



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-154

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the William Floyd Union Free School District

Appearances:

Thivierge & Rothberg, P.C., attorneys for petitioner, by Christina Thivierge, Esq.

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, by Lakshmi Singh Mergeche, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which found that respondent (the district) offered her daughter appropriate educational programming and denied her request to be reimbursed for her daughter's tuition costs at The Vincent Smith School (Vincent Smith) 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 student was the subject of a prior State-level administrative proceeding, and therefore, the parties' familiarity with the facts and procedural history preceding this case is presumed and only a brief summary of the facts and procedural history of this matter and the IHO's decision will be recited here (see Application of the Bd. of Educ., Appeal No. 22-092).

The student has received diagnoses of attention deficit hyperactivity disorder (ADHD), combined presentation, specific learning disorder with impairment in reading (dyslexia), and specific learning disorder with impairment in written expression (Parent Ex. F at p. 5). The student

attended a district elementary school from kindergarten through third grade, and has been enrolled at Vincent Smith since the fourth grade (2019-20 school year) (Dist. Ex. 1 at p. 3).¹

On June 7, 2022, the CSE convened for the purpose of the student's annual review and found the student remained eligible for special education services as a student with a learning disability (see generally Dist. Ex. 5).² The June 2022 CSE recommended services to commence on August 31, 2022 consisting of a 15:1+1 special class for English language arts (ELA), math, science, and social studies; two hours per day of individual specialized reading instruction; one 30-minute session per week of small group occupational therapy (OT); one 30-minute session per week of individual OT; and two 30-minute sessions per month of individual psychological counseling services (Dist. Ex. 5 at pp. 1, 13, 14).³ Additionally, the district recommended supplementary aids and services consisting of copy of class notes, use of graphic organizer, preferential seating, refocusing and redirection, proximity to teacher, books on tape or other recording device, access to additional adult support as needed, and individual aide services during instructional time, which the IEP specifically indicated was not for use during transitions, lunch, physical education, leisure activities, after school, or field trips (*id.* at pp. 13-14). The June 2022 CSE also recommended that the student receive access to assistive technology and both direct and indirect assistive technology consultation, and further recommended supports for school personnel such as assistance with curriculum modifications and information on the student's disability and implications for instruction (*id.* at p. 14).

On June 15, 2022, the parent entered into an enrollment contract for the student's attendance at Vincent Smith for the 2022-23 school year commencing on September 6, 2022 and ending on June 16, 2023 (see Parent Ex. G).

Then, on June 23, 2022, the parent disagreed with the recommendations contained in the June 2022 IEP, and, as a result, notified the district of her intent to unilaterally place the student at Vincent Smith and seek funding for the costs of that placement (see Parent Ex. M).

¹ Vincent Smith has not 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).

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 For the 12-month portion of the school year in July and August 2022, the student was recommended for a 15:1+1 special class three hours per day with one hour of daily individualized specialized reading instruction, daily individual aide services during instructional time, one 30-minute session per week of individual OT, and one 30-minute session per week of psychological counseling services (Dist. Ex. 5 at pp. 1, 14-15). The CSE also recommended access to assistive technology and four 30-minute sessions of direct assistive technology consult services for the six-week summer program (*id.* at p. 14).

On August 22, 2022, the CSE reconvened to consider the results of a July 21, 2022 reading evaluation of the student (see Dist. Exs. 4; 21; 23 at p. 3).^{4, 5} While the August 2022 CSE included information from the reading evaluation in the IEP present levels of performance and made changes to some of the annual goals, the program and related service recommendations in the August 2022 IEP were the same as recommended in the June 2022 IEP (compare Dist. Ex. 5 at pp. 1, 2, 5-6, 13-15, with Dist. Ex. 21 at pp. 1, 3, 8-11, 20-21).

In a due process complaint notice, dated July 1, 2022, and an amended due process complaint notice dated December 28, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Exs. A-B).⁶ The amended due process complaint notice focused on the August 2022 IEP and alleged numerous procedural and substantive violations, including but not limited to: failing to provide the parent with the August 2022 IEP prior to the beginning of the 2022-23 school year; failing to explain how the IEP could be implemented with the amount of reading services recommended; failing to offer a program in a small specialized class "focused on addressing learning disabilities and providing systematic evidence-based reading instruction"; failing to consider reports and evaluations from outside providers; failing to conduct a functional behavioral assessment (FBA); developing goals that did not address all of the student's deficits; failing to recommend sufficient individual OT services; failing to recommend weekly counseling services; denying the parent meaningful participation; and predetermining the student's program (Parent Ex. B at pp. 5-8). As relief, the parent requested direct funding of the tuition and transportation to Vincent Smith for the 2022-23 school year (*id.* at p. 8).

On March 22, 2023, the CSE convened for a program review (see Dist. Exs. 9; 24 at p. 5). The March 2023 CSE continued to recommend a 15:1+1 special class with specialized reading instruction and OT services, but modified the counseling to include two 30-minute sessions per week of individual psychological counseling services and one 30-minute session per week of small group psychological counseling services (compare Dist. Ex. 9 at pp. 1, 26-27, with Dist. Ex. 21 at p. 20). In addition, the March 2023 CSE continued to recommend the same supplementary aids and services as the August 2022 IEP with the addition of repetition of information and use of breaks (compare Dist. Ex. 9 at p. 27, with Dist. Ex. 21 at pp. 20-21).

⁴ The hearing record contains multiple duplicative exhibits. For purposes of this decision, only district 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]).

⁵ The district entered the August 2022 IEP as two separate exhibits: district exhibit 21 includes the summary of services and participants at the August 2022 CSE meeting, and district exhibit 7 is referred to throughout testimony as not all witnesses had the complete district exhibit 21 at the time of their testimony. District exhibit 21 is incorrectly bates stamped as district exhibit 7, on pages one through 24, with page numbering correctly identified (see Dist. Exs. 7; 21). For purposes of this decision when discussing the August 2022 CSE meeting or IEP, district exhibit 21 shall be referenced.

⁶ For purposes of this decision, any references shall be to the December 28, 2022 amended due process complaint notice (see Parent Ex. B).

