



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-072

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

Appearances:

Law Office of Anton G. Cohen, PC, attorneys for petitioners, by Sandra Robinson, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Christine Corbett, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered their daughter appropriate educational programming and denied their request to be reimbursed for her tuition costs at the Churchill School & Center (Churchill) for the 2023-24 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited fully here in detail. Briefly, the student has received diagnoses of a specific learning disorder with impairments in reading (dyslexia), math, and writing, and attention-deficit/hyperactivity disorder (ADHD), predominantly inattentive presentation; she has received integrated co-teaching (ICT) services, occupational therapy (OT), and speech-language therapy since kindergarten (Parent Ex. H at pp. 1-2, 9; Dist. Ex. 5 at pp. 1-2, 9).¹ Over multiple dates during the 2022-23 school year, evaluators conducted

¹ The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits

an independent neuropsychological evaluation of the student (Parent Exs. H; L ¶ 4). A CSE convened on June 16, 2023, to review the March 2023 neuropsychological evaluation report, determined the student was eligible for special education as a student with a learning disability, and developed the student's IEP for the 2023-24 school year (fourth grade) (Tr. pp. 60-61; Dist. Ex. 1).^{2, 3}

The parents disagreed with the recommendations contained in the June 2023 IEP, and, as a result, notified the district of their intent to unilaterally place the student at Churchill for the 2023-24 school year (see Parent Ex. B).⁴ In a due process complaint notice, dated September 6, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parents asserted that the June 2023 CSE predetermined the recommendation for ICT services; the parents were denied meaningful participation in the June 2023 CSE meeting; the June 2023 CSE failed to consider the March 2023 neuropsychological evaluation; the recommended program including ICT services failed to offer the student a small student-to-teacher class with individual support; and the annual goals were not measurable and did not address the student's areas of need (Parent Ex. A at pp. 2-4). In addition, the parents claimed that Churchill was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of an award of tuition reimbursement (id. at p. 5). As relief, the parents requested a finding that the student was denied a FAPE for the 2023-24 school year, reimbursement/direct funding of the tuition at Churchill for the 2023-24 school year, the cost of transportation expenses to and from Churchill, and independent educational evaluations (IEEs) at district expense (id.).⁵

After a prehearing conference on October 16, 2023 and a status conference on October 30, 2023, an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on December 8, 2023 and December 20, 2023 (Tr. pp. 1-167). In a decision dated January 24, 2024, the IHO determined that the district offered the student a FAPE for the 2023-24 school year (IHO Decision at p. 26). In particular, the IHO found that the June 2023 CSE considered sufficient evaluative information including the neuropsychological evaluation, that the student's previous progress in a setting where she received ICT services supported the recommendation for continued ICT services, that the June 2023 IEP was not predetermined and the parents

were cited in instances where both a parent and district exhibit were identical. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

² The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

³ A CSE meeting was held on December 21, 2022 to conduct the student's annual review (see Tr. pp. 60-61; Dist. Ex. 1 at pp. 7-8).

⁴ Churchill has been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

⁵ The parents withdrew their claims for district funding of transportation expenses and IEEs during the impartial hearing (Tr. pp. 12, 34).

meaningfully participated in the CSE process, the annual goals addressed the student's areas of need, and the student's reading performance at grade level did not warrant "specialized reading instruction" (*id.* at pp. 24-26). Although the IHO found that the district met its burden to show that the student was offered a FAPE, the IHO made alternative findings that the parents met their burden to demonstrate that Churchill was appropriate and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (*id.* at pp. 26-27). Ultimately, however, based on the IHO's findings in favor of the district on the FAPE issues, the IHO dismissed the parents' claims with prejudice (*id.* at p. 27).

IV. Appeal for State-Level Review

The parents appeal. The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here in detail. The parent challenges the IHO's conclusion that the district offered a FAPE for several reasons. The parents assert that the student was not progressing with ICT services in prior school years and the recommendation for ICT services for the 2023-24 school year was not appropriate for the student to make progress. Additionally, the parents argue that the IHO erred by failing to give weight to the testimony of the neuropsychologist. The parents also argue that the IHO erred in finding that the student did not require "specialized reading instruction," that the annual goals were appropriate, and that the district considered sufficient evaluative information when formulating the IEP. Further, the parents seek to admit a 2022-23 New York State assessment as additional evidence. As relief, the parents seek reimbursement of the costs of the Churchill tuition for the 2023-24 school year.

In its answer, the district generally denies the material allegations contained in the request for review. The district asserts that the IHO properly weighed the evidence in the hearing record and correctly found that there was sufficient evaluative information to recommend ICT services and, therefore, the IHO's finding that the district offered the student a FAPE for the 2023-24 school year should be upheld.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would

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

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR

300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁶

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

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

VI. Discussion—June 16, 2023 IEP

A. Consideration of Evaluative Information

The parents argue that the IHO erred in finding that the district considered sufficient evaluative information when developing the student's June 2023 IEP. The parents contend that much of the information the school psychologist testified that the CSE used during the development of the student's IEP was not presented as evidence.⁷

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide

⁶ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

⁷ The parents essentially argue with the manner in which the district presented information about the student during the impartial hearing; however, the student's June 2023 IEP contains a description of evaluative information from multiple sources, and the parents did not challenge the accuracy of the June 2023 present levels of performance in their due process complaint notice, nor did they allege that evaluations or assessments were conducted in an incompetent manner (see Parent Ex. A; Dist. Ex. 1 at pp. 1-9). Instead, the claims focus on allegedly inadequate weight given by the CSE to the service recommendations in the March 2023 private neuropsychological evaluation (id. at 2-4), which is further addressed below.

assessments as well as any special factors as set forth in federal and State regulation (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Review of the hearing record shows that, as required, the June 2023 CSE considered the results of the most recent evaluation of the student and her academic strengths, noted the parents' concerns, and developed the student's present levels of academic, developmental, and functional performance based on standardized testing conducted during the neuropsychological evaluation, in addition to results of informal testing completed in the classroom, the student's grades, and attendance (see Dist. Exs. 1 at pp. 1-10; 2 at p. 2).

