



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-159

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

### **Appearances:**

The Law Offices of Regina Skyer & Associates, L.L.P., attorneys for petitioners, by Stephanie De Angelis, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Irene Dimoh, 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 a decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered their daughter an appropriate educational program for the 2023-24 school year and denied their request for tuition reimbursement. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

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

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

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

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

A CSE convened on December 8, 2022 and finding the student eligible for special education as a student with a learning disability created an IEP for the student (see generally Dist. Ex. 1).<sup>1</sup> The CSE reconvened on or around June 20, 2023 (Parent Exs. F at p. 1; O ¶ 11; P ¶ 26;

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<sup>1</sup> 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]).

see Dist. Ex. 1 at p. 26).<sup>2</sup> The June 2023 CSE recommended that the student receive three periods per week of direct special education teacher support services (SETSS) in a group, one period per week of indirect SETSS and two 30-minute sessions per week of occupational therapy (OT) in a group of two (Dist. Ex. 1 at p. 21). The parents disagreed with the recommendations contained in the June 2023 IEP and notified the district of their intent to unilaterally place the student at the Mary McDowell Friends School (MMFS) for the 2023-24 school year (see Parent Ex. B).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated December 8, 2023 the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see generally Parent Ex. A). The parents raised claims regarding the CSE process, the evaluative information relied on by the June 2023 CSE, the student's present levels of performance, recommended management needs, recommended annual goals, and the appropriateness of the recommended program and related services (*id.*). For relief, the parents requested funding for the student's placement at MMFS for the 2023-24 school year (*id.* at p. 5).

### **B. Impartial Hearing Officer Decision**

After a status conference on January 8, 2024, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) on February 13, 2024, which concluded on March 1, 2024, after four days of proceedings (Tr. pp. 1-166). In a decision dated March 21, 2024, the IHO found that the district offered the student a FAPE for the 2023-24 school year (see IHO Decision).<sup>3</sup> More specifically, the IHO determined that the June

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<sup>2</sup> According to the district's certification of the record filed with the hearing record, district exhibit 1 should have been dated June 26, 2023, which is also the projected date of implementation of the IEP (Dist. Cert. of Record; see Dist. Ex. 1 at pp. 1, 21). Upon further review, it appears that the IEP that is in evidence as district exhibit 1 was updated with information that was obtained after the December 2022 CSE meeting (see Dist. Ex. 1 at pp. 5-9). For purposes of this decision, the IEP that is district exhibit 1 will be referred to as the June 2023 IEP.

<sup>3</sup> Included with the hearing record filed with the Office of State Review is a document purported to be an "Amended Findings of Fact and Decision" for this matter which is also dated March 21, 2024 (see Amended IHO Decision). After a review of the amended decision, it is unclear why the IHO issued an amended decision as there appear to be no differences between the two and the IHO did not indicate why he issued an amended decision (compare IHO Decision, with Amended IHO Decision). Moreover, an IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see, e.g., Application of a Student with a Disability, Appeal No. 17-021; Application of the Dep't of Educ., Appeal No. 16-065; Application of a Student with a Disability, Appeal No. 16-035; Application of the Dep't of Educ., Appeal No. 15-073; Application of a Student with a Disability, Appeal No. 15-026; Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also J.T. v. Dep't of Educ., Hawaii, 2014 WL 1213911, at \*10 [D. Haw. Mar. 24, 2014]; Application of the Dep't of Educ., Appeal No. 08-041). Rather, the IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Thus, an IHO lacks the authority to alter material provisions of a final decision. As such, the amended decision will not be considered or cited on appeal.

2023 IEP was based on sufficient evaluative data; appropriately reflected the student's present levels of academic achievement and functional performance; that the goals developed were appropriate, measurable and addressed the student's areas of need; that the recommendations were appropriate to confer an educational benefit in the least restrictive environment; and, that even if the June 2023 IEP contained procedural violations that such would not rise to the level of a denial of a FAPE (id. at pp. 8-12). In the alternative, the IHO also determined that the parents' unilateral placement was appropriate and that equitable considerations supported the parents' request for tuition reimbursement (id. at pp. 13-15). Accordingly, the IHO denied the parents' requested relief for the 2023-24 school year.

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

The parents appeal and challenge the IHO's conclusion that the district offered a FAPE for the 2023-24 school year. 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 recited in detail here. Generally,, the parents argue on appeal that the IHO erred in finding that the June 2023 IEP recommendations were reasonably calculated for the student to make progress specifically in the absence of sufficient annual goals, counseling services, a speech-language evaluation and services, an assistive technology evaluation, device and services, a functional behavioral assessment (FBA), a behavioral intervention plan (BIP), a smaller class size and access to full-time special education support. The parents claim that the student was "suffering tremendously" in the large general education classroom and the continued recommendation of a general education classroom with special education services was not appropriate for the student (Req. for Rev. at p. 6).

