



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-071

### Application of the BOARD OF EDUCATION OF THE Harrison Central 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:

Bond, Schoeneck & King, PLLC, attorneys for petitioner, by Sara M. Richmond, Esq. and Mia DeLane-Gurley, Esq.

Gina DeCrescenzo, P.C., attorneys for respondents, by Gina DeCrescenzo, Esq.

### DECISION

#### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered the district to reimburse the parents for their son's tuition costs at the Windward School (Windward) for the 2021-22, and 2022-23 school years. The appeal must be sustained in part.

#### II. Overview—Administrative Procedures

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

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

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

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

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

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

The student was evaluated by the district's Committee on Preschool Special Education (CPSE) at age four due to concerns regarding motor development and speech articulation (Dist. Ex. 55 at p. 2). He attended a mainstream nursery school and received speech-language therapy and occupational therapy (OT) services (Dist. Exs. 55 at p. 2; 66 at p. 2). For kindergarten (2019-

20) and first grade (2020-21) the student attended a district elementary school where he continued to receive OT (Dist. Ex. 55 at pp. 2-3; see Dist. Exs. 2 at p. 1; 66 at p. 1).<sup>1</sup> During kindergarten, the student was noted to be behind in reading and he began to receive building-level reading intervention just prior to the shuttering of school buildings by executive order due to the COVID-19 pandemic (Dist. Ex. 55 at p. 3).

The district conducted a reevaluation of the student during the 2020-21 school year (Dist. Exs. 19-22). The reevaluation revealed deficits in the student's academic achievement and motor coordination (Dist. Ex. 21 at pp. 3-4; 22).

A CSE convened on March 15, 2021 for the student's annual review for the 2021-22 school year (second grade) (Dist. Ex. 27 at p. 1). The CSE determined that the student remained eligible to receive special education services as a student with an other health impairment and recommended that he receive five 45-minute sessions per six-day cycle of resource room, two 30-minute sessions per six-day cycle of OT in a group, and one 30-minute session per six-day cycle of individual counseling beginning in September 2021 (id. at pp. 1, 7). The student's IEP was subsequently amended by agreement without a meeting on March 24, 2021 to add five 45-minute sessions per six-day cycle of resource room and one 30-minute session per six-day cycle of individual counseling beginning on March 25, 2021 to the student's educational program, which at that time consisted only of two 30-minute sessions per six-day cycle of OT (Dist. Exs. 32; 33 at p. 1, 8; 55 at p. 3).

In an August 10, 2021 letter to the district, the parents stated that the proposed 2021-22 IEP was insufficient to meet the student's educational needs and failed to offer the student a free appropriate public education (FAPE) (Dist. Ex. 43). The parents further asserted that based on the student's lack of academic growth, particularly in language arts, the district failed to provide the student with a FAPE for the 2020-21 school year (id.). They noted that, as a result, they were considering placing the student at Windward for the 2021-22 school year and would seek tuition reimbursement for the student's placement at Windward for the 10-month 2021-22 school year (Dist. Ex. 43; see Dist. Ex. 45).<sup>2</sup>

In response to the parents' August 2021 letter, a CSE reconvened on September 15, 2021 for a program review (Dist. Ex. 48 at p. 1). The CSE changed the student's disability classification to learning disability (id. at p. 2). In addition, the district added a spelling goal and a math problem solving goal to the student's IEP but otherwise determined that its recommendations were appropriate (id.). The parents disagreed with the district's recommendations (id.).

The parents referred the student for an independent neuropsychological evaluation, which was conducted over three consecutive days in April 2022 (Dist. Ex. 55 at p. 1). The evaluating neuropsychologist diagnosed the student as having specific learning disorders in reading and written expression, generalized anxiety disorder, developmental coordination disorder (motor),

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<sup>1</sup> Speech-language therapy services were discontinued when the student transitioned from preschool to kindergarten (Dist. Ex. 55 at p. 2; see Dist. Ex. 66 at pp. 1-2, 4-5).

<sup>2</sup> The parents also indicated that they would seek tuition reimbursement for tuition costs associated with the student's attendance at a Windward 2021 summer program (Dist. Ex. 43 at p. 1).

and speech sound disorder (id. at p. 14).<sup>3</sup> The neuropsychologist opined that, given the student's learning-disabled profile, the student was correctly placed at Windward (id.). In addition, she offered numerous recommendations with respect to the student's academic, speech-language, motor, and social/emotional needs (id. at pp. 14-16).

The parent obtained a private Oral Sensory-Motor/Feeding and Placement speech evaluation on May 26, 2022 (Parent Ex. M). The evaluator reported that the student presented with a moderate oral-motor/speech disorder, secondary to physiological dysfunction of the oral motor mechanism (id.).

On May 27, 2022, a CSE convened to recommend a program for the student for the 2022-23 school year (Dist. Ex. 61 at p. 1). The CSE found that the student remained eligible to receive special education services as a student with a learning disability, and recommended that he attend a class with the support of integrated co-teaching (ICT) services, along with related services of two 30-minute sessions per six-day cycle of OT in a group, and one 30-minute session per six-day cycle of individual counseling (id. at pp. 1, 12).

By email dated June 14, 2022, the parents notified the district of their intent to place the student at Windward for the 2022-23 school year and to seek payment for the tuition, transportation, and related costs from the district (Dist. Ex. 62).

In a due process complaint notice dated January 5, 2023, the parents alleged that the district failed to offer the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years (see Parent Ex. A). The parents asserted the student did not make meaningful progress during the 2019-20 and 2020-21 school years (id. at p. 2). Regarding their allegation that the district failed to "provide" the student a FAPE for the 2021-22 and 2022-23 school years, the parents asserted that the district failed to appropriately evaluate the student, failed to appropriately consider evaluative data, failed to offer methodologies and/or strategies based on peer-reviewed research, failed to complete an appropriate functional behavior assessment (FBA),<sup>4</sup> failed to develop an appropriate behavior intervention plan (BIP), failed to develop measurable annual goals that targeted the student's needs, failed to provide appropriate related services, failed to consider the full continuum of services, and denied the parents meaningful participation (id. at pp. 7-9). Regarding the 2020-21, 2021-22, and 2022-23 school years, the parents asserted that the district failed to recommend adequate instruction, supports, and services and failed to recommend extended school year services (id. at p. 9). The parents also asserted that the district violated Section 504 of the Rehabilitation Act (section 504) (id. at pp. 9-10). Moreover, the parents contended that Windward was an appropriate placement for the student and that equitable considerations favored tuition reimbursement (id. at pp. 10-11). For relief, the parents requested compensatory education services for the 2020-21 school year and tuition reimbursement for the 2021-22 and 2022-23 school years at Windward (id. at pp. 12).

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<sup>3</sup> The evaluator also indicated that attention-deficit/hyperactivity disorder needed to be ruled out as a diagnosis (Dist. Ex. 55 at p. 14).

<sup>4</sup> The parents also asserted that during the 2020-21 school year, the student exhibited avoidance behaviors that interfered with his educational program (Parent Ex. A at p. 8).

Following a prehearing conference on February 21, 2023, an impartial hearing convened on April 17, 2023, April 25, 2023, April 26, 2023, June 27, 2023, July 26, 2023, August 14, 2023, September 18, 2023, and November 1, 2023 (see Feb. 21, 2023 Tr. pp. 1-12; Tr. pp. 1-1277).<sup>5</sup> In a decision dated January 22, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years, that Windward was an appropriate unilateral placement for the student for the 2021-22 and 2022-23 school years, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 34-53). For the 2020-21 school year, the IHO addressed extended school year services and the lack of an FBA and BIP (*id.* at pp. 34-37). For the 2021-22 school year, the IHO addressed the sufficiency of the district's evaluation, instructional methodology, annual goals, related services, and parent participation including a consideration of the continuum of services and extended school year services (*id.* at pp. 37-45). For the 2022-23 school year, the IHO addressed the sufficiency of the district's evaluations to support the district's recommendation, the annual goals, methodology, consideration of placing the student at Windward, and parent participation (*id.* at pp. 48-51). However, in considering relief, the IHO found that the parents' request for compensatory education was not supported by the hearing record as the parent did not present evidence of the student's current educational abilities and needs (*id.* at p. 54). The IHO ordered the district to reimburse the parents for the cost of the student's full tuition at Windward for the 2021-22 and 2022-23 school years (*id.*).<sup>6</sup>

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

The district appeals. The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parents' answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The gravamen of the parties' dispute on appeal is whether the IHO erred in finding that the district did not offer the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years for the reasons stated in her decision and if not, whether the parents' unilateral placement of the student at Windward was appropriate and whether equitable considerations favor tuition reimbursement.

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<sup>5</sup> The prehearing conference and the remainder of the hearing transcripts were paginated separately; for ease of reference, citations to the prehearing conference will be preceded by the date, while citations to the remainder of the hearing record will not be (Feb. 21, 2023 Tr. pp. 1-12; Tr. pp. 1-1277).

<sup>6</sup> The IHO also made specific findings that the district violated Section 504 of the Rehabilitation Act (section 504) (IHO Decision at p. 53). Those findings are not reviewable in this forum as an SRO lacks jurisdiction to consider a party's challenge to an IHO's finding or failure or refusal to rule on section 504, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see *A.M. v. New York City Dep't of Educ.*, 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], *aff'd*, 513 Fed. App'x 95 [2d Cir. 2013]; see also *F.C. v. New York City Dep't of Educ.*, 2016 WL 8716232, at \*11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO does not have jurisdiction to review any portion of the IHO's decision or the parent's claims as they relate to section 504, and accordingly such claims will not be further addressed.

## 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 Andrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>7</sup>

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

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

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<sup>7</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

## VI. Discussion

### A. Statute of Limitations

The district appeals from the IHO's finding that the district waived the statute of limitations as a defense for the parents' claims related to the 2020-21 school year. In response, the parents note that they are not seeking review of the IHO's denial of compensatory education services for the 2020-21 school year.

The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]).<sup>1</sup> Because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at \*16 [E.D.N.Y. Aug. 6, 2014]; see K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at \*14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Further, two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). A second exception may apply if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).

Review of the IHO decision shows that the IHO found that the district did not file a response to the parent's due process complaint notice and only raised the issue of statute of limitations in its closing brief; however, the IHO declined to make a specific finding on whether the issue was raised because she determined the parent was seeking compensatory education services from January 5, 2021 to the end of the 2020-21 school year, which fell within the two year statute of limitations tracking back from the January 5, 2023 due process complaint notice (IHO Decision at p. 34).

In its closing brief, the district specifically argued that any claims that the parents knew or should have known about on or before January 5, 2021 were barred by the applicable statute of limitations (IHO Ex. XIII at p. 9). This argument appeared to be limited to any challenges to the March 2020 IEP, which was in effect from the beginning of the 2020-21 school year through the development and implementation of the March 2021 IEP (id.; see Dist. Exs. 2; 33).

In order to properly address the district's appeal, the IHO's specific findings regarding the 2020-21 school year must be examined as it appears they relate to claims that accrued after January 2021 and were not part of the district's initial statute of limitations defense. The IHO determined



that the CSE was required to conduct an FBA and develop a BIP and that the failure to do so impeded the parent's ability to participate in the decision-making process (IHO Decision at p. 37). Based on these findings, the IHO found that the district failed to offer the student a FAPE for the 2020-21 school year (IHO Decision at p. 37).<sup>8</sup>

Initially, the IHO indicated that the parent's claims accruing on or after January 5, 2021 were within the limitations period (IHO Decision at p. 34). Indeed, review of the IHO decision shows that the facts applied to the IHO's findings regarding the 2020-21 school year relate to events that occurred within the limitations period (*id.* at pp. 34-37). In particular, the IHO addressed extended school year services and the lack of an FBA and a BIP (*id.*). With respect to extended school year services, the IHO improperly included her analysis in the section related to the 2020-21 school year when it actually referred to summer 2021 which falls within the 2021-22 school year (*id.* at pp. 35-36).<sup>9</sup> The March 2021 CSE was the CSE tasked with determining whether the student required extended school year services during the summer of 2021 (Dist. Exs. 27; 28). In her analysis, the IHO cited to the March 2021 IEP and the response to intervention (RTI) services that were provided to the student during the 2020-21 school year, all of which took place after the creation of the March 2020 IEP (IHO Decision at p. 34). She also cited to an evaluation conducted in March 2021 (*id.*). Accordingly, overall, the evidence used by the IHO pertains to the March 2021 CSE and its recommendations. As such, a proper reading of the IHO decision shows that there was no finding of a denial of FAPE based upon a lack of extended school year services during summer 2020 and the IHO's findings instead related to the failure of the March 2021 CSE to recommend extended school year services during summer 2021, which time period fell during the 2021-22 school year.

