



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-239

**Application of the BOARD OF EDUCATION OF THE
EASTCHESTER UNION FREE SCHOOL DISTRICT for
review of a determination of a hearing officer relating to the
provision of educational services to a student with a disability**

Appearances:

Keane & Beane, PC, attorneys for petitioner, by Stephanie L Burns, Esq.

Gina DeCrescenzo, PC, attorneys for respondents, by Gina DeCrescenzo, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeal from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of their son's tuition at the Winston Preparatory School (Winston Prep) for the 2023-24 school year. The appeal must be sustained.

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[a]). 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

In this case, the student began receiving special education—which reportedly included applied behavior analysis (ABA) services, speech-language therapy, and occupational therapy (OT)—while attending a "therapeutic preschool beginning at 19-months of age" (Dist. Ex. at p. 3). The student was found eligible to receive special education upon transitioning to kindergarten as a student with a speech or language impairment and attended a 15:1 special class placement (id.). According to the evidence, the student continued to receive special education programming for first through eighth grade, which ranged from "collaborative" classrooms to a "combination of special education and collaborative classroom support" to "less supported environment[s] for academics," such as a general education setting (id. at pp. 3-5).

During the 2020-21 school year while the student was in eighth grade, the district completed the student's mandatory three-year reevaluation (see generally Dist. Exs. 18-20). At that time, the student was attending a district public school in "special classes for science and math," integrated co-teaching (ICT) services in a general education placement for English language arts (ELA), and a "collaborative" classroom for social studies (staffed with a general education teacher and teaching assistant [TA] support) (Dist. Ex. 18 at p. 1). In addition to completing a psychological evaluation of the student in November and December 2020 (December 2020 psychological evaluation), the district also conducted an educational evaluation in November 2020 (November 2020 educational evaluation) and an updated social history in December 2020 informed by the parents (December 2020 social history) (see Dist. Exs. 18 at p. 1; 19 at p. 1; 20 at pp. 1, 5). In addition, an independent language evaluation of the student was conducted in April 2021 (April 2021 language evaluation) and an independent OT evaluation of the student was conducted in March 2021 (March 2021 OT evaluation) (see Dist. Exs. 16 at p. 1; 17 at p. 1). Shortly thereafter, the parents privately obtained a neuropsychological evaluation of the student in April 2021 (April 2021 neuropsychological evaluation) to assess the student's "current strengths and vulnerabilities and to assist with academic planning and placement" (Dist. Ex. 15 at p. 1).¹

For the 2021-22 (ninth grade) and 2022-23 (10th grade) school years, the parents unilaterally placed the student at Winston Prep (see Tr. p. 10; see generally Parent Exs. A-E; G; L-O; Dist. Exs. 7-13).²

According to the evidence in the hearing record, in late winter or early spring 2023, the parents executed an enrollment agreement with Winston Prep for the student's attendance during the 2023-24 school year for 11th grade, beginning in "August 2023 and ending June 2024" (Parent Ex. S at pp. 1, 4). While it is unclear on what specific date the parents executed the agreement, the document, itself, reflects that the agreement between the parties was "dated as of February 14, 2023" and that the parents had to return the executed agreement to Winston Prep no later than "March 14, 2023" (id. at pp. 1, 4).

In preparation for the 2023-24 school year, a CSE convened on June 7, 2023 to conduct the student's annual review and developed an IEP for the student (11th grade) (see Dist. Ex. 5 at p. 1). Finding that the student remained eligible to receive special education as a student with a speech or language impairment, the June 2023 CSE recommended a daily 15:1 special class placement for instruction in both ELA and social studies, a daily 5:1 resource room, and related services consisting of one 30-minute session per week of individual counseling ("Flexible Support Program" [FSP]), one 30-minute session per week of counseling in a small group (FSP), and two

¹ The parents' privately-obtained evaluation report is more specifically titled "Neuro/Psycho-Educational Evaluation," but will be referred to throughout this decision as a neuropsychological evaluation (Dist. Ex. 15 at p. 1)

² The Commissioner of Education has not approved Winston Prep as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

30-minute sessions per week of speech-language therapy in a small group (*id.* at pp. 1, 12).^{3, 4} In addition, the June 2023 CSE recommended reading instruction in a small group for one period every other day (*id.* at pp. 1, 12).⁵ The June 2023 CSE also recommended supplementary aids and services, program modifications, and accommodations, including having directions read, clarified, and repeated; providing refocusing and redirection; checking for understanding; preferential seating; using visual aids where possible;⁶ providing reminders to slow down; modified homework as needed; access to a computer; providing a copy of class notes, as needed, in all academic classes; access to breaks; using graphic organizers for writing; access to the FSP program as needed; and breaking down assignments, when possible and appropriate (*id.* at pp. 12-13).⁷ As an assistive technology recommendation, the June 2023 IEP included access to a Chromebook (*id.* at p. 13).⁸ Additionally, the CSE noted in the June 2023 IEP that, "[s]hould the student return to the [d]istrict recommended special education program, the administration of the student's triennial evaluation w[ould] be accelerated and conducted at the end of August, 2023, after the student turn[ed] 16 years of age (so that the WAIS c[ould] be administered)" (*id.* at p. 2). The CSE further noted that, "[b]ased upon review of this new information, changes to the IEP w[ould] be considered at that time" (*id.*).⁹

³ Evidence in the hearing record reflects that the FSP program provided a "dynamic, innovative, and student centered approach to developing social-emotionally healthy individuals who [we]re able to access their education" (Dist. Ex. 21 at p. 1). According to the evidence, FSP students "face[d] challenges related to successfully regulating and managing their emotions, which in turn impact[ed] their ability to be successful in school" (*id.* at p. 2).

⁴ Evidence in the hearing record reflects that, at the June 2023 CSE meeting, the CSE "described" the FSP program to the parents, who "asked for a written description of the programs and services that were discussed" (Dist. Ex. 5 at p. 2).

⁵ As noted in the "[m]eeting [i]nformation" portion of the June 2023 IEP, the parents informed the CSE that the student was "receiving private, individual evidence-based therapy to address anxiety" (Dist. Ex. 5 at p. 2).

⁶ With regard to the delivery of visual aides to the student, the June 2023 IEP clarified that the use of visual aids, "[e]specially in the morning," would "help the student with the morning routine" (Dist. Ex. 5 at p. 13).

⁷ With respect to the student's needs related to special factors, the June 2023 CSE denoted that the student required "strategies, including positive behavioral interventions, supports and other strategies to address behavior that impede[d] the student's learning or the learning of others"; however, the CSE indicated that the student did not require a behavioral intervention plan (BIP), but instead, noted that the student "benefit[ed] from structure, executive functioning skills development including a focus on organizational skills and time management skills, and positive supports" (Dist. Ex. 5 at p. 9). In addition, the CSE noted that the student "benefit[ed] from school based counseling to develop self-regulation through coping skills, social communication and interaction skills and identifying behavioral triggers" (*id.*).

⁸ With regard to the student's access to a Chromebook at school, the June 2023 IEP noted that "OT w[ould] complete a trial with [the] student to determine if a speech to text program would be appropriate" and that the Chromebook could be "used for longer written assignments" (Dist. Ex. 5 at p. 13).

⁹ The "WAIS," while not described in the hearing record, typically refers to the Wechsler Adult Intelligence Scale. At the impartial hearing, the CSE chairperson testified that, at the time of the June 2023 CSE meeting, the student was "16.3" years old and the WAIS "start[ed] at 16.6" years of age (Tr. pp. 131-32).

According to the district's assistant superintendent for pupil personnel services (assistant superintendent), after the June 2023 CSE meeting, he met with the student's mother on or about June 20, 2023 because she had "some concerns" (Tr. pp. 231, 240-41). According to the assistant superintendent, the student's mother wanted to know whether the "new [FSP program] that they discussed at the annual review meeting was actually going to happen" and whether the "reading supports" were "going to actually happen"; if so, the student's mother asked "what it would look like in a day" (Tr. p. 241). The assistant superintendent indicated that they "spent a lot of time talking . . . [b]ecause these were two new programs that the district had put in their budget which subsequently passed," and the student's mother "wanted to know how that would be, in sum and substance" (*id.*). With regard to the FSP program, the assistant superintendent "met with several parents because it was a new program" (Tr. pp. 241-42). The district had "developed a flyer" about the FSP program, which he gave to the student's mother (Tr. p. 242; see generally Dist. Ex. 21).

By email to the district dated July 6, 2023, the parents notified the district of their intentions to unilaterally place the student at Winston Prep for the 2023-24 school year and to seek reimbursement for the costs of the student's tuition and transportation, as well as "related costs," from the district (Parent Ex. J).

The student began attending Winston Prep for the 2023-24 school year on or about August 30, 2023 (see Parent Ex. U at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice dated December 12, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Dist. Ex. 1 at p. 1). Specifically, the parents asserted that the district failed to appropriately evaluate the student in all areas of suspected disability and failed to identify all of the student's needs (*id.* at p. 9). Relatedly, the parents alleged that the district failed to appropriately consider the evaluative information available to the CSE (*id.*). Next, the parents contended that the district failed to offer methodologies and strategies based on peer-reviewed research (*id.*). In addition, the parents alleged that the district failed to develop measurable annual goals, "including academic and functional goals designed to meet the student's needs that result[ed] from [his] disability," and similarly failed to develop annual goals "designed to track progress in all areas of [the student's] needs" (*id.*). Next, the parents asserted that the district failed to "provide appropriate related services" (*id.*). The parents also asserted that the district failed to consider the full continuum of services," and more specifically, that the district failed to "consider placement options" that could provide the student with the "intensive services" he required (*id.*). In addition, the parents indicated that the district deprived them of meaningful participation by "failing to provide necessary services requested by the [p]arents and supported by available evaluative data" (*id.* at pp. 9-10). Finally, the parents alleged that the district failed to provide a program "reasonably calculated to enable [the student] to make progress appropriate in light of his circumstances" by failing to recommend adequate special education, supports, and services (*id.* at p. 10).