In an answer, the district denies the material allegations contained in the request for review and argues that the IHO's decision should be upheld entirely.

#### **V. Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]).

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

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

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>4</sup>

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**

As an initial matter, an independent review of the hearing record leads me to find that the IHO relied on the proper legal standards to support his conclusion that the district provided the student a FAPE for the 2023-24 school year and, further, that the decision also demonstrates that the IHO carefully recited and considered the testimonial and documentary evidence presented by both parties, and carefully marshalled and weighed the evidence in support of his conclusions. Specifically, the IHO in this proceeding set forth the factual background that included details regarding the student's specific diagnosis and the academic areas the student was struggling with; a detailed description of a September 2022 private neuropsychological evaluation with a description of the neuropsychologist's findings, recommendations, and opinions; a description of the December 2022 CSE meeting conducted to create the student's IEP for the 2023-24 school year in which the IHO indicated the CSE considered the September 2022 private neuropsychological evaluation and a teacher report and recommended four periods of SETSS in addition to related services in OT; a description of the parents' enrollment contract with MMFS; a detailed description of the May 2023 neuropsychological addendum report, including the neuropsychologist's new findings, recommendations, and opinions; a description of the parents' request for a new CSE meeting; a detailed description of letters from the student's therapist and psychiatrist, including such professionals' opinions regarding the student and the school support she was receiving; a description of the June 2023 CSE meeting in which the CSE reconvened to amend the student's IEP for the 2023-24 school year; a description that the June 2023 CSE considered new evaluative data including the May 2023 neuropsychological addendum, a SETSS report, the letters from the student's therapist and psychiatrist, and input from the parents, the parents' advocate and providers who attended the June 2023 CSE meeting; a description that the June 2023 CSE offered counseling services but that the parents reported the student was receiving counseling outside of school; a description of what recommendations the June 2023 CSE adopted from the neuropsychologist including testing accommodations and management needs; and a description of the actions taken by the district and the parents after the June 2023 CSE meeting, specifically that the district sent a prior written notice that summarized what was considered at the June 2023 CSE meeting, a description of the proposed program and reasons why other programs were considered but not recommended, that a school location letter was not sent to the parents, and that the parents sent a letter to the CSE about their disagreement with the June 2023 IEP and their intention to enroll the student at a private school and seek funding for tuition (IHO Decision at pp. 4-7; see Parent Exs. B, D-E, G-I; Dist. Exs. 1-3, 5). In sum, the IHO determined the district was able to "offer a cogent

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<sup>4</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

and responsive explanation for [its] decisions" in creating the student's IEP for the 2023-24 school year (IHO Decision at p. 12).

### **A. June 2023 IEP**

In reaching his determination that the district offered the student a FAPE, the IHO noted that the district's burden was based on the Burlington/Carter standard and determined that the district met its burden by offering "several exhibits, including the IEP at issue, Parent's neuropsychological evaluation as well as the addendum to this evaluation, as well as the testimony of School Psychologist to support its position" (IHO Decision at p. 8). The IHO stated "[a] review of the record herein...establishe[d] that the weight of the evidence support[ed] the conclusion that the [district] offered [the s]tudent an educational program reasonably calculated to offer [a] FAPE for the 2023-2024 school year" (id.).

Next, the IHO cited to the appropriate case law and regulations and determined that to the extent that there were any procedural violations, they did not rise to the level of a denial of a FAPE (IHO Decision at p. 8). The IHO determined the CSE was "duly constituted" and he identified the members of the CSE who attended (id.). The IHO did not find support for the parents' argument that they were unable to participate in the IEP meeting. Instead, the IHO determined the parents were given the opportunity to participate, "given the numerous references to [p]arent's concerns" noted in the IEP; the IHO also noted that the student's mother testified about her participation in the meeting (id.; see Tr. pp. 138-139; Dist. Ex. 1 at pp. 7-9, 12).

The IHO also determined that the June 2023 IEP appropriately reflected the student's present levels of academic achievement and functional performance at the time the IEP was developed and that the parents did not raise any disagreement with the present levels of performance (IHO Decision at p. 8; see Parent Ex. A). The IHO described the student's present levels of academic achievement and functional performance as indicated on the June 2023 IEP in his decision (see generally IHO Decision at pp. 8-9).