A prior written notice, dated June 16, 2023, indicated that the June 2023 CSE used the following evaluations and records in developing the student's IEP for the 2023-24 school year: a December 2021 educational evaluation report, the March 2023 neuropsychological evaluation report, review of the student's then-current portfolio, and the student's attendance and grades during the 2022-23 school year (Dist. Ex. 2 at p. 2). The parents are correct that the district did not offer the Teachers College Running Record, December 2021 educational evaluation report, or the student's portfolio into evidence (see Dist. Exs. 1-5). However, the school psychologist testified that information from a December 2021 evaluation was included in the management needs section of the June 2023 IEP (Tr. p. 63). When asked to explain the student's "portfolio review," the school psychologist described that the review included informal information from the student's teachers, informal classwork, progress reports from the student's related services providers, attendance, and that "it's a compilation . . . of all the records that we have" (Tr. p. 64). Further, the school psychologist indicated that the information from the portfolio review was reflected in the June 2023 IEP as summarized in the "distinct paragraphs" in the present levels of performance section (Tr. pp. 64-65). Additionally, the attendance page from the June 2023 CSE meeting indicated that the student's parents, ICT regular education and special education teachers, OT provider, and speech-language therapy provider participated during the meeting and their input is reflected in the June 2023 IEP (Dist. Ex. 1 at pp. 3-10, 26). The student's presents levels of performance in the June 2023 IEP also included information from the March 2023 neuropsychological report, discussion from the December 2022 CSE meeting, and a January 2023 OT progress report (Dist. Ex. 1 at pp. 1-10; see Dist. Ex. 4).

Regarding the CSE's consideration of the March 2023 neuropsychological evaluation, a CSE must consider IEEs obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakistic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., Mr. P., 885 F.3d at 753; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to

determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]).

Review of the student's June 2023 IEP shows that CSE included many of the student's scores from cognitive and achievement tests administered during the neuropsychological evaluation in the IEP (compare Parent Ex. H at pp. 12-13, with Dist. Ex 1 at pp. 1-2). The June 2023 IEP reflects that the district adopted some, but not all, of the recommendations made in the March 2023 neuropsychological evaluation report. For example, regarding testing accommodations for the student, the neuropsychologist recommended extended time on all educational exams and standardized testing, a separate testing environment free from distractibility and noise, and all tests read to the student, all of which were included in the testing accommodations section of the student's 2023-24 IEP (compare Parent Ex. H at p. 9, with Dist. Ex. 1 at pp. 19-20). The neuropsychologist also recommended for the student that directions should be broken down into small sections, repetition, use of audiobooks, positive feedback, prompts to check her work, and that instructors use both visual and auditory aids, especially when presenting new concepts, which the June 2023 CSE incorporated into the student's management needs among others (compare Parent Ex. H at pp. 10-11, with Dist. Ex. 1 at pp. 8-9). While the neuropsychologist recommended phonics-based reading instruction, phonics drills, and instruction in identification of basic sight words for the student, the CSE did not specifically adopt all these recommendations in the June 2023 IEP (Parent Ex. H at p. 10). However, although the CSE may have disagreed with some of the neuropsychologist's recommendations, the school psychologist testified that the CSE took "every recommendation from the neuropsychological evaluation and ensure[d] that those recommendations aligned with what [the student] could receive . . . in the classroom and also as related services and supports" (Tr. p. 58).

Based on the above, the parent's contentions that the CSE failed to consider the March 2023 private neuropsychological evaluation are without merit and the hearing record supports the IHO's finding that the June 2023 CSE obtained and considered sufficient evaluative information about the student, and the CSE went so far as to include some of the results and information from the March 2023 neuropsychological evaluation in the development of the June 2023 IEP (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-30 [S.D.N.Y. 2013]).

B. Student's Needs and Progress from Prior School Year

The parents assert on appeal that the IHO erred in determining that the June 2023 IEP was appropriate because the student had been making "appropriate progress" in a general education setting with ICT services during prior school years. Further, the parents claim that the IHO ignored and failed to give due credit to the neuropsychological evaluation results and testimony of the neuropsychologist that the student's "reading, writing, and math skills were far below the levels purported by the [district]," which indicated that she failed to achieve meaningful educational progress.

A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. Jun. 24, 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck

Union Free Sch. Dist., 2008 WL 4449338, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [revised Sept. 2023], available at <https://www.nysed.gov/sites/default/files/programs/special-education/guide-to-quality-iep-development-and-implementation.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how a subsequent IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

A description of the student's needs and progress during the 2022-23 school year provides context for whether the June 2023 CSE's recommendation to continue similar programming was appropriate. During the 2022-23 school year, the student attended a third grade general education class in a public school and received ICT services, speech-language therapy, and OT (Parent Ex. L ¶ 4; Dist. Ex. 1 at pp. 3-8).

