burden in providing the Student an IEP tailored to meet the Student's individualized needs" (id. at p. 35). The IHO did not meaningfully address several other of the parents' claims relating to the evaluative information, the parents' participation, sufficiency of the present levels of performance, lack of a recommendation for behavioral strategies or plans, appropriateness of annual goals, and specific aspects of the CSE's programming recommendations (see Parent Ex. A).

While the parents were not aggrieved by the IHO's determination that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years, when State regulations governing appeals before the Office of State Review were last amended, it was specifically

contemplated that a prevailing party would be chargeable with the knowledge that they may effectively have to defend themselves in an appeal and that this might require an appeal of any underlying determinations made by the IHO (or failures to rule) that were unfavorable to the prevailing party (see N.Y. State Register Vol. 38, Issue 26, at p. 49 [June 29, 2016]; Application of a Student with a Disability, Appeal No. 18-131). Here, through the district's service of the notice of intention to appeal and case information statement, the parents were on notice that the district intended to appeal from the IHO's determination that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years (see Dist. Notice of Intention to Appeal; see also 8 NYCRR 279.2[d]). Therefore, it was incumbent upon the parents to assert in a cross-appeal, any alternative bases in support of their allegation that the district failed to offer the student a FAPE (8 NYCRR 279.8[c][4] [providing that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]).⁴ As the parents did not avail themselves of the opportunity to cross-appeal from the IHO's failure to address claims raised in the due process complaint notice, those claims are not a proper subject of this appeal. Accordingly, as no cross-appeal challenging any portion of the IHO's decision was filed by the parents in this matter, the claims asserted in the due process complaint notice but not addressed by the IHO relating to the sufficiency of evaluative information, the parents' participation, sufficiency of the present levels of performance, lack of a recommendation for behavioral strategies or plans, and appropriateness of annual goals are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).⁵

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

⁵ In addition, the IHO denied the parents' request for reimbursement for the costs of private evaluations (IHO Decision at p. 6). As the parents did not cross-appeal this determination, which was adverse to them, the denial of reimbursement for private evaluations is final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The programming recommendations of the CSEs are broadly at issue on appeal. The district argues that it considered the evaluations including the private evaluations obtained by the parent, found the student eligible for special education, and recommended a program in the LRE for the student with accommodations and supports. In their memorandum of law in support of their answer, the parents argue that the IHO correctly determined that March 2021 IEP did not offer the student a FAPE focusing on the programming recommendations of the CSEs (i.e., the lack of a recommendations for a special education teacher in the classroom, specialized reading instruction, or supports in addition to strategies that had been employed prior to the March 2021 CSE meeting). Relating to the June 2021 IEP, the parents re-assert the same arguments about the programming and additionally argue that the CSE failed to recommend occupational therapy (OT) or a behavioral intervention plan (BIP). After addressing the district's appeal of the IHO's child find determination, I will turn to the parties' arguments regarding the IEPs.

B. Child Find

The IHO held that a January 14, 2020 email exchange between the parent and the student's second-grade general education teacher constituted the date that the district "knew or should have known" that the student needed special education services (IHO Decision at p. 17; see Parent Ex. B). For the reasons that follow, I am unconvinced that the January 2020 email exchange triggered the district's child find obligations.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an ongoing, affirmative duty on State and local educational agencies to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at *7 [S.D.N.Y. Oct. 28, 2019], aff'd, 2021 WL 745890 [2d Cir. Feb. 26, 2021]; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd.

of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent in failing to order testing, or have no rational justification for deciding not to evaluate the student (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 [2d Cir. 2018], quoting Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention (RtI) program (8 NYCRR 200.4[a]; see also 8 NYCRR 100.2[ii]).

Related to child find is the referral process. State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for special education programs and services" (8 NYCRR 200.4[a]). While a parent and certain other specified individuals may refer a student for an initial evaluation (8 NYCRR 200.4[a]1[i]), a professional staff member of the school district in which the student resides and certain other specified individuals may request a referral for an initial evaluation (8 NYCRR 200.4[a]2[i][a]). If a "building administrator" or "any other employee" of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a]2[ii], [a]2[iv][a], [a]3-[a]5; see also 34 CFR 300.300[a]). State regulation also provides that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services (AIS), and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a]9). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a]9[iii][a]-[b]).

The district argues that it was actively monitoring the student's academic progress throughout the 2018-19 through the 2020-21 school years and timely evaluated the student once it received consent to evaluate the student from the parent. According to the hearing record, the student was referred for AIS during the fall of his 2018-19 school year (Tr. pp. 297-98, 329-30). The district's primary school psychologist explained that "[n]ot every general education student

receives AIS. A child needs to be identified for requiring or needing AIS" (Tr. pp. 173-74).⁶ The primary school psychologist explained that "the purpose of the AIS is to reenforce fundamental reading skills with the intention of those skills generalizing to the general education classroom" (Tr. p. 174). The student's first grade regular education teacher testified that she "worked very closely with the reading AIS teacher at that time . . . and [the student] was making progress through the reading AIS support" (Tr. p. 298). She further testified that she believed that the student was making progress in both AIS and his general education classroom during his 2018-19 school year (Tr. p. 299).

The student's regular education teacher for second grade testified that the student was receiving AIS support services for both reading and math and that, although the student was progressing, his progress was inconsistent and she "wanted him to progress more" which is why she recommended him for "an IST meeting" (Tr. pp. 392, 459, 461, 464).⁷ The January 2020 email referenced by the IHO in his decision was between the student's second grade teacher and the student's mother and in it the student's second grade teacher notified the parent that she had "just finished writing up an IST report for [the student]" and that she "wanted to bring [her] academic concerns to [the IST] team to see if we could recommend other strategies" (Parent Ex. B at p. 1). The hearing record reflects that there was an IST meeting in January 2020 that included the student's second grade regular education teacher, a district administrator, and AIS building support teachers to discuss the supports the student needed in math and reading along with the possibility of conducting a speech screening to look at "how [the student] receives information" (Tr. pp. 409-10). The teacher testified that the student "showed progress during the [2019-20 school] year. It was a different scenario once COVID happened" (Tr. p. 419). She noted that the student's attendance and work were inconsistent during that time (Tr. pp. 419-20). However, despite the issues that the student was displaying during the 2019-20 school year, his second grade teacher did not believe that the student needed to be referred for special education (Tr. p. 455).