Turning to the IHO's findings regarding the lack of an FBA and a BIP, the parent's due process complaint notice included an allegation that the student's behavior during the 2020-21 school year should have alerted the district to a need for an FBA and a BIP (*see* IHO Decision at pp. 36-37; Parent Ex. A at p. 8). Similar to the IHO's analysis regarding extended school year services, the IHO's analysis regarding an FBA and BIP focused on events that occurred during the latter half of the 2020-21 school year (IHO Decision at pp. 36-37). In particular, just prior to finding that "the CSE had ample evidence of student[]'s anxiety and interfering behavior," the IHO referenced the March 2021 IEP (*id.* at p. 37). As such, the IHO's analysis regarding the lack of an FBA and a BIP relate to whether the district properly evaluated the student in preparation for the CSE meeting in March 2021 and whether the student's needs were such that he required an FBA and a BIP at that time. Therefore, the allegations regarding an FBA and a BIP fall within the statute of limitations period and will be addressed below.

Based on the above, although it is understandable as to why the district renewed its statute of limitations argument on appeal in light of the IHO's findings that were placed in a section of the decision described as claims for the student's "2020-21 sy," review of the IHO decision shows that the IHO's findings regarding the 2020-21 school year relate to the March 2021 CSE meeting

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<sup>8</sup> The IHO noted the district's failure to present any evidence that the CSE considered the student's "regression/recoupment" or if the student experienced regressions or needed to relearn lost skills following school breaks, as well as, the district's failure to establish it considered the student's dyslexia (IHO Decision at p. 36).

<sup>9</sup> As a matter of State law, the school year begins on July 1 and ends on June 30 (*see* Educ. Law § 2[15]).

and the March 2021 IEP, which fell within the limitations period. Because there were no other findings by the IHO regarding events that occurred during the preceding portion of 2020-21 school year that were beyond the statute of limitations or the adequacy of the March 2020 IEP, it is unnecessary to further review the district's statute of limitations defense.

## **B. March 2021 IEP**

The district developed two IEPs in March 2021 (Dist. Exs. 27; 33). The first March 2021 IEP was developed at a CSE meeting on March 15, 2021 and included a recommendation for a 10-month program with an implementation date of September 9, 2021 (Dist. Ex. 27 at p. 7-8). The second March 2021 IEP was issued as an amendment made on March 24, 2021 to add services to the student's then current educational programming for the remainder of the 2020-21 school year as it was determined that additional support was required during the current school year (see Dist. Ex. 33).<sup>10</sup> The district sent prior written notice of the March 2021 CSE recommendations to the parent on July 14, 2021 (Dist. Ex. 42).<sup>11</sup> The parent then made the decision to place the student at Windward in August 2021 (see Dist. Exs. 43; 45).<sup>12</sup> Based on this, the program set forth in the March 15, 2021 IEP was the relevant programming document in place at the beginning of the 2021-22 school year when the parent made the decision to unilaterally place the student at Windward, and, as such, "[t]he appropriate inquiry is into the nature of the program actually offered," the March 15, 2021 IEP (R.E., 694 F.3d at 187-88; see Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 167 [2d Cir. 2021] ["parents who decide to reject a proffered public placement, place their child in a suitable private school, and seek reimbursement as part of their due process complaint can rely on the contents of their child's written IEP when making the decision to do so"]).<sup>13</sup>

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<sup>10</sup> The substantive appropriateness of the March 24, 2021 IEP is not being reviewed on appeal as that IEP was to be implemented from March 25, 2021 through the end of the school year, after which the March 15, 2021 IEP was to be implemented beginning in September 2021 (see Dist. Exs. 27; 33). Compensatory education was the only relief sought for the 2020-21 school year and as the parents have not appealed from the IHO's denial of that relief, that finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]). Nevertheless, the March 15, 2021 IEP and the March 24, 2021 IEP include the same program recommendations (see Dist. Exs. 27; 33).

<sup>11</sup> The prior written notice only indicates that the CSE "recently reviewed" the student's educational programming and does not indicate which IEP was sent to the parents with the prior written notice (Dist. Ex. 42). However, the email sent with the prior written notice indicated that it included the prior written notice and "2021-22 IEP" (Dist. Ex. 41). Accordingly, it appears that the March 15, 2021 IEP was included.

<sup>12</sup> There was an update to the March 2021 IEP in August 2021; however, the program recommendations remained the same (see Dist. Exs. 27; 28).

<sup>13</sup> The CSE convened on September 15, 2021 for a program review in response to the parents' August 2021 letter rejecting the district's recommend program and informing the district of their intention to unilaterally place the student at Windward for the 2021-22 school year (Dist. Ex. 48 at p. 1). The CSE reviewed the student's 2020-21 report card which indicated that the student was below grade level in the areas of reading, writing, and math problem solving (id.). The September 2021 CSE changed the student's classification from OHI to learning disability (Tr. p. 153, 1064; Dist. Ex. 48 at p. 2). The September 2021 IEP indicated that in addition to the needs identified on the March 2021

## 1. Evaluative Information

Federal and State regulations make clear that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In New York, State regulation specifies that an initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). However, when conducting a mandatory reevaluation, there is no specified assessments that must be conducted, and a CSE is not simply required to conduct all possible evaluations of a student. Instead federal and State regulations explain that the CSE is charged with reviewing existing evaluation data and, "[o]n the basis of that review, and input from the child's parents, identify[ing] what additional data, if any, are needed" to determine if the student remains eligible for special education as a student with a disability, the present levels of performance of the student, and whether any changes to the student's programming and annual goals are warranted to allow the student to access the general education curriculum (34 CFR 300.305[a][2]; 8 NYCRR 200.4[b][5][i]-[ii]). Pursuant to 8

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IEP, the student now also needed to demonstrate command of the conventions of standard English spelling by spelling words with consonant blends, digraphs, and common vowel patterns (Dist. Ex. 48 at p. 4). In addition, the student needed to be able to represent and solve one step addition and subtraction story problems (id. at p. 5). The September 2021 CSE added annual goals for the student to demonstrate command of the conventions of standard English spelling by spelling words with consonant blends, digraphs, and common vowel patterns, and to represent and solve one step addition and subtraction problems (id. at pp. 7-8). The September 2021 CSE continued the same program recommendations from the prior March 2021 IEP (Tr. pp. 1064-65; compare Dist. Ex. 27 at p. 8, with Dist. Ex. 48 at pp. 8-9).

NYCRR 200.4(b)(4), a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability and, in accordance with 8 NYCRR 200.4(b)(5).

By prior written notice dated August 31, 2020, the district requested the parents' consent to conduct a reevaluation of the student to determine his educational needs and continuing eligibility for special education services (Dist. Ex. 7). The district subsequently conducted a reevaluation that included a September 16, 2020 psychological evaluation using the Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V); a December 9, 2020 social history; a February 10, 2021 OT evaluation using the Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition (Beery VMI) and the Wold Sentence Copy Test (Wold), and a March 3, 2021 educational evaluation using the Kaufman Test of Educational Achievement, Third Edition (KTEA-III) Dist. Exs. 19; 20; 21; 22).<sup>14</sup>

The March 15, 2021 IEP reflected the scores attained by the student on the WISC-V, KTEA-III, Beery VMI, and Wold Sentence Copy test (Dist. Ex. 27 at pp. 2-3). Administration of the WISC-V in September 2020 yielded a full-scale IQ of 101, which fell in the average range of cognitive ability (Dist. Exs. 19; 27 at p. 3). Moreover, the school psychologist who conducted the student's psychological evaluation reported that all of the student's scores on the WISC-V fell in the average range (Dist. Ex. 19 at pp. 2, 5).

The social history conducted by the school psychologist in December 2020 indicated that, at that time, the student was attending a general education mainstream class where he received OT "twice a cycle" in a small group (Dist. Ex. 20 at p. 2). The social history also indicated that when the student attended school virtually, he received tutoring with another student two or three times a week (*id.*). According to the social history, the student graduated out of vision in therapy in March 2020, however, was retested in September 2020 and began vision therapy again in November 2020 (*id.* at p. 1).<sup>15</sup> The psychologist noted that the parent described the student as having school anxiety and difficulty separating "seemingly due to the lack of consistency in the school schedule" (*id.*). The parent also indicated that the student had a good relationship with his peers but that the pandemic had placed a significant restriction on his social interactions (*id.*). The social history stated that the student would be having minor surgery later that month (*id.*).

Turning to the district's March 3, 2021 educational evaluation, administration of the KTEA-III yielded subtest scores in the below average range in letter and word recognition (9th percentile), math concepts and applications (13th percentile), math computation (19th percentile) and spelling (10th percentile), as well as a subtest score in the low range in written expression (3rd

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<sup>14</sup> The March 15, 2021 IEP indicates that the March 15, 2021 CSE considered the reports of the evaluations listed above as well as a September 16, 2020 physician input form and a January 17, 2020 physical examination (*see* Dist. Ex. 27 at p. 2).

<sup>15</sup> The student was diagnosed with convergence insufficiencies and was being seen by an optometrist for vision therapy who conducted an evaluation of the student in October 2020 (Parent Ex. Z). As of October 18, 2019, the student had completed a 41-session vision therapy program (*id.* at p. 1). The October 2020 report indicated a recommendation for further vision therapy consisting of one 45-minute session per week for a minimum of 20 weeks (*id.* at p. 4).

percentile) and in the very low range in reading comprehension (2nd percentile) (Dist. Ex. 22 at pp. 1-2; 27 at pp. 2-4; see Tr. pp 345-46). The evaluator explained that the letter and word recognition subtest of the KTEA-III required the student to identify letters and read grade-level words of increasing difficulty, most of which were irregular to ensure that the subtest measured word recognition as opposed to decoding (Dist. Ex. 22 at p. 2). The evaluator reported that the student was able to identify letters and sounds but had an error on the letter R sound (Dist. Ex. 22 at p. 2). The student initially could only read two of six words presented but was able to read more when encouraged to sound them out (id.). On the reading comprehension subtest, which was designed to measure literal or inferential comprehension, the student was able to read some of the words and match them to the correct pictures (id.). However, the student was unable to read other words and did not attempt a strategy to do so (id.). The evaluator reported that on the math concepts and application subtest, on which the student was asked to solve math problems related to real life, the student showed strength in the areas of counting, completing patterns, number identification, number order, and greater than/less than but struggled with reading a bar graph and a calendar, measurement, and skip counting (id. at p. 3). According to the evaluator, the student was initially focused on the test but within five minutes he began to express various ailments he was having and took a break (id.). During the math computation subtest, the student was overwhelmed with the number of problems on the page but was able to answer 16 problems before losing his stamina (id.). The evaluator reported that the student said he did not know how to answer the rest of the questions and would not attempt the remaining problems, even though they were similar to questions he had already answered (id.). According to the evaluator, the written expression subtest, which required the student to complete a story presented orally/visually by writing letters, words, and sentences was the most challenging for the student to complete (id.). The evaluator reported that the student "did not want to write anything at all," that it took "maximum teacher prompting" for the student to pick up his pencil, and that the student wrote some letters legibly, but his pencil grip was loose and unstable (id.). The student said he did not know how to write a sentence describing a picture but was more willing to write a sentence that was dictated for him (id. at pp. 3-4).

With all of the above information available to the March 2021 CSE, the CSE noted the student's testing results and identified the student's present levels of performance in the areas of reading, writing, math, and study skills as well as social and physical development (Dist. Ex. 27 at pp. 2-6). The IEP indicated that, in the classroom, the student performed below grade level in reading (id. at p. 3). The student began the year at a Fountas and Pinnell level B, and at the time the IEP was developed in March 2021, he was at level D, corresponding with a late kindergarten grade level (Dist. Ex. 27 at p. 3; see Parent Ex. KK). According to the IEP, the student was able to use "a couple" of decoding strategies to sound out words and his comprehension and fluency were approaching grade level (Dist. Ex. 27 at p. 3). On the fall Measuring Academic Progress (MAP) reading assessment, the student's score of 163 fell at the 71st percentile, and on the winter MAP reading assessment, the student's score of 169 fell at the 59th percentile, indicating that the student had made progress, but he was lagging behind when compared to his same grade cohort at the time of the winter assessment (Tr. pp. 132-33; Dist. Ex. 27 at p. 3).