An impartial hearing convened on May 22, 2023, and concluded on December 20, 2023 after seven days of proceedings (Tr. pp. 1-779; IHO Decision at p. 1).⁷ In a decision dated March 15, 2024, the IHO determined that the district offered the student a FAPE for the 2022-23 school year and denied the parent's requested relief (IHO Decision at pp. 39-40). The IHO addressed the June 2022, August 2022, and March 2023 IEPs and found that all of the IEPs referenced "extensive evaluations and assessments," that the IEPs adequately addressed the student's social/emotional needs, and that the recommendation for a 15:1+1 special class together with 1:1 aide services during instructional time was appropriate for the student (*id.* at pp. 28-39).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be fully recited here. The parent asserts that the IHO erred in finding that the district offered the student a FAPE for the 2022-23 school year. More particularly, the parent argues the student would not have been able to progress in a 15:1+1 special class, the recommended two hours per day of specialized reading instruction would have been too much for the student and caused her to regress, the counseling services were excessive, 1:1 aide services were too restrictive, and based on the schedules proposed for the student, the district could not implement the IEPs. The parent also alleges that the IHO failed to determine whether the district evaluated the student in all areas of disability asserting a lack of social/emotional testing, the lack of an FBA, and the lack of information regarding the student's OT skills. The parent then asserted that the IHO failed to determine the appropriateness of the recommended annual goals and failed to address whether the CSE predetermined the IEP recommendations by refusing to consider placing the student in Vincent Smith. Finally, the parent asserts that Vincent Smith was an appropriate unilateral placement for the student for the 2022-23 school year and that equitable considerations favor an award of direct funding of the student's tuition at Vincent Smith.

The district submits an answer generally denying the material allegations contained in the request for review.⁸ In its answer, the district asserts that the August 2022 CSE relied on updated evaluations and progress reports, that the district prepared proposed schedules for the implementation of the IEP, that the annual goals were based on the student's "present levels of academic achievement and functional performance," and that the parent's disagreement with the CSE recommendations did not constitute predetermination. In addition, the district claims that the

⁷ The IHO Decision references an August 17, 2022 prehearing conference; however, contrary to State regulations, the hearing record does not include a transcript or a written summary of the prehearing conference (*see* 8 NYCRR 200.5 [j][3][xi] [requiring that a "transcript or a written summary of the prehearing conference shall be entered into the record by the [IHO]"]).

⁸ It should be noted that the answer is dated May 2, 2024; however, the verification was sworn to on May 1, 2024. Additionally, according to the affidavit of service, the answer was served on May 1, 2024, but was not filed with the Office of State Review until May 6, 2024. The procedural regulations state that an answer shall be filed with the Office of State Review "within two days after such service" (8 NYCRR 279.5[c]). Although any errors with the filed pleadings do not warrant further action in this proceeding, counsel for the district should take greater care in compiling documents for submission to the Office of State Review and is reminded to comply with the procedural regulations for filing of pleadings.

parent failed to establish how Vincent Smith met the student's needs and that equitable considerations did not favor the parent.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that

provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁹

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).

⁹ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

VI. Discussion

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE for the 2022-23 school year (IHO Decision at pp. 39-40). The IHO accurately recounted the facts of the case (id. at pp. 3-23), identified the issues to be resolved (id. at pp. 23-25), set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2022-23 school year (id. at pp. 25-28) and applied that standard to the facts at hand (id. at pp. 28-40). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that she weighed the evidence and properly supported her conclusions. Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is not a sufficient basis presented on appeal to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, as explained below, the conclusions of the IHO described above are hereby adopted.

Prior to reaching the analysis of the parent's claims on appeal, a brief discussion of the operative IEP is necessary. As mentioned above, for the 2022-23 school year the CSE developed three separate IEPs for the student, on June 7, 2022, August 22, 2022, and March 22, 2023 (see generally Dist. Exs. 5; 9; 21).¹⁰ The June 2022 CSE convened for the purpose of the student's annual review and determined that an updated reading evaluation was needed "to further assess [the student's] reading level to appropriately provide goals and services for the next school year" (Tr. p. 33; Dist. Exs. 5 at pp. 1, 5; 6 at pp. 1-2, 5). Upon receipt of the July 26, 2022 reading evaluation report, the CSE reconvened on August 22, 2022 to review the evaluation and the CSE updated the student's present levels of performance and modified the annual goals (Tr. pp. 41-42; see Dist. Exs. 4; 14; 15; 21 at pp. 3-4, 8-13; 23 at p. 3).¹¹ Later, after receipt of the December 2022 amended due process complaint notice, the CSE reconvened on March 22, 2023 to discuss the parent's concerns, need for additional evaluations, and to modify the annual goals and the recommendation for counseling services (Tr. pp. 53, 56-57; see Dist. Exs. 9; 24). Here, neither the due process complaint notice nor amended due process complaint notice raise any allegations about the March 2023 IEP, and the parent did not seek to amend her due process complaint notice to include allegations pertaining to the March 2023 IEP. Therefore, the August 2022 IEP is the operative IEP to be reviewed in connection with determining whether the district offered the student a FAPE for the 2022-23 school year, as that is the IEP that was in effect when the parent made her decision to place the student at Vincent Smith for the 2022-23 school year (see Bd. of Educ. of Yorktown Cent. Sch. Dist., 990 F.3d at 173; R.E., 694 F.3d at 187-88).

¹⁰ The Second Circuit has also made clear that parents are entitled to rely on an IEP "as written when they decide to [unliterally] place" their child before the beginning of a school year (Bd. of Educ. of Yorktown Cent. Sch. Dist., 990 F.3d at 173; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]).

¹¹ According to the district's July 28, 2022 response to the parent's initial July 1, 2022 due process complaint notice in this matter, the district indicated it would reconvene the CSE to discuss a smaller class size ratio and the student's social-emotional growth requiring larger class settings for classes where she shows academic success (Dist. Ex. 13).