In addition, the parents alleged that, "[t]o the extent that the foregoing violations of law and regulation [wer]e procedural in nature, these allegations" impeded the student's right to a FAPE, significantly impeded their opportunity to participate in the decision-making process

regarding the provision of a FAPE, and caused a deprivation of educational benefits to the student (Dist. Ex. 1 at p. 10). The parents also alleged that, pursuant to both section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA), the district failed to provide the student with instruction, services, or reasonable accommodations "in order to enjoy meaningful access to the benefits offered by a school district" (id.).

As relief, the parents sought findings that the district failed to offer the student a FAPE for the 2023-24 school year and an order directing the district to reimburse the parents for the costs of the student's tuition and transportation related to his attendance at Winston Prep for the 2023-24 school year (see Dist. Ex. 1 at p. 12).

B. Impartial Hearing Officer Decision

On January 22, 2024, the parties proceeded to an impartial hearing, which concluded on February 28, 2024, after four total days of proceedings (see Tr. pp. 1-478).¹⁰ In a decision dated May 4, 2024, the IHO found that, applying the law to the facts of this case, the district failed to offer the student a FAPE for the 2023-24 school year, that Winston Prep was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' requested relief (see IHO Decision at pp. 35-51). As relief, the IHO ordered the district to reimburse the parents or directly fund the costs of the student's tuition at Winston Prep for the 2023-24 school year (id. at p. 51).

In reaching the determination that the district failed to offer the student a FAPE, the IHO found that a "common theme among" the district witnesses was that "they neither had any firsthand knowledge of the [s]tudent nor did they make a good faith effort to acquire such knowledge" (IHO Decision at p. 39). For example, the IHO noted that "[n]one of the witnesses had met, assessed or even observed the [s]tudent in the classroom," the district did not complete a "social history of the [s]tudent," and the district did not conduct any "transitional assessment" (id.). In footnotes, the IHO clarified that the district's psychological evaluation and educational evaluation reports were "last conducted in November 2020," the social history update included in the hearing record was dated November 2020, and testimonial evidence had stressed the importance of having a "transitional assessment done given the [s]tudent's desire to attend college" (id. at p. 39 nn. 33-35). According to the IHO, although district witnesses testified that "these assessments and/or evaluations would be conducted during the course of the school year," he concluded that the failure to "conduct these assessments and/or evaluations prior to convening the IEP meeting left the IEP team at a considerable disadvantage in terms of creating an appropriate program" (id. at p. 39). The IHO found this was especially troubling "given that all of the information that the [d]istrict had about the [s]tudent from it's (sic) own evaluations was completely out of date" (id.).

¹⁰ At the impartial hearing, the parents' attorney stipulated that the parents were not challenging the supplementary aids and services, program modifications, and accommodations (i.e., "program accommodations," such as preferential seating) or the testing accommodations recommended in the June 2023 IEP (see Tr. pp. 265-67; Dist. Ex. 5 at pp. 12-14).

In support of these findings, the IHO pointed first to the CSE chairperson's testimony (see IHO Decision at p. 39).¹¹ The IHO noted that the chairperson "readily acknowledged that the CSE did not conduct any updated evaluations or assessments" prior to June 2023 CSE meeting, and similar to all of the district's subsequent witnesses, also acknowledged that she had "never met, interacted with or observed" the student (*id.*). As noted by the IHO, however, the CSE chairperson testified that she had "every intention of conducting updated evaluations over the summer and once the school year was underway to determine whether the [s]tudent's program needed to be 'tweaked' or adjusted in some way and, to get to know the [s]tudent better" (*id.*). The IHO characterized this testimony as "to say the least, perplexing, if not [an] astonishing, admission given that one would naturally expect that the information gathering stage would occur before the IEP meeting rather than after" it (*id.* at pp. 39-40 [emphasis in original]). The IHO also found the CSE chairpersons' testimony troubling since she had "absolutely no personal knowledge" of the student, "but proceeded to draft an entire IEP" (*id.* at p. 40).

The IHO then turned to the absence of any transitional services, noting that the CSE chairperson testified that the CSE was "expecting to receive that information" from Winston Prep; however, the IHO found that, although the CSE did not receive that information, it nevertheless "proceeded with the IEP meeting anyway and supposedly planned to do the formal assessment at some time later in the school year" when the student was "older" (IHO Decision at p. 40). The IHO indicated that this "made absolutely no sense," when, as here, if the CSE "felt they needed information" or to "make up for something it felt" Winston Prep did not provide, then the CSE "should have either not held the meeting until the appropriate assessments were completed or, at the very least, planned to reconvene" (*id.*). However, the IHO found that "[n]either of those options appeared to be on the [d]istrict's agenda" (*id.*). Given this evidence, the IHO opined that "it very much seemed that the [d]istrict had a predetermined program in mind" for the student, and rather than recommending a program that fit the student, the CSE was "determined to make the [s]tudent fit their program" (*id.*). According to the IHO, this "completely inverted the processes required of them by the IDEA" (*id.*).

Next, the IHO addressed the June 2023 CSE's "rudimentary effort to develop an appropriate IEP" for the student (IHO Decision at p. 40). Initially, the IHO reiterated the lack of firsthand or updated evaluative information about the student, then noted that the CSE lacked any "related service provider" from the district (*id.* at pp. 40-41). The IHO found that the June 2023 CSE "considered reports and input" from the Winston Prep members of the CSE and "attempt[ed] to address what the team considered [to be] the [s]tudent's primary challenges, speech and language issues and self-regulation" (*id.* at p. 41). According to the IHO, the CSE chairperson's "assessment" of the student—notably, that he was "doing well academically both in public school" and at Winston Prep—and that the "common, and recurring, issue [for] the [s]tudent[wa]s self-regulation issues, grossly oversimplified the [s]tudent's presentation" (*id.*). In contrast, however, the IHO found that the June 2023 IEP offered the student a "number of related services, accommodations and resources that were at least intended to assist the [s]tudent with self-regulation, organization, attentional issues, and academics" (*id.*). The IHO found it was "far less clear" whether the district's recommended program was appropriate for the student; however,

¹¹ The CSE chairperson was also the special education department chairperson and a school psychologist (see Tr. pp. 24-25).

based on the testimony of the psychologist who conducted the student's April 2021 neuropsychological evaluation, the IHO found that the district's "proposed program fell far short of that mark" (id.).

Next, the IHO found that the CSE chairperson's testimony with regard to whether or not the student made progress at Winston Prep during the past two school years was not credible (see IHO Decision at p. 41). The IHO indicated that, although the CSE chairperson testified that the student had not "made any progress" based on her review of the documents, the "reports in evidence suggest[ed] that the [s]tudent made significant progress from a social and emotional standpoint during that time period" (id.). Based on the parent's testimony, the IHO found that "not only did the [s]tudent make progress, but he had become an almost completely different person in terms of advocating for himself, making connections with his peers, etc." (id. at pp. 41-42).

Turning to the program recommendations in the June 2023 IEP, the IHO determined that the "FSP program with small group counseling, essentially ignored the adamant recommendation of [the private evaluator] who insisted that the [s]tudent continued to require intensive 1:1 support," and the recommendation would not address the student's "ongoing social and emotional challenges" (IHO Decision at p. 42). In addition, the IHO noted that both the parents and the private evaluator believed that the student would not receive any benefit from a "general education setting," where the student would not receive 1:1 support (id.). As determined by the IHO, neither the CSE chairperson nor the FSP school psychologist "offered anything resembling a rational explanation as to how FSP, which [wa]s primarily offered on an as needed basis and/or involve[d] small group counseling could even compare to the level of support offered by the Focus program" at Winston Prep (id.). In addition, the IHO noted that the district "had every reason to know, based on its last interaction with the [s]tudent when he was in eighth grade that he did not do well in small group counseling and fared far better in 1:1 interactions" (id.). The IHO further noted that it was "abundantly clear from the totality of the testimony" by the parent and the private evaluator that the student "required this level of support" (id.).

Next, the IHO indicated that, although the FSP school psychologist "remained confident" about the student's ability to "transition back to a more mainstream educational environment with the support of FSP," her opinion—"based only on a review of documents"—was "unsupported by the [hearing] record and appear[ed] to be based on little more than raw optimism" (IHO Decision at pp. 42-43). Ultimately, the IHO concluded that the FSP program did not "provide the level or type of support" the student required, especially in light of the student's need for "intensive 1:1 executive functioning instruction" (id. at p. 43).

With respect to the speech-language therapy services recommended in the June 2023 IEP, the IHO found that the district ignored the recommendation made by the private psychologist, who indicated that the student required daily speech-language therapy services (see IHO Decision at p. 43). The IHO indicated that the district's witness—a speech-language pathologist at the high school—did not "provide any specific reasons why her assessment" of the student's language needs differed from the private psychologist's, noting further that the witness had not worked with the student, she had not participated at the CSE meeting, and she had neither met nor tested the student (id.). Instead, the witness's view of the student was based "exclusively on a review of the records and/or a brief conversation with the speech pathologist" at Winston Prep (id.).