The IHO noted the present levels of academic achievement and functional performance section contained "nearly three pages of information from [the private n]europsychologist's September 22, 2022 report" and that the report described the student's good reasoning and problem-solving abilities as well as her strong visual spatial skills, but noted that the student "slow[ed] down a bit when pages [we]re cluttered with a lot to look at" (IHO Decision at p. 9; see Dist. Ex. 4 at p. 5). The IHO also indicated the report noted above average math skills as one of the student's strengths (IHO Decision at p. 9; see Dist. Ex. 4 at p. 3). He also noted some of the student's difficulties, which included attention and executive functioning, were related to her attention deficit hyperactivity disorder (ADHD) diagnosis (IHO Decision at p. 9; see Dist. Ex. 4 at pp. 8-10). The IHO also discussed that the report noted: the student appeared attentive but struggled to stay focused; the parents had concerns with inattention, impulsivity, hyperactivity, executive functioning abilities, and behavioral regulation; the neuropsychologist described the student's difficulty with wordfinding, despite having intact expressive and receptive vocabulary and described the student's vulnerabilities with reading, for which she has received private tutoring and small group instruction at school; the neuropsychologist's opinion that without appropriate supports, the student's weaknesses would likely become more pronounced and potentially impairing and that the student fatigued quickly while writing and had weak spelling skills (IHO Decision at p. 9; see Dist. Ex. 4 at pp. 1-2, 5-9, 17-18, 31). The IHO also noted that the present

levels of academic achievement and functional performance listed the neuropsychologist's various diagnoses for the student and included a summary of the neuropsychologist's addendum to the student's neuropsychological examination (IHO Decision at p. 9; see Parent Ex. G at pp. 1, 4; Dist. Ex. 4 at pp. 1, 5-8, 17). The present levels of academic achievement and functional performance section also noted the report indicated that the student had not made gains in her core academic skills, that her reading skills were stagnant as she continued to struggle with her dyslexia, that she struggled with handwriting, spelling, stamina, and writing mechanics and that the neuropsychologist recommended alternative solutions and supports (IHO Decision at p. 9; see Parent Ex. G at pp. 2-3).<sup>5</sup> The IHO also noted that the present levels of academic achievement and functional performance section noted the student's mood disorder, anger, irritability, and depressive symptoms and recommended support and interventions targeting those areas (IHO Decision at p. 9; Parent Ex. G at p. 3).

Additionally, the IHO noted that the present levels of academic achievement and functional performance section of the June 2023 IEP included a November 2022 school progress report that described the student as insightful and enthusiastic (IHO Decision at p. 9; see Dist. Ex. 1 at p. 4). The IHO noted that the school progress report also indicated that the student: benefitted from sketching out small moments before starting her writing work; could ask questions about a text before, during, and after reading; had acquired a reading level "M"; was "proficient" in her listed math goals and either "proficient" or "developing" in her reading and writing goals (IHO Decision at p. 9; see Dist. Ex. 1 at pp. 4-5). The IHO also noted that the present levels of academic achievement and functional performance contained a description from the student's SETSS provider that indicated the student was always eager to read and noted that she volunteered to read to groupmates, was able to follow a story sequence, and was able to verbally retell events in sequential order (IHO Decision at p. 9; see Dist. Ex. 1 at p. 5). The section also noted that the SETSS provider opined that the student was able to persist through challenges to complete tasks (id.). The IHO further noted that the present levels of academic achievement and functional performance section of the IEP indicated some of the student's difficulties, which included spelling, word boundaries, and legible writing and that she was working on close reading strategies and was working to slow down to have more accurate outcomes (id.). Additionally, such section of the IEP included an updated March 2023 teacher narrative/classroom progress report which indicated the student was at a level "O" in reading, which was on grade level; that she was able to provide supporting evidence as answers to comprehension questions; that she was approaching standards; and that with guidance and support the student could develop and strengthen her writing (Dist. Ex. 1 at pp. 5-6).<sup>6</sup>

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<sup>5</sup> The neuropsychologist also opined in the September 2022 evaluation that though the student has not made gains, she has also not fallen further behind (Parent Ex. G at p. 2).

<sup>6</sup> The IHO noted in his decision that the June 2023 IEP indicated the parents identified concerns about the disparity between the school reports and the neuropsychological evaluation (IHO Decision at p. 10 n.9; see Dist. Ex. 1 at p. 7). For example, the neuropsychological evaluation noted that the student failed to make gains, while the student's teacher reported that the student had demonstrated growth, was on grade level, and was not a student whose "promotion [was] in doubt" (id.). In addition, while pages five and seven of the June 2023 IEP stated the student was reading at grade level, page 26 of the IEP stated that the student was reading at a second-grade level (IHO Decision at p. 10 n.9; see Tr. at p. 115; Dist. Ex. 1 at p. 5, 7, 26). The IHO reconciled these discrepancies as being the result of the district "adding" to the December 2022 IEP following the CSE reconvening in June 2023



Regarding the student's social emotional behaviors, the IHO described the concerns noted by the student's private neuropsychologist, therapist, and psychiatrist (IHO Decision at p. 9). The IHO noted that the neuropsychologist identified several areas of concern with respect to the student's behavior, which included self-esteem, mood, and anger, and that the therapist described the student's distractibility and "wondered how this translate[d] in the classroom" (*id.*; see Parent Exs. D at p. 2; G at p. 3; P ¶ 19). The IHO determined the therapist's letter was unpersuasive because it generally spoke in hypotheticals, speaking of the challenges the therapist expected the student to face and that the therapist did not raise any behavior issues (IHO Decision at p. 9; see Parent Ex. D). As to the psychiatrist the IHO noted the psychiatrist's concerns about the student's behavior did not appear to have d not manifested in the classroom or had an impact on the student's educational performance (IHO Decision at p. 9; see Parent Ex. E). The IHO noted that the psychiatrist stated that the cause of the student's behavior which he characterized as "violent" (i.e. aggression towards caretakers and attempts to run into traffic) was due to her dyslexia but also determined that the psychiatrist's opinion lacked specific information regarding when, where and how these behaviors transpired and that he did not credit the psychiatrist's statement that the behavior was caused by the student's dyslexia because the psychiatrist did not explain or provide any basis for that conclusion (*id.*). Moreover, the IHO determined there was no evidence presented by the psychiatrist that the observed "violent" behaviors occurred in the classroom and stated the evidence provided by the student's teachers confirms that those behaviors had not been observed at school (*id.*; see Dist. Ex. 1 at p. 9). The IHO noted that the CSE stated in the IEP that the student had received and would continue to receive evidence-based interventions, and that the student had not demonstrated that she was a safety risk at school (*id.*).

In addition to the IHO's findings, the June 2023 IEP described the student as "a bright and endearing girl" (Dist. Ex. 1 at p. 1). The IEP also referred to the student as a "mature 3rd grader" and "an enthusiastic and curious learner" (*id.* at p. 7). The IEP also described the student as a friendly girl who got along well with her peers and adults alike and within the normal range in social development within her peer group (*id.*).

### **1. Sufficiency of Evaluative Information**

The IHO then addressed the parents' argument that the district failed to conduct several evaluations (speech-language evaluation, social-emotional assessment, assistive technology evaluation and an FBA) prior to developing the IEP, which therefore made the IEP inadequate (IHO Decision at p. 8). The IHO determined the IEP was based on sufficient evaluative data, namely a neuropsychological evaluation as well as an addendum, and also numerous reports from district staff (*id.*). Additionally, the IHO found that the CSE incorporated the evaluations provided by the parents in the student's present levels of academic achievement and functional performance, as indicated above, and that the CSE reconvened in June 2023 at the parents' request to discuss the recommendations made in the May 2023 neuropsychological addendum (*id.*). Further, the IHO indicated that the final June 2023 IEP included information provided at the December 2022 CSE meeting as well as information from the June 2023 CSE meeting and determined that the CSE appropriately considered the report and recommendations from the private neuropsychologist (*id.* at pp. 8, 11). Upon an independent review of the hearing record, and for the reasons discussed more fully below, I decline to disturb the IHO's determination that the CSE had sufficient

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(IHO Decision at p. 10 n.9; see Dist. Ex. 1 at pp. 5, 7, 26).

evaluative data regarding the student's needs and functioning at the time of the December 2022 and June 2023 CSE meetings to recommend an appropriate program.

Regulations require 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 S.F. v. New York City Dep't of Educ., 2011 WL 5419847 at \*12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). A CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight or adopt their recommendations (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

According to the prior written notice dated June 20, 2023, the June 2023 CSE reviewed an OT assessment dated November 18, 2022 and "[p]arent provided reports" dated June 20, 2023 (Dist. Ex. 3 at p. 2). The district representative at the June 2023 CSE meeting testified that the CSE reviewed a neuropsychological evaluation, a psychiatric report, and a letter from the student's social worker all of which were provided by the parents, school progress reports, "SETSS information," and a teacher report (Tr. pp. 78-79). According to the June 2023 IEP, the CSE reviewed a parent provided neuropsychological report, a parent provided neuropsychological assessment report addendum with updated testing dated May 19, 2023, a November 2022 school progress report, a March 2023 updated teacher narrative/classroom progress report, a parent provided psychiatrist report dated May 14, 2023, a parent provided social work report and an OT evaluation (Dist. Ex. 1 at pp. 1-12).

Based on the foregoing, the evidence in the hearing record does not support the parents' allegation that the evaluative information relied on by the CSE was not sufficiently comprehensive to identify the student's special education and related service needs. As noted by the IHO in his determination, the CSE relied significantly on the private neuropsychological evaluation and addendum provided by the parents when describing the student's present levels of academic achievement and functional performance and making a program recommendation. The hearing record shows that the CSE considered these private evaluations, as well as information from multiple sources including teachers and service providers, to fashion present levels of performance, management needs, goals, and recommendations for the student's special education program and related services. Accordingly, I find no reason to disturb the IHO's finding that the CSE reviewed and considered sufficient evaluative information to develop an appropriate IEP taking into account the student's social, speech-language, OT and behavioral needs as discussed more fully below.

#### **a. Speech-Language Evaluation**

Although the IHO did not address the student's speech-language needs in detail in his decision, as described above, the IHO correctly determined that the June 2023 IEP appropriately reflected the student's present levels of academic achievement and functional performance at the time the IEP was developed (IHO Decision at p. 8). In addition, the IHO determined the June 2023 IEP indicated that the student had "significant wordfinding difficulty" and that the student would talk around words she had difficulty remembering or found a similar word, resulting in some minor disruptions in her thought process that did not necessarily interfere with her overall communication (see Dist. Ex. 1 at p. 2). The June 2023 IEP indicated the student had an unspecified communication disorder but noted giving the student extra moments to search for the word she wants would be helpful and that she benefitted most from having verbal clues, such as a category (e.g., "It [is] an animal," "It [is] a fruit"), to help her with her fluency (*id.*). According to the September 2022 neuropsychological evaluation, the student met her speech and language milestones as expected; however, the student's speech was notable for some sound substitutions, (e.g., "brudder" for "brother") but that it did not interfere with her intelligibility and that her functional receptive language abilities were intact (Dist. Ex. 4 at pp. 14, 18). The September 2022 neuropsychological evaluation report noted that the student's parents expressed broad concerns about her memory, e.g., forgetting people's names (*id.* at p. 14). Notably, the June 2023 IEP indicated that the student attended a French dual language program since pre-kindergarten and that her dual language teacher reported the student was English dominant, could do work in French with partnered support and that she was growing independent in her French speech (Dist. Ex. 1 at

pp. 6-8). The June 2023 IEP also indicated that the student was able to ask clarifying questions when she was unclear or wanted to learn something new (id. at p. 7). Additionally, the IEP noted that the CSE discussed removing the student from the French dual language program to focus on one language but that the parents would discuss "for future thought and recommendation" (id.).

According to the September 2022 neuropsychological evaluation, the student was assessed using the Wechsler Intelligence Scales for Children, Fifth Edition (WISC-V) and the neuropsychologist opined that the student's capacity to learn and grow was solidly intact for her age and that her verbal and nonverbal reasoning skills were evenly developed, indicating that she worked equally well with language and visual-spatial information (Dist. Ex. 4 at p. 20). The neuropsychologist also opined that the student's good efficiency suggested that she should be able to think and work at the expected pace for her age; however, her working memory skills and processing speed fluctuated depending on the demands and perhaps her attentional resources (id.).

Moreover, the June 2023 IEP afforded the student all of the management needs recommended in the May 2023 neuropsychological addendum report and the OT evaluation, e.g., break down tasks into smaller parts, with visual aids or checklists; visual schedules; repetition and/or clarification of instructions as needed; regular teacher check-ins; preferential and flexible seating; cognitive and movement breaks as needed; graphic organizers, visual aids, outlines, and handouts; consistent praise and rewards; bilateral hand skills; activities to improve hand strength and coordination; separate function from stabilizing sides of hand; darkened/highlighted/raised lined paper; pencil grip and use of slanted writing surface; opportunities to learn cursive; and checklists for correct writing mechanics (compare Dist. Ex. 1 at p. 12, with Dist. Exs. 2 at p. 13, and 5 at p. 5; see Tr. p. 113). The IEP also provided the student with testing accommodations consistent with the neuropsychologist's recommendations (compare Dist. Ex. 1 at p. 23, with Dist. Ex. 5 at p. 5).

### **b. Assistive Technology Evaluation**

Regarding the student's need for assistive technology, similar to the clinical neuropsychologist's recommendation, the November 18, 2022 OT evaluation indicated the student "[wa]s a candidate for assistive technology" (Dist. Exs. 1 at p. 11; 4 at p. 10). The June 2023 IEP indicated the student was aware that her writing was difficult to read and that the SETSS provider used an iPad to have her respond to her reading to assist her with responses (id. at p. 5). It was noted further that the student used "an apple note feature" to talk-to-text her thoughts and ideas during her SETSS sessions and that this tool helped her get her ideas out and present more grade level thoughts without the hindrance of the mechanics of her writing to slow her down (id. at p. 12). The June 2023 IEP also indicated that the student's SETSS provider, teacher, and her counselor noted that technology may be beneficial to assist her academic performance in the future (id.). The June 2023 IEP did not contain a recommendation for assistive technology devices or services (id. at pp. 13, 21). The parents allege that they did not withhold consent for the district to conduct an assistive technology evaluation of the student (see Tr. p. 160; Parent Ex. C). The district representative testified that the student's occupational therapist recommended that the student be evaluated for assistive technology but that such evaluation was not conducted (Tr. p. 99). The district representative testified she emailed the parents asking to move forward with the recommended assistive technology evaluation but there was no agreement to move forward with the evaluation (Tr. pp. 99-100). The email referred to by the school psychologist was not introduced into evidence (see Parent Exs. A-P; Dist. Exs. 1-5).