During the 2019-20 school year the student's reading specialist saw him "[i]n a small group instruction . . . three times a week for 40 minutes" and during the 2020-21 school years the student saw the reading specialist two times a week for 30 minutes (Tr. pp. 1038, 1065).⁸ She testified that the student was assessed twice each school year using the Preventing Academic Failure (PAF)

⁶ State regulation indicates that schools must provide AIS to a student in kindergarten to grade two when the student lacks reading readiness or is at risk of not achieving the State designated performance level in English language arts (ELA) or mathematics (8 NYCRR 100.2[ee][1]). For students in grades three through eight, schools may consider providing AIS to a student that performs at or below a certain scale score on a State assessment in ELA or mathematics after taking into account the "student's scores on multiple measures of student performance" (8 NYCRR 100.2[ee][2][ii]).

⁷ IST is an acronym for instructional support team, which was described by the student's 2018-19 teacher as a "meeting with the other people in the building like your principal, school psychologist, reading, AIS teacher" and that the purpose of an IST meeting was to discuss concerns about the student's learning and to create recommendations and interventions to help the student in the classroom (Tr. pp. 270, 317).

⁸ The reading specialist testified that the student's reading instruction was reduced to two times a week for 30-minutes "[b]ecause of the restrictions with COVID" but that she believed that the reading instruction the district provided for the 2020-21 school year was sufficient to meet the student's needs (Tr. p. 1065).

program tests (Tr. pp. 1267-68).⁹ The reading specialist testified that, when students transition from primary school to elementary school, students are tested and the reading specialist uses the results of the test scores and the student's needs to "determine which program would be best for that child" (Tr. p. 1035). The reading specialist testified that during the 2019-20 school year she could "see on a day-to-day basis how [the student] [wa]s progressing" and stated that the student "definitely improved and showed progress for sure," noting that "he started somewhere around the . . . 14th percentile," and that "by the time he finished, I guess that would be in 3rd grade, we were up to the 59th percentile" (Tr. pp. 1045-47). The reading specialist testified that the student was receiving reading instruction both through her reading specialist sessions and "[d]aily in the classroom" and that during the 2020-21 school year she "would meet with the teacher to offer them ideas and support" (Tr. pp. 1066-67).¹⁰

The student's third grade regular education teacher testified that although the student was below grade level in reading comprehension he made progress in reading (Tr. pp. 1415, 1514-16). She further testified that "[a] child doesn't need to be evaluated or have a document for me to make [the decision to give the student an accommodation or modification] in a classroom" (Tr. p. 1421). The student's third grade regular education teacher testified that she noticed that the student was struggling, and she addressed his struggles using the following accommodations: "put[ting] him in a small group," "working with him a lot," pulling him from "the other room and he would come over to my side just because he needed extra support," redirecting the student and "giv[ing] different instructions, break[ing] it down for him so he knew what to do in a step-by-step manner," "us[ing] a graphic organizer for him to help with reading," "scaffold[ing] a lot of [reading] work," "ask[ing] him comprehension text just to make sure he was understanding what he was reading at the time," modifying the amount of spelling words he was assigned, and modifying his homework assignments (Tr. pp. 1421-23, 1425-26).¹¹

The parents referred the student for an initial evaluation in November 2020 (Dist. Ex. 35).

The IHO stated that there appeared to be consensus at the beginning of the 2019-20 school year that the student was no longer in need of special education services (IHO Decision at p. 12). In addition, he noted that the student received AIS services in second and third grade and, as a result, from the district's perspective, the student was better able to comprehend what he was reading (IHO Decision at pp. 12-13). However, the IHO questioned the "optimism" of the reading specialist who indicated that the student had made progress in second and third grade based on his performance on a PAF test of single word reading (id.; see Tr. pp. 1046-1065; Dist. Ex. 64). The

⁹ PAF was defined by the teacher as "a multi-sensory phonemic-based program that uses strategies to help [the student]... to help his understand how to decode and encode words" and that PAF "is under the Orton-Gillingham umbrella" (Tr. p. 1034).

¹⁰ The reading specialist testified that during the spring of the 2020-21 school year the student was classified as a student with a disability and that his classification "did not change [her] services . . . [b]ecause he was . . . still getting reading with [her] during that time" (Tr. p. 1068).

¹¹ During the 2020-21 school year, the student's class was divided in two, with 14 students in one room and 15 students in the other, with the student's regular education teacher rotating from room to room and a "buddy teacher" there to present the regular education teacher's virtual teaching and to monitor the children (Tr. pp. 922, 934-40).

IHO noted that the student's performance on the Gray Oral Reading Test, Fifth Edition (GORT-5) and Kaufman Test of Achievement, Third Edition (KTEA-3) administered by the district in January 2021, showed that the student performed in the "below average" on many subtests (IHO Decision at p. 13; see Dist. Ex. 25). In addition, the IHO found that the student's scores on the PAF word reading test in October 2020 (52 percent correct) and March 2021 (59 percent correct) represented a "slowing of progress" (IHO Decision at pp. 13-14; Dist. Ex. 64). The district's reading data includes a PAF test of single word reading summary sheet (Dist. Ex. 64 at p. 1). The summary sheet identified four dates on which the test was administered along with the percent of words the student read correctly on each of twelve subtests, and the total percent of words read correctly (id.). The student's total words read correctly were as follows: October 2019, 14 percent; February 2020, 38 percent; October 2020, 52 percent; and March 2021, 59 percent (id.). The reading specialist's testimony that the student made progress appears to be a comment on the student's response to AIS overall, as she noted the improvement in the student's correct responses from 14 percent when he began in fall of second grade to 59 percent in spring of third grade (Tr. pp. 1046-47).

The IHO was correct in noting that the several of the student's subtest scores on the GORT-5 and KTEA-3 were below average (Dist. Ex. 25 at pp. 2, 4, 6-7). However, the district testing was completed between January 12 and January 27, 2021 after—and in response to—the parent's November 2020 referral of the student for special education and the student was found eligible for special education on March 3, 2021; therefore, regardless of the reading specialist's assessment of the student's progress as measured by the PAF test of single word reading the student began receiving special education services shortly thereafter (Dist. Ex. 4).