A. Sufficiency of Evaluative Information

The parent asserts that the district failed "to fully evaluate [the student] in all areas of suspected disability" including the student's vocational skills, social/emotional functioning, and needs related to OT (Req. for Rev. ¶¶ 26-31).¹² In her amended due process complaint notice, the parent raised the fact that the district failed to conduct an FBA but did not raise the issues of evaluating the student's vocational, social/emotional, or OT needs (Parent Ex. B at pp. 5-8).¹³

Although the lack of specific evaluative information was not properly plead within the amended due process complaint notice, both parties and especially the district discussed the evaluative information the CSE relied on in making its recommendations (Tr. pp. 1-339; see Dist. Exs. 21; 23).

In analyzing the appropriateness of the program offered to the student for the 2022-23 school year, the IHO first addressed the sufficiency of the evaluative information (IHO Decision at pp. 28-36). The IHO found that the IEPs, particularly the August 2022 IEP, "reference[d] extensive evaluations and assessments" (id. at p. 30). According to the IHO's review of the hearing record, in addition to reconvening on August 2022 to discuss the results of the student's July 26, 2022 reading evaluation report, the CSE relied on the district's February 2021 psychoeducational evaluation that included results from the Wechsler Individual Achievement Test - Fourth Edition (WIAT-4), Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V), Comprehensive Test of Phonological Processing - Second Edition (CTOPP-2), Gray Diagnostic Reading Tests - Second Edition (GDRT-2), Gray Oral Reading Test - Fifth Edition (GORT-5), Test of Word Reading Efficacy – Second Edition (TOWRE-2), Test of Written Language – Fourth Edition (TOWL-4), and the Wilson Assessment of Decoding and Encoding (WADE), together with results from the December 13, 2019 private neuropsychological evaluation (IHO Decision at pp. 30-31, 34; see Parent Ex. F; Dist. Exs. 1; 21 at pp. 3-8). In addition to that information, the CSE considered various student records from Vincent Smith, including: the student's 2021-22 term 1 report card, the Individual Student Program, a resource room report, and a Wilson Reading System

¹² At the time of the August 2022 CSE meeting, the student was 12 years of age (Dist. Ex. 7 at p. 1); accordingly, the student was due for a vocational assessment at some point during that year. State regulation requires districts to conduct vocational assessments of students at age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]). Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills, and transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).

¹³ At the March 2023 CSE reconvene, the district recommended an FBA; however, Vincent Smith staff and the parent stated that the student did not need positive behavioral supports in her current setting as any behaviors such as challenging opinions, distractibility, or non-compliance were managed with 1:1 intervention within the classroom setting (Dist. Ex. 9 at p. 22; see Dist. Ex. 24 at pp. 65-67). Further, the March 2023 IEP reported that the "parent decline[d] consent for an FBA at th[at] time" (Dist. Ex. 9 at p. 22).

End of Step assessment (IHO Decision at p. 32; Dist. Ex. 21 at p. 3).¹⁴ Furthermore, the CSE considered an April 14, 2021 classroom observation, a February 26, 2021 OT evaluation report, a February 5, 2021 social history, and a January 12, 2021 reading evaluation report (IHO Decision at p. 32; Dist. Ex. 21 at p. 3).

In reviewing the August 2022 IEP, the IHO found that the "standardized testing and clinical evaluations" "accurately reflected the student's present levels of performance, both strengths and weaknesses" (IHO Decision at p. 34). Further, the IHO found that the information relied on and considered from 2021 was current and a reevaluation was not required at the time (see 8 NYCRR 200.4[b][4]; IHO Decision at p. 34). Moreover, the IHO stated that when the CSE determined at the June 2022 CSE meeting that the reading assessments from Vincent Smith were not adequate, the district acted to obtain a reading evaluation from the same agency that evaluated the student's reading in January 2021 (IHO Decision at p. 34; see Dist. Exs. 2; 4). Accordingly, based on my independent review of the evidence in the hearing record, I agree with the IHO's finding that the student's 2022-23 IEPs, in particular the August 2022 IEP, referenced extensive evaluations and assessments, considered various records from Vincent Smith, and accurately reflected the student's present levels of performance, strengths and weaknesses (IHO Decision at pp. 34-40; Tr. pp. 73, 131, 144-45, 155-56, 159, 161, 179, 264, 269-70, 278-79, 282-83, 296, 318-23, 326-27, 511-12; see Parent Exs. F; J at pp. 2-3, 7-8; V; Dist. Exs. 1-3; 4 at pp. 11-12; 9 at p. 22; 14; 15; 20 at p. 1; 21 at pp. 3-15; 23 at pp. 1-12, 14-34, 36-40, 48-49, 55-56, 67-72; 24 at pp. 65-67).

The August 2022 IEP contained evaluative information from multiple sources including the December 2019 neuropsychological reevaluation, the January 2021 reading evaluation, the February 2021 psychoeducational report, the February 2021 OT evaluation, and the July 2022 reading evaluation (compare Dist. Ex. 21 at pp. 3-7, with Parent Ex. F; Dist. Exs. 1-4). In addition to evaluative information, the August 2022 IEP included Vincent Smith 2021-22 report card information from May 2022 within the present levels of performance in the areas of study skills, reading, writing, and mathematics (compare Dist. Ex. 21 at pp. 7-8, 11-12, 14-15, with Parent Ex. J). Specifically, in the area of study skills, the August 2022 IEP included information from the Vincent Smith 2021-22 report card from the student's resource room teacher regarding the supports needed for writing and math, as well as executive functioning skills focused on planning and organizing to keep the student on track for assignments, tests, and daily routines (compare Dist. Ex. 21 at p. 7, with Parent Ex. J at p. 7).

With regard to mathematics, the student's August 2022 IEP included information from the 2021-22 Vincent Smith math report that reflected the areas addressed during the trimester related to ratios, creating tables and line diagrams, and stated that the student used visual aids, graphic organizers, multisensory activities, anchor charts and modeling for support; the IEP reported that in solving word problems the student was provided supports that included having the question read several times, breaking down the problem into smaller parts, and using a math graphic organizer (compare Dist. Ex. 21 at p. 12, with Parent Ex. J at p. 3).