In terms of mathematics, the March 2021 IEP indicated that the student's classroom performance was approaching grade level expectations (Dist. Ex. 27 at p. 3). According to the IEP, the student had a good understanding of counting and place value and was able to solve simple addition and subtraction equations accurately (id. at p. 3). The student was working on answering

multi-step problems (id.). The IEP indicated that on the fall MAP math assessment, the student's score of 155 fell at the 34th percentile (id. at p. 4). On the winter MAP assessment, the student's score of 163 fell at the 29th percentile (id.).

With respect to writing, the March 2021 IEP indicated that the student's classroom performance was approaching grade level expectations in written expression and mechanics (Dist. Ex. 27 at p. 4). The IEP further indicated that the student needed prompting to start sentences with capital letters and end with punctuation but that he had started to write known sight words correctly, was able to stretch out words sometimes getting the beginning and ending sound correct, and was continuing to work on spacing between words (id.).

As to study skills, the IEP indicated that the student needed assistance with organizing his work and time to organize his thinking when completing a task (Dist. Ex. 27 at p. 4).

Turning to the student's social development, the IEP stated that the student was able to have appropriate interactions with his peers (Dist. Ex. 27 at p. 4). However, the IEP also noted that the student tended to perseverate throughout the day and "constantly" asked to see the nurse, and that his in-school anxiety interfered with his ability to do his work (id.). With regard to physical development, the March 2021 IEP indicated that the student had "low" motor coordination skills and difficulty copying using provided lines (id. at p. 5). The IEP reflected the student's progress toward his OT goals (compare Parent Ex. D, with Dist. Ex. 27 at p. 5).<sup>16</sup>

Based on the above, the March 2021 CSE had sufficient information to identify the student's present levels of performance and make a determination as to whether any changes to the student's programming and annual goals were warranted.

Turning to the IHO's specific findings that the district failed to evaluate the student, the IHO found that the educational evaluation was not conducted in a timely manner because the parent signed consent on September 15, 2020 but the evaluation was not conducted until March 2021 (id. at pp. 38-39; Dist. Ex. 8; 22). However, the IHO's finding does not support finding a denial of FAPE for the 2021-22 school year as review of this matter is limited to the program developed at the March 2021 CSE meeting and the evaluation was completed in time for the CSE to review it as part of the student's annual review. This is not an instance, in which any delay, prevented the CSE from having the information that it required to develop the student's educational program for the 2021-22 school year.

Next, the IHO found that the district reevaluation was insufficiently comprehensive (IHO Decision). The IHO's reasoning for the inadequate evaluation finding was that the March 2021 CSE felt the need to begin resource room services immediately (id.). The IHO also noted that the student's occupational therapist testified that the written expression subtest on the student's educational testing was not an accurate representation of what the student could do (IHO Decision at p. 35; see Tr. pp. 346-47; Dist. Ex. 22 at pp. 3-4). The IHO took this as an indication that district staff did not believe the educational testing was accurate (IHO Decision at pp. 35, 39). Relatedly, the IHO found that the March 2021 educational evaluation was "insufficiently comprehensive" in

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<sup>16</sup> The IEP goal progress report for the 2020-21 school year indicated that the student was making progress satisfactorily toward his IEP goals, which related to the student's OT needs (Parent Ex. D).

that it did not address the student's needs related to anxiety, reading, writing, and math as "he scored very low in reading comprehension, written expression and below average in math" (IHO Decision at p. 39; see Dist. Ex. 22 at p. 4).

However, as noted above, the student's writing skills were assessed using the KTEA-III (Dist. Exs. 22 at pp. 3-4; 27 at pp. 6-7) and the student's skills in reading and math were assessed using the KTEA-III as well (Dist. Ex. 22 at pp. 1-3). Review of the testimony shows that the student's occupational therapist believed the student's skills in written expression were better than what the test results indicated, and he was therefore capable of higher-level skills (Tr. pp. 347-48). The occupational therapist explained this by noting that the evaluator who conducted the educational evaluation could not give any prompting, "any interaction, any above-and-beyond support that they c[ould] give in the classroom for him" (Tr. pp. 346-47). Additionally, the occupational therapist, as part of her testimony, explained that "[c]learly there was some anxiety or some refusal during the subtest"; this is also reflected in the educational evaluation report where it was noted that "[a]t times it was unclear whether or not the student did in fact know the answer, but did not want to write it" (Tr. p. 347; Dist. Ex. 22). The special education teacher who conducted the evaluation also testified that she believed the student was anxious during the testing and "could have done better" (Tr. p. 493). Accordingly, while there is a discrepancy between the student's performance on the educational evaluation as opposed to his performance in the classroom, it does not detract from the fact that both the evaluation and the student's classroom performance were providing the CSE with valuable information for the purpose of educational planning. Instead, it shows that the evaluators were using a variety of assessment tools and strategies as required rather than relying on a single measure to gauge the student's abilities, thus the IHO's criticism was unwarranted (see 34 CFR 300.304[b][1]).

Finally, the IHO erred in finding that the district failed to conduct a psychoeducational evaluation despite the parent's request on September 15, 2020 (IHO Decision at p. 39). Initially, it is unclear what the IHO was referring to as the district requested consent for the reevaluation in August 2021 describing the evaluative measures as: a physical examination and physician input form; social history update; psychological evaluation; educational evaluation; and speech-language evaluation (Dist. Ex. 7). The parents signed consent and returned it to the district in September 2021, in which they provided parental consent for the same assessments described by the district except the speech-language evaluation was replaced with an OT evaluation (Dist. Ex. 8).<sup>17</sup> Additionally, as noted above, in addition to the educational evaluation, the district conducted intelligence testing on September 16, 2020 as part of its psychological evaluation (see Dist. Exs. 19; 22).

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<sup>17</sup> Any allegation regarding the 2020-21 or 2021-22 school years that the district did not have sufficient evaluative information to recommend appropriate related services, specifically speech-language therapy, is without merit and the IHO erred by making such a finding (see IHO Decision at p. 43). As discussed in detail above, the evaluative information at the time of the March 2021 CSE did not indicate that the student required speech-language therapy (see Parent Ex. W; Dist. Ex. 27). The IHO's reliance on the June 2018 CPSE IEP to find that the student had needs related to speech and pragmatic language skills was misplaced as, at that time, the student was recommended for speech-language therapy and speech-language therapy was later discontinued in April 2019 after a speech-language evaluation showed the student's expressive and receptive language skills were within the average range with a mild articulation delay (IHO Decision at p. 43; see Parent Ex. GG at p. 7; Dist. Ex. 66 at pp. 2, 4-5, 8).

## 2. FBA/BIP

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a behavioral intervention plan (BIP) for a student that is based upon a functional behavioral assessment (FBA) (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to:

the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student's record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

The Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F.3d at 190).

With regard to a BIP, the special factor procedures set forth in State regulations note that the CSE shall consider the development of a BIP for a student with a disability when:

the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more



restrictive programs or placements as a result of the student's behavior;  
and/or (iv) as required pursuant to 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]).

If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).

As with the failure to conduct an FBA, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

In her decision the IHO found that the CSE had ample evidence of the student's anxiety, interfering behavior, and school avoidance behavior that resulted in him becoming more resistant to attending school for hybrid instruction during the 2020-21 school year (IHO Decision at p. 36). The IHO found that that the CSE was required to conduct an FBA and develop a BIP to manage the student's behaviors and that this failure impeded the parents' ability to participate in the decision-making process (id. at p. 37).

The hearing record contains information regarding the student's behavior over the course of the 2019-20 and 2020-21 school years. According to the student's March 2020 IEP, the student had taken "a long time to come out of his shell" in kindergarten (Dist. Ex. 2 at p. 6). While the student cried daily and was easily overwhelmed at the start of kindergarten, his behavior had improved by the time of the March 2020 CSE meeting (id.). The IEP noted that the student had made friends, was able to joke with the teacher and interact with peers, and seemed happy (id.). The March 2020 CSE determined that, at the time of the meeting, the student did not have any social or emotional needs for which he required special education services (id.).

The student's first grade teacher testified that later, at the start of first grade, the 2020-21 school year, the student presented as anxious (Tr. p. 74). She reported that the student would indicate that he missed his mother and would complain of stomach aches resulting in going to the nurse and sometimes being sent home, or frequently using the bathroom (Tr. p. 74). The teacher indicated that the student's anxiety and lack of confidence interfered with his ability to complete his work and he avoided work when not feeling confident (Tr. pp. 136-37).<sup>18</sup> The teacher acknowledged that the student's anxiety may have resulted from the COVID-19 shutdown, as well

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<sup>18</sup> The district's interim director of special education testified that avoidance is common for small children when something is hard for them and that it can result in anxiety (Tr. p. 532).

as some medical issues and surgery that the student experienced during first grade (Tr. pp. 105-06, 212-15). The teacher addressed the student's anxiety by talking with him, expressing empathy, suggesting he draw his mother a picture or write her a note, and providing him with strategies like taking deep breaths (Tr. pp. 75-76). The teacher noted that the student's anxiety lessened as the year progressed due to the strategies he was taught and because he had friends and felt a sense of belonging (Tr. p. 78). However, she also noted that some of the student's "same habits" continued throughout the school year (Tr. p. 78). In a November 18, 2020 email to his teacher, the parent stated that the student seemed to be doing "a little better in the mornings" (Dist. Ex. 13). According to the student's report card, during the second trimester he often displayed avoidant behavior, such as going to the bathroom, to avoid activities he had difficulty with (Dist. Ex. 25 at p. 4; see Tr. pp. 1043-44). The report card stated that the student benefitted from one-to-one support during these times, and the avoidant behavior was occurring with decreasing frequency (Dist. Ex. 25 at p. 4).

Testimonial evidence in the hearing record indicated that multiple variables contributed to the student's anxiety during the 2020-21 school year including COVID-19 precautions and restrictions, separation from his mother, and his surgery (Tr. pp. 74, 77, 212-213, 240-241, 1107, 1113, 1115-16).

In terms of the student's social development, at the time of the March 2021 CSE meeting, the student was able to have appropriate social interactions with his peers and could identify when something was bothering him (Dist. Ex. 27 at p. 4). The March 2021 IEP noted that the student tended to persevere over things and constantly asked to see the nurse when mildly bothered by something (id.). The student exhibited anxiety that interfered with his completion of work and tended to avoid work by asking to use the bathroom (id.). The IEP stated that the student needed "to verbally identify situations where he experience[d] anxiety and strategies to help him deal with his anxiety" (id.).

To address his social/emotional needs, the March 2021 CSE recommended that the student receive individual counseling one time for 30 minutes per six-day cycle, beginning March 25, 2021 (Dist. Exs. 27 at p. 7; 33 at p. 3; see Dist. Ex. 32). The March 2021 IEP included two annual goals related to the student's social/emotional needs, first, that the student would make three positive statements about his qualities and accomplishments and, second, that the student would verbally identify situations where he experienced anxiety and identify strategies to deal with his anxiety (Dist. Exs. 27 at p. 6; 33 at p. 7).<sup>19</sup>

The parents assert that at the September 15, 2021 CSE meeting they expressed concern that the student's behavioral needs were not assessed during his most recent re-evaluation (Parent Ex. A at p. 6). They further assert that the director of special education told the parents that the CSE had sufficient information concerning the student's behavioral needs and additional evaluations were unnecessary (id.). The CSE meeting summary did not reflect this conversation but noted that "[c]onsent for rating scales would be sent home" (see Dist. Ex. 48 at pp. 1-2). According to the parents, on September 21, 2021, the district sent them a prior written notice seeking consent to

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<sup>19</sup> Although not necessary for determining the appropriateness of the program, according to a 2020-21 progress report, by June 2021 the student had achieved his social/emotional goal to verbally identify situations where he experienced anxiety and identify strategies to deal with his anxiety (Dist. Ex. 23 at p. 2).

assess the student's behavior (Parent Ex. A at p. 6; Dist. Ex. 49).<sup>20</sup> By letter to the district dated October 18, 2021, the parents stated that they were "confused" by the district's request as they had raised the fact that no behavioral evaluation or observation was conducted as part of the reevaluation of the student and the district had responded that no further evaluation was needed (Dist. Ex. 50). The parents asserted that the statement in the district's form letter that a "[b]ehavior rating scale ha[d] been requested by [the student's] teacher and/or educational team" was inaccurate and further asserted that an assessment of the student's behavior should have taken place during the previous school year and was no longer relevant or timely (*id.*).