As noted above, a district's child find obligation arises when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii, 158 F. Supp. 2d at 1194). "A school district must begin the evaluation process within a reasonable time after the district is on notice of a likely disability" (W.A. v. Hendrick Hudson Cent. Sch. Dist., 927 F.3d 126, 144 [2d Cir. 2019]). In reviewing whether the district satisfied its child find obligations, the child find inquiry "must focus on what the [d]istrict knew and when" (K.B., 2019 WL 5553292, at *8, quoting J.S., 826 F. Supp. 2d at 652; see, e.g., Application of the Dep't of Educ., Appeal No. 21-113 [rejecting the parent's argument that a child find violation occurred between September and November and upholding the IHO's finding that a district had reason to suspect a disability in March of the same school year when the district had taken some interventive steps, but the difficulties persisted]).

The hearing record establishes that the district was continually monitoring the student's progress and abilities. As detailed above, the January 2020 email in which the student's teacher acknowledged the student's needs and difficulties resulted in an IST meeting where new supports were instituted to aid the student in his academics; accordingly, the email served to establish the district's intention to revisit the student's AIS interventions, under which he had been making some progress, and did not represent either a reason for the district to suspect a disability or notice of a disability that would give rise to a child find violation (Tr. pp. 410-12). In this case, the student received AIS support from the district in the time leading up to the parents' November 2020 referral of the student for special education and was showing academic progress in his general education setting with AIS support albeit at times inconsistent and modest (Dist. Exs. 16; 64). As noted by

the IHO, between winter 2020 and spring 2021 the student's progress slowed (Dist. Ex. 64). Additionally, on at least one assessment the student's progress in reading appeared to regress (Dist. Exs. 16). However, the parents had already referred the student for an initial evaluation in November 2020 and, therefore, the evidence noted by the IHO does not reflect that the district, at some earlier date, had reason to suspect a disability and the need for special education.

The IHO also examined the parents' procedural claim with respect to child-find in light of the timing of the initial evaluation and CSE meeting (IHO Decision at pp. 17-19). The IHO indicated that an initial evaluation must be completed within 60 calendar days of receipt of consent to evaluate [8 NYCRR 200.4(b)(1)] and that school districts must obtain consent for evaluations within 10 school days after the initial referral is submitted [8 NYCRR 200.4(a)(2)(iv)] (*id.* at p. 17). Upon written request by a student's parent, a district must initiate an individual evaluation of a student (*see* Educ. Law § 4401-a[1], [3]; 8 NYCRR 200.4[a][1]-[2]; [b]; *see also* 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). Once a referral is received by the CSE chairperson, the chairperson must provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; *see also* 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).¹²

With respect to the IHO's reliance on 8 NYCRR 200.4(a)(2)(iv), rather than setting a 10 day deadline for the district to seek the parents' consent to evaluate, the regulation refers to the situation where an individual requests a referral (as distinguished from a direct referral by the parents or other specified individuals listed in 8 NYCRR 200.4[a][1]) and the district must within 10 days request the parents' consent to initiate the evaluation or provide the parents a copy of the referral and inform them of their right to refer the student (8 NYCRR 200.4[a][2][iv]). The regulation does not specifically state a timeframe for the district to request the parents' consent to evaluate but does state, upon receipt of the parents' referral, the CSE chairperson must provide prior written notice and, a prior written notice relating to an action proposed by the district must be provided at the same time as the parents' consent is sought (8 NYCRR 200.4[a][6]; 200.5[a][2], [5]).

The hearing record reflects that the parent contacted the elementary school psychologist via e-mail dated November 17, 2020 stating "I am interested in obtaining a speech and language evaluation for my son I have concerns regarding his reading level and his ability to decode/encode, spelling and possible auditory processing issues. I have addressed these concerns with his reading teacher . . . and she directed me to you" (Dist. Ex. 35 pp. 1-2). The elementary school psychologist stated that she spoke with the student's mother about "bringing [the student] up to th[e] [IST] team to see if there are any other supports and strategies [they] could put in place first before going right to a referral," noting that she "want[ed] mom to know all her options" but

¹² A "school day" is defined as "any day, including a partial day, that students are in attendance at school for instructional purposes" (8 NYCRR 200.1[n][1]).

the parents "wanted to go through the CSE referral process" (Tr. pp. 649-51).¹³ The elementary school psychologist testified that once she received the CSE referral form from the parents, she "draft[ed] up a prior written notice with a consent that indicate[d] the parents' concerns and . . . the evaluations [the parties] want[ed] to do" (Tr. p. 651). The district and the parent agreed that the district would perform the following evaluations: a social history; behavior rating scales; a classroom observation; and an educational evaluation (Tr. p. 652).¹⁴ The elementary school psychologist reported that after the evaluations were conducted copies of the reports were sent to the parent and the providers reviewed them with the parents (Tr. p. 653).

Neither the prior written notice referenced by the elementary school psychologist nor a consent form signed by the parents are part of the hearing record. The time period for the district to complete the evaluations and arrange for special programs and services runs from the date that the parents provide their consent for evaluation of the student (8 NYCRR 200.4[b], [e][1]). However, even assuming that the parents signed consent on the same day as their November 17, 2020 email to the district, while the district's evaluation of the student may have been delayed, the March 3, 2021 CSE convened within 60 school days of the November 2020 referral or, at the latest, shortly thereafter, taking into account school vacation dates that usually occur during this timeframe such as Thanksgiving recess, winter break, and mid-winter recess. Accordingly, any delay in the process was, at most, brief and did not rise to the level of a denial of a FAPE.

C. March 2021 IEP

The March 2021 CSE had before it the following evaluative information: a June 30, 2020 physical examination, a December 4, 2020 report card, a December 23, 2020 private auditory processing evaluation, a January 11, 2021 social history, a January 12, 2021 educational evaluation, a January 21, 2021 district speech-language evaluation, a February 17, 2021 private vision evaluation, a February 20, 2021 private neuropsychological evaluation, a March 1, 2021 district psychological evaluation, and a March 1, 2021 classroom observation (Dist. Exs. 4 at p. 2; 9; see Dist. Exs. 13; 21; 22a; 23; 24; 25; 26; 27). Present at the meeting were the CSE chairperson, the elementary school psychologist, the student's general education teacher, the student's special education teacher, the student's speech-language pathologist, the parents, and the private neuropsychologist who conducted the private evaluation of the student (Dist. Ex. 4 at p. 1). In addition to the documents before it, the CSE also relied on committee discussion, including information from the student's regular education teacher about the student's progress, functioning in the classroom, and modifications and accommodations then-currently in place (Tr. pp. 505, 1417-18).