In addition to the "shortcomings of the FSP program," the IHO pointed to the private psychologist's testimony, which "found other fatal defects with regard to the [d]istrict's IEP and recommendation" (IHO Decision at p. 43). In particular, the private psychologist testified that the "small class sizes" in the district were "too large" for the student, and the student "would be utterly 'lost' in [the general education] environment and totally unable to access his education" (*id.*). The IHO found that the private psychologist's "concerns were borne out by the evidence" (*id.* at p. 44). As an example, the IHO described the student's struggle at Winston Prep during the 2023-24 school year (albeit after the June 2023 IEP was developed) when placed in a classroom with a new cohort of unfamiliar students (*id.*). As a result, Winston Prep "moved him to a different class" with familiar students, which, according to the IHO, had an "immediate and profound" impact on the student, who "did much better in that environment" (*id.*). The IHO noted that "these events . . . illustrate[d] the level of difficulty that the [s]tudent would have encountered in attempting to transition into a totally new environment" (*id.*). The IHO also noted that these events highlighted "how completely inappropriate" the district's plan was to move the student into a "larger classroom setting, and even a general education setting for some classes" (*id.*). Given that the district was aware of the private psychologist's recommendations at the June 2023 CSE meeting, "as well as the type of educational setting the [s]tudent had become accustomed to over the past two school years," the district's "decision to radically alter this environment, without a trace of evaluative data to contradict the recommendations of [the private psychologist], represented a fatal flaw in the [d]istrict's proposed plan" (*id.*).

In the final part of the IHO's analysis of the district's recommended program, he examined the parent's testimony (*see* IHO Decision at pp. 44-45). Based on the parent's testimony, the IHO noted the "profound difficulties" the student had when previously attending the district, as well as the "extraordinary personal lengths" the parent went to in assisting the student during that time (*id.*). More specifically, the IHO indicated that the student's "self-esteem was extremely low" and he could not "make any connections at school"; as a result of growing concerns, the student's father "essentially quit his job" to befriend the student and to "work with him on a 1:1 basis" (*id.*). These efforts, however, failed to "yield the desired result" and the student continued to "struggle both academically and socially" (*id.* at p. 45). The IHO also noted that the district was "certainly aware" of the student's struggles and the "enormous progress" he made while attending Winston Prep (*id.*). According to the IHO, the student's progress was a "testament to the level of support" the student required, and the district's decision to place the student in a "general education setting for any portion" of the school day "reflected a complete disregard for both the [p]arent's and [the private psychologist's] grave concerns," as well as the student's "profound struggles in that very environment less than two years earlier" (*id.*). As a result, the IHO found that the hearing record contained "no basis to conclude that the limited support that would have been afforded the [s]tudent through the FSP program would have been sufficient to address the monumental challenges" he would have faced when transitioning to the district's program (*id.*).

In light of the foregoing, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year (*see* IHO Decision at p. 46).

Turning to the appropriateness of the unilateral placement, the IHO initially found that the district "did not meaningfully contest the appropriateness" of Winston Prep (IHO Decision at p. 47). Based on the evidence in the hearing record, the IHO found that the student engaged in "classes, programs and related services which were specifically tailored to address" the student's

needs (id.). The IHO noted that, when a "new environment" at Winston Prep was not "working for him, the school immediately changed his classroom to accommodate" his anxiety, and provided the student with "numerous accommodations" and "both individual and group instruction" (id.). In addition, the IHO indicated that the student's related service providers worked with his classroom teachers, and a "vital aspect of this instruction was the [45-]minute, 1:1, attention the [s]tudent received in the Focus program that provided executive function instruction, academic support and social and emotional support" (id. at pp. 47-48). The IHO also found that the student made progress at Winston Prep "across a broad array of subjects and areas of disability and continued to show marked personal growth," which Winston Prep monitored and communicated to parents (id. at p. 48). Based on the evidence, the IHO concluded that Winston Prep was an appropriate unilateral placement for the student for the 2023-24 school year (id.).

Next, the IHO examined equitable considerations, and concluded that the evidence in the hearing record supported a finding that the parent was entitled to the requested relief (see IHO Decision at pp. 49-50).

Consequently, the IHO ordered the district to reimburse or directly fund the costs of the student's tuition at Winston Prep for the 2023-24 school year (see IHO Decision at p. 51).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred by finding that the district failed to offer the student a FAPE. The district also alleges that the IHO erred by failing to consider the district's obligation to educate the student in the least restrictive environment (LRE). Next, the district asserts that, although the IHO properly determined that the June 2023 IEP provide the student with access to related services, accommodations and resources to address his self-regulation, organization, attentional issues, and academics, the IHO erred by finding that the recommended programs and services were not appropriate for the student. Additionally, the district asserts that the IHO erred by finding that the FSP program failed to offer the student 1:1 support and that the recommended speech-language therapy services were insufficient to address the student's needs. The district also asserts that the IHO erred by finding that the district failed to evaluate the student prior to the June 2023 CSE meeting, and relatedly, that the evaluations completed in November and December 2020 were outdated or stale. The district contends that the IHO erred by finding that the CSE's programming was inappropriate because district staff did not personally know the student. In addition, the district contends that the IHO erred by finding that the June 2023 CSE impermissibly engaged in predetermination of student's program. In addition, the district argues that the IHO erred by finding that the district failed to provide a rational explanation for not finding the student eligible to receive special education as a student with autism, rather than as a student with a speech or language impairment. Finally, with respect to the June 2023 CSE, the district argues that the IHO erred by finding that it failed to include related service providers or a special education teacher.

With respect to the parents' unilateral placement, the district asserts that the IHO erred by finding Winston Prep was appropriate to meet the student's needs. Specifically, the district argues that the IHO failed to consider the restrictiveness of the unilateral placement.

As relief, the district seeks to overturn the IHO's findings and to rescind the order directing the district to reimburse or directly fund the costs of the student's tuition at Winston Prep for the 2023-24 school year.

In an answer, the parents respond to the district's allegations. More specifically, the parents initially contend that the district failed to demonstrate that the IHO's credibility findings must be set aside. The parents also contend that the IHO considered the LRE when reaching his conclusions, noting further the private psychologist's recommendation that the student's placement with other neurotypical students would be detrimental to his emotional well-being. The parents assert that the IHO properly found that the June 2023 IEP did not offer the student a FAPE based on several determinations, including: the district's lack of personal knowledge of the student, the failure to conduct evaluations prior to the June 2023 CSE meeting, the June 2023 CSE predetermined the student's program, and by crediting the private psychologist's testimony concerning the inappropriateness of the district's recommended program more than the CSE chairperson's testimony. In addition, the parents assert that the student required intensive 1:1 support, as recommended by the private psychologist, and the district's FSP program only provided the student with 1:1 counseling once per week. Relatedly, the parents assert that the district failed to explain how the FSP program provided the same level of support as the Focus program at Winston Prep. With respect to speech-language therapy, the parents argue that the IHO properly credited the private psychologist's testimony regarding the student's need for daily speech-language therapy, rather than the district speech-language pathologist's testimony, which was based on a review of records. The parents also argue that the IHO properly concluded that the district failed to conduct additional testing prior to the June 2023 CSE meeting, and instead, relied on evaluative information that was more than two years old. The parents further argue that the district failed to conduct any transition assessments, despite the student's need for transition planning. In addition, the parents assert that the IHO properly relied on the parents' testimony. Additionally, the parents assert that the evidence supports the IHO's finding that the district predetermined the student's program recommendations, especially given the CSE chairperson's testimony that the district would evaluate the student after the June 2023 IEP was proposed, and would then update the IEP. Next, the parents argue that the district ignored the recommendations in the April 2021 neuropsychological evaluation report, and ignored the student's need for 1:1, daily executive functioning support. In addition, the parents argue that the student would be overwhelmed in a 15:1 special class placement and in a general education setting, and the district offered no evidence to support the decision in recommending these placements. Finally, the parents note that, although the IHO found that the student would be more appropriately classified as a student with autism and that the June 2023 CSE did not include related service providers or a special education teacher, the IHO's ultimate conclusions did not rest on these findings.¹²

¹² To the extent that the IHO issued findings about the composition of the June 2023 CSE and whether the student's eligibility category was appropriate, the parents did not raise these issues in the due process complaint notice as issues to be resolved at the impartial hearing (see generally Parent Ex. A). Therefore, as it appears that the IHO raised these issues sua sponte, this was error. However, as noted by the parents in their answer, the IHO's ultimate conclusion that the district failed to offer the student a FAPE for the 2023-24 school year did not rest on these findings. Consequently, these issues will not be further addressed in the decision. As a reminder, the IDEA requires a CSE to include the following members: the parents; one regular education teacher of the student (if the student was, or may be, participating in the regular education environment); one special education teacher of the

With regard to the unilateral placement, the parents assert that the IHO properly found that Winston Prep was appropriate. Here, the parents allege that Winston Prep provided the student with 1:1 executive functioning in the Focus class and the student was placed with students with similar needs. In addition, the parents contend that the student made progress in his ability to self-regulate, as well as socially and academically.

Overall, the parents seek to uphold the IHO's decision in its entirety.