In direct testimony by affidavit, the student's father indicated that the student had "always struggled with learning, especially reading and writing," and that a private tutor had worked with the student weekly "for years" to help her with her reading, writing and math difficulties (Parent Ex. L ¶ 3). He indicated that the student "could barely put a written sentence together," "her written stories appeared to be that of a kindergarten child, with letters written backwards, no grammar, and no punctuation" (*id.* ¶ 7). The father testified that he and the student's mother were both present at the June 2023 CSE meeting, listened to the CSE's recommendation for "an ICT class with related services" and that the CSE stated the student was making progress but that they, at that time, "did not see the progress [the CSE] said she was making" (*id.*). According to the father, they informed the CSE that the student "was having a lot of anxiety" and that the student often did not want to do her homework and after a day of "masking" at school, she wanted to unwind and not focus on school (Tr. p. 140; Parent Ex. L ¶ 7).⁸

In January 2023, the student's third grade teacher had reported to the neuropsychologist that the student was reading at a Fountas & Pinnell reading level L, which corresponded to approximately a mid-second grade level (Parent Ex. H at p. 2). The student's teacher also reported that despite the student's reading delays, she expressed enjoyment in reading (*id.* at p. 4). The June 2023 IEP stated that the student was then-currently meeting "benchmark expectations" of level P of the Teachers College running record, which she stated correlated to "the end of third grade" or

⁸ The parent described the neuropsychologist's description of masking as "hiding the deficiencies and troubles that she was having at school" (Tr. p. 141).

grade level at that time (Tr. p. 91; Dist. Ex. 1 at p. 4). The June 2023 IEP also indicated that the student could decode familiar and unfamiliar words, use context clues to determine an unknown word, and reread to self-correct (Dist. Ex. 1 at p. 4). According to the June 2023 IEP, the student was able to retell "big events" from a given text, answer literal questions about text accurately, and could sequentially retell what had happened from beginning to end (id.). The June 2023 IEP noted that during read aloud lessons, the student enjoyed listening to texts, which allowed her to focus on "understanding the text rather than her decoding abilities," and was always willing to share her thoughts regarding the text being read (id.). The June 2023 CSE meeting minutes indicated that the student's teachers discussed her instruction in phonics-based reading skills, phonics drills for basic letter combinations, sight word recognition, and reading fluency (Dist. Ex. 3 at p. 2). When asked during cross-examination how frequently the student received the described reading instruction, the school psychologist replied that the student received this daily during ELA, writing, and also in her speech-language therapy sessions (Tr. pp. 70-71).

With regard to writing, the June 2023 IEP indicated that the student enjoyed writing about preferred topics and required the support of an adult when transitioning from one writing genre to the next (Dist. Ex. 1 at p. 4). When starting a draft, the student required the support of an adult or graphic organizer to plan, and while writing, she benefitted from the use of sentence stems as an elaboration technique (id. at p. 5). The June 2023 IEP noted that the student worked quickly to "get her thoughts down," which caused her to misspell known sight words or reverse letters (id.). The June 2023 IEP also indicated that the student benefitted from a word wall and a "writing process chart" to help revise and edit her work and she was encouraged to check her work before approaching an adult to check her writing (id.).

In math, the June 2023 IEP stated that the student felt "confident" when she worked in a small group during math, which the school psychologist testified was a group of three or four students (Tr. p. 53; Dist. Ex. 1 at p. 5). The June 2023 IEP also noted that the student "love[d] working with numbers" and challenging herself to "hard problems" (Dist. Ex. 1 at p. 5). The June 2023 IEP noted that the student received "intervention math support" in the classroom four to five days per week and the student was working on understanding place value in comparing two-digit numbers to different two-digit numbers and representing numbers in picture form (id.). The June 2023 IEP indicated that the student was working on adding and subtracting more fluently but that she had a basic understanding of addition and subtraction, and she had become more fluent adding and subtracting with multiples of ten (id.). According to the June 2023 IEP, the student learned best when the math lesson was previewed with a warm-up activity before receiving "scaffolded instruction with manipulatives" (id.). The student often used a number line to demonstrate addition and subtraction of numbers and was said to struggle with fluency in addition, subtraction, and multiplication (id. at p. 6). She required information repeated to her and vocabulary words clearly explained during math lessons (id.). The June 2023 IEP noted that the student often said that math was her favorite subject, frequently participated during math lessons, and helped peers when she was able to (id.).

Additionally, the June 2023 IEP indicated that the student received three sessions per week of speech-language therapy in a small group during the 2022-23 school year (Dist. Ex. 1 at p. 6). According to the June 2023 IEP, the student transitioned to her speech-language sessions "with ease" and was motivated to learn new skills (id.). The student's speech-language sessions targeted

expressive and receptive language needs and the June 2023 IEP reported that the student presented with appropriate social pragmatic skills as she was able to greet others, initiate both academic and social conversations, maintained topics, and took turns in conversations (id.). With the support of previewing lessons, visuals, graphic organizers, the IEP stated that the student was making "steady progress" with her expressive and receptive language skills (id.). The student also worked on developing skills which included story grammar elements, comparing and contrasting characters, and identifying parts of speech (id.). Further, the student worked on developing the complexity of her sentence structure and rereading written work to ensure it was understandable to the reader (id.).

Socially, the June 2023 IEP described the student as a "funny, lively, outgoing girl" and that during unstructured time, she was found "joking, laughing and playing" with her friends (Dist. Ex. 1 at p. 7). The June 2023 IEP indicated that when the student perceived something as being too difficult, she could be hard on herself and engaged in negative self-talk (id.). To "support her confidence," the June 2023 IEP stated that the student benefited from "previews, positive self-talk sentence stems, and reminders of similar scenarios" where she had been successful (id.). The IEP noted that the student was responsible, helpful, and empathetic toward others, advocated for herself in class, and asked questions as needed (id.). In January 2023, the student's teacher reported to the neuropsychologist that the student "express[ed] disappointment and frustration that other students [were] able to complete academic work more quickly than her" (Parent Ex. H at p. 4). The student's teacher indicated that the student was an active participant but required "a lot of reassurance from her teacher throughout instruction (id.). Additionally, the neuropsychological report included that her teacher had reported that the student not only benefitted from small group breakout work, but she also "really need[ed] it to make progress" (id.). At the June 2023 CSE meeting the parents shared that the student presented very differently at home and that she sometimes cried and expressed "many anxieties" (Dist. Ex. 1 at p. 7).

With regard to physical development, the June 2023 IEP reflected that the student received one 30-minute session per week of group OT for the 2022-23 school year (Dist. Ex. 1 at p. 8). The June 2023 IEP stated that the student was making progress with her fine motor skills and had made noticeable improvements in her writing skills evidenced by her writing with increased speed and a decrease in letter and number reversals (id.). The student wrote with space between words, required cues to use lowercase text throughout her writing, and needed reminders to place letters on the line (id.). The June 2023 IEP indicated that the student required cues to organize her writing, add more detail when needed, "persist" to complete writing, and was working on self-monitoring her work including rereading and using spell-check (id.). The June 2023 IEP noted that the student demonstrated the ability to attend both small and large group instruction and in her OT sessions, she often required repeated directions to follow multi-step tasks (id.).

In describing the student's management needs, the June 2023 CSE noted that the student required the following supports to enable her to benefit from instruction: small group support across all content areas, seating close to teacher during small and large group instruction, refocusing breaks, multimodal modeling and prompting of new skills and strategies, teacher check-ins when completing classroom assignments, verbal and visual reminders, checklists for assignments and routines, directions repeated and rephrased with a visual component, access to math manipulatives, charts for math tasks/assessments, use of keywords in lessons, access to word wall or personal sight word chart, graphic organizers, editing checklist, visual cues for writing

tasks, access to audiobooks, positive reinforcement, verbal directions with gestures, chunking information and tasks into smaller parts, access to noise cancelling headphones, reminders to slow pace when making decisions during a task, and prompts to check her work to minimize errors (Dist. Ex. 1 at pp. 8-9). In addition, the June 2023 CSE identified that the student required testing accommodations including a separate location, on-task focusing prompts, breaks, index cards to track place on assessments requiring a "bubble sheet," word prediction software, additional paper for math calculations, use of a tablet or computer, extended time, and all tests read except those of reading comprehension or decoding (*id.* at pp. 19-20).

Turning to the parents' claim that the June 2023 CSE erred in determining that the student had made progress while receiving ICT services, as discussed above, the June 2023 IEP included evaluative information directly from the March 2023 neuropsychological evaluation report (*compare* Dist. Ex. 1 at pp. 1-3, *with* Parent Ex. H at pp. 12-15). The school psychologist who participated in the June 2023 CSE meeting as the school psychologist and district representative testified that the student's test scores from the March 2023 neuropsychological evaluation report were "largely within the average range" and that "[t]here were very few scores" that pointed to a need for "very significant intervention"; however, the CSE included the scores in the IEP to be sure the student's team was aware of those scores (Tr. pp. 48-49, 56-57; *see* Dist. Ex. 1 at pp. 1-3).

In contrast, the March 2023 neuropsychological report indicated that the student's scores on a measure of her reading comprehension showed a decrease in skills after approximately five months of reading instruction and that the student was "clearly struggling significantly across nearly all areas of reading, writing and mathematics" (Parent Ex. H at pp. 6-7).

For example, in his affidavit the neuropsychologist testified that "select subtests" from the Kaufman Test of Educational Achievement, Third Edition (KTEA-3), the Gray Oral Reading Test, Fifth Edition (GORT-5) Form A, and Wechsler Individual Achievement Test, Fourth Edition (WIAT-4) were administered to the student in fall 2022, and in spring 2023, the neuropsychologist administered "parallel forms" of the KTEA-3 Form B, and GORT-5 Form B, as well as an additional subtest from the Wechsler Individual Achievement Test, Third Edition (WIAT-III, which he stated reflected that the student's reading abilities "showed little to no progress and, in some respects, showed regression" (Parent Ex. I ¶¶ 22-23). The neuropsychologist also stated in his affidavit that the student's silent reading fluency subtest score fell to the 23rd percentile after five months of reading instruction (*id.* ¶ 23). However, the neuropsychologist stated in his direct testimony by affidavit that the KTEA-3 Form A silent reading fluency subtest was administered to the student in fall 2022, as also reported in his written report, and not in March 2023 (Parent Exs. H at p. 13; I ¶ 23). The neuropsychologist stated that "after five months," the student's reading comprehension based on the KTEA-3 decreased to the low average range (12th percentile); as noted in his written report, he compared the student's 2023 KTEA-3 comprehension subtest score to the student's 2022 reading comprehension subtest score (30th percentile) on the WIAT-4 (Parent Exs. H at pp. 6, 12; I ¶ 23).⁹ He also compared the student's score (10th percentile) on the WIAT-4 pseudoword decoding subtest in fall 2022 with the spring 2023 score (3rd percentile) she had received on the KTEA-3 nonsense word decoding subtest, which he stated indicated regression

⁹ Further, the neuropsychologist stated that he administered subtests from the Test of Written Language-Fourth Edition (TOWL-4) in fall 2022, while his written evaluation report indicated that the subtest was administered on March 24, 2023 (*compare* Parent Ex. I ¶ 22, *with* Parent Ex. H at p. 13).

(Parent Ex. H at p. 6). Review of the neuropsychologist's testimony shows that he administered reading assessments to the student "across multiple, different ways" (see Tr. pp. 108-12).

A decrease in a score on a standardized test from one year to the next does not necessarily mean a student was regressing in the assessed skills rather than simply experiencing less growth than the student's peers (Mr. and Mrs. G. v. Canton Bd. of Educ., 2019 WL 1118094, at *14 [D. Conn., Mar. 11, 2019]). Here, there is not a sufficient basis in the hearing record to show that the student's scores on one specific assessment can be correlated, or compared with the student's scores on other assessments—even those assessments which measure similar skills—in order to determine whether the student was progressing or regressing in reading skills (see Mr. and Mrs. G., 2019 WL 1118094, at *14 [acknowledging the difficulty of comparing results of assessments from one year to the next given the different manner in which some tests are updated or normed]).

Also, in four pages of his written report, the neuropsychologist reported the student's scores (which included standard, percentile rank, scaled, T-scores and grade equivalencies) obtained during testing (Parent Ex. H at pp. 12-15). In his written narrative, while he discussed the student's standard scores and percentiles, for the student's word-reading, oral-reading, writing, and math subtests he also reported the grade level equivalencies showing below grade level performance (id. at pp. 6-7). The school psychologist testified that she did not agree that the student was performing below grade level in reading, and that the district did not permit grade/age equivalencies for "interpretive purposes," but that there was no dispute over the percentile scores reported in the neuropsychological evaluation report (Tr. pp. 72-73).¹⁰ Furthermore, after discussing the student's scores from the neuropsychological evaluation that showed the student's strengths, the school

¹⁰ The school psychologist is correct that age and grade equivalent scoring is unreliable for purposes of interpretation, but at times the undersigned continues to see it relied upon to in debates over programming recommendations. The unreliability has been understood by education officials for decades, and in just a snapshot of state educational agency due process proceedings across the country in the current decade, such reliance on age and grade equivalencies has continued to face considerable criticism (see, e.g., In re Baltimore County Pub. Schs., 123 LRP 24961 [SEA MD 2023] [noting that grade equivalents on testing results are not statistically reliable and can be misleading]; In re Independent School District No. 833 (South Washington County School District), 123 LRP 30369 [SEA MN 2023] [noting testimony that warned against the reliance on grade level equivalent data for assessing reading progress, that grade level equivalents are stated in certain assessments like the WIAT and WISC and explaining that grade level equivalents are "incredibly misleading" and statistically unsound, provide "misinformation" because they are based upon regression analysis and data extrapolation, not actual scores]; In re Williamsport Area Sch. Dist., 122 LRP 21678 [SEA PA 2021] [explaining that "this hearing officer is not endorsing the use of grade equivalents as an IEP present level metric"]; In re Morris Sch. Dist. Bd. of Educ., 121 LRP 24140 [SEA NJ 2021] [noting that age equivalency and grade equivalency are not used in special education programs and the question an evaluator's practice of switching between more reliable standard scores versus less reliable age and grade equivalents to justify the evaluator's argument in favor of a particular placement]; In re Sharpville Area Sch. Dist., 78 IDELR 179 [SEA PA 2020] [grade-level equivalency scores are a type of developmental score that must be interpreted cautiously and carefully, because they can be misleading for many reasons. For example, grade equivalents tend to exaggerate minor variations in performance; and, grade equivalents vary from instrument to instrument, and even from subtest to subtest, and are therefore quite difficult to compare]). With regard to the WIAT-4 used in this case, the Minnesota administrative law judge was careful to point out that "Pearson is the publishing company that created the WIAT-4 assessment," and the experts in the proceeding "agreed with Pearson's warning that: 'Because of the inherent psychometric problems associated with age and grade equivalents that seriously limit their reliability and validity, these scores should not be used for making diagnostic placement decisions'" (In re Independent School District No. 833 (South Washington County School District), 123 LRP 30369 [SEA MN 2023]).

psychologist testified that she did not "cherry-pick[] scores," rather, she looked at the student's overall performance (Tr. pp. 77-79). The school psychologist testified that the neuropsychological evaluation results were "specific data points" but the district had to "look at all the different data points," which did not "always translate to the classroom and vice versa" due to factors that could have affected the validity of the testing, for example, this particular student was shy and "may not have performed to the best of her abilities" (Tr. pp. 77-79).

The IHO weighed the evidence summarized above noting limits in the neuropsychological evaluation, including that the same assessments were not used between November 2022 and March 2023, and the testimony of the neuropsychologist that the different assessments measured different skills and methodologies, and concluded that the different scores "[we]re not fit for direct comparison and ha[d] limited value in terms of knowing whether a student's discrete skills improved" (IHO Decision at p. 6). The IHO also questioned the neuropsychologist's conclusion that the student's academic deficits remained at a third grade level, noting other results that approach or exceeded grade equivalents, and further pointing to evidence that grade equivalents were not the most reliable measure (*id.* at pp. 7-8 & n.20 & n.24).¹¹

Based on a review of the above, and despite the neuropsychologist's view to the contrary, the hearing record does not present a convincing basis to depart from the IHO's determination that the June 2023 CSE had sufficient information to make a reasonable determination that the student was having some success in her general education class with the support of ICT services and related services during the 2022-23 school year.¹² Although the district did not offer the student's

¹¹ The parents allege that the IHO erred in finding the neuropsychologist was not credible. Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). Review of the IHO's decision demonstrates that the IHO did not make a determination regarding the credibility of the neuropsychologist's testimony but instead described the weight she accorded to the evidence.

¹² On appeal the parents offer additional evidence consisting of a 2022-23 New York State assessment that reflects the student's performance in English language arts (ELA) and math and contend that the scores demonstrate that the student's reading levels were below grade level and therefore, ICT services were not appropriate for the student. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). It is unclear from the undated, one page 2022-23 assessment results when the document became available to the parents. However, there is no indication that the June 2023 CSE had the State assessment scores available at the time of the meeting and the scores were not noted on the June 2023 IEP (see generally Dist. Ex. 1). In a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through

progress notes as evidence, the June 2023 IEP, as noted above, contained evidence of progress in reading, math, writing, speech-language, and OT skills (Dist. Ex. 1 at pp. 3-9). Additionally, while there were some identified areas of concern of academic testing from October and November 2022 compared to March 2023 listed in the neuropsychological report, the student's overall test scores do not convincingly show that she had not shown progress or had regressed with some skills during the 2022-23 school year.

C. Annual Goals

The parents assert that the IHO erred in finding that the June 2023 IEP annual goals were appropriate because they were not measurable, the reading fluency goal was not attainable by the student, and the annual goals failed to address the student's "delays in essay writing skills, spelling, and attention."

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]).

Review of the June 2023 IEP shows that it included nine annual goals that targeted the student's needs in the areas of executive functioning, reading fluency, math operations and problem solving, graphomotor skills for writing, and ability to identify the main idea of text read or heard, answer inferential comprehension questions about a text, use parts of speech in verbal and written form, and identify and respond to anxiety provoking situations (Dist. Ex. 1 at pp. 12-16). Contrary to the parents' assertion on appeal that the annual goals were not measurable, review of the annual goals shows that they included criteria to determine when the goal had been achieved (e.g. 80 percent accuracy in three of four opportunities over a six-week period, 80 percent accuracy in two out of three trials over a six-week period), methods of how progress would be measured (e.g. work samples, checklists), and a schedule of when progress would be measured (twice per month) (id.).

Regarding the content of the annual goals, the June 2023 IEP noted that in December 2022 the parents had expressed concerns about the student's ability to edit and revise her work, and her ability to build confidence around academic tasks, as well as her frustration level when performing academic work (Dist. Ex. 1 at p. 7). The parents also expressed concerns with the student's reading

retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"). The hearing record contains additional test results, teacher reports and observations, and related services reports to describe the student's needs that were available to the CSE (see Dist. Ex. 1 at pp. 1-9). Accordingly, as it would not be appropriate to rely on the State assessment results for purposes of assessing the appropriateness of the June 2023 IEP, I exercise my discretion and find the evidence is not necessary to render a decision in this matter.

comprehension, overall reading skills, math challenges, and general writing abilities (id.). The June 2023 IEP also noted the parents' concerns regarding the student's presentation during school compared to home and her expression of anxiety in the home (id.). The June IEP did not indicate that there was any dispute with the student's annual goals (see Dist. Exs. 1-3).

The June 2023 IEP indicated that the student continued to demonstrate difficulty with synthesizing information from longer texts and making inferences, and that she required "planning and elaboration support while writing to craft legible, purposeful and focused writing pieces" (Dist. Ex. 1 at p. 9). To address these needs, the June 2023 IEP featured annual goals to address the student's executive functioning, reading, and writing skills (id. at pp. 11-12). In the area of executive functioning the CSE developed annual goals for the student to work on reviewing her work, ensuring all task components were included, with no more than one to two teacher prompts, and also to demonstrate her ability to organize her thoughts for writing using graphic organizers, charts, sentence stems, or math models (id.). To address the student's needs regarding inferencing skills, the June 2023 IEP included a reading annual goal in which the student would answer inferential comprehension questions about a text during independent reading and whole group instruction (id. at p. 14). In addition to the inferencing goal described above, the June 2023 IEP contained an annual reading goal in which the student would read grade-level text orally with accuracy, appropriate rate (id. at p. 12). Although the neuropsychologist testified that the student had "not a chance" of achieving the reading fluency annual goal, I note that some of the student's reading fluency scores were in the low average range and according to assessments of the student's reading skills in the classroom she was reading at grade level (compare Tr. p. 116, with Dist. Ex. 1 at pp. 2-3). Further, even if the student's reading fluency annual goal was overly ambitious, that would not necessarily render the IEP inappropriate to the extent it could be deemed to have failed to offer the student a FAPE.

Next, the June 2023 IEP noted that the student required additional support in math to "establish stronger confidence and automaticity in her skills," and that she benefited from small group support in the classroom in order to receive "explicit modeling and practice with . . . math skills to enhance meaning and clarity" (Dist. Ex. 1 at p. 9). The June 2023 IEP included a math annual goal in which the student would improve her math fluency for multiplication equations and word problems (id. at p. 13). To the extent that the parents argue on appeal that the student's math fluency annual goal "failed to establish a baseline level of achievement and mastery level by which to measure progress," such a "baseline" is not required in the annual goals, and the June 2023 IEP present levels of performance provided sufficient information about the student's then-current math skills, including subtest math scores from the March 2023 neuropsychological evaluation and a narrative of the student's functional performance in math, to develop annual goals (id. at pp. 2, 5-6).

The June 2023 IEP indicated that speech-language therapy would address the student's receptive and expressive language delays and also support her reading and writing skills (Dist. Ex. 1 at p. 9). The June 2023 IEP contained two speech-language goals; one in which the student would identify the main idea with at least two supporting details from a read aloud or independent reading with moderate verbal support, and another in which the student would identify and use parts of speech, both verbally and in written form, with moderate verbal support (id. at pp. 14-15).

The June 2023 CSE determined that OT was necessary for the development of the student's "fine motor and graphomotor skills, visual motor integration, attention/focus, and work behavior skills" while counseling was required to support her "confidence, self-esteem, and anxiety" (Dist. Ex. 1 at p. 9). To address the student's graphomotor skill needs, the June 2023 IEP contained an annual goal in which the student would initiate and persist at writing assignment by typing, or with legible functional formation of letters, spacing, and line awareness (*id.* at p. 13). When asked during cross-examination if this was an OT goal, the school psychologist replied, "not necessarily" as this goal related to writing as well, whether it was essay writing, typing, or handwriting for any subject (Tr. p. 84). The June 2023 IEP included one counseling goal in which the student would identify anxiety inducing thoughts or situations, generate a list of coping skills, and practice these strategies in real or role-playing scenarios (Dist. Ex. 1 at p. 15).

While the parents argue that the June 2023 IEP should have included annual goals for essay writing skills, spelling and attention, 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 school psychologist testified that essay writing was a multi-step process and that several of the annual goals addressed the student's writing needs, including using graphic organizers, sentence stems, and correct form of speech (Tr. pp. 81-82; Dist. Ex. 1 at pp. 12-15). She testified that while the June 2023 IEP did not include a specific annual goal for spelling, that skill would be addressed as part of the student's annual goals related to revision of her work (Tr. pp. 84-85). Moreover, although the IEP did not include an annual goal related to the student's attention skills, review of the IEP management needs and testing accommodations sections shows that they included several strategies to address the student's attention during instruction and assessment (Dist. Ex. 1 at pp. 9-10, 19-20).

Therefore, while the IEP may not have addressed every area in the precise manner that the parents would have preferred, the evidence in the hearing record supports the IHO's finding that the June 2023 IEP annual goals addressed the student's needs, and the parents' claims regarding defective annual goals are without merit.

D. ICT Services

The parents assert on appeal that the IHO erred in relying "exclusively" on the testimony of the school psychologist that "continuing ICT services for the 2023-[]24 school year was appropriate because [the student] was making progress because she was on grade level in reading, approaching grade level in writing and one grade below in math" and "ignored" the neuropsychological evaluation results that showed the student had a significant phonics-based reading disability and that her academic levels were "well-below grade level."

State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities receiving ICT services within a class may not exceed 12 (8 NYCRR 200.6[g][1]). In addition, State regulations require

that the class in which students receive ICT services must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]).

The June 2023 CSE found the student remained eligible for special education as a student with a learning disability and recommended that the student receive ICT services for ten periods per week in ELA, five periods per week in math, and five periods per week in social studies (Dist. Ex. 1 at p. 16). In addition to ICT services, the June 2023 IEP reflected the parents' concerns regarding the student's anxiety, and one 30-minute session per week of individual school-based counseling was added to the IEP (*id.* at p. 7, 16). Further, the June 2023 CSE recommended that the student receive one 30-minute session per week of group (3:1) OT, and one 30-minute session per week of group (3:1) speech-language therapy (*id.*). The June 2023 IEP indicated that the student had become more interested in typing during the 2022-23 school year and the school psychologist noted that due to "writing concerns," the CSE recommended assistive technology services of a "cloud-based computer" which would provide word processing, auditory feedback, dictation, and PDF annotation for daily use at school and home (Tr. pp. 57-58; Dist. Ex. 1 at pp. 8, 17).

In addition to the support of two teachers in the classroom, the CSE also recommended small group support across all content areas when introducing new concepts for the student (Dist. Ex. 1 at p. 8). Additionally, the CSE identified that the student benefited from the small group support provided in the classroom "to receive explicit modeling and practice with reading comprehension strategies, writing supports, and math skills" (*id.* at p. 9). Further, the school psychologist testified that having a regular education teacher and a special education teacher allowed the class to break into groups, and that "whenever [the student] was receiving any type of direct instruction or intervention, she would be in a group of no more than 12 students" with the exception of "morning meeting" and "choice time" (Tr. pp. 52-53).¹³

¹³ The parents argue that the IHO erred in relying on testimony that the student would receive small group instruction and individualized teacher supports (*see* IHO Decision at p. 25); however, as noted, the IEP provided for these types of supports (*see* Dist. Ex. 1 at p. 8). The Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unilaterally] place" their child before the beginning of a school year (*Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S.*, 990 F.3d 152, 173 [2d Cir. 2021]; *see R.E.*, 694 F.3d at 187-88 [indicating that "[a]t the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"). Generally, *R.E.* stands for the proposition that a district cannot rely on after the fact testimony to rehabilitate a deficient IEP (*see* 694 F.3d at 186-88). In grappling with the permissibility of retrospective evidence in *R.E.*, the Second Circuit squarely held that the question of whether an IEP was reasonably calculated to enable the student to receive education benefits "must be evaluated prospectively as of the time [the IEP] was created" (694 F. 3d at 184-88 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). Although the Second Circuit has held that a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP," testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (*R.E.*, 694 F.3d at 186-88; *see also E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'" [internal citations omitted]; *P.C. v. Rye City Sch. Dist.*, 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]).

The school psychologist testified that the June 2023 CSE recommendations were appropriate because the student had progressed as evidenced in the present levels of performance on the June 2023 IEP (Tr. p. 52). The school psychologist also indicated that the student "had been so responsive to the interventions to the ICT [services] in previous years, [and] knowing that she was at grade level, at benchmark according to the Common Core Standards in New York . . . we felt as a school-based team that that would be most appropriate, least restrictive, and that she would continue on that trajectory given the data that we had available at that time" (Tr. p. 53). In considering other options, the school psychologist testified that the CSE considered 12:1 and a 12:1+1 special classes in a community school, and also the parents' and neuropsychologist's recommendation of a nonpublic school placement, but were rejected as both "eliminate[d] access to the neurotypical peers," (Tr. pp. 53-54; see Parent Ex. H at p. 9; Dist. Ex. 1 at p. 24). The school psychologist indicated that the student had an "amazing group of friends" and access to neurotypical peers was not only a social benefit to the student but academically as well (Tr. p. 55).

In contrast to the school psychologist, the parents assert that the June 2023 CSE's recommended programming was not appropriate to meet the student's needs. In his direct testimony by affidavit, the father stated that the student had received services on a weekly basis from a private tutor, to help her with her reading, writing, and math difficulties but even with that extra help, she still "struggled and remained behind" (Parent Ex. L ¶ 3). According to the father, the neuropsychologist did not recommend ICT services but rather a "small full-time special education class of 12 students, or less, with two instructors for children" in a learning environment that can provide her with "1:1 or small group attention" (id. ¶ 2). He stated that after reading the neuropsychological evaluation report, the parents "were convinced" that the student needed a more supportive program aligned with what the neuropsychologist had recommended (id. ¶ 5).