¹³ The IHO took issue with the psychologist's offer of an IST meeting at this juncture (see IHO Decision at p. 17). However, as summarized above, State regulations explicitly contemplate that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education provided that any such meeting takes place within 10 days and does not impede the CSE process (see 8 NYCRR 200.4[a][9]).

¹⁴ The district also performed a speech-language evaluation of the student (see Dist. Ex. 24).

The March 2021 IEP listed the student's standard scores and percentile ranks on several standardized measures (Dist. Ex. 4 at pp. 2-7). In addition, the March IEP reflected more specific information contained in the February 2021 private neuropsychological evaluation report, including that the student's general ability index on the WISC-V was 112, falling at the 79th percentile, and that he was diagnosed with a language disorder, specific learning disorders with mild impairments in reading and written expression, and had received a provisional diagnosis of ADHD, combined type (compare Dist. Ex. 4 at pp. 8, 10, with Dist. Ex. 22a at pp. 3-4, 8-9).

The March 2021 IEP also reflected information contained in the December 2020 private auditory processing evaluation which indicated that the student presented with an auditory processing disorder in the areas of discrimination, figure-ground listening, auditory and temporal integration, as well as a phonological processing disorder (compare Dist. Ex. 4 at p. 8, with Dist. Ex. 27 at p. 7). The evaluation revealed that the student exhibited deficits in the areas of listening comprehension and phonological awareness skills (compare Dist. Ex. 4 at p. 8, with Dist. Ex. 27 at p. 7). The March 2021 IEP noted that the student exhibited difficulty sustaining attention to auditorily presented information, and that as the information increased in length and complexity, his understanding decreased (Dist. Ex. 4 at p. 8). The March 2021 IEP further noted that the student exhibited weaknesses in identifying sounds, deleting syllables, deleting sounds, and substituting one sound for another (id.).

The March 2021 IEP documented the results of the KTEA-3 and the GORT-5, as reported in the January 2021 educational evaluation, which indicated that the student's reading and writing skills ranged from below average to average (compare Dist. Ex. 4 at pp. 8-9, with Dist. Ex. 25 at p. 2). The IEP indicated that the student's classroom performance suggested that spelling and written expression were areas of challenge for him (Dist. Ex. 4 at p. 9). The IEP reflected that the student exhibited difficulty spelling high frequency words and phonetically decodable words in his writing assignments, and often wrote incomplete sentences (id.). The IEP stated that the student benefitted from the use of graphic organizers, reminders, scaffolding, and visual cues (id.).

The March 2021 IEP reflected the results of the KTEA-3 indicating that the student's mathematics skills fell within the average range including math concepts and applications, math computation, and math fluency (compare Dist. Ex. 4 at p. 9, with Dist. Ex. 25 at p. 5). The student's performance in the classroom revealed that while his computation skills were strong, he struggled to solve word problems due to difficulty interpreting language in order to determine which operations to use (Dist. Ex. 4 at p. 9). The March 2021 IEP described the student as organized, hardworking, and outgoing, and indicated that he benefitted from small group instruction (id.).

The March 2021 IEP reflected information from the February 2021 private developmental vision evaluation which indicated that the student exhibited severe binocular and accommodative vision deficits as well as severe visual processing delays in the areas of visual discrimination, visual spatial memory, visual spatial relations, and laterality (compare Dist. Ex. 4 at p. 10, with Dist. Ex. 23 p. 3).

In order to address the student's needs, the March 2021 IEP included supplemental aids and classroom management strategies, including modeling, visual aids, scaffolding of assignments, modified homework, use of a graphic organizer for writing and reading activities, preferential seating, additional time, teacher check ins, and refocusing and redirection (Dist. Ex. 4 at pp. 10-

12). Testing accommodations included in the IEP provided for extended time (1.5 times), tests administered in a location with minimal distractions, and directions explained (*id.* at p. 13).

The March 2021 IEP included nine annual goals to address the student's needs in the areas of reading, writing, math, and speech-language development (Dist. Ex. 4 at pp. 11-12). Specifically, the IEP included reading goals for the student to answer inferential comprehension questions based on text and accurately decode words with two syllables; writing goals for the student to compose a cohesive paragraph, correctly spell sight words and decodable words, use correct capitalization and punctuation, and write grammatically correct sentences; math goals for the student to solve single step word problems; speech-language goals for the student to work on deleting syllables and sounds from given words and respond to concrete and inferential questions from an orally presented passage (*id.*).¹⁵

Based on the student's progress, the evaluations, the report card, and input from the student's teacher, the March 2021 CSE recommended the student receive resource room services five times per week, 40 minutes each day, as well as two times 30 minutes per week of speech-language therapy in a group for the remainder of the school year (Tr. p. 512; Dist. Ex. 4 at p. 12).

A resource room program is defined by State regulation as "a special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]). State policy guidance further clarifies that resource room services are for the purpose of "supplementing" instruction ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 9, Office of Spec. Educ. [Nov. 2013], available at <https://www.p12.nysed.gov/specialed/publications/policy/documents/continuum-schoolage-revNov13.pdf>). State guidance describes examples of supplementary instruction that might be provided in a resource room, such as "organization skills, reading, the use of an assistive technology device, the use of Braille or the use of a compensatory strategy" ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 10-11).

The March 2021 CSE determined that the student's goals could be met, and he would make meaningful progress in a resource room setting (Tr. p. 513). In addition, the special education teacher who conducted the January 2021 educational evaluation stated that the resource room recommended by the March 2021 CSE would address the student's need for daily, direct, small group instruction, and enable him to generalize and transfer those skills into the general education classroom (Tr. pp. 820, 835). The district school psychologist testified that given the information presented and "the fact that this was an initial referral and [the district] looked for the least restrictive placement" the recommendations were appropriate for the student (Tr. p. 682). According to the CSE chairperson, the CSE determined that the student was making progress in

¹⁵ The criteria by which the student's progress toward achieving the annual goals would be based were set, for example, at 60 to 75 percent success (Dist. Ex. 4 pp. 11-12). The elementary school psychologist testified that the CSE included lower criteria so that the student would "come close to" achieving the goals given that "we only ha[d] three months of the school year left" (Tr. p. 753). The CSE chairperson confirmed that the student's goals, including the criteria, were developed based on his needs and considering the fact that there were three months left in the school year and that an annual review would be convened in June (Tr. pp. 507-08, 514).