¹⁴ The Vincent Smith progress reports identified in the August 2022 IEP were from May 2022 and were also reported in the June 2022 IEP (compare Dist. Ex. 7, with Dist. Ex. 5). The August 2022 CSE also had additional information regarding the student's classroom performance provided by Vincent Smith just prior to the August 2022 CSE meeting (Dist. Ex. 15).

As per the August 2022 IEP, Vincent Smith did not provide progress reports regarding the student's social development (Dist. Ex. 7 at p. 12). However, the IEP indicated that, according to a May 2022 counseling progress report, the student attended a group social skills class once every six days, she was an active participant, and she showed "signs of maturity: in that she was less likely to interrupt, was helpful, and was more tolerant of others (id.).

In the area of physical development, the August 2022 IEP included information from the student's occupational therapist at Vincent Smith from May 2022 and August 2022, that indicated OT sessions focused on keyboarding exercises and organization, problem solving, fine motor, and handwriting activities (Dist. Ex. 21 at pp. 14-15). Further, the CSE chairperson testified that for the 2022-23 school year the CSE recommended that the student continue to receive OT services based on a Vincent Smith OT progress report (Tr. pp. 117, 144). The CSE chairperson reported that, as of the June 2022 CSE meeting, Vincent Smith had not provided evaluative reports; however, a February 2021 district OT evaluation was included in the hearing record (Tr. p. 145; Dist. Ex. 3). Additionally, in the area of management needs, the August 2022 IEP included information from the Vincent Smith 2021-22 report card as reported by the student's resource room teacher, in addition to needs identified at the August 2022 CSE meeting (compare Dist. Ex. 21 at p. 15, with Parent Ex. J at p. 7; see generally Dist. Ex. 23 at pp. 1-12, 36-40).

Based on the above, the hearing record supports the IHO's determination that the district had sufficient evaluative information available to it at the August 2022 CSE meeting. While the parent asserts on appeal that the district failed to conduct any social/emotional testing during the 2022-23 school year, as noted above, the June 2022 and August 2022 CSEs had information from a counseling progress report regarding the student's then current social emotional functioning.¹⁵ Additionally, the hearing record does not support the parent's other claims raised regarding the sufficiency of the district's evaluations and the IHO's finding on this issue is affirmed on appeal.

B. Specialized Reading Instruction

Turning to the parties' dispute regarding the student's reading instruction, the August 2022 IEP included information from the student's specialized reading teacher who instructed the student using the Wilson Reading System, the student's two Vincent Smith ELA teachers with information from both ELA classes, in addition to updated testing information from the July 2022 reading evaluation (compare Dist. Ex. 21 at pp. 7-8, with Parent Ex. J; Dist. Ex. 4). The IEP identified that the student was "on [s]tep [three] of the Wilson reading program" at Vincent Smith as of May 2022 and the student's annual reading goals should address the next steps (Dist. Ex. 21 at p. 7). Further, the August 2022 IEP included information from both ELA classes at Vincent Smith, with information from the student's first ELA class teacher that reported the student worked on "SPIRE" vowel teams, and stated the student had difficulty reading and writing these words, and benefited from multi-sensory, systematic strategies and activities to support her development and overall reading skills (id. at pp. 7-8). The August 2022 IEP included information from the student's second

¹⁵ To the extent that the December 2019 neuropsychological reevaluation noted that the student exhibited symptoms of anxiety and depression and further noted that although the student did not meet the criteria for diagnoses of anxiety or depression the student's symptoms should continue to be monitored, the CSE had information from the student's counseling progress report and there is no indication in the hearing record that the student was exhibiting those symptoms during the 2022-23 school year so that a further standardized evaluation was required.

ELA class teacher that addressed the student's abilities in highlighting text, and stated the student worked on identifying vocabulary in context of reading and using context clues to decode words (id. at p. 8). Further, the August 2022 IEP included the updated July 2022 reading evaluative information that addressed the student's current needs that revealed the student had significant deficits in areas of phonological processing, vocabulary, fluency, reading comprehension, and written expression demonstrating that "[the student] ha[d] not acquired the foundational skills for reading" (Dist. Exs. 4 at p. 12; 21 at pp. 8-11; 23 at pp. 14-34).

Additionally, in the area of reading, the August 2022 IEP included an updated August 2022 Vincent Smith report with the student's current level within the Wilson Reading Program and reported that the student would begin the Orton-Gillingham Reading Program in September 2022 (see Dist. Exs. 21 at p. 11; 23 at pp. 48-49). In the area of writing, the August 2022 IEP included information from the 2021-22 Vincent Smith ELA report in addition to the updated July 2022 reading assessment, and updated August 2022 Vincent Smith summer report (Dist. Ex. 21 at pp. 11-12). The August 2022 IEP reported from the Vincent Smith 2021-22 report card, that the student's second ELA class at Vincent Smith addressed mechanics of writing and grammar, and as the student demonstrated hesitation in writing, she needed convincing at times to work on writing assignments (id. at p. 11). The August 2022 IEP additionally included information from the July 2022 reading assessment related to the student's writing needs and required support in spelling, punctuation, writing mechanics, and use of mature language (id.).¹⁶

Following the July 2022 reading evaluation, the August 2022 IEP reported that "[i]n accordance with her reading disability and diagnosis of dyslexia, [the student] need[ed] a specialized, highly structured, multimodal reading program (Orton-Gillingham-based) that w[ould] address her age and cognitive abilities" (Dist. Ex. 21 at p. 12). The August 2022 IEP further included that the student needed tactile and kinesthetic strategies and multisensory materials to support the student's needs in reading, writing, math, and study skills (id. at pp. 12-13). The CSE chairperson testified that the purpose of the August 2022 CSE reconvene meeting was to discuss the July 2022 reading evaluation, to make sure the annual goals developed for the Wilson Reading Program were accurate, and to provide "actual diagnostics" to assist in setting up the student's Wilson Reading Program (Tr. pp. 155-56). The CSE chairperson further stated that, at the August 2022 meeting, the CSE changed and updated the student's reading annual goals in line with the updated reading evaluation and progress data in the Vincent Smith trimester report (Tr. p. 159; see Dist. Ex. 21 at pp. 17-18).¹⁷ The August 2022 CSE recommended that the student receive two 60-minute sessions per day of individual specialized reading instruction (Dist. Ex. 21 at p. 20).