The hearing record shows that at the time of the March 2021 CSE meeting the district was aware that the student's anxiety interfered with his ability to complete his work and indicated this on the student's IEP (Dist. Ex. 27 at p. 4). As discussed above, the student's first grade teacher reported that she used a variety of strategies to address the student's anxiety and while some of his anxious behavior decreased some of the student's habits continued. While it would have been a better procedural practice for the district to have assessed the student's behavior as part of its reevaluation of the student, as indicated above the Second Circuit has held that the failure to conduct an FBA does not always rise to the level of a denial of a FAPE. Contrary to the conclusion reached by the IHO, the evidence above shows that the CSE adequately identified the student's behaviors in the March 2021 IEP as related to anxiety and work avoidance. In addition, the district otherwise addressed the student's anxiety by adding counseling to his March 2021 IEP and developed annual goals directed at his social emotional development and addressing anxiety (Dist. Ex. 27 at pp. 6-7).

### **3. Reading Instruction**

Much of the IHO's decision, finding a denial of FAPE for the 2021-22 school year, relates to the IHO's view that the district failed to appropriately address the student's need in the area of reading (IHO Decision at pp. 35, 39-41, 44-45).<sup>21</sup>

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs, as defined in subdivision 2 of section 4401 of the Education Law, 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]). Education Law § 4401(2), in turn, sets for the definitions of "[s]pecial services or programs," which includes, among other things, special classes, resource rooms, consultant teacher services, and related services. Consistent with the reference to the various special services or programs included in the definition of special education under State Law, State guidance notes that specialized reading instruction could be recommended in the IEP

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<sup>20</sup> The September 21, 2021 prior written notice included in the hearing record did not include a request for consent to evaluate the student's behavior needs (Dist. Ex. 49).

<sup>21</sup> Here, the IHO determined that the district "failed to change the program from general education to special education," which exasperated the student's anxiety, noting that the Wilson reading program was not added to the student's IEP and that the parent testified the student could not decode word lists that were sent home, but the IHO ultimately found that "the failure to change the program was not a denial of FAPE" (IHO Decision at pp. 44-45).

of the student as a special class, direct consultant teacher service, related service, resource room program ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Requirements," at p. 31, Office of Special Educ. Mem. [Updated Oct. 2023], [available at https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development\\_0.pdf](https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development_0.pdf)).

In addition, generally, an IEP is not required to specify the methodologies used with a student and the precise teaching methodologies to be used by a student's teacher are usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94). Indeed, a CSE should take care to avoid restricting school district teachers and providers to using only the specific methodologies listed in a student's IEP unless the CSE believes such a restriction is necessary in order to provide the student a FAPE. However, when the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).23-309).

Here, the district argues that the IHO incorrectly found that it failed to address the student's reading needs and that the lack of multisensory phonics-based instruction during the 2021-22 school year was a denial of a FAPE. Reviewing the parent's allegations, as raised during the hearing, the parents contended that the district did not recommend appropriate services to address the student's reading needs as the resource room instruction was not sufficient (IHO Ex. XIV at pp. 11-13, 17-18). As to methodology, the parents asserted that the district did not develop any goals for the student "aligned to any research-based reading program" and that the student's first grade resource room teacher, for the 2020-21 school year, did not implement the Wilson reading program "with fidelity" (id. at pp. 19-20).

In reviewing these allegations I will look back at the events leading up to the development of the student's March 2021 IEP for the 2021-22 school year, which occurred prior to the student receiving resource room instruction.

The parents hired the student's first grade teacher to provide tutoring for the student during summer 2020, prior to starting first grade (Tr. pp. 56, 157-59, 1041-42). The teacher testified that the purpose of the tutoring was to help the student transition to first grade and also provide him with extra support in reading (Tr. pp. 56-57, 161-62). The teacher stated that she did not have concerns, and nothing about the student's reading and writing alarmed her when she worked with him during the summer (Tr. pp. 57-58). The teacher added that at the beginning of the school year there were other students who were behind in reading and she was not concerned because she knew they had not had traditional schooling due to Covid-19 and her job was to make school feel more normal and then go about catching them up on what they did not get in kindergarten (Tr. pp. 58, 182-83).

With respect to reading, the student's first grade, first trimester report card indicated that he was able to follow a pattern across pages, point to each word in a sentence, and was encouraged to use picture clues to help him read words (Dist. Ex. 25 at p. 2). The student decoded unknown words by identifying the first and last letters but needed encouragement to sound them out (*id.*). According to the report card the student continued sounding out words with digraphs (*id.*). He was beginning to recognize more sight words in his leveled texts but needed repetitive practice to help him memorize new words (*id.*). In terms of writing, the student was able to put thoughts and ideas onto paper and to include characters, setting, and events given prompting (*id.*). The student continued to work on using punctuation and capitalization appropriately, with prompting (*id.*). The student's second trimester report card indicated that he was reading below grade level and continued to work on using decoding strategies he had learned to read unknown words such as tapping out CVC words, using picture clues, and following a pattern across pages (*id.* at p. 3). According to the report card, the student was able to answer basic comprehension questions after reading a story, was working on answering both literal and inferential questions, and was beginning to read with expression (*id.*). The student was working on reading fluency and understanding punctuation (*id.*). In the area of writing, the report card indicated that the student was able to generate and draft story ideas (*id.*). The student was working on spacing and stretching out longer, unknown words when writing and was encouraged to use the classroom and personal word walls to help spell sight words (*id.*).

The student's first grade teacher testified that at the start of the 2020-21 school year, the student's decoding skills were approaching grade level, and his comprehension and stamina were "good" (Tr. pp. 82-83; *see* Dist. Ex. 25 at pp. 1-2). In writing, the student was approaching grade level, as he was able to generate and share ideas, but needed some prompting to elaborate on written work (Tr. p. 83; *see* Dist. Ex. 25 at pp. 1-2). The teacher noted that the student would sometimes forget a vowel when spelling or would confuse writing mechanics but these were normal for first grade (Tr. p. 83-84). The teacher testified, however, that by mid-year she became aware that the student was not making as much progress as he should have been, especially as the academic demands became more challenging (Tr. pp. 84-85, 221).

The district began implementing response to intervention (RTI) strategies during the 2020-21 school year to address the student's specific reading needs (Tr. pp. 97-100, 106-07, 200, 379-

81). The district interim special education director (director) explained the difference between building-level support and special education support within the elementary school (Tr. p. 511). She testified that building level support was available to all general education and special education students (Tr. p. 512). Through the RTI process a teacher would identify a need or raise a concern about a student and a team would then develop next steps for the student (Tr. p. 512). The director explained that some building-level supports could be tier one or tier two services offered through RTI (Tr. p. 512). Tier one supports were provided in the classroom while tier two supports were provided as pull out services (Tr. p. 512). The director testified that when a student did not make progress with the highest level of building-level supports, the district would switch to special education supports (Tr. pp. 513-14). With respect to reading, the director indicated that, in kindergarten through second grade general education classes, the district employed Foundations, which was a Wilson program, as a means of providing structured literacy (Tr. pp. 515-17; 595).

The district special education teacher testified that with the hybrid schedule she had some extra time available in her day therefore in November 2020 began pushing into the first-grade classrooms to provide all students with tier one support, and from there she moved on to tier two services when she identified about five students who needed additional support, the student being one of them (Tr. pp. 379-84). She recalled that she increased the level of support she was providing the student before she evaluated him in March 2021 (Tr. pp. 389-90, 404). The first-grade teacher reported that the student began receiving building level support in February 2021 which consisted of the special education teacher going into the classroom, or pulling a small group of students from class, to provide guided reading instruction (Tr. pp. 98-100, 106-07, 123-26; Dist. Ex. 18). The student's classroom teacher recalled that the student received one or two, but mostly likely two sessions per week of building-level reading services (Tr. p. 124). The parent testified that the student's assignments were modified by reducing the amount of work and modifying instruction to meet his level of ability (Tr. p. 1046). The special education teacher testified that she provided in-person guided reading instruction in the classroom every day that the student was in attendance (Tr. p. 388). The special education teacher conferred with the student's first grade teacher and occupational therapist to understand his needs (Tr. pp. 385, 387).

As noted above, a CSE convened on March 15, 2021 for the student's annual review and finding that the student remained eligible for special education services as a student with an other health impairment recommended that he receive five 45-minute sessions per six-day cycle of resource room services, two 30-minute sessions per six-day cycle of OT in a group, and one 30-minute session per six-day cycle of individual counseling (Dist. Ex. 27 at p. 7).

In a March 15, 2021 email from the district special education teacher to the parents, the teacher informed the parents that she understood their frustration with how the student's school year was going and had discussed the student with her supervisor and the principal (Dist. Ex. 29). The teacher informed the parents that she was taking steps to add resource room to the student's IEP for the remainder of the 2020-21 school year as it was "evident from his testing that [the district] should not wait until next year and we now have concrete evidence to support that" (*id.*).

In a March 24, 2021, IEP amendment consent form, the parent and the CSE agreed to amend the student's IEP without a meeting for the rest of the 2020-21 school year (Tr. pp. 148-49, Dist. Ex. 32; *see* Dist. Ex. 33). That same day the student's IEP was amended to add five 45-minute sessions per six-day cycle of resource room; one 30-minute session per six-day cycle of

individual counseling; reading, writing, and social/emotional goals; and classroom accommodations of a slant board and graphic organizers for writing tasks, and preferential seating, beginning March 25, 2021 (Tr. pp. 148-49, Dist. Ex 32 at p. 2; see Dist. Ex. 33).<sup>22</sup>

Thus, the hearing record shows that the district implemented a series of increasingly progressive strategies to address the student's academic needs in accordance with the district's RTI process, and, when his progress under RTI was less than expected, the district increased his special education services from related services only to resource room with related services during the 2020-21 school year. In addition, the district recommended that the increase in special education and related services continue into the 2021-22 school year.

The special education teacher indicated that she was present at the March 15, 2021 CSE meeting, at which the student was recommended for resource room services (Tr. pp. 394-95). The special education teacher explained that resource room services differed from the support she had been providing the student in that resource room was a mandated special education program that was taught by a special education teacher (Tr. pp. 395-96). She noted that the program met for five days out of a six-day cycle and instruction was provided in groups of no more than five students (Tr. p. 396). She indicated that the main difference between resource room and previous support she provided the student was that in resource room students received "very specialized instruction" that was "very individualized" (Tr. p. 396). She stated that resource room was not about what was best for the group but rather what was best for the student (Tr. p. 396). The special education teacher reported that resource room focused on skill remediation and provided additional practice of a skill that was taught (Tr. p. 396). She stated that instruction was driven by the IEP and the teacher worked toward very specific goals that were set to target student's skill deficits (Tr. p. 396). The special education teacher testified that the recommended resource room services would have provided more intensive support, in terms of both duration and frequency, than the services the student had been receiving (Tr. 396). She indicated that resource room was 45 minutes instead of 30 minutes (Tr. p. 396). She opined that the student fit the profile of many of the student's that she would see and noted that although the student had skill deficits they were not in all areas and therefore she felt like the student's deficits could be remediated in the resource room and carried over to his classroom (Tr. p. 397).