AIS group reading instruction and therefore "would continue to make progress in th[e] more specially designed program of instruction in a group [resource room] setting" (Tr. p. 513).

In finding the CSE's recommendations inappropriate, the IHO generally cited to the CSE's failure to adopt the recommendations from the February 2021 neuropsychological evaluation (see IHO Decision at p. 30). The February 2021 neuropsychological evaluation report included numerous recommendations for the student including a specialized educational setting to address the needs of students with language-based learning disorders and executive function challenges, a small student-to-teacher ratio, direct and individualized attention, multisensory and evidence-based strategies, minimal distraction, individual special education teacher support services (SETSS), OT, and computer-based writing for extended writing tasks (Dist. Ex. 22a at pp. 4-5). The report recommended pre-teaching of new concepts, providing class notes in advance, check-ins to ensure comprehension of instructions and to provide clarification, preferential seating, use of an FM System, connecting auditory information to visual images, visual checklists, and extra time to complete tasks (id. at p. 6). Further recommendations included repetition, hands-on instruction, modeling, visual aids, manipulatives, movement breaks, audiobooks, large print, reduced homework, templates for writing, extended time on tests, minimal distractions, and refocusing prompts (id. at p. 7).

The private neuropsychologist was present at the March 2021 CSE meeting and she testified that she recommended to the CSE that the student be placed in a specialized school setting but that her recommendation was not incorporated into the IEP (Tr. pp. 1723-24). The neuropsychologist further testified that she found the CSE's group resource room recommendation "to be highly inappropriate in terms of services for [the student]" because the "resource room did not include an evidence-based trained reading specialist that would be able to give [the student] individualized attention that he required," the level of services was insufficient in light of the student's "complicated . . . learning profile," and the service was in a group and, therefore, was "not individualized enough" (Tr. p. 1725). The prior written notice issued after the March 2021 CSE meeting reflects that the CSE considered the position of the neuropsychologist that the student should attend a 1:1 resource room but rejected that option as it was not the student's LRE (Dist. Ex. 9 at p. 1). According to the notice, the parents "agreed to begin services in a group setting" and the CSE "discussed that his goals w[ould] be similar to the other students in the group" (id.).

Having duly considered the private neuropsychological evaluation, the CSE was not obligated to adopt the recommendations of the private evaluator in this instance (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]). This is particularly so given that the district staff who contributed to the IEP development had been working directly with the student and that, in addition to considering what supports and services the student needed in order to receive educational benefits, the district was mandated to consider placing the student with his nondisabled peers in light of the IDEA's LRE requirements. Where, as here, the student could be educated satisfactorily in a general education classroom with supplemental aids and services, the placement recommended

in the March 2021 IEP represented the student's LRE (see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 119-20).

With respect to the parents' position that the student required support in the general education classroom, the student's mother testified that, during the March 2021 CSE meeting, she inquired about the possibility of the student attending a classroom with integrated co-teaching (ICT) services but was convinced by the members of the CSE that their recommendation that the student stay in his general education classroom with the addition of a resource room would address the student's needs related to dyslexia and his auditory processing and social/emotional delays (Tr. pp. 1963-67).¹⁶ As summarized above, the IEP included several modifications and accommodations to be delivered throughout the school day, including in the general education classroom (Dist. Ex. 4 at pp. 10-12). Several of the management strategies included in the IEP were developed by the student's regular education teacher during the 2020-21 school year prior to the CSE meeting based on her observations of the student and his particular struggles (see Tr. pp. 1421-23, 1425-26, 1454-55).

The CSE chairperson testified that, although the CSE's recommendations did not include a special education teacher in the classroom, the regular education teacher would be working with the student on "decoding, encoding, math and writing" (Tr. pp. 611-12). Similarly, the district special education teacher who performed the January 2021 educational evaluation testified that in content area subjects such as science, social studies, or math, students with reading difficulties could be supported by the regular education teacher "assisting them in the reading component," for example, by reading a word problem or certain vocabulary terms to the student (Tr. pp. 848-49).

The IHO opined that the special education teacher "evaded" questions regarding whether the student would have benefited from "extra support provided by a special education teacher present in the classroom" (IHO Decision at p. 23, citing Tr. pp. 851-61); however, as the district's counsel argued, the issue presented was not whether the student would benefit from more support but whether the supports and services recommended were reasonably calculated to enable the student to make progress in light of his circumstances (see Endrew F., 580 U.S. at 403). As noted above, the IDEA ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132).

Regarding the parents' position that the IEP was inappropriate due to the lack of a recommendation for specialized reading instruction, 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

¹⁶ During the student's 2020-21 school year, the student's general education class was "a split class" with smaller classrooms of approximately 15 students (Tr. p. 1907). The CSE chairperson testified that the March 2021 CSE may not have considered placement of the student in a different class, specifically a general education class with ICT services, due to the time of year, because the district did not typically move students into a new classroom that late in the school year (Tr. pp. 573-75, 578).

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](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.*).

Here, it is undisputed that the student exhibited deficits in reading. The parent argues that the student did not make sufficient progress receiving AIS services leading up to the March 2021 CSE meeting and that, therefore, the recommendation which relied, in part, on the continuation of AIS was inappropriate. However, the CSE also recommended resource room and speech-language therapy services, which the student had not been receiving previously. Accordingly, the parents' position that the student would continue receiving the same level of support as available prior to the initial eligibility meeting and recommendation for special education is belied by the evidence in the hearing record.

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

The March 2021 CSE considered both views but had information before it demonstrating that the student was making academic progress in the district curriculum, albeit modest progress, and that the student could receive educational benefits with the additional supports recommended. While the parent may be correct that the student would receive more benefits if the recommended program included different supports, the district was not required to maximize the student's potential (*Rowley*, 458 U.S. at 189, 199). Based on the foregoing, the evidence in the hearing record does not support the IHO's determination that the May 2021 IEP did not offer the student a FAPE for the remainder of the 2020-21 school year.

D. June 2021 IEP

The June 2021 IEP included recommendations similar to those recommended in the March 2021 IEP; the student received the program and services recommended in the March 2021 IEP at the end of the 2021-22 school year. Generally, a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year, courts have been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]; N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at *9 [D.D.C. July 30, 2021]; James D. v. Bd. of Educ. of Aptakistic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

The elementary school psychologist testified that due to issues related to getting the parents to sign the consent necessary to implement the March 2021 IEP, the March 2021 IEP was not implemented until early April 2021 (Tr. pp. 683-84).

The student's 2020-21 resource room teacher testified that following the March 2021 CSE meeting the student was placed in her resource room with other students who were grouped based on similarity of needs and abilities and were functioning at a similar level (Tr. pp. 1084-87). The resource room teacher testified that she was responsible for working on the student's reading, writing, and math goals (Tr. pp. 1089-91; see Dist. Ex. 4). The students in her resource room class were working on similar goals, including goals in written expression, paragraph structure, mechanics of writing, word problem solving skills, reading fluency, and reading comprehension (Tr. p. 1087). The resource room teacher stated that instruction focused on visualization strategies to improve reading comprehension and listening comprehension (Tr. pp. 1090-91). The resource room teacher met with the student's classroom teacher and AIS reading teacher in order to help guide her instruction in resource room (Tr. pp. 1092-95). The resource room teacher took data on the student's ability to read two-syllable words, assessed the student's ability to answer comprehension questions independently and used graphic organizers, mini lessons, and brainstorming to support his writing goals (Tr. pp. 1096-97).

The resource room teacher explained that, when needed, she engaged the student in writing conferences to work on writing mechanics, grammar, punctuation, and spelling (Tr. p. 1097). Writing topics were introduced to the group, and the teacher worked with the student one on one in writing conferences to address his IEP goals, targeting capitalization and punctuation using a writing checklist (Tr. pp. 1099-1100). Writing checklists and graphic organizers were used to address the student's needs regarding the sequence and structure in his writing, topic sentences, details, closing, complete sentences, capital letters, punctuation, vocabulary, and personal narratives (Tr. p. 1103). The student used a spelling sight word dictionary which identified high-frequency words that were challenging for him to spell accurately (Tr. p. 1104).

The resource room teacher focused on decoding two syllable words with different syllable types with the student one on one (Tr. pp. 1096, 1099). The resource room teacher worked with the students as a group on passages using strategies such as read aloud, stop and retell, check for understanding, identify important information in order to respond to comprehension questions, and targeted the student's goal related to answering inferential questions (Tr. pp. 1098-99). The resource room teacher reported that she worked on the student's reading fluency as it impacted his comprehension and ability to solve two-step word problems (Tr. p. 1102).

The resource room teacher indicated that she provided mini lessons in solving math word problems in order to assess the student's independent skills and his ability to generalize skills (Tr. p. 1097). In math, the resource room teacher presented word problems on the Smartboard, read the problem aloud, and identified the relevant information to determine the operation needed to solve the problem (Tr. p. 1100). The resource room teacher provided highlighting and visual cues to help the students identify key words in word problems indicating which operations were needed to solve the problem (Tr. p. 1105).

The resource room teacher reported that the student transitioned well into resource room, was an active participant, and achieved most of his goals during the period from April to June 2021 (Tr. pp. 1105-06). Although the student had difficulty with attention and focusing, and required clear and consistent expectations, he did well with the supports she provided (Tr. p. 1106). Overall, the teacher noted that the resource room program was able to address the student's IEP goals (Tr. p. 1111). At the time of the June 2021 IEP goal progress report, the student had achieved all of his goals except one reading goal; answering inferential comprehension questions based on text (see Dist. Ex. 15).

The student's 2020-21 speech-language therapist began working with the student in March 2021, and testified that she provided therapy to the student in a group of three (Tr. p. 1203). The therapist described the student as comfortable, confident, and an "active participant" in every session (Tr. pp. 1203, 1207-08). The therapist worked on two goals with the student: deleting syllables or sounds from given words and answering concrete and inferential questions (Tr. p. 1205). Initially, the therapist assessed the student to determine his baseline abilities (id.). The therapist stated that she used visualizing as a listening comprehension strategy, took data on his ability to answer concrete and inferential questions, and that the student did very well (Tr. pp. 1206-07, 1208). The student benefitted from cues to use "whole body listening," and the therapist reported no issues with the student's ability to focus or attend to tasks (Tr. pp. 1222-23). The therapist noted that the student implemented and benefitted from the strategies she used, made

progress, and he was able to accomplish his goals by June (Tr. pp. 1208-11; Dist. Ex. 15 at pp. 3-4).

In May 2021 the parent requested a meeting with the principal because they were "at the end of the school year and resources were invested into [the student] and things were not going well" (Tr. p. 1968).¹⁷ The elementary school psychologist testified that the May 2021 meeting was attended by herself, the parent, and the school principal, and that during the meeting the parent discussed the student's continued "frustrations" after the implementation of the March 2021 IEP, specifically "the crying with the homework and [the student] saying he was not smart" (Tr. pp. 762-64). On May 25, 2021, the parent gave the student's regular education teacher permission to fill out a teacher request from a private school that the parent was "looking at" because she was considering sending "him elsewhere for targeted dyslexia learning" (Dist. Ex. 57 p. 1).

A CSE convened on June 1, 2021 for the student's annual review (see Dist. Exs. 5; 10). In developing the student's IEP for the 2021-22 school year, the CSE considered a March 2021 neuropsychological evaluation report and the March 2021 IEP (Dist. Exs. 5 at p. 2; 10 at p. 1).¹⁸ In addition, the CSE relied on the discussion of committee members, which included the participation of the district speech-language therapist who provided a summary of the student's progress and recommended goals for the 2021-22 IEP (Tr. pp. 1213-18; Dist. Exs. 5 at p. 2; 10 at p. 1).

The June 2021 IEP noted that the student had received a provisional diagnosis of attention deficit disorder, combined type, as well as diagnoses of specific learning disorders in reading (dyseidetic and dysphonetic dyslexia) and writing, binocular and accommodative vision deficits, visual processing delays, an auditory processing disorder, and a phonological processing disorder (Dist. Ex. 5 at p. 2). According to the June 2021 IEP, the student had made progress in the areas of speech-language development, reading, writing, and mathematics (id. at p. 8). In speech-language therapy, the student had been working on improving his listening comprehension skills by responding to concrete and inferential type questions based on an orally presented passage, and deleting syllables and sounds from words (id.). The student was reportedly making good progress towards his speech-language goals (id.). The IEP noted that, to support his ability to respond to questions and recall details during conversation, the student benefitted from reminders and using active listening strategies such as visualizing, paraphrasing, and repeating (id.). The student was working on expanding his verbal sentences, formulating grammatically and syntactically correct sentences, and providing supporting details (id.). The student was working on improving his

¹⁷ Before the IEP was implemented, on March 9, 2021, the parent e-mailed the student's regular education teacher stating that the student was "starting to say 'I'm so dumb. I'm going to fail'. [The parent said she was] so concerned he is losing confidence in himself" (Parent Ex. C at p. 3). Via an April 9, 2021 e-mail, the parent informed the student's regular education teacher that the student "d[id]n't want to go to school [that day]" because "[h]e [wa]s really starting to recognize how much trouble he [wa]s having with his work" but also acknowledged that his struggles would "be helped with his IEP," which she was sending in that day (Dist. Ex. 52 at p. 2). With regard to homework, on April 13, 2021, the parent indicated that the student "[wa]s not cooperating after school and [she was] trying to give him some leeway but [didn't] want him to think he d[id] not have to complete his homework" (id. at p. 1).

¹⁸ The June 2021 CSE had before it the full March 2021 neuropsychological evaluation report completed after the CSE met in March 2021 (Dist. Ex. 10; compare Dist. Ex. 22, with Ex. 22a; see Tr. pp. 569-72, 1658-59).

phonemic awareness skills, which was supported by breaking down information and using checklists (id.).

Turning to reading, the June 2021 IEP indicated that, as of the end of May, the student's instructional guided reading level was level N and at that level he was able to read an average of 64 words per minute, his accuracy was 96%, his fluency score was one, and his comprehension fell within the limited proficiency range (Dist. Ex. 5 at p. 8). The IEP stated that the student needed to work on reading fluency, prosody and intonation, as well as his reading comprehension (id.). The student benefitted from prompts to use more details in his responses and using a reading comprehension chart/checklist for answering inferential questions (id.).

In writing, the IEP indicated that the student was able to write a paragraph consisting of a topic sentence, relevant details, and a closing sentence (Dist. Ex. 5 at p. 8). The student's ability to appropriately use capital letters and punctuation, write grammatically correct, complete sentences, and spell high frequency words had improved (id.). The IEP stated that the student benefitted from the use of editing/revising checklists, graphic organizers, and clear, consistent expectations and noted that he was beginning to use more descriptive language and more interesting word choices when writing about a familiar topic (id.).

In terms of mathematics, the IEP stated that the student was demonstrating an understanding of learned math concepts in the classroom and had developed consistent computational skills (Dist. Ex. 5 at p. 8). The student was able to solve one step word problems, using visualization, highlighting, and writing out a math sentence, but required teacher support for two step word problems (id.).

In addition, the June 2021 IEP included 10 measurable annual goals to address the student's needs in reading, writing, mathematics, and speech-language (Dist. Ex. 5 at pp. 10-11). Specifically, to address his difficulty in reading fluency and accuracy, the IEP included a goal that targeted the student's ability to read 100 words per minute with 95% accuracy (id. at p. 10). To address his weaknesses in reading comprehension, the IEP included a goal related to answering inferential comprehension questions using text-based evidence from a passage to support responses (id.). To address the student's needs in the area of decoding, the IEP included a goal that targeted the student's ability to decode multisyllabic words incorporating the various syllable types (id.). To address his needs in the area of writing, the IEP included goals that targeted his ability to complete a writing assignment on a teacher directed topic using grammatically correct sentences, correct capitalization and punctuation, and correct spelling of phonetically decodable and irregular words (id. at p. 11). In the area of mathematics, the student's needs were targeted with a goal to solve multi-step word problems involving addition, subtraction, multiplication and/or division by underlining key words, drawing a model, writing a math equation, and writing a statement (id.). With regard to the student's speech-language development, the IEP included goals related to answering higher-level critical thinking questions about a story or passage and recalling key details to provide relevant evidence to support his answers; producing expanded, descriptive sentences that were grammatically and syntactically correct during writing tasks; and segmenting given words into phonemes and/or syllables during structured activities (id.).

In order to accomplish his goals, the June 2021 CSE recommended that the student receive five 40-minute sessions per week of group (5:1) resource room services and two 30-minute

sessions per week of group (5:1) speech-language therapy (Dist. Ex. 5 at p. 11). In addition, the June 2021 CSE recommended supplementary aids, program modifications, and accommodations corresponding with the student's management needs in his general education classroom including modeling, scaffolding of assignments, use of a graphic organizer, preferential seating, visual aids, refocusing and redirection, additional time to process information, checking for understanding, modified homework assignments, a writing checklist for editing and revising, an inference checklist for reading comprehension, and a copy of class notes (*id.* at pp. 9, 12). In addition, the June 2021 CSE recommended the use of an FM unit trial for his academic classes (*id.* at p. 13).¹⁹ Finally, to address his need for extra time and difficulty with attention to tasks, the June 2021 CSE recommended testing accommodations of 1.5 extended time, a setting with minimal distractions, directions explained, and focusing prompts (*id.* at p. 14).

The June 2021 CSE considered other options including ICT services, but rejected this option as overly restrictive and recommended keeping the student in a general education classroom setting with a resource room because the CSE determined that student's annual goals and needs could be addressed in a resource room program with the related service of speech-language therapy (Tr. p. 769; Dist. Ex. 10 at p. 1).²⁰ The CSE also discussed the testing accommodation of double extended time, but this was rejected as the student currently received extended time (1.5) which addressed his need for extra processing time (Tr. p. 704; Dist. Ex. 10 at p. 1). The CSE discussed monitoring the student for an assistive technology trial, to be reconsidered in October 2021 (Dist. Ex. 10 at p. 1). The prior written notice issued by the district stated that the student's mother agreed with the CSE's recommendations (Tr. p. 705; Dist. Ex. 10 at p. 1). However, the June 2021 IEP also noted that the parent had unilaterally placed the student at Windward School (Dist. Ex. 5 at p. 1).

The student's mother testified that she did not agree with the recommendations of the June 2021 CSE and that she "kept asking for things like . . . a one-to-one classroom . . . , a small setting classroom," ICT services or more resource room but that the district members of the committee "kept saying . . . that [they] wanted to be as least restrictive as possible and [she] did not understand what that meant" (Tr. pp. 1982-83).²¹ The student's mother also testified that during the June 2021

¹⁹ The hearing record shows that the student had been trialing an FM unit to address his distraction due to background noise in the classroom, but the use of his FM system had been inconsistent (Tr. pp. 986, 1935-37; Parent Exs. D at pp. 1-2; P at p. 1; Dist. Ex. 22 at p. 5).