The CEO of the agency that conducted the student's 2021 and 2022 reading evaluations

¹⁶ The July 2022 reading evaluation was conducted at district request and was completed by a specialized reading evaluator from a private agency (specialized reading evaluator); the January 2021 reading evaluation was completed by a different evaluator from the same agency (see Dist. Exs. 2; 4). The specialized reading evaluator presented information about the July 2022 reading evaluation at the August 2022 CSE meeting (Dist. Ex. 23 at pp. 3, 13-42).

¹⁷ During the August 2022 CSE meeting, the CSE developed annual goals for the student specific to the Wilson program, reading, writing, use of sentence starters in writing, highlighting text evidence, and assistive technology as related to speech-to-text (Dist. Ex. 23 at pp. 67-72).

(agency CEO) testified that a comparison of the reading evaluations completed by her agency in January 2021 and July 2022 showed that the student was not exhibiting "gap closing progress" on most measurements and that she would benefit from multisensory instruction (Tr. pp. 227, 263-64). During the August 2022 CSE meeting, the agency CEO opined that the student required "a highly specialized – a highly structured, multimodal reading program, something Orton-Gillingham based" and acknowledged that at the time of the CSE meeting the student was using the Wilson Reading System (Dist. Ex. 23 at p. 37). The CSE chairperson testified that the CSE discussed the July 2022 reading evaluation and how the student had little to no growth from the previous reading evaluation and the recommended two hours of specialized 1:1 reading instruction would support this need (Tr. p. 161). At the August 2022 CSE meeting, the CSE chairperson described the specialized reading program for the 2022-23 school year in which the student would receive two hours per day of reading instruction with a Wilson certified teacher in addition to daily core classes (Dist. Ex. 23 at pp. 55-56).

In her decision, the IHO reviewed the findings from the July 2022 reading evaluation that found "scores in the poor to very poor range with marginal improvement, if any, when compared to the" 2021 reading evaluation and found that in "many sub-tests, the [student's] scores unequivocally declined" (IHO Decision at p. 34). The IHO noted that the student "demonstrated severe deficits in phonological processing, phonological memory, rapid symbolic naming, total word reading efficiency and fundamental literacy" (*id.* at pp. 34-35). Based on the student's deficits, and the recommendation by the specialized reading evaluator, the IHO found that the CSE's recommendation for two 60-minute individual specialized Wilson reading instruction sessions and daily ELA special class instruction was appropriate for the student (*id.* at p. 35).¹⁸ Additionally, the IHO recognized that in this instance the district went beyond its "customary and

¹⁸ State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a resource room program, as a consultant teacher service, in a special class, or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>). In addition, the guidance specifies that the CSE should "consider what prior instructional methods and strategies have been utilized with the student to avoid reinstating programs that have not proven effective in the past" and further indicates that "[i]nstructional methodology may be discussed at the [CSE] but is not specified on an IEP" (*id.*). State guidance specific to students with disabilities resulting from dyslexia, dysgraphia, and dyscalculia emphasizes that "[t]he specially designed instruction that is appropriate to the unique needs of each student with a disability resulting from dyslexia, dysgraphia, and/or dyscalculia may vary across individual students with each of these specific learning disabilities" and that "[b]ecause of this, there is no single approach, product, or method of delivering specially designed instruction to such students that is required in federal or State law and regulations" ("Students with Disabilities Resulting from Dyslexia, Dysgraphia, and Dyscalculia: Questions and Answers, at p. 6, Office of Special Educ. [Aug. 2018], available at <http://www.p12.nysed.gov/specialed/publications/documents/q-and-a-students-with-dyslexia-dysgraphia-dyscalculia.pdf>; see generally Educ. Law § 305[56]; Dear Colleague Letter, 66 IDELR 188 [OSERS 2015]).

usual practice of [d]istricts not designating a specific educational protocol or technique in its IEPs" when it mandated Wilson as the student's reading instruction methodology (id.).¹⁹

As related to the student's reading programming, the parent's initial argument focused on the district's failure to recommend an appropriate evidence-based reading methodology, arguing that the student needed "systematic, evidence-based multisensory reading instruction" (Parent Ex. B at p. 6). The evidence in the hearing record showed, as detailed above, that following completion of the July 2022 reading evaluation the CSE updated the student's IEP to reflect that the student needed "a specialized, highly structured, multimodal reading program (Orton-Gillingham-based)" and provided supports that included tactile and kinesthetic strategies, multisensory materials, and two hours per day of specialized reading instruction to meet her needs (Dist. Ex. 21 at pp. 12-13; see Dist. Ex. 23 at p. 36).

Furthermore, the parent argues that the district would not have been able to implement the two hours of specialized reading per day, and it would have been too intensive and would have caused the student to regress. In particular, the parent objected to the possibility of having two hours of consecutive reading instruction during the school day, testifying that the student would have been "lost" after 45 minutes if given "two hours straight of reading" (Tr. p. 761). During the August 2022 CSE meeting, the agency CEO described the importance of implementing a reading program for the student on a consistent basis stating: "for significant progress to be achieved, instruction must be delivered with consistency, frequency and integrity. Her progress should be closely monitored and paced according to her individual response to the intervention. Adjustments to her program, in accordance with her response to the intervention, may be required as determined by ongoing diagnostic instruction" (Dist. Ex. 23 at p. 37).²⁰

The district's assistant director of special education and the CSE chairperson both testified to creating a mock schedule for the student that included all core curriculum classes in addition to the two hours of specialized reading instruction (Tr. pp. 73, 179-80, 318-23, 326-27; Parent Ex. V at pp. 1-2; Dist. Ex. 20 at p. 2). The agency CEO testified that her agency had providers who

¹⁹ 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).