One 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]). Federal and State regulations describe an assistive technology device as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability" and assistive technology service as "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device" (34 CFR 300.5, 300.6; 8 NYCRR 200.1[e]; [f]). Furthermore, State regulations consider assistive technology services to be a related service defined as a "developmental, corrective, and other supportive services as are required to assist a student with a disability" (8 NYCRR 200.1[qq]).<sup>7</sup> The failure to recommend specific 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).

Here, the parents allege that given the student's significant deficits in writing and the occupational therapist's recommendation for an assistive technology evaluation, the district's failure to conduct such an evaluation denied the student a FAPE; however, such argument is not supported by the hearing record. Regarding the student's writing deficit, the September 2022 neuropsychological evaluation indicated the student's writing reflected poor letter formation, spacing and sizing and noted her significant weaknesses in mechanics often contributed to poor sentence structure, e.g., the student fused sentences and used poor grammar (see Dist. Ex. 4 at p. 4; Parent Ex. G at p. 2). Regarding executive functioning skills, the report addendum noted that the student continued to struggle with inattention, executive dysfunction, and a communication disorder (word-finding difficulty) (Parent Ex. G at p. 3). With respect to academic interventions for writing, the clinical neuropsychologist opined the student would benefit from interventions

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<sup>7</sup> Examples of the term assistive technology service include:

- (1) the evaluation of the needs of a student with a disability, including a functional evaluation of the student in the student's customary environment;
- (2) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by students with disabilities;
- (3) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
- (4) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
- (5) training or technical assistance for a student with a disability or, if appropriate, that student's family; and
- (6) training or other technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that student

(8 NYCRR 200.1[f]).

targeting graphomotor skills, handwriting legibility, and stamina, "e.g., Handwriting Without Tears, The Writing Revolution" (Dist. Ex. 4 at p. 10). The report addendum noted the neuropsychologist's recommendation for assistive technology to address the student's difficulties with graphomotor control and written expression for assignments or exams which required more than a few sentences of writing, and noted that "[a]dults should keep in mind that [the student's] writing difficulties are neuropsychological in nature, and not the result of laziness or carelessness" (Parent Ex. G at pp. 4-5). The June 2023 IEP also included two writing goals, one of such goals also being a typing goal – i.e., the OT goal which states the student will write, type, or record a paragraph, legibly, within the confines of the given lines and on the baseline, with appropriate use of capital and lowercase letters and punctuation at the end of each sentence; go back and revise her work; and use checklists to check for correct use of capital and lowercase letters, punctuation, and correct grammar (Dist. Ex. 1 at p. 14). Accordingly, I find the June 2023 IEP addressed the student's writing needs and it does not appear the student otherwise had a communication need that required an assistive technology device to access her education but, to the contrary, that the student's memory was a significant factor for her being diagnosed with an "[u]nspecified [c]ommunication [d]isorder" (Dist. Ex. 1 at pp. 2-3). For example, the IEP included the neuropsychologist's assessment that the student's depressive symptoms and diagnoses related to mood and attention limited the amount of energy she had and impaired her "ability to concentrate on academic or challenging tasks and [to] efficiently retrieve information from memory" (*id.*). The failure to recommend specific 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). The evidence in the hearing record does not support a finding that the district did not deny the student a FAPE by failing to recommend assistive technology.

### **c. Interfering Behaviors – Functional Behavior Assessment**

In their request for review, the parents allege that the district's failure to conduct an FBA and develop a behavioral intervention plan (BIP) for the student led to a denial of a FAPE for the 2023-24 school year.

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 BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]).

State regulations define an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the

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

(8 NYCRR 200.1[r]).

According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained 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). 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 (id.).

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

the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to [8 NYCRR 201.3]

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

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

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).

Regarding the student's social emotional behaviors that may necessitate the need for the student to undergo an FBA, the IHO described the concerns noted by the student's private neuropsychologist, therapist, and psychiatrist (IHO Decision at p. 10). The IHO noted that the neuropsychologist identified several areas of concern with respect to the student's behavior, which included self-esteem, mood, and anger and that the therapist described the student's distractibility and "wondered how this translates in the classroom" (id.; see Parent Exs. D at p. 2; G at p. 3; P ¶ 19). The IHO determined the therapist's letter was unpersuasive because it generally spoke in hypotheticals, speaking of the challenges the therapist expected the student to face and that the therapist did not raise any behavior issues (IHO Decision at p. 10; see Parent Ex. D). As to the psychiatrist, the IHO noted the psychiatrist's concerns about the student's behavior did not appear to be exhibited in the classroom or to have an impact on the student's education (IHO Decision at p. 10; see Parent Ex. E). The IHO noted that the psychiatrist stated that the cause of behaviors he characterized as "violent" (i.e., aggression towards caretakers and attempts to run into traffic) was her dyslexia but also determined that the psychiatrist's opinion lacked specific information regarding when, where and how these behaviors transpired and that he did not credit the psychiatrist's statement that the behavior was caused by the student's dyslexia because the psychiatrist did not explain or provide any basis for that conclusion (id.). Moreover, the IHO determined there was no evidence presented by the psychiatrist that the observed "violent" behaviors occurred in the classroom and stated the evidence provided by the student's teachers which confirmed that these behaviors had not been observed at school (id.; see Dist. Ex. 1 at p. 9). The IHO noted that the June 2023 IEP indicated the CSE discussed that the student had received and would continue to receive evidence-based interventions, and that the student was a safety risk at school (id.).

In addition to the IHO's findings, the June 2023 IEP described the student as "a bright and endearing girl" (Dist. Ex. 1 at p. 1). The IEP also referred to the student as a "mature 3rd grader" and "an enthusiastic and curious learner" (id. at p. 7). The IEP indicated the student asked clarifying questions when she was unclear or wanted to learn something new and she did her best to remain focused and accomplish whatever tasks she needed to complete (id.). The IEP also described the student as a friendly girl who got along well with her peers and adults alike and as within the normal range in social development within her peer group (id.). Accordingly, there is insufficient evidence in the hearing record to support the parents' argument that the student had emotional and behavioral needs in the classroom such that she required an FBA and a BIP to be developed (see 20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; 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).

## **2. Annual Goals**

The parents argue the June 2023 CSE did not develop appropriate goals to address the student's attentional, behavioral, social/emotional and executive functioning needs. The IHO determined that the goals developed in the June 2023 IEP were appropriate, measurable, and addressed the areas of need for the student (IHO Decision at p. 10). Additionally, the IHO



determined that the lack of goals related to the areas of concern identified by the parents, on its own, did not rise to the level of a denial of FAPE because "an IEP need not identify annual goals as the only vehicle for addressing each of the student's needs" (id.). The IHO noted that the behavioral needs identified by the parents and the neuropsychologist had not been observed at school and therefore the district would not be in a position to measure any progress with respect to goals in the areas of attentional, behavioral, social/emotional and executive functioning needs (id.).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The student's June 2023 IEP featured approximately seven annual goals to address the student's needs in the areas of reading, writing, math, and OT (Dist. Ex. 1 at pp. 14-20). The goals included measurement criteria to determine if each goal was achieved, identified the method of how progress would be measured, and the schedule for when progress would be measured (id. at pp. 14-20).

According to the district representative's testimony, the goals recommended by the CSE were appropriate and they were "definitely put in through the SETSS provider who was going to work on the actual goals that [the CSE] discuss[ed], including dyslexia, in addition to the OT being put on as well" (Tr. p. 81). The district representative testified that the IEP did not identify a specific goal to address the student's executive functioning, but she explained that other goals broke down "things into word groups or different concepts" and targeted executive functioning skills (Tr. p. 122). Regarding goals to address the student's social/emotional needs, the district representative testified that there were none as the counseling services proposed by the CSE "w[ere] not accepted by the parents" (Tr. p. 130).

While there could have been more goals, or goals that addressed the student's needs with greater specificity, based on the above I find the goals developed by the CSE targeted the student's major areas of need, that the evidence in the hearing record supports the IHO's determinations.

### **3. Educational Program**

#### **a. SETSS**

Turning to the parties' disputes related to the student's educational programming for the 2023-24 school year, the IHO determined the student's June 2023 IEP recommendations were appropriate to confer an educational benefit in the least restrictive environment (IHO Decision at p. 11). The parents argue that the student "suffer[ed] tremendously because of the large general education program" and required counseling services. Additionally, the parents claim that the student required a smaller class size with access to full-time special education support.

The June 2023 CSE recommended three periods per week of direct SETSS in a group, one period per week of indirect SETSS and two 30-minute sessions per week of OT in a group of two (Dist. Ex. 1 at p. 21). The term SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district (see e.g. Application of the Dep't of Educ., Appeal No. 20-125; Application of a Student with a Disability, Appeal No. 17-034; Application of a Student with a Disability, Appeal No. 16-056).