²⁰ The student's 2021-22 classroom setting would no longer be a split classroom, so his class size would increase from 15 students to approximately 25 students in the 2021-22 school year (Tr. pp. 886-87).

²¹ The district's reference to restrictiveness appears to conflate the student's need for additional adult support within a classroom compared to the student's placement in the LRE, which relates to the disabled student's opportunities to interact with nondisabled peers (see R.B. v. New York City Dep't of Educ., 603 F. App'x 36, 40 [2d Cir. 2015] [explaining that the requirement that students be educated in the least restrictive environment applies to the type of classroom setting, not the level of additional support a student receives within a placement with the goal of integrating children with disabilities into the same classrooms as children without disabilities]; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *7 [S.D.N.Y. Mar. 30, 2016] [noting that 'restrictiveness' pertains to the extent to which disabled students are educated with non-disabled students, not to the size of the student-staff ratio in special classes]). It is unlikely that there would be a demonstrable difference in the student's access to nondisabled peers in the program recommended by the CSE compared to a program that included some of the supports suggested by the parent like ICT services. Thus, the parent's confusion on this

CSE she "asked them for a dictation pen or dictation modality of some kind because children with dyslexia struggle with writing because they are more aware of what they want to say well [in] advance than what they can write . . . that was denied" (Tr. pp. 1983-84). The mother stated that "the District did not offer [the student] what he needed" (Tr. p. 1985). The parent referenced writing samples of the students that to her highlighted the student's struggles related to dyslexia, as opposed to work products sent home from school that had been edited and corrected (Tr. pp. 1993-95, see Parent Ex. F). At the end of the June 2021 CSE meeting, she expressed frustration that the student could not "write a legible sentence" (Tr. p. 1996). The parent stated that the CSE "was not providing [the student] what he needed. He needed a specific targeted program for his dyslexia and his reading and writing. That was not provided" (id.).

The March 2021 private neuropsychological evaluation report included updated recommendations compared to those before the March 2021 CSE (compare Dist. Ex. 22 at pp. 14-17, with Dist. Ex. 22A at pp. 4-6). In contrast to the earlier draft of the evaluation, which recommended a class with a small student-to-teacher ratio in a "very specialized educational setting" (Dist. Ex. 22A at p. 4), the full evaluation continued to recommend a small student-to-teacher ratio but opined that the student "require[d] an inclusive school setting that can provide more special education support services OR a specific specialized educational setting tailored to address the needs of students with language based learning disorders and executive function challenges" (Dist. Ex. 22 at p. 15). When the neuropsychologist was asked her opinion as to the appropriateness of these recommendations, she replied:

Well, the first comment I want to make is that a brain-based disorder like dyslexia and ADHD does not change, you know, from even year to year, right. The remediation that needs to take place is a process. It is an intensive and, in some cases, it is slow going depending on other factors. I would not expect from March to June there to be any significant or any significant modification to a program that would have led to a very different presentation. As far as I'm concerned, the recommendation for resource room in June was inappropriate, just as inappropriate as it was in March and would remain inappropriate for this kind of complex profile because this is a brain-based profile not a circumstantial profile.

(Tr. pp. 1731-32).

Notwithstanding the views of the parents and the private neuropsychologist, the information before the CSE regarding the student's progress in the district program with resource room services, speech-language therapy, and supports and accommodations under the March 2021 IEP supports the committee's recommendation to continue a similar program for the 2021-22 school year. For the same reasons as discussed above, the June 2021 CSE was not required to adopt the recommendations of the private evaluator (J.C.S., 2013 WL 3975942, at *11; Watson, 325 F. Supp. 2d at 145), and the student's need for specialized reading instruction was

point is understandable; however, the hearing record still indicates that the CSE's recommendations provided for an appropriate amount of support to address the student's needs.

encompassed in the CSE's recommendations ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education"). While the parents point to various other services and accommodations that the CSE could have incorporated into the IEP, information about the student's needs before the CSE did not reveal that the student required OT, an FBA, or additional accommodations in order to receive educational benefit. Specific to behavior, although the student was reported to be hyperactive, in that he often had trouble staying seated, acted without thinking, and was often in "constant motion" (Dist. Ex. 21 at p. 4), with the private neuropsychological evaluation it was reported that the parents "denied any behavioral concerns at school and this was confirmed by [the student's] teachers during his [March 2021 CSE] meeting" (Dist. Ex. 22 at p. 6). Although the private neuropsychological evaluation included a recommendation for OT to address the student's executive function skills and writing fluency (Dist. Ex. 22 at p. 15), other annual goals and accommodations/modifications in the IEP addressed these needs (see Dist. Ex. 5 at pp. 9-12). Finally, while the IEP did not include every strategy and accommodation/modification that the private evaluation included in its recommendations, it included several that were targeted to address similar skills (compare Dist. Ex. 22 at pp. 16-17, with Dist. Ex. 5 at pp. 9, 12).

The parent argues that, although the student was progressing from year to year, the continued struggles he experienced within his areas of educational and academic need were impeding his full potential as a student. While the parent's desire for the student to meet his potential is entirely understandable, the IDEA guarantees something more modest. The Court in Rowley explicitly rejected the idea that a FAPE required a district to ensure that a student's full potential be realized (Rowley, 458 U.S. at 198-99). The Court in Andrew F. reaffirmed some of the points articulated in Rowley, such as the fact that, for a student fully integrated in the general education classroom, an IEP would be appropriately ambitious if it was "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade" (137 S. Ct. at 992, quoting Rowley, 458 U.S. at 204). Here, the district's program meets this standard. Accordingly, the evidence in the hearing record does not support the IHO's determination that the June 2021 IEP did not offer the student a FAPE for the 2021-22 school year.

VII. Conclusion

Having determined that the evidence in the hearing record established that the district offered the student a FAPE for the 2020-21 and 2021-22 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether the Windward School was an appropriate unilateral placement for the student (Burlington, 471 U.S. at 370) or whether equitable considerations support an award of tuition reimbursement (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated September 8, 2023, is modified by reversing those portions which found that the district violated its child find obligations, denied the

student a FAPE for the 2020-21 and 2021-22 school years, and ordered it to reimburse the parents for the costs of the student's tuition at Windward for the 2021-22 school year.

Dated: **Albany, New York**
 December 6, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER