



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-102

Application of a STUDENT WITH A DISABILITY, by his 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 Offices of Regina Skyer and Assoc., LLP, attorneys for petitioners, by Timothy S. Nelson, Esq. and Linda A. Goldman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Samantha Labossiere, 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 found that respondent (the district) offered their son appropriate educational programming and denied their request to be reimbursed for their son's tuition costs at the Bay Ridge Preparatory School (Bay Ridge) for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be fully recited here in detail. The student has received diagnoses of attention-deficit hyperactivity disorder (ADHD), combined presentation; specific learning disorder with impairment in reading; specific learning disorder with impairment in math; social anxiety disorder; other specified depressive disorder; mixed receptive-expressive language disorder; and developmental disorder of speech and language (Parent Ex. B at p. 5; Dist.

Ex. 4; 5).¹ The student attended third grade in a district elementary school during the 2021-22 school year (Dist. Ex. 1 at p. 1). On May 7, 2022, the parents entered into an enrollment contract for the student to attend Bay Ridge for the 2022-23 school year (see Parent Ex. C).²

The CSE convened on June 7, 2022 and found the student continued to be eligible for special education services as a student with an other health-impairment and developed the student's IEP to be implemented beginning June 21, 2022 (see generally Dist. Ex. 1).³ The parents disagreed with the recommendations contained in the June 2022 IEP, and, as a result, by letter dated August 22, 2022, notified the district of their intent to unilaterally place the student at Bay Ridge for the 2022-23 school year and seek public funding for that placement (see Parent Ex. G).⁴ The student attended Bay Ridge during the 2022-23 school year where he repeated third grade (Parent Ex. F).

In a due process complaint notice, dated February 1, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). The parents asserted that the CSE failed to evaluate the student in all areas of disability, including the student's need for assistive technology; failed to provide the parents with timely and adequate prior written notices; integrated co-teaching (ICT) services were inappropriate for the student; the goals in the IEP were inadequate, and that the parents were denied meaningful participation in the IEP development process (Parent Ex. A at pp. 3-4). Additionally, the parents asserted that Bay Ridge was an appropriate unilateral placement and that they cooperated with the CSE (id. at p. 4). As relief, the parents requested reimbursement of the tuition at Bay Ridge and transportation expenses for the 2022-23 school year (id.).

After several prehearing and status conferences between March 16, 2023 and May 1, 2023, an impartial hearing convened on May 19, 2023 and concluded on February 5, 2024 after 12 days of proceedings (Tr. pp. 1-178). In a final decision dated February 10, 2024, the IHO determined that the district offered the student a FAPE for the 2022-23 school year, that Bay Ridge was an appropriate unilateral placement, and equitable considerations did not weigh against either party (IHO Decision at p. 9). Specifically, the IHO found the testimony of the district's witness to be credible, noted evidence that the student was making progress toward his goals, found that the CSE considered appropriate evaluative information to develop the student's IEP, and the recommendation for ICT services was appropriate for the student, noting evidence that a more

¹ The hearing record contains duplicative exhibits. For purposes of this decision, only parent exhibits 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 Bay Ridge tuition was in the amount of \$67,850 which included a registration enrollment deposit of \$6,500 with the remainder tuition in the amount of \$61,350 (Parent Ex. C at pp. 1-2).

³ The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

⁴ The Commissioner of Education has not approved Bay Ridge as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

restrictive setting would not be appropriate (*id.* at pp. 6-9). Consequently, the IHO dismissed the due process complaint notice (*id.* at p. 9).

IV. Appeal for State-Level Review

The parents appeal and challenge the IHO's conclusion that the district offered a FAPE for the 2022-23 school year. 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 fully recited here. In particular, the parents argue on appeal that the IHO erred in finding that the June 2022 IEP recommendations were reasonably calculated for the student to make progress specifically in the absence of a functional behavioral assessment (FBA), behavioral intervention plan (BIP), and assistive technology evaluation. The parents claim that the student regressed with ICT services in prior school years, and the continued recommendation for ICT services was not appropriate for the student. In addition, the parents assert that the student had "significant school-related behavioral problems," but the district did "not see fit" to conduct an FBA or develop a BIP which is a procedural violation that rises to the level of a denial of FAPE (Req. for Rev. at p. 8).

In an answer, the district denies the material allegations contained in the request for review.⁵ The district asserts that the parents' allegations regarding the lack of an assistive technology evaluation, an FBA or the provision of a BIP to address interfering behaviors should be "disregarded" as the issues were not raised in the due process complaint notice (Answer ¶¶ 6, 9). The district also asserts that the June 2022 CSE reviewed sufficient evaluative information and the IHO was correct in finding that the recommended program was substantively appropriate and "reasonably calculated to enable [the student] to make progress" (*id.* ¶ 9). Additionally, the district argues that even if it is determined that the issue of an FBA was raised in the due process complaint notice, the June 2022 IEP was appropriate without the CSE having conducted an FBA or developed a BIP. The district also contends that an assistive technology evaluation was not required to address the student's deficits. Ultimately, the district seeks to uphold the IHO decision.

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

⁵ The district does not cross-appeal the IHO's findings that Bay Ridge was appropriate, and neither party appeals the IHO's finding that "equities disfavor neither side" and therefore, those findings have 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 Dept't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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

Preliminarily, the district argues that the request for review fails to comply with the pleading requirements in Part 279 of State regulations. The request for review failed to comply with the practice regulations by failing to enumerate each of the specific findings of the IHO from which the parents appeal.⁷ The request for review contains numerous numbered paragraphs as a statement of facts that level criticisms at the CSE, but then in the midst of the fact section starts to allege error on the part of the IHO starting with enumerated paragraph nine. The parents then go

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 State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

on to a new section toward the end and cite "Issue #1" as an error of the IHO which blends a statement related the Rowley with the lack of an FBA, a BIP, and an AT evaluation, and from there the parents continue to press their argument that the IHO should have issued findings against the district in her final decision on the lack of an FBA, BIP, and AT evaluation. The pleading continues to level criticisms at the CSE in a rambling fashion, sometimes returning to facts about the purported inadequacy of the ICT setting but returns most often to the lack of favorable IHO rulings on matters including an FBA, BIP and AT evaluation.⁸ The pleading is deficient, failing to separately identify each issue, and is vague when defining what the CSE did incorrectly versus actual challenges to how the IHO ruled on their claims incorrectly, thus the district was understandably at a loss as to how to structure a response. However, as a matter within my discretion, I find the district was able to mount an adequate defense in this appeal and I will not reject the parents' pleading and dismiss the appeal on the procedural deficiencies, at least this time. However, the attorneys for the parents are cautioned that repeated failures to conform to the practice regulations with regard to the form requirements may result in dismissal of an appeal by an SRO due to failure to comply with the pleading requirements.⁹

A. June 7, 2022 IEP

1. Student's Needs

The parties do not dispute the accuracy of the information in the student's June 2022 IEP present levels of performance nor do they argue over whether the present levels of performance were deficient in terms of describing the student's behaviors, and a review of the student's needs is in order. The present levels of performances and the private neuropsychological evaluation provide the evidentiary context in which to resolve the parties disputes that are presented in this appeal.

At the time of the June 2022 CSE meeting the student was receiving ICT services in a third grade district elementary school (Dist. Ex. 1 at pp. 1, 4). The IEP included a June 2022 Fountas and Pinnell benchmark assessment result, which indicated that the student read at the late second grade level, and the IEP also indicated that he performed at the second-grade level on an end of unit fractions test in April 2022 (*id.* at p. 1). The June 2022 IEP included information from a private February 2022 neuropsychological evaluation that indicated the student's full-scale IQ was within the average range, his working memory score fell within the very low range, and the student's academic scores in areas of mathematics, reading, and spelling were in the borderline (math problem solving, phonological processing) to average range (compare Parent Ex. B at pp.

⁸ While occasionally mentioning facts related to goals, the parents did not set forth any specific arguments regarding the adequacy of the annual goals in their closing brief before the IHO (see IHO Ex. I), nor do they advance arguments that the IHO erred with respect to annual goals in their request for review.

⁹ In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

1, 24, 26-27, with Dist. Ex. 1 at pp. 1-2).

With respect to academics, the June 2022 IEP reported within the classroom setting, the student could re-tell stories; however, struggled with non-factual answers as he had difficulty understanding fictional characters either by not relating to them or "putting his own life experiences into the story too strongly" (Dist. Ex. 1 at p. 4). In the area of writing the student was working on capitalization, grade-level conventions, and his spelling was often "phonetically close but incorrect" (id.). In mathematics, the IEP stated the student understood concepts of multiplication and division and could count by multiples, but had difficulty with word problems, memorizing math facts, consistently adding and subtracting two-to-three-digit numbers, and demonstrating a variety of skills on a math test; the student preferred working in small groups and at times when working 1:1 when he demonstrated an understanding of the skill taught (id.). Within the classroom, the June 2022 IEP reported the student worked best in a small phonics group and in math he worked best 1:1 and in a small group; however, noted that he increasingly copied from peers in his everyday work and missed a considerable amount of third grade math content (id. at pp. 4, 6-7).

According to a private neuropsychological evaluation as reported in the June 2022 IEP, the student had cognitive strengths in verbal intelligence, a robust vocabulary, and average to high average language comprehension, application of structural language, and reasoning and visual spatial skills; weakness reported were challenges with attention, working memory, and impulsivity across multiple settings, as well as cognitive flexibility (compare Parent Ex. B at p. 6, with Dist. Ex. 1 at pp. 4-5). The IEP reported academic challenges with the student's reading skills, that his phonological processing skills were in the borderline range, he exhibited poor spelling, and his reading comprehension and rapid automatic naming skills were below average (compare Parent Ex. B at pp. 6, 26-27, with Dist. Ex. 1 at p. 5). Additionally, the IEP reported the student's writing was "largely unintelligible due to the severity of his spelling errors," with grammar skills and mechanics within normal limits; the IEP reported that "writing challenges [we]re not diagnostic at this time but an at-risk area of concern" (compare Parent Ex. B at p. 6, with Dist. Ex. 1 at p. 5). Further, the June 2022 IEP reported math weaknesses in subtraction fluency, automatizing math fact retrieval, and solving multi-digit problems; the student's basic addition and multiplication facts were average (compare Parent Ex. B at pp. 6-7, 27, with Dist. Ex. 1 at p. 5).

In the area of speech-language development, the June 2022 IEP reported the student made significant progress in his communication skills with respect to pragmatics, narrative language, participation with peers, ability to negotiate game play with peers, and increased oral narrative skills; however, the IEP reported that the student continued to have "some difficulty transitioning at the beginning of most sessions" with refusal if peers were absent (Dist. Ex. 1 at p. 6). Production of the "r" and "th" sound had not yet been addressed during speech-language therapy, with the student resistant to suggestions to modify these productions stating, "the way he sp[o]k[e] [wa]s fine" (id.).¹⁰

¹⁰ The June 2022 IEP reported that the student's articulation errors affected his intelligibility, recommended continued services in a group no larger than three, and stated that the student would benefit from individual sessions to address articulation and phonological goals (Dist. Ex. 1 at p. 6).

Turning to the student's social development, the June 2022 IEP included information from the social history update that reported the student's preferred activities, and parent concerns regarding academics, the student's social esteem, anxiety, and that the student's work refusal was stemming from his learning differences, medications for ADHD, and anxiety (compare Dist. Ex. 6 at pp. 1-2, with Dist. Ex. 1 at p. 7). Information about the student's social/emotional and behavioral needs reflected in the IEP is discussed further below.

The June 2022 IEP included information reported during the June 2022 CSE meeting that noted the student received private reading tutoring for three years, and the student's teachers reported he benefited from repetition, explicit skill practice, and small groups for math and word study, skills taught in isolation and repeated, access to manipulatives, use of a concrete/visual schedule, preview of the schedule and notice for transitions, and provided choices (Dist. Ex. 1 at p. 7). The IEP further listed the parents' expressions of concern that the student "is significantly behind in all subjects which due to work refusal and attention deficits and has led to social issues, behavioral issues and anxiety in school" (Dist. Ex. 1 at p. 26).

The June 2022 IEP included information from the school counselor that reported the student matured considerably during the school year, related well to his teachers and peers, made several friends, improved his social skills, and improved active listening during small group activities; the IEP reported needs included working to be flexible in conversations, and allowing others more time to share and speak (Dist. Ex. 1 at p. 8). The June 2022 IEP reported the student benefitted from teacher check-ins as he was "a very sensitive kid"; the student in general when at school "follow[ed] the norms and routines of the classroom" (id.). Further, the June 2022 IEP reported that the student when having a difficult time in a subject area "may shut down and withdraw and have a hard time finding the words to express himself" and benefited from an adult to support his needs and ask for help (id.). In the area of physical development, the June 2022 IEP included the diagnoses within the student's neuropsychological report and that the student graduated from OT the previous school year (id. at p. 10; see Parent Ex. B at p. 5).

2. Sufficiency of Evaluative Information

Turning to the parties' dispute over the sufficiency of the information before the CSE in terms of formulating an IEP, 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).

The parents complained that defects in the prior written notice amounted to a clear substantive denial of a FAPE because the CSE only listed a classroom observation and a social history therein (Parent Ex. A at p 2). The parents' statement about the contents of that notice is factually accurate. According to the June 13, 2022 prior written notice, the CSE considered evaluative information including a classroom observation and social history update both completed in May 2022 (Dist. Ex. 2 at p. 1). But the parents' conclusion that an incomplete prior written notice in this instance amounted to a denial of a FAPE is incorrect. The evidence in the hearing record also shows that the school psychologist testified to reviewing teacher/provider progress reports, the student's behavior chart, as well as the private neuropsychological evaluation report obtained by the parents that was conducted in February 2022, and information from all of these sources was written into student's June 2022 IEP (Tr. pp. 60-62, 64, 68; Dist. Ex. 7 ¶¶ 21-23, 27; see Dist. Ex. 1 at pp. 1-12, 26).¹¹ It was not a denial of FAPE that the CSE failed to duplicate the same information again in the prior written notice.

a. Special Factors - Interfering Behaviors

I turn next to the parties' arguments over which issues were raised or could/should have otherwise been addressed. The district argues that the FBA and BIP claim was not raised in the parents' due process complaint notice and the parents counter that the district "opened the door" to the claim that an FBA should have been conducted and a BIP created because the district raised the issue in the direct testimony by affidavit of the school psychologist.¹² Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by

¹¹ The hearing record included the February 2022 private neuropsychological evaluation report, the May 2022 classroom observation, and the May 2022 social history update; the record did not include the teacher/provider progress reports or the student's behavior chart (see Parent Ex. B; Dist. Exs. 3, 6; see generally Parent Exs. A; C-M; Dist. Exs. 1-2; 4-5, 7).

¹² The parents' due process complaint notice alleged that the district "failed to fully evaluate [the student] in all areas of disability, related service needs and the impact on his academic and [s]ocial [e]motional functioning" (Parent Ex. A at p. 3). The parents specifically alleged that the district failed to evaluate the student's assistive technology needs (id.).

the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Here, the parents' due process complaint notice did not put the specific issue of the lack of an FBA and BIP before the district and the IHO, as it contained a generic catch-all allegation that "the DOE did not conduct, secure, or rely on sufficient evaluative measures to make a determination of present levels of performance, educational and cognitive profile, and areas of need" (Parent Ex. A at p. 3), but such catch-all provisions of this variety that lack any specificity and which can apply to virtually all students with a disability are plainly inadequate (Phillips v. Banks, 656 F. Supp. 3d 469, 482 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]). The fact that the parents spent a large part of their cross-examination of the district witness and direct examination of their witnesses on the student's behaviors (see Tr. pp. 30-111, 117-41, 153-58, 163-70), would not serve to bring the issue within the permissible scope of the impartial hearing because unless the district otherwise agreed, which it did not in this case, it is not permissible to raise a matter for the first time during the impartial hearing and the issue is forfeit (Polanco v. Banks, 2024 WL 2105530, at *2 [2d Cir. May 10, 2024]).

One exception is that "if the district, however, raises a claim or elicits testimony regarding a claim not included in the initial [due process] complaint, an IHO may find that the district 'opened the door' to that claim" Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 2017 WL 4466613, at *1 [S.D.N.Y. Oct. 5, 2017], aff'd, 739 F. App'x 79 [2d Cir. 2018] citing M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217, 244 [2d Cir. 2012]; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]). But if the elicited testimony is merely due to routine background or foundational questions, the questions are not sufficient to open the door (J.C.S., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]; B.M., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]).

In this case, the district presented one witness through direct testimony by affidavit and did not present any live direct questioning of the witness during the impartial hearing, nor did the district cross-examine any of the parents' witnesses (see Tr. pp. 30-111, 117-41, 153-58, 163-70; Dist. Ex. 7). The district did not inquire about an FBA or a BIP, but at one point asked a general question about discussion of the student's social emotional needs during the June 2022 CSE meeting and at another point asked whether the programming was appropriate for the student, and at yet other times the witness responded to questions with brief comments regarding behavior and a behavior chart for the student (Dist. Ex. 7 at pp. 5, 6, 10, 12, 15). In the procedural history section of their closing brief, the parents directed the IHO to the parents' cross-examination regarding the lack of an FBA (IHO Ex. I at pp. 4-7), but they did not mention their arguments to the IHO that the district had, in their view, "opened the door" to another issue for the impartial hearing (id. at pp. 8-9). Unsurprisingly, the IHO therefore did not make any findings with respect

to the district conducting an FBA or developing a BIP in relation to her other findings with respect to the district offering the student a FAPE. I find that the district did not elicit testimony that opened the door to the lack of an FBA and BIP and that instead it was the parents who attempted to specifically raise those matters during cross-examination of the district's witness without securing the agreement of the district (Tr. pp. 68, 74-76, 84-85).

Even if the issue had been raised, the parents' claim would not have resulted in a finding of a denial of a FAPE. 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]).

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).

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).

Here, the June 2022 IEP included results from administration of the Behavioral Assessment System for Children-Third Edition (BASC-3) Parent Report and Teacher Report, and the Multidimensional Anxiety Scale for Children-Second Edition (MASC-2) Parent Report as part of the February 2022 neuropsychological evaluation (compare Parent Ex. B at pp. 27-28, with Dist. Ex. 1 at pp. 2-4). The IEP also included information from the neuropsychological report which reflected the student had increased social anxiety in the transition back to in-person learning due to the pandemic and the increased academic demands of the third-grade curriculum (Dist. Ex. 1 at pp. 7-8).¹³ Further, the neuropsychological evaluation as referenced in the June 2022 IEP reported

¹³ The student's mother stated in her direct testimony by affidavit that during the fall 2021 district staff reported to her that the student's behaviors were "escalating and keeping him from learning" because of "increased work resistance, anxiety, missing classes, school refusal, and declining academics" (Parent Ex. M ¶ 10).

that the student was "very sensitive to being negatively evaluated," had a "deep fear of judgment" regarding academics, hid his learning challenges by choosing books above his reading level, and his difficulty with flexibility, emotional regulation, coping with emotional distress, and low self-esteem led the student to "externalize his irritability, frustration, and anxiety outwardly towards adults and peers with noncompliance, being disruptive, or being argumentative" (*id.* at p. 8).¹⁴ Additionally, the IEP indicated the student was vulnerable to feeling anxious and sad, and had a fragile sense of self, although was generally a happy and confident child outside of school and academics (*id.* at p. 7). As included in the IEP, the evaluator noted that the student responded well to social reinforcers such as praise and high fives as he was motivated to please (Dist. Ex. 1 at p. 8).

Turning to information about the student's performance at school, the hearing record included the May 2022 classroom observation of the student during morning meeting in his ICT classroom (Dist. Ex. 3 at p. 1). The school psychologist reported that the student did not look up when directed at the start of the meeting; however, he did stand up and participated in selecting a peer to greet when instructed (*id.*). During student presentations he did not engage in listening, but rather "focused on sketching and was not disruptive" (*id.*). The classroom teacher stated this was typical classroom behavior for the student, and noted he was usually quiet in the morning, did not tend to participate in class, but had a difficult time in the afternoon after lunch and recess "where he c[ould] have meltdowns and be more emotionally volatile" (*id.*). The school psychologist summarized her observations that the student was quiet and somewhat disengaged and required social/emotional support to support his school participation (*id.*).

The June 2022 IEP reported in the classroom the student demonstrated inflexibility, "low self-esteem and a fear of failure," low frustration tolerance, easily felt shame, and had a difficult time participating once he shut down in shame or frustration; the student at times put his head down and did not participate in class activities (Dist. Ex. 1 at pp. 8-9). Further, the June 2022 IEP included information from the social history update that the student had "a very rough year," work refusal throughout the year surrounding all subjects that stemmed from learning differences, and insecurities around peers regarding academic performance (*id.* at p. 7). Additionally, the IEP reflected the social history update report from the parents that the student "suffered from panic attacks" and had behavioral "episodes" at school (*id.*).

Also, the June 2022 IEP included information as stated above from the student's counselor that the student benefited from check-ins as he was "a very sensitive kid" and in general when at school the student "follow[ed] the norms and routines of the classroom" (*id.* at p. 8). The school counselor further reported that when the student had a difficult time in a subject area, he "may shut down and withdraw and have a hard time finding the words to express himself" and benefited from an adult to support his needs and ask for help (*id.*). The June 2022 IEP reported both in speech-language therapy and by the school counselor that the student had improved pragmatic, communication skills, and social skills significantly over the past year; specifying that the student

¹⁴ The June 2022 IEP included BASC-3 results from the parent and teacher that both indicated "[c]linically [s]ignificant" scores across domains in areas of externalizing problems, hyperactivity, aggression, conduct problems, depression, attention problems, adaptive skills, adaptability, and leadership (compare Parent Ex. B at pp. 27-28, with Dist. Ex. 1 at pp. 2-3).

used language to negotiate, had made several friends, related well to others, and had improved his active listening skills and flexibility in conversations (id. at pp. 6, 8).

Despite the student's improved communication and social skills, the June 2022 IEP reported that the student directed anger towards himself and made statements that he wanted to hurt himself; the IEP stated that "[the student's] therapist and parents sa[id] that this [wa]s a way of venting his frustrations and d[id] not see it as suicidal ideation" (Dist. Ex. 1 at p. 9).^{15, 16} The June 2022 IEP described "extreme but rare" outbursts at which time the student exhibited behaviors such as leaving the room, venting his frustrations, banging things, breaking pencils or punching a bulletin board; in addition to repeating behaviors with peers such as taking a hat or "pranking" them (id.). Further, the June 2022 IEP included per parent report that the student's infrequent outbursts had been triggered in the past due to low blood sugar and noted for teachers to be aware and ensure the student ate and drank regularly throughout the day (id. at p. 10). The June 2022 IEP included that teachers were using "a behavior plan in collaboration with [the student's] private therapist" that focused on staying in the classroom, walking with the class during transitions, stopping behaviors if bothering others, keeping hands to himself, and trying assignments for at least five minutes, with an additional behavior management need of access to his guidance counselor for crisis situations (id. at pp. 7, 11).

Within her direct testimony by affidavit, the school psychologist reported that she reviewed the student's behavior chart, among other information prior to the meeting (Dist. Ex. 7 ¶¶ 1, 21).¹⁷ When raised by the parent during cross-examination, the school psychologist testified that an FBA was not conducted at the time of the June 2022 CSE because the "teachers were managing the behavior through like a [response to intervention] RTI behavior system that they had been working on with his private therapist," and the CSE did not feel an FBA was necessary at the time (Tr. pp. 68-69). Further, the school psychologist explained that regarding the "behavior chart," the student's private therapist was in communication with his teachers frequently about the student's social/emotional concerns, as related to his depression, anxiety and ADHD, and how those diagnoses affected his participation in the classroom (Tr. pp. 71-72). The school psychologist testified that use of the chart was to "encourage [the student] to participate more in the classroom" and was "a system in order to encourage him to participate more during the day" and did not mean he was having disruptive behaviors; she testified classroom wide interventions and "a lot of different behavioral supports" were put in the student's IEP and could be provided by an "ICT teacher" and "did not indicate the need for further special education evaluation" (Tr. pp. 72, 74;

¹⁵ The student's mother noted an incident with another student in December 2021 where the student "fled" the classroom due to a panic attack and because of the student's level of agitation, the district hid scissors from the student and the student and his mother were driven home by the student's counselor due to concern for the student's safety (Parent Ex. M ¶¶ 12-15).