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<sup>22</sup> The IHO found that the hearing record did not establish that the student was grouped appropriately for resource room services (IHO Decision at pp. 41-42). However, the due process complaint notice does not include any claims regarding the appropriateness of grouping for the student's resource room services, and therefore, the parents did not challenge the functional grouping of the programs recommended for the 2021-2022 and 2022-2023 school years (see Parent Ex. A). Despite this, the IHO's conclusion is flawed (IHO Decision at p. 41). Deficiencies in functional grouping when a student has not yet attended the proposed classroom at issue tend to be speculative in nature (J.C., 643 Fed. App'x at 33 [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP"], quoting R.E., 694 F.3d at 195). Various district courts have followed this precedent post M.O. (G.S., 2016 WL 5107039, at \*15 [same]; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at \*4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"], citing M.O., 793 F.3d at 245). Therefore, the IHO's findings on this issue were in error as the student did not attend a district program for both the 2021-22 and 2022-23 school years and, accordingly, any grouping claim for those school years is necessarily speculative.

The IHO noted that the district had discretion in deciding the appropriate methodology for educating the student as long as the chosen methodology enabled the student to receive educational benefits (IHO Decision at p. 40). The IHO then found that the hearing record "was replete with evidence" that the student needed Orton-Gillingham methodology in order to progress (IHO Decision at p. 40). The IHO determined that the lack of multi-sensory phonics-based instruction during the 2021-22 school year denied the student a FAPE (IHO Decision at p. 41). The IHO based her conclusion on the testimony of the parent's expert witness in language development, language disorders, and literacy, who testified that although the district reading program was based on phonics, the student needed explicit multi-sensory instruction, such as Orton-Gillingham based instruction, and that a whole language approach was inappropriate for the student (IHO Decision at pp. 40-41; Tr. pp. 879-881, 1000).

However, the IHO erred in relying on this testimony to draw such conclusions because neither the evaluation nor the hearing testimony for that matter were before the March 2021 CSE in question for consideration. Instead the evidence shows that the expert witness who testified at the impartial hearing had met the student only recently in his home, had never observed the student in his school environment, and had never spoken with the student's teachers at Windward (Tr. p. 987). Based on her review of the student's educational records she testified that the student exhibited "red flags" that suggested the student might have difficulty with reading (Tr. pp. 853-54). When asked about them, the witness noted that, although she could not remember what exhibit she saw it in, the issue with the most immediacy was that the student had difficulty recognizing and producing rhymes (Tr. pp. 853-54). In review of the hearing record the exhibit referencing the recognition and production of rhyming words was the March 2020 IEP, which noted that the student was able to produce rhyming words but had difficulty distinguishing rhymes with accuracy (Dist. Ex. 2 at p. 4).<sup>23</sup> When asked further about this, the witness explained that "rhyming is [a] crucial skill required in children younger than [six]," a foundational skill, and the student was six at the time of the March 2020 IEP (Tr. pp. 876-77). Additionally, the expert stated that the student's pronounced articulation difficulties, for which she opined he received minimal help in school, also put him highly at risk for a reading disability (Tr. p. 853). However, according to results of the March 2019 administration of the GFTA3, the student's articulation fell within the average range, at a percentile rank of 55, and his intelligibility was judged to be good in context, and fair-to-good outside of context (Dist. Ex. 65 at p. 5).

The private neuropsychologist who conducted the April 2022 neuropsychological evaluation report described above, testified that with intervention consisting of a systematic, phonics-based program which included enough intensity, repetition, and progress monitoring, students with dyslexia could learn to read (Tr. p. 759). However, the private neuropsychologist evaluated the student in April 2022 and although she attended the May 2022 CSE meeting, the IHO should have recognized that she did not attend or provide information to the participants at any of the student's prior CSE meetings (see Dist. Exs. 2; 27; 28, 33; 48).

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<sup>23</sup> The information contained within the March 2020 IEP regarding the student's reading appears to have been taken from the student's second marking period kindergarten report card, which indicated that the student could produce rhyming words, but became self-doubting and guessed when asked to distinguish rhymes (Parent Ex. C at p. 2).



The interim director of special education stated that for kindergarten through second grade, the district used two reading programs in the general education curriculum (Tr. p. 515). The reading programs included Wilson Foundations, which she described as structured and systematic instruction that built upon skills previously taught, as well as a balanced literacy approach, comprised of mini lessons focused on specific reading skills like interpreting pictures to help students think about how to make sense of what they read (Tr. pp. 515-16).

The district's special education teacher, who was also the student's resource room teacher, testified that she used the Wilson reading program to teach decoding and encoding most of the time during the student's resource room services, following the mandated scope and sequence required by the curriculum (Tr. pp. 400, 450-51, 457, 485-86, 499). The teacher explained that she chose the Wilson program for the student because the student's deficits lie mostly in decoding and encoding so she thought that Wilson would be the most appropriate program for the student at that time (Tr. p. 451). She reported that she also used "teaching basic writing skills" for writing (Tr. p. 400). In addition, the teacher worked on guided reading using the Fountas and Pinnell level library, to check whether the student was implementing the skills he learned through Wilson (Tr. pp. 463, 465).

Under the circumstances presented in this matter, although the parents' frustration with the student's rate of progress in reading and desire for faster improvement is understandable, the evidence in the hearing record does not lead to the conclusion that the student required a specific reading methodology to the exclusion of all others in order to receive a FAPE. The CSE was not required to rely solely on the Wilson Reading Program or an Orton-Gillingham program exclusively and it was permissible for the teacher in her professional judgment to use Wilson amongst a number of other approaches in the student's instruction (see A.G. on behalf of J.G. v. Bd. of Educ. of Arlington Cent. Sch. Dist., 2017 WL 1200906, at \*9 [S.D.N.Y. Mar. 29, 2017] [noting that in response to the parent's challenges of a lack of "fidelity" to the Wilson reading system, there is no requirement that any particular methodology be used, or that it be used exclusively]). Overall, it was not necessary for the CSE use the IEP to further limit the instructional methodologies used by the teacher and the after the fact testimony second guessing the selected methodology is not appropriate evidence to rely upon to conclude that the use of that methodology in the first instance was inappropriate.

#### **4. Goals**

The IHO examined the parents' multiple objections to the IEP goals developed for the student for the 2021-22 school year and determined that without sufficient evaluations to support them, the reading, writing, and social/emotional goals were inappropriate (IHO Decision at p. 42). The IHO further found that the that annual goals were insufficient to address the student's difficulties in decoding and handwriting (IHO Decision at p. 43).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to

measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

However, the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need. (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]; see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at \*20-\*21 [S.D.N.Y. Feb. 14, 2017]).

The student's March 2021 IEP featured eight annual goals that targeted the student's needs in reading, writing, social/emotional development, and motor development (Dist. Ex. 27 at pp. 6-7). The IEP included two reading goals (Dist. Ex. 27 at p. 6). The first goal targeted the student's ability to use explicitly taught strategies to decode words on his instructional level and the second goal targeted the student's ability to answer "wh" questions after reading a text on his instructional level (id.). The IEP also included a writing goal related to the student's ability to rehearse his ideas with a teacher and write three sentences with proper punctuation and capitalization (id.). The special education teacher indicated that she would be responsible for the three academic goals, described above, that were created at the March 15, 2021 CSE meeting (Tr. pp. 397-98). She indicated the goal that targeted the student's ability to use explicitly taught strategies to decode words was appropriate based on the results of KTEA-III testing, as well as the student's Fountas and Pinnell and MAP scores (Tr. p. 398). She indicated that decoding was the student's biggest struggle at this time (Tr. p. 398, 402). The special education teacher reported that the reading comprehension goal was appropriate for the student and that she had been working on this skill with the student (Tr. p. 399). She indicated that after each Fountas and Pinnell story there was a series of questions for the student to answer and she felt that he needed more practice answering both literal and inferential questions (Tr. pp. 399). She further indicated that based on her work with the student the writing goal was also appropriate (Tr. p. 399).

The student's March 15, 2021 IEP also included three motor goals (Dist. Ex. 27 at pp. 6-7). The first goal addressed the student's need to improve his visual motor skills and targeted his ability to write two sentences with appropriate spacing and adherence to lines (id. at p. 6). The second motor goal targeted the student's tracking and scanning abilities and the third goal called for the student to improve his fine motor skills in order to complete mazes, connect the dots, and trace with accuracy (id. at p. 7). The occupational therapist reported that she was responsible for all of the IEP goals related to motor skills (Tr. p. 294). She explained that the first goal was recommended because when the student wrote there was often inconsistent spacing between letters within the same word which made it hard to tell where one word started and the next word ended (Tr. p. 294). The occupational therapist testified that with regard to the second IEP goal that targeted tracking and scanning, the student had some difficulty with convergence and accommodation when he was scanning, and while he had strength in these skills when working in far-point copying he would fatigue easily (Tr. p. 294-95). Lastly, the occupational therapist reported that the student's lowest score on the Beery VMI was on the motor coordination subtest and she added a goal to address fine motor precision (Tr. p. 295).

To address the student's social/emotional needs, the IEP included two annual goals targeting the student's ability to make positive statements about his qualities and accomplishments and to verbally identify situations where he experienced anxiety and strategies to deal with it (Dist. Ex. 27 at p. 6). The counseling goals related to the student's needs as described the present levels of performance (Dist. Ex. 27 at p. 4).

While some of the IEP goals were imprecise and there could have been more goals, or goals that addressed the student's needs with greater specificity, based on the above I find the goals did target the student's areas of need and that the CSE shortcomings in drafting the student's IEP goals did not render the IEP so deficient as to amount to a denial of a FAPE.

### **5. 12-month services**

The IHO found that the district's failure to recommend 12-month services for summer 2021 resulted in a denial of a FAPE (IHO Decision at pp. 35-36; 45). However, the IHO's analysis did not use the proper standard for evaluating whether a student requires 12-month services.

The purpose of 12-month services is "to prevent substantial regression" (8 NYCRR 200.6[k][1]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at <http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf>). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (*id.*; see *F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist.*, 274 F. Supp. 3d 94, 125 [E.D.N.Y. 2017]). Review of the hearing record shows that there is no indication that the student exhibited substantial regression during school breaks, or that the parent requested a 12-month program be considered at any time prior to the August 2021 ten-day notice of unilateral placement (Dist. Ex. 43 at p. 3). Further, there is no evidence in the hearing record that the student had lost skills requiring a period of review in excess of eight school weeks in order to recoup that skill, which is what would have been required to find extended school year services necessary for the student to receive a FAPE. Without any evidence of regression or loss of skills, the IHO erred by finding that the failure to consider extended school year services contributed to a denial of FAPE as the district had no reason to consider such services at the time of the March 2021 CSE meeting.

### **6. Parental Participation**

The IHO held that the parents were denied meaningful participation throughout her decision (IHO Decision at pp. 36-45, 49-51). In particular, the IHO noted that procedural inadequacies, including the adequacy of the evaluative information, impeded the parents'

participation in the decision-making process (id. at p. 44). However, review of the hearing record does not support the IHO's findings on this issue.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's CSE meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a proposed IEP does not amount to a denial of meaningful participation (see Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57 [2d Cir. 2016]; Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 449 [2d Cir. 2015]; E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. 2009]; Cerra, 427 F.3d at 193; F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 2017 WL 3574445, at \*11-\*13 [E.D.N.Y. Aug. 15, 2017], aff'd F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 F. App'x 38 [2d Cir. 2018] [finding that the parent's participation was not impeded when the parent was "given the opportunity [to] speak, ask questions, raise concerns, and offer suggestions"]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*17 [E.D.N.Y. Aug. 19, 2013] [holding that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; Sch. for Language and Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]).

The hearing record shows that the parents were afforded an opportunity to participate in the IEP development process, as they provided input, and asked and answered questions (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]). Of particular note, the hearing record shows that the parents participated at the March 2021 CSE meeting, after the meeting the district special education teacher contacted the parent to set up RTI services for the student and add resource room services to the student's then current programming, the student's IEP was amended by agreement in March 2021, the student's IEP was again updated in August 2021, the district provided prior written notice of its programming for the 2020-21 school year in July 2021, the parents notified the district of their disagreements with the student's program in August 2021, the district responded by letter setting up another CSE meeting, the parents attended and participated in the September 2021 CSE meeting for the student, and following the September 2021 CSE meeting the district and parents exchanged letters (Parent Exs. I; J; Dist. Exs. 27; 28; 29; 33; 41; 42; 43; 45; 46; 48).