The neuropsychologist recommended that the student be placed in a "small (\leq 12:1+1) special education classroom . . . within a full time special education school" with a small student to teacher ratio (Parent Ex. H at p. 9). Further, he stated that any less restrictive environment "would not work academically, socially or emotionally and [the student] would experience significant regression" (id.). The neuropsychologist opined that the second adult in the classroom should be a qualified teacher, as opposed to a paraprofessional, who was capable of teaching the student individually or in a small group (id.).

Notwithstanding the neuropsychologist's view that the student required a private school, generally, district staff responsible for formulating the student's IEP in compliance with the requirements of the IDEA may be afforded some deference over the views of private experts (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]). Moreover, in addition to considering what supports and services the student needed in order to receive educational benefits, the district was mandated to consider placing the student with his

nondisabled peers in light of the IDEA's LRE requirements, but the independent neuropsychologist was not bound to adhere to the same mandates as the district personnel on the CSE in formulating recommendations for the student, and her evaluation report reveals little to no consideration of the benefits of access to nondisabled peers during her assessment when she recommended continued full-time placement in a special class and/or private school (see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 119-20).

Regarding the student's reading ability specifically, the IHO determined that the student's June 2023 IEP was not deficient due to a lack of specific reading intervention or methodology (IHO Decision at p. 26). The IHO also found that specialized reading instruction may be provided through various means and need not appear on an IEP, and that there was no consensus that the student required such intervention (id.). On appeal the parents assert that the IHO erred in finding that the June 2023 CSE's failure to recommend specialized reading instruction for the student did not render the IEP substantively inappropriate.

The neuropsychologist testified that he wanted to assess how significant the student's reading disability was using different tests to see where she was making progress, and what she was able to generalize (Tr. pp. 108-09). Also, he indicated that the student's score on the GORT-5 reading comprehension subtest (5th percentile), where the student had to read text orally as compared to her WIAT-4 reading comprehension subtest score (30th percentile), where she was able to look back at text, showed that the student "had a significant reading disability" (Tr. pp. 109-11). In his written report, the neuropsychologist reported the student's WIAT-4 word reading subtest standard score of 79 (8th percentile), and a KTEA-3 Form B nonsense word decoding standard score of 71 (3rd percentile) (Parent Ex. H at pp. 12-13). The neuropsychologist concluded that the student's oral reading difficulties remained significant and required a more specialized program, and he specifically recommended a phonics-based reading instruction program that used a variety of phonics-based methods "such as Orton-Gillingham" (id. at pp. 7, 10).¹⁴ However, the neuropsychological evaluation report included several other subtest scores which did not necessarily indicate a need for specialized reading instruction.¹⁵ For example, the student achieved

¹⁴ The parents did not request that a specifically methodology, e.g., Orton-Gillingham, be provided to their daughter during the June 2023 CSE meeting. 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).

¹⁵ 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

a WIAT-4 decoding fluency subtest standard score of 88 (21st percentile, low average); a KTEA-3 Form A silent reading fluency subtest standard score of 89 (23rd percentile), and on the KTEA-3 Form B, the student achieved standard scores of 83 (13th percentile, low average) in letter and word recognition and 82 (12th percentile, low average) in reading comprehension (*id.* at pp. 6, 12-13). As discussed previously, the district's assessment of the student's reading skills indicated that she was "meeting benchmark expectations," and the IHO found there was "no reason to credit the opinion of the [p]arents' private evaluator here over the CSE team and staff who had worked directly with the student" (IHO Decision at p. 26).¹⁶

The June 2023 CSE acknowledged the student's diagnosis of a specific learning disorder with impairment in reading, reflected the lower scores she achieved on some of the reading assessment subtests, and identified management needs, annual goals, and ICT services to address those reading needs (Tr. p. 71; Dist. Ex. 1 at pp. 2, 4, 6-9, 12, 14, 16). Specifically, the June 2023 CSE recommended management needs that included small group support across all content areas, access to a word wall, personalized sight word chart, audiobooks as needed, and positive feedback and reinforcement when the student encountered challenging tasks (*id.* at pp. 4, 8-9). As discussed above the IEP included annual goals to improve the student's reading fluency, and ability to identify the main idea from a read aloud or independent read, and answer inferential questions about a text, as well as ICT services during ELA instruction (*id.* at pp. 12, 14, 16). In discussing the student's reading needs, the school psychologist noted that many of the student's test scores indicated strengths and the June 2023 CSE also looked at the student's "overall performance" while also considering these "specific data points" (Tr. p. 79). Based upon the foregoing, the evidence in the hearing record supports the IHO's determination that the lack of a recommendation for specialized reading instruction did not rise to the level of a denial of a FAPE to the student.

As the hearing record supports finding that the student made progress during the prior school year, the June 2023 CSE was reasonable when it recommended programming for the 2023-24 school year that was similar to what the student received during the 2022-23 school year and it was reasonable for the June 2023 CSE to expect the student to continue to make progress (*see S.H. v. Eastchester Union Free Sch. Dist.*, 2011 WL 6108523, at *10-11 [S.D.N.Y. Dec. 8, 2011] [decision to recommend continuation of the same program student had made progress in for prior school year was appropriate and a more restrictive placement was not necessary]).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Churchill was an

that specialized reading instruction could be recommended in the IEP 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).

¹⁶ As noted above, the IHO weighed the evidence but did not make a specific determination that the testimony of the neuropsychologist was not credible.

appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
April 24, 2024**

**JUSTYN P. BATES
STATE REVIEW OFFICER**