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

student or, where appropriate, not less than one special education provider of the student; a district representative; an individual capable of interpreting instructional implications of evaluation results; at the discretion of the parent or district, other persons having knowledge or special expertise regarding the student, "including related services personnel as appropriate"; and if appropriate, the student (20 U.S.C. § 1414[d][1][B]; see Educ. Law § 4402[1][b][1][a]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]; see also 8 NYCRR 200.1[pp], [xx], [yy] [defining "regular education teacher," "special education provider," and "special education teacher," respectively, as individuals qualified who are providing instruction or services to the student or who may serve as a teacher or provider to the student]). State regulation provides that the district representative shall serve as the chairperson of the committee (8 NYCRR 200.3[a][1][v]). To be clear, the June 2023 CSE did not appear to include a special education teacher of the student or a related service provider of the student—or any individuals who may have served as the student's teacher or provider if he had returned to the district (see Dist. Ex. 5 at p. 1). Nor does the district assert on appeal that the district special education teacher or the district speech-language therapist who both attended the June 2023 CSE meeting would have served in those roles had the student returned to the district (see Req. for Rev. ¶ 11).

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" (Andrew 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 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]).¹³

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

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

VI. Discussion

A. Preliminary Matters—Credibility

Turning first to the IHO's alleged credibility findings, generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). However, in addressing credibility determinations made in other administrative settings, the Second Circuit Court of Appeals has pointed out that an assessment of a witness' credibility should provide specific reasons for the adverse credibility determination (see Zhang v. U.S. I.N.S., 386 F.3d 66, 74 [2d Cir. 2004] [2d Cir. 2007] [noting that court looks to see if the trial judge "provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding"]; Williams v. Bowen, 859 F.2d 255, 260-61 [2d Cir. 1988] ["A finding that the witness is not credible must nevertheless be set forth with sufficient specificity to permit intelligible plenary review of the record"]).

In their answer, the parents contend that the district failed to challenge the IHO's credibility as a basis to overturn the IHO's decision. Overall, a review of the IHO's decision and, more

¹³ 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).

specifically, the findings of fact cited by the parents in support of their assertion, do not support a conclusion that the IHO made credibility findings, but rather, drew attention to conflicting and confusing testimonial evidence elicited at the impartial hearing (see IHO Decision at pp. 11-15, 17, 19, 21-22, 33-34). Additionally, a review of the IHO's decision reflects that within the findings of fact, the IHO, at times, may have questioned the accuracy of a witness's testimony or engaged in making rhetorical soliloquies or statements about a witness's testimony, but the IHO did not make any specific credibility findings, nor do the parents point to specific credibility findings. Generally, within the findings of fact, the IHO accurately recited the witnesses' testimony, and then when analyzing whether the district sustained its burden of proof, the IHO gave little to no weight to certain aspects of the witnesses' testimonial evidence (*id.* at pp. 35-46). To the extent that I agree or disagree with the IHO's findings of fact, it is based on the weight accorded to the evidence, not the credibility of the witnesses' testimony (see L.K. v. Ne Sch. Dist., 932 F. Supp. 2d 467, 487-88 [S.D.N.Y. 2013]; E.C. v. Bd. of Educ. of City Sch. Dist. of New Rochelle, 2013 WL 1091321, at *18 [S.D.N.Y. Mar. 15, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *9-*10 [S.D.N.Y. Feb. 20, 2013]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581 [S.D.N.Y. 2013]). Therefore, to the extent that the parents argue that the IHO's decision regarding a FAPE cannot be disturbed because it was based, in part, on credibility determinations, the parents' argument is without support.

B. June 2023 CSE Process

1. Parent Participation and Predetermination

The district contends that the IHO's finding that the June 2023 CSE predetermined the student's program recommendations for the 2023-24 school year was not supported by the evidence in the hearing record. The parents agree with the IHO's finding, arguing that the CSE chairperson's testimony that the district would evaluate the student after the June 2023 CSE meeting and use the information to modify the "continuum of services, not . . . the placement" supports the IHO's finding.

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], *aff'd* 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], *aff'd*, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dept. Of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P., 2015 WL 4597545, at *8, *10; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that "[a] professional disagreement is not an IDEA violation"]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S., 2011 WL 3919040, at *11, quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

Initially, a review of the meeting information section of the June 2023 IEP reflects that the following individuals attended the CSE meeting: the CSE chairperson, a consultant, a district special education teacher, a district regular education teacher, a district occupational therapist, a district speech-language therapist, both parents, a Winston Prep general education/Focus teacher, a Winston Prep dean, and a district school counselor (see Dist. Ex. 5 at p. 1). A further review of the meeting information section of the June 2023 IEP reveals the CSE's discussions, which included input from both Winston Prep attendees, as well as the parents (id. at pp. 1-2).

In the decision, the IHO appears to have tethered his finding that the June 2023 CSE predetermined the student's program recommendations to what the IHO found was a lack of sufficient evaluative information (see IHO Decision at pp. 39-40). However, when assessing whether a CSE impermissibly engaged in predetermination, the crux of that analysis focuses on whether the CSE had the requisite open mindedness with regard to the contents of the IEP. The IHO neither cited to the appropriate legal standard nor conducted the appropriate factual analysis in reaching the conclusion that the June 2023 CSE improperly predetermined the student's program, and moreover, the meeting information section of the June 2023 IEP recites, at length, the CSE's discussions, as well as the input from both parents and the Winston Prep attendees (see Dist. Ex. 5 at pp. 1-2). Thus, the parents' active participation at the June 2023 CSE meeting, as documented in the IEP, necessarily defeats any claim that the June 2023 CSE predetermined the contents of the student's IEP. The failure of the CSE to adopt the parent's preferred programing recommendations does not mean that the outcomes of the meeting were predetermined (B.K. v.

New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014]). As a result, the IHO's finding of predetermination must be reversed.

2. Sufficiency and Consideration of Evaluative Information

Next, 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]). 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., 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).

At the outset, the evidence in the hearing record demonstrates that the district had evaluated the student during his previous triennial reevaluation in November and December 2020 (see generally Tr. pp. 1-428; Parent Exs. A-Y; Dist. Exs. 1-21). Given the district's obligation to reevaluate students with disabilities at least once every three years, however, the student's triennial reevaluation was not due until fall 2023, approximately five to six months after the June 2023 CSE meeting (see 8 NYCRR 200.4[b][4]). Therefore, the IHO's conclusions that the district evaluations of the student were "completely out of date" and put the June 2023 CSE at a "considerable disadvantage" in developing the student's IEP was error (IHO Decision at p. 39). This is especially true where, as here, the evidence in the hearing record supports a finding that the June 2023 CSE had sufficient evaluative information upon which to develop the student's June 2023 IEP for the 2023-24 school year. For example, based on the June 2023 IEP itself, the document reflects that the CSE relied on a variety of evaluative information, including testing results from the November 2020 educational evaluation, the December 2020 psychological evaluation, the December 2020

social history, the March 2021 OT evaluation, the April 2021 language evaluation, and the April 2021 neuropsychological evaluation; input from CSE members, which included both parents, the Winston Prep dean, and the Winston Prep Focus/general education teacher; a February 2023 letter from the student's private psychologist; Winston Prep report cards; and Winston Prep progress reports (see Dist. Ex. 5 at pp. 4-5; see also Dist. Ex. 4 at p. 3). More specifically, at the impartial hearing the CSE chairperson confirmed that the June 2023 CSE had the student's spring and fall Winston Prep progress reports, his reports cards, and his private psychologist's letter available at the meeting (see Tr. pp. 32-33; see generally Dist. Exs. 7-8). With respect to the April 2021 neuropsychological evaluation report, the CSE chairperson explained that it was "not reviewed from beginning to end," but it was "referenced in talking about [the student's] strengths and weaknesses," and it was "used to make some decisions" (Tr. p. 34; see generally Dist. Ex. 15). She confirmed, however, that the April 2021 neuropsychological evaluation had been "previously reviewed by a district CSE" (Tr. p. 34).

On cross-examination, the CSE chairperson candidly stated that, prior to the June 2023 CSE meeting, she had never met the student or observed him in class and she had also never assessed him (see Tr. pp. 72-73). However, she testified that, prior to the June 2023 CSE meeting, she reviewed the student's "prior IEPs," his "report cards," the April 2021 neuropsychological evaluation report, the February 2023 letter written by the private psychologist, progress reports from Winston Prep, and the student's "last triennial evaluation reports" (Tr. pp. 28-29; see generally Dist. Exs. 14-15; 18-20).¹⁴ She further testified that, at the June 2023 CSE meeting, the dean of Winston Prep and the Focus teacher from Winston Prep both shared information about the student, as well as the parents (see Tr. pp. 30-31; Dist. Ex. 5 at pp. 1-2). In sum and substance, Winston Prep participants at the CSE meeting indicated that the student had "made tremendous growth," and academically, the student had "made a lot of progress"; however, the Winston Prep participants also noted that they continued to have "concerns" about the student's self-regulation, which "was getting better recently" (Tr. p. 31; see Dist. Ex. 5 at pp. 1-2). According to the CSE chairperson, the parents agreed that the student had "made a lot of progress," including improving in his ability to "do more homework at home" (Tr. pp. 31-32; see Dist. Ex. 5 at p. 2). The parents also shared their concern about the student's "social skills, executive functioning," and how "really hyper aware [the student was] of his environment, socially and just his surroundings, [and] how he was aware more and more of being different" (Tr. p. 32; see Dist. Ex. 5 at p. 2).