Notably, there were allegations that the September 15, 2021 CSE meeting was contentious, which are disputed (see Dist. Exs. 48 at p. 2; 51). Additionally, the IHO's findings regarding parent participation note that the September 2021 CSE did not change the placement recommendation for the student (IHO Decision at pp. 40, 44; see Tr. p. 1065). While the relationship between the parties was clearly acrimonious at times, the hearing record shows that the parents were able to ask questions and the members of the CSE attempted to answer or respond to their questions (see Dist. Ex. 48 at pp. 1-2; Parent Exs. I; J). Additionally, while there may have been a better way of approaching the contentiousness that arose during the September 2021 CSE meeting, overall, the district held multiple CSE meetings for the 2021-22 school year, adapted and changed the student's

program and goals following the March 2021 CSE meeting, and was responsive to the parents' questions—although not in a way preferred by the parents (E.H., 361 Fed. App'x at 160; F.L., 274 F. Supp. 3d at 117). Accordingly, the evidence does not show that the district significantly impeded the parents' participation in the decision making process.

### **C. May 2022 IEP**

Turning to the parties' disputes related to the student's programming for the 2022-23 school year, the IHO found that the May 2022 CSE failed to recommend an appropriate program for the student because the CSE had the results of the private neuropsychological evaluation as well as the participation of the neuropsychologist, but did not recommend a special class for the student as recommended by the neuropsychologist (IHO Decision at pp. 48-49). The IHO also made findings that the May 2022 IEP did not include of appropriate annual goals, the CSE did not consider an appropriate reading methodology for the student, the student would not have been appropriately grouped in a class with the support of ICT services, and that the CSE declined to consider placing the student at Windward and denied the parent participation by not considering her objection to ICT services (IHO Decision at pp. 49-51).

Although I do not concur in the reasoning underlying the IHO's findings related to the 2022-23 school year for a number of the reasons that bear out in the evidentiary record and cited in the district's request for review and not sufficiently refuted by the parent in the answer, for the reasons set forth below and based upon my independent review, I nevertheless find that the district did not offer the student a FAPE for the 2022-23 school year. Accordingly, rather than review the IHO's decision point-by-point and the evidentiary bases related thereto, the inquiry below more narrowly focuses on the one area where it is apparent that the district failed to address the student's needs in its programming recommendations.

For the 2022-23 school year, the review begins with a private neuropsychological evaluation obtained by the parents in April 2022, the report of which they shared with the district (Tr. pp. 1068-69). As part of the neuropsychologist's assessment of the student, she administered the WISC-V, the Woodcock Johnson Tests of Achievement - Fourth Edition (WJ-IV), the Feifer Assessment of Reading (FAR), the Gray Oral Reading Test - Fifth Edition (GORT-5) (Form A), the Test of Everyday Attention for Children (Tea-Ch): selected subtests, the Conners Continuous Performance Test (CPT), the NEPSY: A Developmental Neuropsychological Assessment Test-Second Edition (NEPSY-2): selected subtests, the Clinical Evaluation of Language Fundamentals - Fifth Edition (CELF-5), the Grooved Pegboard Test, the Roberts Apperception Test, the Conners 3 - Parent and Teacher Forms, and the Behavior Assessment System for Children-Second Edition (BASC-2)- Parent and Teacher Forms (Dist. Ex. 55 at p. 5). She also conducted a clinical interview (id.).

With regard to her behavioral observations and impressions, the neuropsychologist reported that the student presented as thoughtful, sensitive, and hard-working (Dist. Ex. 55 at p. 5). She noted that the student exhibited anxiety, which appeared to interact with symptoms of inattention, distractibility, and impulsivity (id.). In addition, she indicated that the student exhibited some obsessive-compulsive behaviors (id.). The neuropsychologist commented that the student frequently reported physical complaints during challenging tasks or tasks that required stamina (id. at pp. 5-6). According to the neuropsychologist, the student responded

enthusiastically to all questions and initiated appropriate conversations (id.). The student often spoke quickly, which reduced his intelligibility, and his articulation errors made his speech difficult to understand (Dist. Ex. 55 at p. 6). The neuropsychologist observed that the student was unable to complete age-appropriate fine motor tasks such as opening a snack bag, opening a water bottle, and tying his shoes (id.). She noted that he enjoyed drawing, but that his fine motor control was weak (id.).

As measured by the WISC-V, the student's full scale IQ of 104 fell in the average range (Dist. Ex. 55 at p. 17). The neuropsychologist noted that the student's verbal IQ fell in the superior range and the student could reason well with language and had acquired a large fund of verbal knowledge and strong vocabulary (id. at pp. 6-7; 13). In contrast, the student exhibited a weakness in working memory (id. at p. 7).

Turning to academic achievement, the neuropsychologist reported that the student's reading and spelling scores fell in the below average range and were indicative of specific learning disorders in reading and written expression (Dist. Ex. 55 at p. 7). On the WJ-IV, the student's ability to read single words fell at the 5th percentile, and on the FAR, the student's reading skills fell at the 3rd percentile (id. at p. 8). On both tests the student guessed the words based on the initial sounds rather than using decoding strategies (id.). On the WJ-IV, the student's ability to decode nonsense words was at the 15th percentile and on the FAR his nonsense word decoding was at the 10th percentile (id.). According to the FAR subtests, the student's phonological awareness skills fell at the 10th percentile and his rapid naming skills fell at the 27th percentile (id.). The neuropsychologist reported that while the student also struggled to read accurately in context, he was able to read more words correctly when doing so, using his intelligence and background knowledge to compensate (id.). She indicated that the student read slowly and made many errors and that his oral reading fluency score fell at the 34th percentile on the FAR and his reading rate fell at the 9th percentile on the GORT-5 (id.). The student's reading accuracy and reading comprehension both fell at the 16th percentile on the GORT-5, but his reading comprehension fell at the 4th percentile on the WJ-IV due to fewer context clues (id.).

According to the neuropsychologist, the student struggled with handwriting and letter formation, and his ability to write letters and spell single words fell at the 12th percentile as measured by the WJ-IV (Dist. Ex. 55 at pp. 8, 18). The student exhibited a high level of reversals and omitted and misrepresented sounds when spelling (id. at p. 8). The neuropsychologist reported that the student's ability to write single sentences in response to evaluator prompts was in the average range at the 44th percentile which indicated he had made gains expressing his ideas in complete sentences; however, he was not penalized for spelling, capitalization, or punctuation on this measure (id.).

In terms of mathematics, the neuropsychologist reported that the student's skills in solving math problems in numeric format fell at the 30th percentile (Dist. Ex. 55 at p. 9). The student was able to add and subtract two digits but was unable to add with carrying or subtract with borrowing and could not perform single-digit multiplication (id.). On a measure of math reasoning (applied problems) the student's skills fell at the 19th percentile, and his timed retrieval of math facts fell at the 30th percentile (id. at pp. 9, 18). The student was able to tell time to the hour and to identify some coins and their values (id. at p. 9).

Next, the neuropsychologist indicated that the student's language processing skills were assessed using subtests from the CELF-5, WISC-V, and FAR (Dist. Ex. 55 at p. 9). She reported that the student exhibited language processing weaknesses in the areas that underlie decoding, spelling, phonological processing, and retrieval (id.). According to the neuropsychologist, the student exhibited significant difficulties with speech articulation and noted that his articulation errors were possibly related to deficits in phonological processing, oral motor strength and control, and tongue tie (id.). The neuropsychologist indicated that the student exhibited a strong expressive vocabulary, reasoned well with language and was able to comprehend sentences and paragraphs (id.). In addition, the student was able to follow directions and repeat sentences back verbatim (id.).

In terms of the student's attention and executive functioning abilities, the neuropsychologist reported that they were assessed using subtests from the WISC-V, Tea-Ch, and CPT (Dist. Ex. 55 at p. 10). She noted that the student exhibited significant deficits in executive functioning including working memory, auditory attention, and visual attention (id.). The neuropsychologist reported that although the student's distractibility and impulsivity had typically been attributed to his anxiety, test data suggested that some portion of his difficulties related to a separate difficulty with attention and self-regulation (id.). The neuropsychologist indicated that the student's auditory working memory fell at the 25th percentile, visual working memory fell at the 16th percentile, processing speed fell at the 50th percentile and his auditory attention fell in the low average range at the 16th percentile (id.).

The neuropsychologist indicated that the student performed in the clinically significant range on a task of sustained visual attention (Dist. Ex. 55 at p. 11). The student's score indicated significant difficulties with attention and impulsivity/response inhibition (id.). However, the evaluator determined that an ADHD diagnosis was inappropriate at the time because the parent and teacher report were not clinically significant, and ADHD was typically present across settings (id.). On the Conners' Rating Scale, the parents' responses placed the student in the clinical range for peer relations, and his teacher report placed him in the borderline clinically significant range for learning problems, executive functioning, and peer relations (id.).

According to the neuropsychologist, the student's memory skills were assessed using subtests from the NEPSY-II (Dist. Ex. 55 at p. 11). The student performed at the 75th percentile on a task of story memory, at the 16th percentile for visual memory, and at the 37th percentile for delayed recall (id.).

Next, the neuropsychologist assessed the student's visual-motor and visual-spatial reasoning using subtests from the WISC-V, NEPSY-II, and Grooved Pegboard test (Dist. Ex. 55 at p. 12). She noted that the student displayed significant weaknesses in fine motor, oral motor, and visual-motor functioning (id.). In addition, the student demonstrated a weak and incorrect grasp when writing and drawing (id.). The student performed at the 9th percentile on tests of figure copying and block design (id.).

The neuropsychologist reported that parent report, clinical interview, projective measures and questionnaire measures were used to assess the student's social-emotional functioning (Dist. Ex. 55 at p. 12). She noted that on a standardized measure of affect recognition, the student exhibited the ability to differentiate subtle emotions and demonstrated intact perspective taking

and theory of mind (id.). The BASC-3 parent rating scale placed the student in the at-risk range for anxiety but within the average range for all other areas (id. at p. 13). The BASC-3 teacher rating scale placed the student in the at-risk range for anxiety, at the clinical range for somatization, and in the average range for all other areas (id.).

Based on her assessment, the neuropsychologist offered the following diagnoses of the student: speech-sound disorder, specific learning disorders in reading and written expression, developmental coordination disorder, and generalized anxiety disorder (Dist. Ex. 55 at p. 14). She also noted the need to rule out attention deficit/hyperactivity disorder (id.).

In addition, the neuropsychologist recommended that the student continue to attend Windward School and receive intensive, multi-sensory, phonics-based, systematic instruction for reading and writing, scaffolding throughout the day, and specialized instruction in the area of executive functioning (Dist. Ex. 55 at pp. 14-15). The neuropsychologist recommended testing accommodations of extended time, flexible setting, directions read and clarified, and checking for understanding (id. at p. 15). The neuropsychologist recommended classroom accommodations of preferential seating, pre-teaching, repetition, re-teaching, directions read and repeated, directions and task steps provided in writing, checks for understanding, wait time when responding, assignments broken down into smaller parts, use of rubrics and graphic organizers for writing, scaffolded class notes, and subtle prompts for redirection (id.). The neuropsychologist recommended speech-language therapy to remediate the student's speech articulation, and OT to address his motor planning, control, strength, coordination, and stamina (id. at pp. 15-16). Finally, the neuropsychologist recommended cognitive behavioral therapy for the student, and consultation with a psychiatrist to discuss the full range of treatment options including medication (id. at p. 16).

### **1. ICT recommendation**

The May 27, 2022 CSE had before it the April 23, 2022 neuropsychological evaluation report, an April 26, 2022 attendance record, an April 26, 2022 progress report, and an April 26, 2022 report card, as well as prior evaluations from the 2020 and 2021 school years (Dist. Ex. 61 at p. 3; see Dist. Exs. 19; 20; 21; 22; 54; 55).