¹⁶ Within the mother's affidavit, she stated that the student reported harming himself at school in March 2022; however, the student's private treating therapist determined the student "was not in any immediate harm and that the threats were likely a result of a lack of impulse control" (Parent Ex. M ¶¶ 23, 24). During this incident, the district also removed scissors from the classroom (id. ¶ 23).

¹⁷ The school psychologist also reported review of teacher/provider progress reports, the classroom observation, social history update and parent provided neuropsychological evaluation which were included within the present levels of performance of the June 2022 IEP (Dist. Ex. 7 ¶¶ 21, 23, 27).

Dist. Ex. 7 ¶ 36).¹⁸ She explained that before conducting an FBA "the first step [wa]s to put into place classroom-wide interventions and other behavior supports," which the teachers were doing in this instance (Tr. p. 74). The school psychologist testified that although the student's refusal behaviors impacted his academics there was " a great deal of information" in the IEP "to address some of these concerns" and an FBA was unnecessary in this case (Tr. pp. 74, 83-84). According to the school psychologist, the student was receiving ICT services in a "classroom setting where he was receiving quite a bit of modification and accommodations for his behaviors" (Tr. pp. 82-83). Moreover, she testified that an FBA was not brought up as a concern at the CSE meeting and only during the impartial hearing (Tr. p. 84).

In addition to identifying the student's social/emotional and behavior needs as described above, review of the June 2022 IEP shows it provided supports to address the student's behaviors such as positive encouragement, on task focusing prompts, frequent breaks, set routines, clear expectations, preferential seating, previewing activities, extra wait time, frequent body movement breaks, a behavior chart developed by his teachers and private therapist, and access to a guidance counselor for crisis situations (Dist. Ex. 1 at p. 11). The CSE developed annual goals and recommended ICT services to address the student's academic deficits, which were identified as a cause of some of the student's behavioral and social/emotional difficulties (*id.* at pp. 6-10, 16-18). The CSE also developed an annual goal to improve the student's use of self-regulation/coping strategies to avoid engaging in disruptive behavior when upset, frustrated, or angry, and recommended that the student receive both individual and group counseling services (*id.* at pp. 19-20).

Thus even if the parents had raised the issue in their due process complaint notice, they would not prevail on the issue because contrary to the parents' assertions, the evidence above shows that the CSE adequately identified the student's behaviors in the June 2022 IEP and addressed the areas of concern within the management needs through identification of a behavior chart used in conjunction with the student's private therapist, academic and behavioral annual goals, and ICT and counseling services.

b. Assistive Technology Evaluation

The parents argue that the IHO erred in not addressing their assistive technology claim is true because the district's argument that the lack of an AT evaluation was not raised in the due process complaint notice is incorrect. The parents specifically stated in the due process complaint notice that "[t]he CSE failed to evaluate [the student's] assistive technology needs . . . despite the school knowing of [the student's] struggles" (Parent Ex. A at p. 3).

Another of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]). The failure to recommend specific

¹⁸ The school psychologist testified that the teachers were not "charting his behavior" but using this system "to encourage him to participate more during the day" (Tr. p. 73).

assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121). More recent guidance from the United States Department of Education appears to require that each time a CSE meets to develop, revise, or amend an IEP the CSE "must consider whether the child requires [assistive technology] devices and services" (see "Myths and Facts Surrounding Assistive Technology Devices and Services," January 2024, at p. 1 available at: <https://sites.ed.gov/idea/files/Myths-and-Facts-Surrounding-Assistive-Technology-Devices-01-22-2024.pdf>). Although this guidance seems to place the burden on the district to consider assistive technology at every CSE meeting, that does not mean that CSEs are obligated to provide for assistive technology in every disabled student's IEP and, as further described below, the parents claim' in this case relates to communication deficits which were already addressed by the goals and related services.

As described above, the student demonstrated articulation deficits in two sounds -"r" and "th" (see Parent Ex. B at p. 5; Dist. Ex. 1 at p. 6). Otherwise, the neuropsychologist noted that the student's "speech was normal in its tone, rate, and volume" (Parent Ex. B at p. 5). The June 2022 IEP included information in the area of speech-language therapy that the student had made "significant progress in his communication skills" that year; however, his articulation or phonological awareness goals were not addressed (Dist. Ex. 1 at p. 6). The June 2022 IEP specified that the student stated, "the way he s[poke] [wa]s fine" and he resisted any suggestions to modify his production of the "r" and "th" sounds (id.). Further, the IEP present levels of performance noted the possibility that the student could not hear his own articulation errors; however, reported "it [wa]s more likely that he [wa]s sensitive to criticism, and perhaps embarrassed about being corrected in front of peers" (id.). The CSE acknowledged that the student's articulation errors were "no longer age appropriate and adversely affected his intelligibility" (id.). To address the student's needs in articulation and phonological awareness, the IEP included two goals: one goal targeted that the student would improve his articulation skills by producing the "th" sound and "r" sound in words and phrases and another speech goal addressed improved phonological awareness skills by generating rhyming words, segmenting phonemes, and identifying final phonemes in words (id. at pp. 13-15).

As related to the student's writing, the private neuropsychological report indicated "[the student's] sentence writing [wa]s largely unintelligible due to the severity of his spelling errors, which [wa]s subsumed under his reading disability" (Parent Ex. B at p. 6). The neuropsychological report went on to say that the student's grammar and use of mechanics were within normal limits, although noted he needed support with capitalization, and thus concluded the student's writing challenges were not diagnostic (id.). In connection with writing, the June 2022 IEP reported that the student was working on capitalization and using grade-level conventions (Dist. Ex. 1 at p. 4). Further, the June IEP provided four annual goals to address the student's spelling needs; one speech-language annual goal as described above that addressed phonemic awareness skills, and three additional classroom goals that addressed decoding and encoding words through use of systematic and multisensory methods for teaching phonics, capitalization at the beginning of a sentence, the word "I" and many proper nouns, and recognizing, reading, and writing sight words in isolation and in context with small group support, multisensory experiences, and "foundations" word work (id. at pp. 15-17). Specific to the student's writing needs, the school psychologist testified that the CSE included in his speech-language annual goals an additional phonological

awareness goal as "phonological awareness [wa]s the underlying reason why students might struggle with spelling" (Tr. p. 123). She further testified that the word study goal for phonics addressed decoding and encoding and stated "[e]ncode means spell words with beginning and ending consonant blends, simple suffixes, welded sounds with use of systematic and multisensory methods for teaching phonics" (*id.*). The school psychologist testified that this "made sure the student had access to those supports in the classroom to help him with his difficulties with spelling and phonics" (Tr. pp. 123-24).

The school psychologist testified that the diagnosis the student received during the neuropsychological evaluation included a specific learning disorder with impairment in reading, with an "at-risk area to support" of written expression (Tr. pp. 122-23). As related to the neuropsychologist's recommendation that the student have access to a scribe when writing lengthy responses, the school psychologist testified that the student was not diagnosed with a learning disorder in written expression (Tr. p. 122; *see* Parent Ex. B at pp. 6, 8). As related to writing, the June 2022 IEP and the private neuropsychological report solely reported the student's writing illegibility was due to his number of spelling errors (Parent Ex. B at p. 6; Dist. Ex. 1 at p. 5). The private neuropsychological report stated the student was resistant to writing activities, had difficulty sustaining mental effort and generating ideas, and needed writing activities split into several sections over three days of testing (Parent Ex. B at p. 21). Contrary to this, the June 2022 IEP identified that the student loved reading and writing comics, showed creativity in his stories, and given the choice favored writing fantasy (Dist. Ex. 1 at p. 6).

Based upon the foregoing, although the district did not conduct an assistive technology evaluation, the hearing record makes clear that the student's written language needs arose from spelling difficulties, which were identified and addressed with the recommended annual goals, ICT services, and speech-language therapy. Even if it was determined that an assistive technology evaluation was warranted under the circumstances, the failure to conduct such evaluation did not rise to the level of a denial of FAPE in this instance.

3. ICT Services

Although not well articulated in their request for review, the parents appear to argue that the recommendation for ICT services was not appropriate because the student had previously "deteriorated" and regressed with ICT services in the classroom (Req. for Rev. at pp. 7, 9).

State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students and that the school personnel assigned to each class shall minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]).

As related to academics, through direct testimony by affidavit, the parent stated the student had been in a district ICT "program" since first grade and returned to in-person instruction in third grade for the 2021-22 school year in an ICT program (Parent Ex. M ¶¶ 8-9). The parent testified that the student functioned at the first/second grade level in both reading and math in his third-

grade year, asserted that the student regressed during the school year, and also contended that the district did not consider the recent neuropsychological report in making the ICT recommendation because it was not listed on the prior written notice (id. ¶¶ 17, 29-30).

The evidence in the hearing record shows that the June 2022 CSE relied on the private neuropsychological evaluation information, in addition to the student's functional performance data in academic, behavioral, social, and physical functioning from classroom teachers and service providers; in addition to progress on IEP annual goals, as well as management needs in making recommendations for the student (Dist. Exs. 1 at pp. 1-8, 10; 7 ¶ 27). Notwithstanding the neuropsychologist's view that the student "require[d] placement small, full-time specialized education school for students with language- based learning disabilities . . . a small student-to-teacher ratio [while] matched with peers who have average to above average intellectual functioning" (Parent Ex. B at p. 7), 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 with regard to placement decisions (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. While offering useful information that was incorporated into the student's June 2022 IEP, the private 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 placing the student full-time in a small special class in a specialized private school, so I ascribe less weight to that aspect of her evaluation report (see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 119-20).

Further, the June 2022 CSE determined that the student had demonstrated "significant progress" in his communication skills in areas such as pragmatics, participation with peers, and negotiating game play, as well as in his narrative language skills (Dist. Ex. 1 at pp. 5, 8-9). Further, the June 2022 IEP reported that the student had matured significantly during the school year, related well to his teachers and peers, made several friends, improved his social skills, and improved active listening during small group activities (id. at p. 8).

The district considered recommending general education and related services only, however rejected these options as they did not provide enough support for the student's academic, and social/emotional needs (Dist. Exs. 1 at p. 26; 2 at p. 2; 7 ¶¶ 44-45). The school psychologist also indicated that a 12:1 special class setting was considered; however, this setting was rejected as it was considered too restrictive as the student benefited from an integrated setting to support his social/emotional needs (Dist. Exs. 1 at p. 26; 2 at p. 2; 7 ¶ 45).

Based on the foregoing, the June 2022 CSE recommended ICT services for ELA, math, and social studies for five periods per day within a general education classroom (Dist. Ex. 1 at p. 20). The parents alleged within their due process complaint notice that the June 2022 CSE recommended an ICT program that was not appropriate as it was only a "part-time [ICT] program five periods per week," and stated "[w]hat [wa]s most strange was the ICT recommendation for certain school subjects, and only for [five] periods per week," and "[t]he [p]arents could not understand how in a school with approximately [30] academic periods per week, would offer [the student] such little support, maybe 15% of his day with a special educator" (Parent Ex. A at pp. 2-3). However, the parents appeared to misread the contents of the June 2022 IEP which provided five periods per day of ICT services, not per week (Dist. Ex. 1 at p. 20). During the impartial hearing, the school psychologist testified during cross-examination that the recommended program for the 2022-23 school year was a full time ICT program which she defined as around 70 percent, for 25 periods per week (Tr. p. 99). The school psychologist further testified that the ICT program was approximately 25 periods per week and although science was not delineated on the June 2022 IEP, particular subjects were flexible within an elementary school schedule and concepts such as science were integrated within ELA periods (Tr. p. 104; see Dist. Ex. 1 at p. 20). The June 2022 IEP included ICT programming for ELA three periods per day, for math one period per day, and for social studies one period per day (Dist. Ex. 1 at p. 20). During cross-examination, when asked about this breakdown of services, the school psychologist described that an elementary school is a "little bit more flexible" in that they are not structured the same as middle school periods, so for example "math is something that [] happens during some of those ICT periods" (Tr. p. 99).

During the impartial hearing, the school psychologist testified that the student was "about a year below" instructionally and functionally at the time of the CSE meeting, and the recommended program would provide the student a full time ICT program of 25 periods of ICT services per week (Tr. pp. 98-99). To further address the student's needs, the June 2022 CSE recommended the following management needs: positive encouragement, on task focusing prompts, frequent breaks, set routines, clear expectations, preferential seating, previewing activities, extra wait time, and frequent body movement breaks (Dist. Ex. 1 at p. 11). Overall, the June 2022 CSE documented that the student "require[d] a high degree [of] social emotional and behavioral supports in order to increase his participation in the general education curriculum," which included ICT and related services, "in order to further increase his ability to participate and progress in his school environment" (id. at pp. 12, 20). Specifically, in conjunction with ICT services, the CSE recommended the following related services on a weekly basis: one 30-minute sessions of individual counseling services, one 30-minute session of counseling services in a group; and two 30-minute session of speech-language therapy in a group of three (id. at pp. 20-21). The school psychologist further testified that the student received related services that addressed intensive, small group pragmatic language skills, with modification to goals to address phonological and articulation goals; in addition to "mandated" counseling, the student's teachers and therapist were in regular communication to monitor the student's social/emotional needs (Dist. Ex. 7 ¶ 42).

The school psychologist testified that the recommendations were appropriate given the student's cognitive potential, progress on IEP goals, and opportunity for him to receive specially designed individualized instruction and related services through the IEP (Dist. Ex. 7 ¶ 30). She specified that the student received special accommodations and learning accommodations that included: small group learning using evidence-based techniques for teaching phonics, daily

intensive word study lessons, and two teachers in the classroom that allowed for differentiation across subjects and allowed opportunities to work in small groups throughout the day (id. ¶ 42).

Based on the foregoing, the evidence in the hearing record supports the IHO's conclusion that the June 2022 CSE's recommendation for ICT services in combination with related services and additional supports described in the management needs, was reasonably calculated to enable the student to receive educational benefits in light of his circumstances for the 2022-23 school year. Although the public programming in the June 2022 IEP may not have been viewed as ideal by the parents, the school district was not required to maximize the student's potential in an ideal setting, and the CSE met the more modest objective of offering the student an appropriate education in a less restrictive setting.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2022-23 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Bay Ridge was an 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
May 24, 2024**

**JUSTYN P. BATES
STATE REVIEW OFFICER**