²⁰ The agency CEO described an example of how the student's reading program needed customized instruction in order "to get more consistency, [and] greater gap closing growth" and described two examples to support growth such as adding multisensory instruction and different mastery check-ins to get a better response to intervention (Tr. pp. 278-79). The agency CEO speculated that as the student received both SPIRE and Wilson reading programming and although they were similar, the order and pathway, and mastery targets were different and therefore the student may need more cohesive instruction (Tr. pp. 282-83). The specialized reading evaluator described that programs needed to be provided with fidelity of instruction and defined this as "implementing a curriculum in accordance with standards and practices consistently, frequently, [and] regularly" (Tr. p. 296).

would be able to implement the program of two hours of daily 1:1 reading instruction at the student's school (Tr. pp. 268-72; Dist. Exs. 2; 4).²¹ While one proposed schedule had reading instruction for three consecutive periods, another proposed schedule broke up the periods of reading instruction for the student throughout the school day (Parent Ex. V; Dist. Ex. 20 at p. 1). However, these schedules were proposed and not finalized as the student did not attend the district program (Tr. pp. 73, 179, 318-23, 326-27; see generally Parent Ex. V; Dist. Ex. 20 at p. 2).

Accordingly, I agree with the IHO's conclusion that the "speculation" pertaining to the student's proposed schedules was not supported by the evidence in the hearing record and the evaluative information contained in the hearing record demonstrated that the district's recommended specialized reading program was appropriate for the student (see IHO Decision at pp. 35-36).

C. Counseling

Next, the IHO analyzed whether the August 2022 CSE adequately addressed the student's social/emotional needs (IHO Decision at pp. 36-37). The IHO examined the district's psychoeducational report from February 2021, which indicated that the parent reported "no social-emotional concerns other than 'your normal pre-teen outbursts and attitude to her adults'" (id. at p. 36). The IHO noted the evidence in the hearing record that the student was "was repeatedly described as 'sweet and friendly' a 'pleasure to have in class' and a student who 'brings joy to the classroom'" (IHO Decision at p. 36; Parent Exs. J at pp. 2-7; P at pp. 3-4, 6-9; Dist. Exs. 1 at p. 4; 2 at p. 1; 3 at p. 1; 4 at p. 3; 5 at pp. 5-8; 21 at pp. 8, 12, 14). Accordingly, the IHO found that the recommended counseling in the August 2022 IEP was appropriate which is supported by the evidence in the hearing record (IHO Decision at p. 37; Tr. pp. 146-49, 588, 596, 599-600; 605-06, 625, 634-35, 650-53, 663, 664-71; 683-84; Parent Exs. J at pp. 2-8; R at p. 10; Dist. Exs. 1 at p. 4; 3 at p. 1; 4 at p. 3; 9 at pp. 1, 25; 21 at pp. 1, 14, 20-21; 23 at pp. 11-12; 24 at pp. 28-31).

Overall, a review of the hearing record shows that reports from evaluators and teachers alike, described the student as friendly, cooperative and a pleasure (see Parent Ex. J at pp. 2-8; Dist. Exs. 1 at p. 4; 3 at p. 1; 4 at p. 3). Specifically, one of the student's teachers at Vincent Smith reported, the "[student] [wa]s such a joy and br[ought] such happiness to her classmates" (Parent Ex. J at p. 3). The August 2022 IEP present levels of social development reflect the May 2022 counseling progress report, which indicated that during group social skills class the student benefitted from topics such as conflict resolution, peer pressure, coping skills, and mindfulness (Dist. Ex. 21 at p. 14).²² According to the IEP, the student was an active participant in the social skills class, provided thoughtful and personal experiences related to the topic, showed signs of maturity, was less likely to interrupt, was helpful, and more tolerant of others (id.). Teacher reports reflected in the IEP indicated that the student advocated for herself when experiencing difficulties

²¹ The agency CEO had a master's degree in special education, and was certified in the Wilson Reading System, and as an Orton-Gillingham "dyslexia practitioner" (Tr. pp. 227-29, 242).

²² According to the school social worker, the "social skills class" differed from a "typical group counseling session" in that the social skills class worked on lesson plans that were developmentally appropriate for all students that covered topics such as effective communication, problem solving, or coping strategies, whereas group and individual counseling was based on an individual's specific goals (Tr. pp. 599-600).

in the classroom, was an active participant, and multiple teachers reported she was "a pleasure to have in class" (*id.*).

During the impartial hearing, the student's Vincent Smith social worker spoke about the student's social/emotional needs and the counseling services that she received during the 2022-23 school year (Tr. pp. 589, 595-96, 599-600; 605-06, 663, 664-71). The social worker testified regarding the student's needs as related to counseling and described the student as sensitive, with issues in confidence and assertiveness, and reported the student "often misperceive[d] social scenarios" and had needs related to effectively problem solving and resolving conflicts (Tr. p. 596). The school social worker testified that the student received one session of individual counseling per six-day cycle, and all the students received social skills in a group setting once every six-day cycle during the 2022-23 school year (Tr. p. 599).

The August 2022 CSE recommended that the student receive two 30-minute sessions per month of individual counseling services for the 2022-23 school year (Dist. Ex. 21 at pp. 1, 20). During the impartial hearing, the CSE chairperson testified that the recommendation for counseling was based on information from Vincent Smith which was referenced in the student's IEP present levels of performance (Tr. pp. 146-49; Dist. Exs. 21 at p. 14; 23 at pp. 11-12, 75). Given the information known to the August 2022 CSE regarding the student's social/emotional skills and needs, the hearing record supports a finding that the August 2022 CSE's counseling recommendations were appropriate.²³

D. 15:1+1 Special Class and 1:1 Aide

Next, the IHO discussed whether the 15:1+1 special class was appropriate for the student (IHO Decision at pp. 37-39). The IHO found that the 15:1+1 "self-contained classroom" was "a supportive paradigm conducive to learning and free from distractions," which provided differentiated instruction with "individualized attention with educational material" (*id.* at p. 38). The IHO relied on the testimony of the CSE chairperson "that the 15:1+1 program include[d] the use of enriched literacy techniques including enhanced visuals, sight words, kinesthetic activities and movement breaks which facilitate language, and literacy opportunities" (Tr. pp. 139-40; IHO Decision at p. 38). The IHO referred to the testimony of the CSE chairperson that the 15:1+1 special class setting offered small group instruction with attention from a special education teacher, teaching assistant, and for this student the support of a 1:1 aide (Tr. pp. 140-41, 160; IHO Decision at p. 38). Ultimately, the IHO found that the recommendation for a 15:1+1 special class together with the "extensive educational modifications and accommodations denominated in the [student's] IEPs" was appropriate (IHO Decision at pp. 38-39).

According to State regulation, a 15:1 special class placement derives from the provision which states that "[t]he maximum class size for those students whose special education needs

²³ Although the IHO addressed counseling services as of the March 2023 CSE meeting (IHO Decision at pp. 36-37), both the August 2022 and March 2023 CSEs recommended the same two 30-minute sessions per month of individual counseling services during the 10-month school year and one 30-minute individual session per week of counseling services during the 12-month portion of the school year (compare Dist. Ex. 5 at pp. 13, 15, with Dist. Ex. 7 at pp. 18, 19). Accordingly, although I do not adopt the IHO's decision on this issue given her emphasis on the March 2023 CSE and IEP, my findings are consistent with the IHO's findings as to the student's needs for counseling services during the 2022-23 school year.

consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting shall not exceed 15 students, or 12 students in a State-operated or State-supported school" (8 NYCRR 200.6[h][4][i]). With regard to increasing adult support beyond a 15:1 special class setting, State regulation further provides that a 15:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). In turn, "management needs" are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's "management needs" shall be determined by factors which related to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (see 8 NYCRR 200.1[ww][3][i][a]-[d]).

In describing the learning profile of the students in the 15:1+1 special class, the CSE chairperson testified that many of the students had learning disabilities in reading, writing, and math (Tr. p. 139). The CSE chairperson also testified that the 15:1+1 special class provided students with differentiated instruction, time to work individually with the teacher, small group instruction, a high level of sight words and rich literature, more visuals in the classroom, kinesthetic activities, and tactile learning (Tr. pp. 139-41). In conjunction with the supports inherent in a 15:1+1 special class, the August 2022 CSE recommended a list of management needs to support the student, developed approximately 29 annual goals including specialized reading goals based on recent testing, and recommended specialized reading instruction, related services, assistive technology, as well as supplementary aids and services for the student (Tr. p. 159; Dist. Ex. 21 at pp. 15-23).²⁴

The parent's main arguments against the 15:1+1 special class were that it was too large, the schedules proposed for the 2022-23 school could not be implemented, and the 1:1 aide services would have caused the student to regress. As discussed above, the parent's claims regarding implementation were speculative as the schedules developed by the district were "proposed" and "drafts" and were not finalized for the 2022-23 school year as the student did not attend the district's school (Tr. pp. 317-18, 322-23; see Parent Ex. V; Dist. Ex. 20 at p. 1). Despite the arguments regarding class size and the potential for regression, the evidence in the hearing record supports the IHO's finding that the 15:1+1 special class was appropriate for the student (Tr. pp. 42-43, 139-41, 159-60, 408, 412, 640-41, 654-55, 746-47; Dist. Exs. 21 at pp. 15-23; 23 at pp. 12, 50-79).

Whereas the dean of school and social worker from Vincent Smith testified to not agreeing with the 15:1+1 special class recommendation, stating the class size would be too large and distracting for the student, both professionals testified to not observing the district 15:1+1 special

²⁴ The parent argues in the request for review that the IHO erred by failing to address that some of the student's annual goals for the 2022-23 school year had flaws. The August 2022 IEP annual goals addressed the student's needs in the areas of study skills, reading, writing, mathematics, social/emotional, and motor skills (Dist. Ex. 7 at pp. 14-17). As reviewed above, the August 2022 CSE relied on sufficient evaluative information that included parent and district evaluations, as well as progress and needs reported in the student's 2021-22 Vincent Smith report card in formulating the student's present levels of performance, and areas of need in formulating the student's goals. Review of the goals shows that, as a whole, they were appropriate in addressing the student's areas of need (see Dist. Exs. 7; 21; 23).

class and did not recall teaching in that setting (Tr. pp. 408, 412, 640-41, 654-55).²⁵ The parent testified that a district 15:1+1 special class would have too many children and distractions, and that the student would not get the same 1:1 support she received at Vincent Smith; the parent testified that the student had been in a district 15:1 special class in the third grade without a 1:1 aide and did not make progress (Tr. pp. 746-47). Review of meeting minutes from the August 2022 CSE meeting shows that the CSE engaged in extensive discussion about the 15:1+1 special class recommendation, including the parent's concerns (Dist. Ex. 23 at pp. 12, 50-79). The CSE chairperson testified to reiterating for the parent all of the supports within a 15:1+1 special class such as a teaching assistant, "small groups, visited learning, the kinesthetic learning, the vocab on the board, the sight words that are there" (Tr. pp. 159-60).

Next, the IHO discussed whether the student required the recommended 1:1 aide services (IHO Decision at p. 39).²⁶ The parent claims on appeal that a 1:1 aide would be stigmatizing to the student and would cause her to regress (Req. for Rev. ¶¶ 22-23). In assessing the appropriateness of the recommendation for the support of 1:1 aide services, the IHO relied on evidence in the hearing record showing that the "student's distractibility and poor working memory remained both an educational and a classroom management concern" as well as information from Vincent Smith progress reports showing that the student needed 1:1 assistance, and I find no basis in the hearing record to depart from such finding (Tr. pp. 48-49, 75-77, 141-42, 143-44, 160-61, 370-71, 399, 408, 510, 519, 628, 630, 640-41, 648, 663-64, 689-90, 729, 732; IHO Decision at p.

²⁵ The Vincent School staff testimony illustrates a common predicament: that often what is considered "small" in terms of class size is in the eye of the beholder (*M.W. v. New York City Dep't of Educ.*, 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012] [holding "[t]hat the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits"], *aff'd*, 725 F.3d 131 [2d Cir. 2013]), but a parent's decision to provide a smaller classroom ratio is not in and of itself conclusive evidence of the question of whether a public placement provides appropriate services to meet a student's needs (see *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 452 [2d Cir. 2015]).

²⁶ State regulation includes as a special factor a CSE's consideration of "supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability" (8 NYCRR 200.4[d][3][vii]; see 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]). A CSE must consider a number of factors before recommending a 1:1 aide on a student's IEP, including: the student's management needs, goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations that could meet the student's needs, the extent (e.g., portion of the day) or circumstances (e.g., transitions between classes) the student needs the 1:1 aide, staffing ratios, how the support of a 1:1 may enable the student to be educated with nondisabled peers, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]). Further, a State guidance document, dated January 2012 contemplates that a "goal for all students with disabilities is to promote and maximize independence," and provides examples of student needs that may require a CSE to consider a recommendation for the services of a one-to-one aide, including: the student "presents with serious behavior problems with ongoing (daily) incidents of injurious behaviors to self and/or others or student runs away and student has a functional behavioral assessment and a behavioral intervention plan that is implemented with fidelity"; the student "cannot participate in a group without constant verbal and/or physical prompting to stay on task and follow directions"; the student "needs an adult in constant close proximity for direct instruction," "requires individualized assistance to transition to and from class more than 80 percent of the time," and "needs an adult in close proximity to supervise social interactions with peers at all times" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>).

39; Parent Ex. J at pp. 3, 4, 5, 8; Dist. Exs. 5 at p. 9; 21 at pp. 16, 20; 22 at pp. 57-60; 23 at pp. 12, 50-51, 58-64).

The August 2022 CSE recommended that the student receive daily 1:1 aide services during instructional time and specified that an individual aide was not needed for transitions, at lunch, during physical education, leisure activities, afterschool, or on field trips (Dist. Ex. 21 at p. 20). The assistant director of special education testified that the CSE recommended 1:1 aide services based on reports the CSE received from Vincent Smith that the student "needed a frequent refocusing and prompting within the classroom" and a higher level of academic prompting and support within the classroom and only for academic instruction, not during non-academic or transitions times (Tr. pp. 47-48). Likewise, the CSE chairperson testified that the CSE recommended 1:1 aide services as the Vincent Smith progress reports alluded to the student needing 1:1 assistance throughout (Tr. p. 141).

The student's 2021-22 Vincent Smith report card included comments from the student's classroom teachers that indicated throughout core curriculum classes the student often needed redirection, refocusing, support to stay on task, 1:1 assistance, and reminders (Parent Ex. J at pp. 2-5). Specifically, the Vincent Smith report card stated, in ELA, the student needed to be "redirected and refocused often during classwork," the student had difficulty staying on task and completing work, and often needed to be reminded to stop doodling (*id.* at pp. 2-3). The 2021-22 report card, in the area of United States History 1, reported the student needed 1:1 assistance for typing purposes and noted that the student asked relevant questions but needed reminders to raise her hand at times; in the science class, the student "ha[d] to be reminded to stay on task and need[ed] refocusing often" (*id.* at pp. 4, 5). The report card also included that, during resource room, the student worked on executive functioning skills such as planning and organizing to track assignments, tests, and daily routines, as well as organizing notes and classwork (*id.* at p. 7).

The CSE chairperson testified that the August 2023 CSE felt 1:1 aide services would have supported the student in a number of ways that included providing carryover of the reading skills developed in the 1:1 reading program during core classes, providing reminders to stay on task and maintain focus, and reminding the student she had access to support if needed (Tr. pp. 141-42; Dist. Ex. 23 at pp. 58-64).

The parent expressed concerns during the August 2022 CSE meeting that having a 1:1 aide would "mortify" the student and cause her to regress as she would not want that person to help her (Tr. pp. 729, 732; Dist. Ex. 23 at pp. 50-51). During the impartial hearing, the dean of students, 1:1 reading teacher, and the social worker from Vincent Smith all testified that they did not think the student would need a 1:1 aide, or found the recommendation for a 1:1 aide or teaching assistant not to be appropriate for the student in the district class (Tr. pp. 370-71, 399, 408, 519, 628, 630, 641; Dist. Ex. 22 at pp. 57-60). Despite opining that the recommendation for 1:1 aide services would be detrimental for the student's social/emotional well-being, the dean testified that the student "need[ed] redirection and refocusing but [i]n our setting d[id] not need a 1:1" aide (Tr. p. 371). Although the social worker testified that 1:1 aide services were not needed at Vincent Smith and would negatively impact the student's self-esteem, she also stated that she worked with the student 1:1 during recess with other peers present, played games, and interacted with the students and this did not stigmatize the student (Tr. pp. 640, 689-90).

The assistant director of special education and the CSE chairperson testified that the 1:1 aide services were recommended to provide academic support only, and the assistant director explained "our aides are instructed to supply just support and not be hovering over children" and testified that after taking data for four to six weeks, the committee would reconvene to determine if the aide was necessary (Tr. pp. 49, 160-61; Dist. Ex. 23 at p. 12). Further, the CSE chairperson testified that the CSE was responsive to the parent's concerns of the aide being too restrictive and causing social concerns, as the aide was only recommended for "core academic areas" and would not be needed for transitions, in the hallway, during electives, leisure activities, lunch, physical education class, or for after school activities (Tr. pp. 143-44, 160-61; see Dist. Ex. 21 at p. 20; Dist. Ex. 23 at pp. 58-62). At the August 2022 CSE meeting, the CSE chairperson stated that "on the IEP we can and we have specified that the 1:1 aide or teaching assistant would only be there for core classes, to assist in instructional intervention and instructional differentiation" (Dist. Ex. 23 at p. 58).

As stated by the IHO, the evidence in the hearing record supports finding that the district offered a program that was "reasonably calculated" to provide meaningful educational benefit to the student (IHO Decision at p. 39). While I agree with the IHO that the parent preferred placement at Vincent Smith, as noted above, the IDEA ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132). Accordingly, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE for the 2022-23 school year.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations 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 Vincent Smith was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parent's 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**

**CAROL H. HAUGE
STATE REVIEW OFFICER**