According to the June 2023 IEP and consistent with the June 2023 prior written notice dated June 20, 2023, other options considered by the CSE for the student included general education, related services only, SETSS, integrated co-teaching, and a special class in a community school (12:1) (Dist. Exs. 1 at p. 27; 3 at pp. 1-3). Similar to the prior written notice, the IEP identified the reasons for rejection of those programs and stated that general education was rejected as the student demonstrated a delay in reading and writing (Dist. Ex. 1 at p. 27). The IEP reflected that integrated co-teaching services were discussed as part of services on the continuum of programs available to support the student consistently to reduce the number of pull-out services; however, the student's parents and teacher reported that she may not benefit on a social/emotional level due to the adjustment period, as she had been with her then-current "[d]ual [l]anguage peers" since prekindergarten, and the parent had concerns regarding "the behaviors within an [i]ntegrated [c]o-[t]eaching classroom setting, and that [the student] c[ould] be easily influenced" (Dist. Exs. 1 at pp. 7-8, 27; 3 at p. 3; Tr. pp. 116-117). Further, there was a concern about the student leaving her friends from the dual language classroom (Tr. pp. 116-17; Dist. Ex. 1 at pp. 7-8). The IEP and the prior written notice indicated that SETSS was amended to remove a math pull-out service and add an indirect service where the SETSS provider would provide consultation to the teacher to support the evidence based reading intervention program used in the classroom (Dist. Exs. 1 at p. 27; 3 at p. 3). The IEP indicated that OT was added based on the recommendation from the previous reevaluation and the CSE discussed a smaller classroom setting; however, the student's teacher and SETSS provider reported that the student did not demonstrate an academic and behavioral deficit where she needed a more restrictive setting, and she was "performing and making progress in her [then-]current least restrictive setting" (Dist. Ex. 1 at p. 27).

According to the parent's affidavit testimony, at the IEP meeting, the CSE discussed an integrated co-teaching classroom as an option as well as the addition of counseling support given the student's social/emotional struggles at home; however, the parent indicated that when they received a copy of the IEP, the recommendations remained the same and the CSE recommended a general education classroom with four periods of SETSS and two group sessions per week of OT (Parent Ex. O ¶ 11). The parent further testified that at the CSE meeting, the parents stressed their concerns regarding the student's social/emotional needs, the toll that pull-out services took on her self-esteem and her learning disabilities, and their concern that the student's classrooms "tended to have children with significant behavioral issues" which the student herself did not exhibit in school, and, therefore was an added distraction and that the class sizes were too large (Parent Ex. O ¶¶ 7, 11). The IEP noted that the student's SETSS provider reported that she did not want to consistently attend her SETSS program, which was a recent development at that time (Dist. Ex. 1 at p. 7). Regarding the student's involvement and progress in the general education curriculum, the June 2023 IEP noted that the student was able to participate in the general education program and receive special education supports such as SETSS to assist with her "reading and writing

deficits" and noted that she would also receive OT as a mandated related service (Dist. Ex. 1 at p. 13). The June 2023 IEP noted the student was not a "promotion in doubt student" (id. at p. 7).

Accordingly, the evidence in the hearing record supports the IHO's determination that the June 2023 IEP was appropriate to confer an educational benefit in the least restrictive environment to the student.

### **b. Counseling Services**

An IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" (20 U.S.C. § 1401[26][A]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]).

Turning to the final issue before me on appeal, the IEP noted that the CSE offered counseling services to the student at both the December and June meetings, which the parents declined (Dist. Ex. 1 at p. 9). Specifically, the IEP noted that the parent opted for outside counseling rather than an additional pull-out service in school and noted that the student's counselor attended the CSE meeting (Dist. Ex. 1 at p. 9). However, the counselor was not included in the list of participants listed at the bottom of the IEP (Dist. Ex. 1 at p. 28). The parent testified that the CSE discussed counseling services, and the parent expressed her concern that an additional pull-out service "would exacerbate the emotional dysregulation" and the student already had "so many issues with [pull-out services]" (Tr. p. 140). However, the parent further testified that she relayed to the CSE that she was "open to [counseling services] if that was the [district]'s recommendation" (Tr. pp. 140-41). As indicated above, the district representative testified that the counseling services proposed by the June 2023 CSE were "not accepted by the parents" (Tr. p. 130). At the time of the June 2023 CSE meeting, the student's teacher reported the student was "kind and respectful to her peers and teachers" (Dist. Ex. 1 at p. 9) Although the parent expressed concern regarding the student's emotional regulation, and noted that the student could be "oppositional defiant" and would "shut down with tasks" and may not reach or demonstrate her full potential, the parent rejected the CSE's offer of counseling services (Dist. Ex. 1 at p. 9). The IEP reiterated that the parent believed an additional pull-out service would "exacerbate [the student's] behavior" (id. at p. 27).

Based on the foregoing, there is not enough evidence in the hearing record to support the parents' argument that the student required counseling services to receive a FAPE and the hearing record supports the IHO determination that the district offered the student an educational program reasonably calculated to offer a FAPE for the 2023-2024 school year (IHO Decision at p. 8).

## **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 2023-24 school year, the necessary inquiry is at an end.

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  
July 5, 2024**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**