In his decision, the IHO repeatedly faulted the district witnesses for their lack of personal familiarity with the student. However, reliance on that standard was error, because the consideration of evaluative assessments and data under IDEA is not merely a contest to decide which side has greater familiarity with the student. It should not have been surprising to the IHO that the Winston Prep staff might have been more familiar with the student at the time of the June 2023 CSE meeting since the parents had removed the student from the public school and unilaterally placed him two years earlier, and it was unrealistic to expect the district staff to have greater familiarity with the student. Furthermore, as noted above, those with the greatest familiarity with the student, namely the parents, participated in the CSE meeting and provided

¹⁴ The hearing record does not include copies of any of the student's previous IEPs or report cards issued by the district during the student's attendance through eighth grade (see generally Tr. pp. 1-478; Parent Exs. A-Y; Dist. Exs. 1-21).

their input. Neither the analysis of whether the June 2023 CSE had sufficient evaluative information to develop the student's IEP nor the related determination of whether the district offered the student a FAPE for the 2023-24 school year relies on specific individuals having personal knowledge about the student. Accordingly it was error for the IHO to rely on this fact as a basis for striking down the district's proposed programming.

With respect to developing the June 2023 IEP and the CSE's reliance on the April 2021 neuropsychological evaluation, 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 Aptakistic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

Overall, the evidence in the hearing record reflects that, consistent with many of the IHO's specific findings, the June 2023 CSE did not adopt wholesale the ultimate recommendations in the April 2021 neuropsychological evaluation report with regard to class size, the frequencies of the speech-language therapy services and counseling services, and executive functioning instruction. However, at the impartial hearing, the CSE chairperson described the April 2021 neuropsychological evaluation report as "a piece of information used to make recommendations" (Tr. p. 82). Rather than relying solely on the information within that evaluation report, the CSE chairperson testified that at the time of the June 2023 CSE meeting "mostly used" verbal input at the meeting "based on reports from Winston Prep, parent concerns, needs and data" (Tr. pp. 82-83). She also testified that the data from the April 2021 neuropsychological evaluation was not "presented at the meeting," but rather, the CSE had the report, as well as the student's "grades from Winston Prep" as data (Tr. p. 83). In addition, the CSE chairperson clarified that the student's testing scores listed in the IEP were used because the CSE did not "have access to reports," but had "access to the numbers" (Tr. pp. 83-84). The CSE chairperson testified that the CSE did not need any additional testing to make recommendations, other than what was listed in the student's IEP, and the question of whether additional testing was needed had been "addressed at the meeting" (Tr. p. 84).

When asked by the IHO why the district had not evaluated the student prior to the June 2023 CSE meeting, the CSE chairperson explained that a CSE had not been held the "year that some agreement was made" between the district and the parents (Tr. p. 118). She further testified that if the district had held a CSE meeting and if the student had been in the district, "we would have done those things" (Tr. pp. 118-19). In addition, the CSE chairperson testified that she had not reached out to the parents prior to the June 2023 CSE meeting for additional testing of the

student because the district had the April 2021 neuropsychological evaluation report, which, according to the chairperson, was not "very old," and moreover, although "there [wa]s testing that need[ed] to be done, it c[ould not] be done before the [student] [wa]s 16 and a half" years of age and that that testing would be used for postsecondary planning (Tr. p. 119).

However, the CSE chairperson noted that the June 2023 CSE discussed conducting additional testing "over the summer to get more information for him coming back," but that its purpose was related to postsecondary planning and not for "his program" (Tr. p. 119). The IHO then questioned why the district did not seek an updated social history or classroom observations of the student when the June 2023 CSE meeting about the student occurred two years after the completion of the April 2021 neuropsychological evaluation (*id.*). In response, the CSE chairperson testified that, since it was the student's "triennial year," it was discussed at the CSE meeting, but because certain assessments could not be administered until the student was a certain age in order to use that testing for postsecondary planning, her "thinking, right or wrong," was that "this was going to be part of the plan for moving forward, whether he came back to the [district] or not" (Tr. pp. 119-20).

The IHO responded that he was not necessarily speaking to the CSE chair about developing a transition plan for the student (*see* Tr. p. 121). Instead, he was concerned that the June 2023 CSE was aware that the student would be moving from "almost certainly a small classroom setting to a potentially significantly larger one," and thus, he questioned why the district had not evaluated the student on this basis (Tr. pp. 121-22). The CSE chairperson responded that, given the continuum of services offered by the district, the district "would have done those things as he came back," and further stated that "it [wa]sn't as if we were recommending that [the student] get the most restrictive or supportive program that [the district] ha[d] to offer" (Tr. p. 122). She continued to explain that, if testing was completed prior to the start of the school year, the results would be used to modify the student's "continuum of services," such as "tweaking" the student's overall program and how the district was providing services to the student (Tr. pp. 122-23). The CSE chairperson acknowledged that the district had "more supportive classes in science and math" for the student and the CSE "could have given him more support"; however, she was attempting to "balance a program based on what the student wanted and wishing to be part of the mainstream and what the parents' goals were based on his needs" (Tr. p. 123).

The CSE chairperson also testified, however, that the June 2023 CSE had an "accurate picture of the student and the student's weaknesses and student's deficits" without additional testing (Tr. p. 127). With respect to the testing to be completed, the CSE chairperson clarified that it was "to help the student acclimate and transition to a new environment" (Tr. p. 128). She then specified that when students applied for postsecondary services, the "testing need[ed] to be done at a certain age" or it could not be used and "new testing" would be requested (Tr. p. 129).

Next, the CSE chairperson testified that, at the June 2023 CSE meeting, the CSE discussed completing the student's triennial evaluation in summer, rather than waiting (*see* Tr. p. 130). According to the chairperson, moving the triennial up would allow them to "get to know [the student] personally, to see if any other strengths or weaknesses, if anything could have possibly been missed that needed to be adjusted" (*id.*). She further indicated that it would provide a "good opportunity to get to know a student, to transition him back to the school and just to leave no stone

unturned" (*id.*). More specifically, the CSE chairperson noted that it would provide information about his "needs and his wants as he [wa]s entering adulthood" (*id.*).

With respect to transition planning, the CSE chairperson acknowledged the requirement to begin such at age 14, and she testified that, at the district, they began the process "from eighth grade going into ninth grade" (Tr. pp. 131-32). The CSE chairperson also testified that she had "assumed" the student was working on that at Winston Prep; however, "at the meeting, [the CSE] didn't get anything from Winston Prep" and therefore, the CSE "did the best" it could with the information it had (Tr. p. 133).

As discussed previously, the student was scheduled to undergo a mandated three-year reevaluation before the 2023 calendar year concluded. Although that schedule had not yet run its course at the time the annual review was conducted and IEP was drafted, the IHO improperly conflated facts related to the anticipated upcoming reevaluation to hold that CSE failed to consider adequate evaluative information at the time of the annual review. The fact that the CSE chairperson was mindful that a reevaluation was anticipated in the upcoming months and that she discussed her upcoming strategies for complying with that procedural requirement imposed by the IDEA during the impartial hearing did not undermine the district's compliance with the annual review requirements at the time the CSE formulated the student's IEP in June 2023, and the IHO's determinations to the contrary must be reversed.

C. June 2023 IEP

1. Educational Placement

With respect to the student's educational placement for the 2023-24 school year, the district contends on appeal that the IHO ignored the district's LRE mandate and evidence demonstrating that the recommended placements in 15:1 special classes for ELA and social studies, together with general education settings for mathematics, science, and electives, the support of the FSP program and daily resource room, reading instruction, and related services, offered the student a FAPE in the LRE.

State regulation describes a 15:1 special class placement as the "maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). Additionally, State regulation notes that resource room programs "shall be for the purpose of supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]).

Initially, a review of the June 2023 IEP reflects that, in reaching the educational program recommendations, the CSE considered that the student might be transitioning back to the district from a "very small ratio program," and that the 15:1 special class placement for ELA and social studies had been considered and discussed together with daily resource room in a 5:1 student-to-teacher ratio, as well as recommending reading instruction every other day in a small group (Dist. Ex. 5 at p. 2). As noted in the IEP, the resource room would "support the student with study skills" and "reinforce content from his academic classes, particularly the general education science and math classes" (*id.*). The June 2023 CSE also noted in the IEP that the FSP program was discussed,

and the student would "have access to this counseling service daily on an as needed basis in addition to CSE mandated counseling services" (id.). As reflected in the meeting information section of the IEP, the FSP program used "research based interventions rooted in practices of [DBT], whereby students practice[d] skills of mindfulness, distress tolerance, emotional regulation, [and] interpersonal skills" (id.). In addition, these skills were "designed to help students with social/emotional struggles [to] discover their strengths and increase their self-esteem" (id.). As reflected in the June 2023 IEP, the FSP program would be staffed with a school psychologist and a teaching assistant, and a student could access the FSP program throughout the school day when "feeling dysregulated" (id.). Next, it was noted in the IEP that the student was not currently receiving "counseling services or social skills support," but he would receive "these supports through direct counseling, speech[-]language therapy, and through the mentoring program" at the district (id.). It was further noted that the student was working "toward a high school diploma" (id.).

In describing the student's needs with respect to his involvement in and progress in the general education curriculum, the June 2023 IEP noted that the student's delays in "inferential reading comprehension skills, written expression, pragmatic language skills, and social/emotional skills" affected his school performance (Dist. Ex. 5 at p. 9). To address the student's management needs, the June 2023 IEP indicated that the student's delays required ELA and social studies "to be taught in a small teacher-to-student ratio program with minimal distractions within a regular school environment in order to academically progress" (id.). In addition, it was noted that the student required the "additional support of [r]esource [r]oom to be successful in the regular education classroom (i.e., math and science)" (id.).

At the impartial hearing, the CSE chairperson testified that, based on the student's areas of weakness, which were primarily "verbal," the June 2023 CSE recommended a 15:1 special class placement for ELA and social studies, a reading program, speech-language therapy, group and individual counseling, access to the FSP program, and resource room support (Tr. pp. 51-52).¹⁵ She explained that the small classes for ELA and social studies were self-contained and capped at a maximum of 15 students, but typically there were no more than 10 students in the class, with a special education teacher and a teaching assistant in the room (see Tr. p. 52). According to the CSE chairperson, the June 2023 CSE recommended the district high school as the location within which to implement the student's recommended program (see Tr. p. 69). She explained that this decision was based on the student's needs and abilities, as well as "all of the data and all of the comments" made at the meeting and because the district high school represented the student's LRE (id.).

¹⁵ At the impartial hearing, the student's mother was asked whether she expressed any concerns or dissatisfaction with the June 2023 CSE's program recommendations, which included a 15:1 special class placement, as well as general education settings, related services, reading instruction, and resource room (see Tr. p. 458). The parent testified that she was "concerned" about both the 15:1 special class placement and the general education setting, adding that she "wasn't expecting that, at all" (id.). The parent did not specifically state, however, whether she expressed those concerns to the June 2023 CSE (id.). At the impartial hearing, the student's mother explained that she was concerned because she knew the student would "flounder there," and he had "already shown that he c[ould]n't handle that" (id.). Upon review, the June 2023 IEP does not include any notations documenting any concerns voiced by the parents at the CSE meeting with respect to these placement recommendations (see generally Dist. Ex. 5).

Based on her review of the student's previous IEPs before the June 2023 CSE meeting, the CSE chairperson found the student to be a "bright young man that ha[d] some emotional dysregulation" and "extremely slow processing" (Tr. p. 74). She also noted that the student got "distracted" and had "difficulty with friendships"; however, the student appeared to do "well one-to-one" with his teachers (*id.*). Based on her review of the student's previous IEPs, the CSE chairperson testified that, in the past at the district, he had been recommended to attend a "combination of small classes and co-teaching classes" (Tr. p. 75).¹⁶ She also recalled that the student had "struggled emotionally" in the district and that, as a result, "programmatic changes" had been made (Tr. p. 77). More specifically, she testified that the student had been "moved from a larger mainstream class to a smaller supportive class" (Tr. pp. 77-78). When questioned by the IHO about this testimony, the CSE chairperson clarified that the student's struggle had been related to his "emotional regulation" and that "sometimes . . . different environments c[ould] be more helpful than other environments" (Tr. pp. 78-79). When cross-examination resumed, the CSE chairperson was asked whether the student had been moved to a "smaller class to, in part, deal with his struggle," and the chairperson responded "[n]o" (Tr. p. 79). She explained that the student had been having difficulty in "one class" due to his "emotional dysregulation," and it was felt, at that time when the student was in eighth grade, that a "supportive smaller classroom environment would be better for him" (Tr. pp. 79-80). She added that the student's difficulty was not "about his ability," rather, it was about the student "being confident and feeling success" (Tr. p. 80).

With regard to the Winston Prep documents before the June 2023 CSE, the CSE chairperson had gleaned that, while the student was "doing well" academically, the "concern continued to be social-emotional" (Tr. p. 80). She understood that the student's classes at Winston Prep were comprised of less than 10 students, and the CSE chairperson confirmed that, within those smaller classes, the student still presented with a need for "support socially and emotionally" (Tr. p. 81). Given this information, the CSE chairperson was asked to confirm her understanding of the student at the time of the June 2023 CSE meeting, which included information that he was "coming from a classroom of less than [10 students]," he did "well in supportive smaller classroom settings," and he did "well with his teachers one-to-one" (Tr. p. 82). In response, the CSE chairperson testified, "[n]o," rather, she understood the student as presenting with "emotional regulation issues here in middle school and d[oin]g well academically here" and similarly, he was now in a "small setting, and he [wa]s doing well academically there, but [he] still ha[d] the emotional-social issues going on [at Winston Prep] also" (*id.*).

The CSE chairperson was asked about the recommendation in the April 2021 neuropsychological evaluation, which noted that the student "should be educated in a class of no more than [10] peers," as well as input from Winston Prep indicating that the student benefitted from the "small group size" in the context of the CSE's decision to depart from the private psychologist's recommended class size (Tr. p. 84; Dist. Ex. 15 at p. 26). She noted that the student benefitted from the "small group size" at the district, but confirmed that the April 2021 neuropsychological evaluation report included that specific recommendation (Tr. pp. 84-85). When pressed on the issue of the June 2023 CSE's decision to depart from that specific

¹⁶ The CSE chairperson testified that the student's co-teaching classroom, which was a mainstream setting with two teachers, had approximately 20 to 22 students in the classroom on average, but she could not "speak to . . . what it would be today" (Tr. p. 75).

recommendation, the CSE chairperson explained that, based on her experience, the "cohort you [we]re with ma[de] a big difference as to what your recommendations [we]re" (Tr. p. 85). In this instance, the CSE chairperson perceived the student as struggling with social/emotional issues and dysregulation both in the district's middle school and at Winston Prep, and as performing well academically in both the district's middle school and at Winston Prep (see Tr. p. 86).¹⁷ And given the district's obligation to educate students in the LRE, together with information indicating that the student performed "the same" in both settings, the CSE chairperson testified that she would "never recommend such a restrictive environment to get the same results" (Tr. p. 86). According to the CSE chairperson, this was especially true here, when the "parents' goals were for [the student] to go to college and to hold down a job and to be successful" (id.). Additionally, the CSE chairperson testified that "to not give [the student] access to a mainstream environment . . . would have been irresponsible on my part" (id.).

Next, the CSE chairperson confirmed that, during eighth grade at the district, the student attended a combination of 15:1 special class placements and a general education placement with ICT services (see Tr. p. 88). The student also participated in general education placements for specials, such as art and physical education, and, according to the CSE chairperson, he had done well both academically and social/emotionally because the elective classes were "less stressful settings" (Tr. p. 88).

As noted by the CSE chairperson, resource room provided the student with access to a special education teacher for one period per day to work on "specific goals related to study skills, organization, specific strengths and weaknesses, [and] executive functioning for students to be successful" (Tr. p. 38). According to the chairperson, the special education teacher in the resource room monitored "those goals" and gathered data, and communicated with teachers about the student's progress (see Tr. pp. 38-39). With respect to academic support in content areas, the special education teacher in the resource room knew "all of the assignments" and "tests" the student had and the teacher would "work on specific skills to make sure that he [wa]s successful in his other classes" (Tr. p. 39). The CSE chairperson also testified that, during resource room, the "organization happen[ed]" with regard to homework (id.). The IEP itself noted updated information from Winston Prep in June 2023 that "math is a real strength for the student. He has become very confident and self-assured in his abilities in this area. He is able to follow the steps in problem solving; some computational challenges continue" (Dist. Ex. 5 at p. 1). It was reasonable for the CSE to provide the student with access to his nondisabled peers in classes where he was stronger academically and then provide resource room in a 5:1 ratio to supplement the student's instruction in the general education environment as necessary in the event that social emotional dysregulation manifested in the general education environment. The strategy balanced the need for appropriately supportive instruction in specialized classes that were individualized to

¹⁷ The CSE chairperson testified that she formulated this opinion about the similarity of the student's academic performance at the district and at Winston Prep based on the student's grades (see Tr. p. 86). In addition, she clarified that, based on Winston Prep reports and input at the June 2023 CSE meeting, she formed the opinion that the student continued to struggle with social/emotional issues and regulating his emotions, which interfered with his academic performance (see Tr. pp. 86-87). According to the CSE chairperson, this opinion, however, did not mean that she believed that the student had not made any progress in his ability to regulate his emotions while attending Winston Prep (see Tr. p. 87). She further acknowledged that, based on what was reported by Winston Prep, the student had made progress in regulating his emotions (see Tr. p. 88).

his needs while also providing some of his education alongside his nondisabled peers to the maximum extent appropriate (see Newington, 546 F.3d at 120). The IHO recounted testimony related to restrictiveness in several instances in the decision (see, e.g. IHO Decision at pp. 11, 13, 14), but failed to conduct an analysis of the proposed programming in terms of the IDEA's mandate to place the student with nondisabled peers to the maximum extent appropriate, even if that was not viewed as ideal by the parents or the private experts.¹⁸

The CSE chairperson also explained that the annual goals in the June 2023 IEP addressed the student deficit areas in reading, writing, and organization (see Tr. p. 35). With respect to the student's annual goals in reading, the CSE chairperson testified that "there was a lot of conversation about his reading ability," noting further that while the student did not exhibit issues with decoding, "his processing speed [wa]s very slow" and he often gave the "wrong meaning for vocabulary words" (Tr. pp. 39-40). In discussing the annual goals for reading, the CSE chairperson testified that the CSE recommended a reading program for the student because he had "many things going on," such as language issues, attentional issues, an autism spectrum disorder diagnosis, very low processing speed, and difficulty with comprehension (Tr. p. 41). She explained that the June 2023 CSE's recommended reading program was "evidence-based," which the student would receive "every other day in a group of two or three students" (Tr. p. 42). According to the CSE chairperson, the student's reading needs would be "addressed in resource room," in his speech-language therapy, and in his English class (Tr. pp. 42-43).

¹⁸ To apply the principles in IDEA's LRE requirements, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (T.M., 752 F.3d at 161-67 [applying Newington two-prong test]; Newington, 546 F.3d at 119-20; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to:

- (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom;
- (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class;
- and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).

To support the student's needs in English, the CSE chairperson testified that the CSE recommended a "small class"—or a self-contained, 15:1+1 special class—in addition to the reading support (Tr. p. 43).¹⁹

Turning to the annual goals in the June 2023 IEP addressing the student's social/emotional needs, the CSE chairperson testified that the student would work on his difficulties with self-regulation in both individual and group counseling (see Tr. pp. 47-48; Dist. Ex. 5 at pp. 11-12). She also testified that with the district's new FSP program, the student would be able to go there to "work through [any conflicts or dysregulation] in the moment" (Tr. p. 48). She explained that the FSP program would have a psychologist and a teaching assistant available to students, and students could access the program to help process situations arising during the school day and they would implement the interventions and DBT taught to them during counseling services (see Tr. pp. 48-49).²⁰ According to the CSE chairperson, teachers knew which students could access the FSP program, and the students could "just leave the classroom and report to FSP" (Tr. p. 49). The student's remaining annual goals targeting social/emotional needs addressed his dysregulation and his ability to decrease anxiety and to deescalate; his difficulties with relationships, friendships, and feeling isolated; and the use of DBT skills to function and return to class (see Tr. pp. 49-51; Dist. Ex. 5 at p. 11).

The June 2023 CSE recommended program accommodations primarily to address the student's very slow processing speed, his deficits in reading, attentional issues, social/emotional and dysregulation issues, homework issues, and organizational skills (see Tr. pp. 54-59). With respect to the recommendation for access to the FPS program as an accommodation, the CSE chairperson testified that it was in response to the student's "inability to regulate himself and [his] difficulty emotionally during the school day" (Tr. p. 59). Similarly, the testing recommendations in the June 2023 IEP addressed the student's issues with processing speed, his attentional and dysregulation issues, and his sensitivity to noise (see Tr. pp. 59-62).

Next, the CSE chairperson testified that the June 2023 CSE discussed the student's postsecondary goals and transition planning (see Tr. pp. 66-67).²¹ In speaking to the parents at the CSE meeting, the parents indicated that "they expected" the student to go to college (Tr. p. 67). The CSE chairperson also testified that, in her notes, she indicated that she was "going to invite [the district's] transition coordinator who work[ed] with [the district's] special education

¹⁹ The CSE chairperson explained that the 15:1+1 special class for English included 15 students and a teaching assistant (see Tr. pp. 45-46). According to the June 2023 IEP, the CSE recommended a 15:1 special class for ELA and social studies (see Dist. Ex. 5 at p. 12).

²⁰ At the impartial hearing, the student's mother testified that, following the June 2023 CSE meeting, she asked the student's psychiatrist whether DBT was something she should be pursuing for the student (see Tr. pp. 459-60). The psychiatrist purportedly told the parent that she did not think "that would be a good fit for him" and that it "would be really a stretch for him" (Tr. p. 460). However, a Winston Prep 2023 spring progress report indicated that the student's self-regulation issues were being "addressed in Focus through the use of select DBT skills such as interpersonal effectiveness, acting in a wise mind, and distress tolerance" (Dist. Ex. 12 at p. 1).

²¹ According to the CSE chairperson, the student had been invited to attend the June 2023 CSE meeting (see Tr. p. 100).

population . . . to the next meeting had" the student returned to the district (*id.*).²² With respect to the student's transition needs, the CSE chairperson testified that, "since college was the expectation, and college [wa]s a mainstream environment, transitions, especially with students with his diagnosis, [we]re extremely important" and therefore, it was "very important" for the student to "acclimate[e] to a more mainstream setting" and to be "successful in that goal" (Tr. p. 68).

The evidence above demonstrates that the CSE balanced the need to provide the student with two types of supportive specialized environments of a special class and resource room that was commensurate with his academic abilities, and also factored in appropriate level of access to nondisabled peers in a general education setting for a portion of the day with an eye toward the gradual movement toward the student's postsecondary goals of being in a college setting. The evidence overall shows that the CSE engaged in careful planning that was individualized to the student's strengths and weaknesses, and the evidence does not lead me to the conclusion that the CSE offered an inappropriate placement to the student. I will turn next to the parties dispute over related services.

2. Related Services

a. Speech-Language Therapy

In his decision, the IHO found that the June 2023 CSE ignored the recommendation for daily speech-language therapy services when making the recommendation for two 30-minute sessions per week in a group setting (*see* IHO Decision at p. 43).

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]).

Generally speaking, it is undisputed that the student requires some level of speech-language therapy to address his needs.²³ In the June 2023 IEP, the CSE noted that although the student was not then-currently receiving speech-language therapy services at Winston Prep, he continued to have "challenges with respect to social communication" (Dist. Ex. 5 at p. 7). The June 2023 CSE also noted that the student "struggle[d] in class and also in unstructured moments with peers and off topic comments and using humor at inappropriate times" (*id.*). The CSE indicated that the student "expressed a desire to connect with others, but his attempts often f[e]ll flat and d[id]n't match the social context" (*id.*). At that time, the student was becoming "more aware of these

²² After providing this response, the parents' attorney moved to strike the statement (*see* Tr. p. 67). The IHO appeared to agree with the parents' attorney, but he did not formally strike the statement from the hearing record (*id.*).

²³ Nevertheless, the student did not receive any speech-language therapy services at Winston Prep, but he worked on "similar goals which include[d] social pragmatic skills" with his "Focus teacher" (*see* Dist. Ex. 5 at p. 1).

challenges and [was] more interested in making connections with others that [we]re meaningful," and he had "shared that he often fe[lt] left out as a result" (id.).

With regard to the student's needs in this area, the June 2023 IEP indicated that he needed to improve his "auditory attending [and] processing" skills and to "develop pragmatic language skills," which included "developing conversational skills and understanding nonverbal and nonliteral language such as tone, facial expression and body language" (Dist. Ex. 5 at p. 7).

At the impartial hearing, the CSE chairperson testified that the June 2023 IEP included recommendations for related services based on the information presented (see Tr. pp. 53-54; Dist. Ex. 5 at p. 12). In addition, the district presented a speech-language pathologist as a witness at the impartial hearing (see Tr. pp. 188-201). Although the witness acknowledged that she did not attend the June 2023 CSE meeting, she testified that the therapist who had been in attendance was no longer with the district, but the witness had reviewed the June 2023 IEP, as well as "documents provided for this hearing" to learn about the student (Tr. pp. 192-93, 198-99). In addition, the witness had contacted the "speech therapist who used to work" at the district—and who had attended the June 2023 CSE meeting—to "get a little bit more background information" about the student (Tr. pp. 193, 199; see Dist. Ex. 5 at p. 1). According to the witness, if the student had returned to the district for the 2023-24 school year, she would have been the therapist to deliver the student's speech-language therapy to him (see Tr. p. 199).²⁴

Based on her conversation with the previous speech therapist and her review of the student's June 2023 IEP and documents, she understood that the student presented with "social pragmatic concerns," as well as concerns with "processing skills" and "executive functioning" skills (Tr. p. 173). The speech-language pathologist had also reviewed the two annual goals in the June 2023 IEP related to the student's needs in speech and language, and she testified that both were appropriate for the student (see Tr. p. 174; Dist. Ex. 5 at p. 11). More specifically, the witness explained that the first annual goal targeting the student's auditory attending skills addressed his difficulty with processing skills (see Tr. pp. 194-95; Dist. Ex. 5 at p. 11). According to the witness, the second annual goal targeted the student's needs in the area of social pragmatic skills (see Tr. p. 195; Dist. Ex. 5 at p. 11). She also explained how the student's annual goals would be addressed in a group setting (see Tr. pp. 195-96).

With respect to the recommendation for two 30-minute sessions per week of speech-language therapy, the speech-language pathologist agreed that it was the appropriate frequency and duration for the student to address his needs (see Tr. p. 196; Dist. Ex. 5 at p. 12). The witness explained that, "in conjunction with the other services" in the IEP, the recommendation "would best fit his profile to meet his speech and language goals" (Tr. pp. 196-97). According to the witness, the speech-language therapy, counseling services, the FSP program, and resource room all worked together and was the "best recommendation for him" (Tr. p. 197).

Upon cross-examination, the district speech-language pathologist acknowledged that she had never worked with the student or assessed him, and her testimony had been based solely on a review of records (see Tr. pp. 198-200). The witness also acknowledged that she had reviewed

²⁴ I do not find that a change in employment circumstances of the therapist who attended the CSE is a basis to discount the viewpoints of the witness.

the April 2021 neuropsychological evaluation report and the April 2021 language evaluation report, both of which included recommendations for the student to receive "daily speech-language instruction" (Tr. p. 200; see generally Dist. Exs. 15-16). When asked whether she had reviewed any records that served as a basis to depart from the recommendations for daily speech-language instruction, the witness explained that it was not "typical" for a student with his needs to "receive daily speech at the high school level" and referenced her "current caseload" by noting that she currently had "one or two students that g[o]t speech four times weekly, and those [we]re students on communication devices who [we]re completely nonverbal" (Tr. p. 200). The witness further explained that she could "remediate" the student's deficits with the recommendation for two 30-minute sessions per week of services (Tr. pp. 200-01).

b. Counseling and the FSP Program

In this case, the IHO was not convinced by the evidence in the hearing record that the FSP program and counseling services in a small group appropriately addressed the student's social/emotional needs and, similar to the finding related to the speech-language therapy recommendation in the June 2023 IEP, the CSE's recommendations ignored the recommendation in the April 2021 neuropsychological evaluation report, which indicated that the student required "intensive 1:1 support" (IHO Decision at p. 43).