According to the May 2022 IEP, the private school reported that the student was able to apply explicitly taught strategies to decode CVC words, and with teacher support could decode words with suffixes and CVC-E words (Dist. Ex. 61 at p. 7).<sup>24</sup> The student was also working on decoding words with initial and final blends (id.). The IEP noted that the student continued to work on fluency, as he was not consistently attentive to punctuation when reading (id.). He was able to answer literal comprehension questions and continued to work on answering inferential comprehension questions (id.). According to the IEP, the student was learning from the PAF reading program and was currently working on a beginning first-grade level (id.). The IEP noted that the student used the Touch Math program and did well with addition (id.). He benefitted from reminders to slow down when computing numbers (id.). The student had word problems read to him (id.). The IEP noted that the student continued to work on addition and subtraction with

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<sup>24</sup> A representative from the private school attended the May 2022 CSE meeting, as did the neuropsychologist who conducted the April 2022 neuropsychological evaluation of the student (see Parent Ex. N; Dist. Exs. 60; 61 at p. 1).



regrouping and solving one-step word problems (id.). According to the IEP, the private school reported that the student had made progress in handwriting and overall legibility (id.). The student was working on writing at the sentence level (id.). The IEP indicated that, in reading, the student needed to use a decoding strategy to read words with digraphs, blends, and suffixes; accurately read irregular words; improve reading fluency (accuracy, rate, and expression); and accurately answer comprehension questions related to a text (id. at p. 8). With respect to writing, the IEP indicated that the student needed to write three to five word sentences with proper capitalization, punctuation, and spelling, and demonstrate command of the conventions of standard English spelling (id.). In math, the student needed to demonstrate grouping with regard to addition and subtraction and solve one-step addition and subtraction story problems (id.).

Turning to social development, the IEP stated that the student was comfortable socially and liked receiving validation from peers and adults (Dist. Ex. 61 at p. 8). The IEP noted the parents' concerns regarding the student's anxiety, confidence, and peer relationships (id.). The IEP indicated that the student needed to verbally identify situations where he experienced anxiety and strategies to deal with anxiety (id.). In terms of physical development, the IEP stated that the student was able to cut curved and straight-lined shapes with improved precision and write letters with appropriate top-down formation (id. at p. 9). The student was able to copy a sentence from the board with visual cues, marking short, tall, and diving letters with independence (id.). The IEP stated that the student needed to improve visual spatial skills in order to write two sentences with appropriate spacing, to improve visual scanning and attention, to copy two to three sentences, to complete fine motor precision activities, and to use correct placement of fingers on the keyboard in order to improve his typing skills (id.).

To address the student's needs, the May 2022 CSE recommended that for the 2022-23 school year the student receive the support of ICT services for four hours per day, as well as two 30-minute sessions per six-day cycle of OT in a group, and one 30-minute session per six-day cycle of individual counseling (Dist. Ex. 61 at p. 1). In addition to the support of ICT services and related services, the May 2022 IEP included 13 annual goals that targeted the student's weaknesses in reading, writing, mathematics, social/emotional development, and motor skills as described in the present levels of performance (id. at pp. 10-11). The May 2022 CSE also recommended numerous classroom accommodations including use of a slant board during writing activities, use of graphic organizers, preferential seating, directions read and repeated, assignments broken down, and extra time, as well as numerous testing accommodations (id. at pp. 12-13, 14).

## **2. Related Services**

Although not specifically addressed by the IHO in her decision, the parents' January 2023 due process complaint notice included an assertion, without further elaboration, that the district "failed to provide appropriate related services" (Parent Ex. A at p. 9). However, the IHO found that the May 2022 CSE failed to follow the recommendations included in the privately obtained 2022 neuropsychological evaluation (IHO Decision at pp. 48-49). This evaluation, as summarized above, demonstrates the student required additional related services not recommended by the May 27, 2022 CSE, specifically speech-language therapy.

Here, the hearing record shows that although the student received speech-language therapy as a preschooler, the district discontinued the service when the student transitioned to kindergarten

as his receptive and expressive language skills tested in the average range, and his articulation was good in context and fair to good outside of context (Tr. pp. 1177-1180; Dist. Ex. 55 at p. 2). Nevertheless, the student's April 2019 IEP indicated that the student had "difficulty lifting his tongue tip," and that he exhibited "excellent improvement with his articulations skills but still exhibited a mild articulation delay" (Tr. p. 1183; Dist. Ex. 66 at 2). While a failure to offer speech language services on this basis alone would not result in a denial of a FAPE, more recent information was available to the May 2022 CSE.

In her April 2022 evaluation report, the neuropsychologist diagnosed the student with a speech-sound disorder and recommended speech-language therapy to remediate the student's speech articulation (Dist. Ex. 55 at pp. 14-16). Specifically, she wrote:

1. [The student] requires speech-language therapy to remediate his speech articulation. This therapist must be trained in PROMPT therapy and specialized in the remediation of articulation for his age group.
2. Prior to starting this intervention, [the student] should be evaluated to determine the extent of his tongue tie and what intervention would be required to allow him to make the full range of sounds.
3. Individual speech therapy should be paired with a structured home practice that provides brief, daily reinforcement of target skills.  
(Dist. Ex. 55 at p. 15).

At the May 2022 CSE meeting, the neuropsychologist noted that the student had deficits in language processing that underlaid his language-processing based learning disabilities (Parent Ex. N at 4:45-5:00). The neuropsychologist further noted that the student struggled with phonological processing and retrieval, which were "two key underpinnings for fluent reading and [we]re root causes of dyslexia" (*id.* at 5:11-5:23). The neuropsychologist indicated that the student had a speech-sound disorder and that he "misarticulate[d] several sounds" and it looked like he was having a lot of trouble with oral-motor control (*id.* at 5:23-5:38). She also stated that the parent had just obtained another evaluation (*id.* at 5:29-5:33). The neuropsychologist continued that the student had a "significant tongue tie that w[ould] need to be remediated before [his] speech c[ould] be effectively remediated" (*id.* at 5:38-5:47). Further, the neuropsychologist stated that "once we address the tongue tie, that he'll have [a]rticulation therapy, but also maybe broader speech therapy to address some of these language processing issues that are underlying the learning difficulties" (*id.* at 8:01-8:20).

At the May 2022 CSE meeting, the CSE chairperson asked the student's mother if she wanted to elaborate on "the tongue tie issue" (Parent Ex. N at 29:48-58). In response, the student's mother indicated that the parents were just made aware of the student's tongue tie and explained that the student had undergone "a very specialized evaluation" the day before about "how it was impacting his speech and that it turned out it was impacting his speech "greatly" (*id.* at 30:03-30:15). The parent noted that the student's tongue tie was impacting "the way that his mouth function[ed]," "the way his jaw move[d]" and that it was "incapable of structurally upholding the rest of his mouth" (*id.* at p 30:18-30:30). She explained that due to the student's tongue tie, his tongue could not reach the roof of his mouth, which led to an underdeveloped palate and the need

for the student to compensate when speaking (*id.* at p. 30:15-31:02). In addition, there were some sounds that the student could not make at all (*id.* at 31:02-31:22).

The student's mother further explained to the CSE participants that the parents "went down this path" because they received "a call from Windward that it was impacting his reading and writing because what he was saying wasn't necessarily matching what's on the page, and then when he was trying to sound it out, it wasn't translating well onto the paper" (*id.* at 31:26-31:40). She stated that the parents were trying to figure out next steps which "preliminarily seem to, you know, include first strengthening the muscles in the mouth before we go on and structurally look at the mouth" (*id.* at 31:45-31:55). In response to the parent, the CSE chairperson indicated that the district would like to obtain a speech-language evaluation, but that it wanted to make sure it was conscious of what was going on structurally with the student (*id.* at 32:10-32:21). The CSE chairperson requested that the parent stay in contact with the school, give consent for an evaluation, and then come back "because it does sound like speech and language pieces [are] an area of concern that we may want to address" (*id.* at 32:22-32:37). The CSE chairperson indicated that she did not want to do so while the student and parents were "trying to manage like the physicality piece" (*id.* at 32:37-32:44). The parent noted that she would be obtaining a report from the person who conducted the evaluation the previous day and that she would give it to the district, and then "we can go forward" (*id.* at 32:44-32:53). Towards the end of the meeting, the CSE chairperson stated "before we looked at any sort of speech and language therapy, I would want to make sure that we did an updated evaluation to see specifically those areas of deficit" (*id.* at 53:56-54:07).

The May 2022 IEP noted that the student had been diagnosed with a speech-sound disorder; however, the May 2022 CSE did not recommend that the student receive speech-language services for the student (Dist. Ex. 61 at pp. 1, 9, 12). Comments included with the May 2022 IEP indicated that the parent brought the student to a specialist for his speech, that the student's tongue tie was contributing to issues with articulation, that the parent was obtaining a further evaluation, and that the CSE was recommending a speech-language evaluation "once a course of action has been determined by [the student's] physicians to address the tongue tie" (*id.* at p. 2). The parent evaluation was completed on May 26, 2022, in a letter dated July 1, 2022 the private evaluator recommended that the student receive oral motor therapy two times per week, and the district evaluation was completed in September, 2022 (Parent Exs. M; P; R).<sup>25</sup>

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<sup>25</sup> The "specialized evaluation" report was entered into the hearing record (*see* Parent Ex. M). Although, it was not before the May 2022 CSE, the report stated that the student exhibited "moderate oral- motor/speech disorder secondary to physiological dysfunction of the oral mechanism" (Parent Ex. M at p. 3). In addition, the report stated that a "lack of muscular development inhibited the development of the jaw, tongue, and lip dissociation" which was a "necessary component of standard articulation skill development" (*id.*). The evaluator recommended oral-motor therapy for the student to improve his "tone, strength, grading, and dissociation of tongue/lip/jaw movements in order to achieve standard articulation" (*id.*). The evaluator noted that during an initial consultation with a physician, the physician recommended that prior to oral motor therapy the student undergo upper and lower jaw expansion (*id.* at pp. 3-4). She developed a plan to facilitate the student's underlying motor skills to support safe nutritive eating and oral placement for speech (*id.* at pp. 5-8). In a July 1, 2022 document labeled "Therapy Recommendations," the evaluator recommended that the student receive individual oral motor therapy twice weekly from a therapist with oral motor training (*id.* at p. 9; Parent Ex. P). Additionally, the district conducted a speech-language evaluation in September 2022 (*see* Parent Ex. R). Again, this report was not before the CSE, but it stated that the student had been getting therapy every other week all summer (Parent Ex. R at p. 1). The evaluating speech-language pathologist reported that, compared to prior testing conducted in 2019, the student's receptive language scores were similar and there was an

Based on the discussion at the May 2022 CSE meeting, the parent had concerns regarding the student's speech and language development, as did the neuropsychologist who evaluated the student: an IEE was presented to the CSE on the subject, and both the neuropsychologist and the parent explained during the CSE meeting how their concerns related to continuing deficits in the student's reading. However, rather than recommending speech-language therapy for the student to be included in the May 2022 IEP, the CSE expressed that it wanted to delay the recommendation waiting for a district speech-language evaluation to be conducted. In this instance, the audio recording of the May 2022 CSE meeting shows that the CSE opted to wait until it had more information from the parent regarding the student's tongue tie before conducting a speech-language evaluation of the student. However, it is sufficiently clear that the student had phonological processing problems identified by the neuropsychologist and unrelated to his articulation difficulties that warranted a recommendation for speech-language therapy at time of the CSE meeting. While the district would not have been required to conduct a medical procedure to surgically remediate the student's tongue tie, even in the absence of a surgical intervention the district was responsible to provide speech-language services to address the student's needs related to oral motor strengthening and phonological processing deficits, and I am not convinced that the CSE was permitted to delay until further evaluations were conducted or after a surgical intervention was conducted, and it bears mentioning that no evidence of a surgical intervention ultimately came to light in the hearing record.<sup>26</sup> Accordingly, it was incumbent on the CSE to make that recommendation and the failure to do so resulted in a denial of a FAPE to the student (see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017] [recommendations included in private evaluation created a consensus as to what the student required where the district did not conduct any evaluations of its own to call into question the opinions and recommendations contained in the private evaluations]). In my view the programming lacked a vital related service that was necessary for the proposed IEP to be reasonably calculated to enable the student to receive educational benefits. Accordingly, while I do not agree with the IHO's reasoning, I ultimately reach the same conclusion as the IHO that the district denied the student a FAPE for the 2022-23 school year.

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increase in the student's overall composite score and expressive language skills (id. at p. 2). She also noted that her testing yielded a lower articulation score that was in the below average range (id. at pp. 2, 6). The district speech-language pathologist conducted an oral peripheral examination of the student (id. at p. 5). She reported that the student had a high narrow palatal arch and could not elevate his tongue towards his upper lip (id. at pp. 5, 6). She noted that at times, when the student spoke, he did not seem to have much jaw or mouth movement (id. at p. 5). Administration of the sounds-in-words subtest of the Goldman Fristoe Test of Articulation – Third Edition (GFTA3) yielded a standard score of 75 (5th percentile) and the student's performance was judged to be in the below average range (id. at pp. 5-6). The speech-language pathologist judged the student's intelligibility to be fair to good and noted that the student exhibited the phonological process of gliding, final consonant deletion, and palatalization (id. at p. 6). According to the speech-language pathologist, the student's rapid rate of speech contributed to a decrease in his intelligibility (id. at p. 6). No further information was available regarding any subsequent events before the CSE later during the 2022-23 school year, and the parent's decision to unilaterally place the student had to be made on the basis of the May 2022 programming.

<sup>26</sup> A surgical intervention of this nature might have eventually altered the focus of speech-language therapy to a degree due to changing circumstances after the surgery, but it would not have eliminated the need for services in light of the student's other deficits.

#### **D. Unilateral Placement**

Having found that the district failed to offer the student a FAPE for the 2022-23 school year, I next turn to the district's appeal of the IHO's determination that Windward was an appropriate unilateral placement for the student for the 2022-23 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every

special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

On appeal, the district argues that the IHO erred by finding Windward was appropriate for the 2022-23 school year. Specifically, the district contends that Windward was not appropriate because it did not provide the student with an adequate program to meet the student's OT and social/emotional needs and that the lack of services in those areas caused his development to diminish while at Windward. In response, the parents assert that Windward provided a full-time special education environment for the student.

The IHO held that Windward was an appropriate unilateral placement because Windward provided a self-contained specialized school environment and that Windward met the student's unique academic, social, and emotional needs (IHO Decision at p. 52). Regarding the 2022-23 school year analysis, the IHO did not address the lack of related services at Windward; however, she did so in her analysis of the 2021-22 school year (compare IHO Decision at pp. 51-52 with IHO Decision at pp. 45-47). To support the finding that Windward was appropriate, despite the lack of related services, the IHO cited to M.H. v New York City Dep't. of Educ., 685 F.3d 217, 253 [2d Cir. 2012] (IHO Decision at p. 45). The IHO correctly noted that M.H. allows for a unilateral placement to be deemed appropriate even if it does not provide related services to a student; however, in that matter that the student received all of the related services recommended by the district but at a separate location from the private school and the court found that there was nothing that required the services be provided "during the school day" (M.H. at pp. 253-254). I also note that courts have often held that the failure of a unilateral placement to provide every related service that would be beneficial to a child given his or her needs will not, by itself, render a unilateral placement inappropriate if the placement as a whole is reasonably calculated to enable the student to receive educational benefits (see, e.g., T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 838-39 [2d Cir. 2014]).

As discussed in detail above, the information in the hearing record lead me to the conclusion that the student required OT, counseling services, and speech language therapy during the 2022-23 school year in order to receive an appropriate educational program under the Act. Additionally, as discussed below, Windward does not provide related services to the student. Accordingly, the focus of this analysis is whether the parents presented sufficient evidence to show that the educational program offered to the student at Windward during the 2022-23 school year, as well as any evidence of services provided outside of Windward, were appropriate to meet the student's educational needs.

The hearing record shows that during the 2022-23 school year Windward provided the student with instruction in language arts, which included the use of the Orton—Gillingham approach to teach reading, spelling, and handwriting (Parent Exs. U at p. 1, II at p. 2). The student's language arts class focused on decoding, developing a sight vocabulary of irregular words,

building fluency, reading comprehension, spelling, and writing linguistically complex sentences and well-developed paragraphs (Parent Exs. U at pp. 1-2; V at p. 2; II). The student's math class was taught using direct and explicit multisensory instruction, complimented by the use of manipulatives and technology (Parent Exs. U<sub>2</sub> at p. 3; V at pp. 3-4; II at p. 4). The focus of math instruction was on number sense and concepts, computation, and problem solving (*id.*). The student also receive instruction in social studies, science, and specials (Parent Exs. U at pp. 2, 4-5; V at pp. 3, 5-6; II at pp. 3, 5-6).

Prior to turning to the testimony presented by the parents' expert witness as to the appropriateness of the program provided to the student at Windward, I note that that pursuant to Windward's policies, and consistent with the terms of its enrolment contract, no administrators, teachers, or staff members from Windward testified at the hearing (*see* Parent Ex. L at p. 2). Pursuant to the enrollment contract it is Windward's "policy not to make available School administrators, teachers or staff members to testify or prepare testimony relating to tuition reimbursement proceedings initiated by or against any state or local authority" (*id.*). While the nonpublic school is not precluded by law from such a policy, the implications of it are staggering from the perspective of adequate development of a hearing record in unilateral placement cases and it is worth noting that it puts the parents of students enrolled at the school who are seeking reimbursement for school tuition in a precarious position as, regardless of the private school's policy, parents have the burden of proving that the program provided by the school was appropriate to meet the student's needs. A burden that, as becomes more apparent below, is difficult to carry without cooperation and testimony by the people who are providing the student's educational services at a unilateral placement.

Here, the parents' expert witness testified that she had a Ph.D. in psycholinguistics and had been affiliated with Windward for 35 years in that she was a member of the Windward Institute and taught Windward teachers their required courses in multisensory instruction (Tr. pp. 919-20, 1002). She reported that she met with the student for two hours in his home but did not formally assess him (Tr. pp. 968, 987). She acknowledged that she never observed the student in school or spoke with any of his Windward teachers but reported that she spoke with the Windward CSE liaison who in turn had spoken with the student's Windward teachers (Tr. pp. 924-25, 968, 987-88). According to the parents' expert, based on her conversation with the CSE liaison, the student was reading at about a first or second grade level in Windward's structured materials and the student's teachers had noted the student's needs related to blends due to his articulation difficulties (Tr. pp. 925-26). The expert reported that Windward used Preventing Academic Failure, which was based on the Orton-Gillingham approach (Tr. p. 926, 988). With respect to reading, the parents' expert reported that the student "could generate sentences and ideas that exceed[ed] his ability to write them down, because he can't spell those words" (Tr. p. 926). She reported that Windward staff had been working on "grammatical parsing" which taught children to control their rate when they were reading so they were not reading one word at a time, which would disturb comprehension (Tr. pp. 926-27). According to the parents' expert, Windward staff were working with the student on handwriting and the student had learned to write intelligently using script (Tr. p. 927). She reported that the student's sentences were increasing in length because Windward staff had taught the student how to use conjunctions (Tr. p. 927). In terms of mathematics, the parents' expert reported that the student was doing better with addition but struggling with subtraction, that Windward staff was using lined papers with the student because of a special pencil they gave him, and that word problems had to be read to the student because he could understand

the concepts but could not decode (Tr. pp. 927-28). The expert further stated that the student's ability to hold a pencil was poor, and his motor control was "not good" (Tr. p. 928). She explained that Windward used a pencil grip with the student that created stability and allowed him to write more effectively with less effort (Tr. pp. 928-29). She reported that because the student had visual motor issues, he was also given special paper with lines on it (Tr. p. 929). The parents' expert stated that she believed that there were six students in the student's class but that she could not recall what the CSE liaison said with regard to instructional cohorts (Tr. p. 965).

Turning to the student's need for related services, at the May 2022 CSE meeting the student's mother reported that the student had "recommenced" OT approximately one month earlier, following the neuropsychologist's evaluation, and that her understanding was that while the student was in school there was a lot of emphasis placed on those skills in the classroom (Parent Ex. N at 41:45-42:08). The parent confirmed that the student had been receiving counseling, and that both OT and counseling were obtained privately by the parents and not through Windward (Parent Ex. N at 42:08-42:37).

The parents' expert indicated that she was aware that the neuropsychologist recommended that the student receive OT and that Windward did not provide OT to the student (Tr. p. 983). She further indicated that she was aware of the neuropsychologist's evaluation, conducted when the student was at Windward and not receiving OT, which indicated that the student had significant fine motor issues and anxiety related to going to the bathroom due to his motor challenges (Tr. p. 984). The parents' expert opined that OT services related to building core strength coordination could "to some extent" be managed in physical education classes where the student was not the only one with a weak core (Tr. p. 1008).<sup>27</sup> She stated that the student's parents were addressing his motor needs which was important "because when a service such as OT is provided in school there's not sufficient carry over to family" and "you don't get the same consistency and impact" (Tr. p. 1008). The parents' expert confirmed that Windward did not provide direct OT but asserted that "if [the student] spen[t] the rest of his life without good posture or good handwriting but he c[ould] read and spell an[d] learn to type and dictate, it will be okay" (Tr. p. 1008).

The parents' expert also confirmed that the student did not receive counseling at Windward (Tr. p. 937). Based on her conversation with the CSE liaison she reported that in the two years the student had attended Windward he had only sought a conversation with the counselor on one occasion (Tr. p. 937). The parents' expert opined that the student did not require counseling at Windward "[b]ecause he d[id]n't feel disabled and different and unable to learn" (Tr. 937). The expert opined that the cognitive behavioral therapy recommended by the neuropsychologist was different than counseling provided in schools (Tr. p. 980, 981). She stated that while the neuropsychologist identified the student as having a generalized anxiety disorder, she also made it

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<sup>27</sup> Although the hearing record includes progress reports from Windward for four marking periods for the 2022-23 school year, and the progress reports include a description of physical education classes, there is nothing in the progress reports that indicate the student received any special education supports in physical education (see Parent Exs. U-V; II; SS). In fact, while a review of the progress reports provides a brief description of the student's classes in language arts—including reading comprehension and written expression; social studies; math—including number sense and concepts, computation, and problem solving; science; music; art; and physical education, and the progress report tracks a number of skills across each of these areas, the reports themselves provides little information, other than generalities, as to special education supports or strategies provided to the student at Windward (*id.*).



clear in her report that the student was getting treatment for his anxious symptoms (Tr. p. 981). She opined that what the family chose to do with the student privately was different than having the student pulled out for small group counseling one or two times a week (Tr. p. 1007).

The testimonial evidence in this case was hearsay which is admissible in an administrative hearing of this nature. But admissible does not mean that it is either weighty or convincing. The witness conceded that she did not speak to the student's teachers and did not see the student in the private school. Furthermore, the mere fact that the parent is not seeking reimbursement for privately obtained related services does not relieve the parent of the obligation to demonstrate that the student has been provided with educational instruction specially designed to meet the unique needs of a disabled student, supported by such services as are necessary to permit the child to benefit from instruction (Gagliardo, 489 F.3d at 112 [emphasis added]), and the evidence regarding OT and counseling and any speech-language services that the parent obtained is very scant at best. It would defy logic and the Supreme Court's holding in Carter to find what the district did was inappropriate under Rowley, and then find that similar evidence passed muster as "proper under the Act" and "reasonably calculated to enable the student to receive educational benefits" with regard to the unilateral placement (Carter, 510 U.S. at 11). Accordingly, upon considering the totality of the circumstances and the evidence included in the hearing record regarding the educational services the student was provided during the 2022-23 school year, I reach the conclusion that the parents did not provide sufficient evidence to establish that Windward and student's related services obtained by the parent were appropriate to address the student's needs.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports finding that the district offered the student a FAPE for the 2021-22 school year, it is unnecessary to reach the issue of whether Windward was an appropriate unilateral placement for that school year, or whether equitable considerations weighed in favor of the parent's request for reimbursement. Any award for relief as it pertains to the 2021-22 school year is rescinded.

Having determined that the hearing record supports finding that the district failed to offer the student a FAPE for the 2022-23 school year and the unilateral placement of Windward was not appropriate, it is unnecessary to reach the issue of whether equitable considerations weighed in favor of the parent's request for reimbursement. Any award of relief as it pertains to the 2022-23 school year is also rescinded.

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

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the January 22, 2024 IHO decision is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2021-22 school year; and

**IT IS FURTHER ORDERED** that the January 22, 2024 IHO decision is modified by reversing that portion which found that Windward was an appropriate unilateral placement for the student for the 2022-23 school year, and

**IT IS FURTHER ORDERED** that the January 22, 2024 IHO decision is modified by reversing that portion of the decision that ordered the district to pay the costs of the student's tuition at Winward for the 2021-22 and 2022-23 school years.

**Dated:**           **Albany, New York**  
                          **April 25, 2024**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**