With regard to his social development, the June 2023 CSE described the student's needs by generally repeating information describing the student's speech-language needs. For example, the June 2023 IEP indicated that, although Winston Prep indicated that the student "made gains as he matured socially and emotionally," he continued to have "challenges with respect to social communication" (Dist. Ex. 5 at p. 8). In addition, the June 2023 CSE noted that the student "struggle[d] in class and also in unstructured moments with peers and off topic comments and using humor at inappropriate times" (id.). The CSE indicated that the student "expressed a desire to connect with others, but his attempts often f[e]ll flat and d[id]n't match the social context" (id.). At that time, the student was becoming "more aware of these challenges and [was] more interested in making connections with others that [we]re meaningful," and he had "shared that he often fe[lt] left out as a result" (id.). The June 2023 CSE added that the student had "been able to open up about social anxiety and [wa]s aware that his humor [wa]s not always well received," and he was "steadily progressing and showing gains in flexible thinking as well as in his ability to shift perspective" (id.).

The June 2023 CSE also reported information in the IEP obtained from the February 2023 letter written by the student's private psychologist (see Dist. Ex. 5 at p. 8). According to the letter, the student had "been seen for the past year to address issues around anxiety," and the psychologist opined that the student had made "improvements in [his] psycho-social well-being as he report[ed] that he [wa]s improving his coping skills in his current program" (id.; see Dist. Ex. 14).

In light of these needs, the June 2023 IEP indicated that the student needed to improve his "self-regulation by employing coping strategies when encountering a conflict," his ability to "identify behavioral triggers and understand the impact on his behavior," and to improve his "social interactions with peers" (Dist. Ex. 5 at p. 8). The June 2023 CSE recommended both individual (one 30-minute session per week) and small group (one 30-minute session per week) counseling services, and recommended daily access to the FSP program on an as needed basis to meet these

needs (*id.* at pp. 12-13). The June 2023 CSE also developed annual goals addressing the student's social/emotional needs (*id.* at p. 11). For example, the annual goals targeted the student's ability to "seek assistance from his teachers, counselors, or psychologist" when "experiencing a conflict (emotionally, socially, or academically)"; and to "accurately identify situations and/or thoughts" leading to negative emotions (such as "frustration, anger, anxiety, sadness") and to "explain how these triggers impact[ed] his behavior" (*id.*). In addition, the student's annual goals addressed his difficulties with peer relationships and his ability to foster positive peers relationships (*id.*). The annual goals also targeted the student's ability to "identify and appropriately use a coping skill (e.g., perspective-taking, assertive-communication, deep breathing, problem-solving, planned positive activities) to self-regulate and maintain acceptable school behavior" when he "express[ed] a negative emotion at school (e.g., frustration, anger, anxiety, sadness, impulsivity)" (*id.*).

While the meeting information section of the June 2023 IEP included a brief description of the FSP program, the student's mother obtained a more descriptive pamphlet about the FSP program from the district assistant superintendent after the June 2023 CSE meeting (*see* Tr. pp. 231, 240-41; Dist. Ex. 21 at pp. 1-2). According to the pamphlet, the FSP program was a "safe, consistent and therapeutically-centered environment which enable[d] socially and emotionally vulnerable students to remain in and connected to school" (Dist. Ex. 21 at p. 2). The FSP program "employ[ed] research-based interventions that [we]re rooted in the practices of [DBT] which allow[ed] students to practice skills and strategies so they c[ould] regulate and manage their emotions, improve interpersonal relationships and tolerate distress" (*id.*). The pamphlet indicted that the FSP program provided a "critical link between parents, staff, and outside providers," and it offered students the "necessary support, guidance and encouragement that enable[d] them to successfully engage in their academics" (*id.*). The pamphlet also described the FSP program's philosophy, the type of students who required the support of the program, and the locations and staffing of the FSP programs in the district's middle school and in the district's high school (*id.* at pp. 1-2).

At the impartial hearing, the district school psychologist assigned to the FSP program testified (*see* Tr. pp. 139-62). She explained that, as part of her duties and responsibilities as the FSP school psychologist, she provided "individual and group counseling to the students enrolled in the program" (Tr. p. 140). She also noted that she was available throughout the school day "as needed as things pop[ped] up" (Tr. pp. 140-41). When asked to describe the FSP program, the school psychologist testified that it was the "most supportive program for students who might be more emotionally vulnerable or fragile" and that it provided students with a "home base" when they needed "varying levels of support throughout the day or throughout the week" (Tr. pp. 143-44). The school psychologist noted that students could "pop in, whether they need[ed] more social-emotional support or a safe space or access to our TA here for some more of the academic support" (Tr. p. 144). She further explained that, to access the FSP program, "all of [the students'] teachers [we]re aware that [the students] [we]re in FSP," and the students could "take breaks and come to FSP" (Tr. p. 152). According to the school psychologist, some students were "comfortable using a laminated pass" to take a break, others might excuse themselves to "go to the restroom or get a drink of water" and access the FSP program; essentially, it depended on the student (Tr. p. 152). She also indicated that some students would email her and the TA to ask if someone could go to the student and help the student to take a break (*see* Tr. p. 153). In addition, the school psychologist testified that, at times, teachers had also "prompted gently to say, . . . , this might be a good time to use FSP" or "do you feel like you need to go to FSP" (Tr. p. 153).

With respect to this student and based on a review of documents, including the student's June 2023 IEP, the FSP school psychologist testified that the annual goals in the IEP were appropriate (see Tr. pp. 153-54). She explained that, having reviewed the student's progress reports, the annual goals were appropriate because "self-regulation came up frequently, as well as how it impact[ed] his ability to interact with his peers in an expected way and regulate his emotions" (Tr. p. 154). The school psychologist also confirmed that the recommended counseling services in the June 2023 IEP were an "appropriate amount of support" to start with, and "if there was a need to increase that, that would definitely be considered and discussed" (Tr. pp. 154-55). She also confirmed that the recommendation to participate in the FSP program was appropriate for the student (see Tr. p. 155).

During cross-examination, the FSP school psychologist confirmed that she, herself, had not "personally convey[ed] any of the information regarding the FSP program" to the parents (Tr. p. 157). She also confirmed that whatever information had been presented about the FSP program during the June 2023 CSE meeting had been memorialized in the IEP, and furthermore, she had not attended the June 2023 CSE meeting (*id.*). With respect to her understanding of the student's deficits, which the FSP school psychologist identified as self-regulation, social challenges, academic challenges (i.e., inferencing and comprehension), and executive functioning challenges, she understood based on her review of records that the "daily meetings through the focus group" had been helpful to the student (Tr. pp. 158-59). When asked if the June 2023 IEP provided the student with "any kind of daily one-to-one touch base" similar to the Focus group at Winston Prep, the school psychologist testified that the "access to the FSP room daily would entail that" (Tr. p. 159). She also testified that the student had daily resource room support and he had improved in his ability to self-advocate (*id.*). Additionally, the FSP school psychologist noted that the FSP program also had a TA, and the TA could support the student's executive functioning deficits, which would have also been more directly addressed by the student's resource room teacher (see Tr. pp. 159-60). As part of the FSP program, the school psychologist noted that students had to "fill out a daily goal sheet acknowledging what academic work they ha[d] to complete and their plan for completing it," and both she and the TA "regularly" communicated with teachers and the resource room teacher (Tr. p. 161).

While the parents may believe that the setting at Winston Prep was the best environment for the student for the 2023-24 school year, it was not necessary for the district to recreate that precise environment in order to offer the student a FAPE (*M.E. v. New York City Dep't of Educ.*, 2024 WL 1514299, at *5 [S.D.N.Y. Apr. 8, 2024]; *M.C. v. Mamaroneck Union Free Sch. Dist.*, 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; *Z.D. v. Niskayuna Cent. Sch. Dist.*, 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]). More modestly, the evidence shows the June 2023 CSE addressed the student needs in an individualized manner and his IEP was reasonably calculated to enable the student to receive educational benefits in light of his circumstances, and it did so while adhering to the mandate that the student be educated in the LRE.

VII. Conclusion

While the IHO provided a lengthy rationale related to the facts in this proceeding, his conclusions that the CSE was required to conduct a reevaluation of the student prior to June 2023 and lacked sufficient information about the student when conducting an annual review were error. Furthermore, the IHO did not conduct an adequate analysis of the district's responsibility to offer

appropriately supportive programming while adhering to the IDEA's LRE requirements. Having determined that the evidence in the hearing record leads to the conclusion that the district did not deny the student a FAPE, the necessary inquiry is at an end, and it is not necessary to reach a determination of whether Winston Prep was an appropriate unilateral placement for the 2023-24 school year or whether equitable considerations supports the parent's requested relief (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the [parties'] remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated May 4, 2024, is modified by reversing that portion which found that the district failed to offer the student a FAPE in the LRE for the 2023-24 school year; and,

IT IS FURTHER ORDERED that the IHO's decision, dated May 4, 2024, is modified by reversing that portion which ordered the district to reimburse or directly fund the costs of the student's tuition at Winston Prep for the 2023-24 school year.

Dated: **Albany, New York**
 August 7, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER