



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-368

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Lawrence Union Free School District

Appearances:

Law Offices of Lauren A. Baum, PC, attorneys for petitioners, by Kristen M. Chambers, Esq.

Guercio and Guercio, LLP, attorneys for respondent, by Barbara P. Aloe, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition at The Shefa School (Shefa) for the 2022-23 school year. The district cross-appeals from that portion of the IHO's decision which found that Shefa was an appropriate unilateral placement and that equitable considerations favored the parent. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student in this case attended the Hebrew Academy of Long Beach (HALB) for the 2021-22 school year (fifth grade) (Dist. Ex. 9 at p. 1).

A subcommittee on special education convened on March 31, 2022 for the student's annual review and to review a reevaluation of the student, determined the student was eligible for special education as a student with a speech or language impairment, and developed an IESP for the student for the 2022-23 school year with an implementation date of September 1, 2022 (see Dist. Ex. 3).¹ The subcommittee noted that the parents intended to have the student continue at HALB

¹ The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

for the 2022-23 school year (id. at p. 2).² The subcommittee recommended one 40-minute period per day of a 5:1 resource room program with two 30-minute sessions per week of small group speech-language and one 30-minute session per week of small group counseling services (id. at p. 9). The subcommittee also recommended daily supplementary aids of positive reinforcement, refocusing and redirection, language simplified, check for understanding, copy of class notes, and use of a graphic organizer (id.). The IESP indicated that the student was paternally placed in a nonpublic school (id. at p. 11).³

On August 1, 2022, the parent signed a district form which indicated that the student would attend HALB for the 2022-23 school year (Dist. Ex. 44).

The parent signed a contract with Shefa on August 30, 2022 for the student's enrollment for the 2022-23 school year (see Parent Ex. J).⁴

On August 31, 2022, the parent signed the same district form as was sent on August 1, 2022 titled "Non Public School Placement Letter"; however, the August 31, 2022 letter indicated that the student would be attending Shefa for the 2022-23 school year (Dist. Ex. 23).⁵ The document indicated that signing the form relieved the parent of their "obligation to send a letter (due June 1st) to the" district stating that the student would be "attending a non-public school for the 2022-2023 school year at [the parent's] own expense" (id.).

On September 1, 2022, the district notified the parents of a CSE meeting scheduled for the morning of September 2, 2022 by emailing the parent a copy of the notice of meeting and a waiver (Dist. Ex. 26 at p. 3). On the same day, the parents signed the district form indicating that they waived their right to have five-day's notice prior to a CSE meeting (Dist. Ex. 38).

The CSE convened on September 2, 2022 (Dist. Ex. 4 at p. 1). The meeting information indicated that the student had previously attended HALB, the parents completed paperwork indicating that the student would be attending Shefa at their own expense, and the parents had

² The IESP indicated that the meeting was to review the student's three-year reevaluation as an annual review (Dist. Ex. 3 at p. 1). The evaluations listed were: March 2022 standardized test results; March 2022 annual review educational evaluation summary; a March 2022 classroom observation; a March 2022 psychological reevaluation; a March 2022 social history; a March 2022 annual counseling report; a March 2022 speech-language reevaluation; a February 2022 teacher report; a December 2021 report card; a December 2021 educational reevaluation; and the prior IEP from April 2021 (id. at p. 3).

³ Although the March 2022 IEP indicates that the meeting was held by a subcommittee on special education, a prior written notice dated March 31, 2022, indicated that the CSE met that date and recommended the student continued to be eligible for special education services (see Dist. Ex. 6). The prior written notice also indicated that the parent had previously received procedural safeguards and provided a contact number if they needed an additional copy (id. at p. 2). For ease of reference, the remainder of this decision will refer to the March 2022 meeting as a CSE meeting.

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

⁵ In an email to the parent dated August 31, 2022, the district requested that the parent sign and return an attached form (Dist. Ex. 24 at p. 3). The parent responded to the district's email on August 31, 2022 with an attachment named "JUNE 1st LETTER 22-23: (id. at p. 1).

reached out the district regarding busing to Shefa (id.). The meeting information also indicated that the parents agreed that the student needed a more restrictive placement (id. at p. 2). The CSE developed an IEP for the student, and recommended daily, 47-minute 15:1+1 special classes in math, language arts, social studies, and science with two 30-minute sessions of small group speech-language therapy per week and one 30-minute session of small group counseling services per week (id. at p. 9). The CSE also recommended supplementary aids and supports (id.). The IEP noted that the student was parentally placed in a nonpublic school (id. at p. 11).⁶

In an email sent later in the afternoon on September 2, 2022, the parents notified the district that the student would be attending Shefa for sixth grade, as he was not making progress at HALB (Parent Ex. B). The parents indicated that they would be seeking funding for the student's program (id.).

In an email dated September 8, 2022, the parent requested to visit the district's middle school special education program prior to an upcoming CSE meeting scheduled for the following Monday (Dist. Ex. 30). District staff confirmed the parent could "visit the recommended class placement," and informed the parent of the right to cancel the CSE meeting (id.). The parent responded and requested that the meeting be cancelled and rescheduled for after a visit to the proposed placement (id.).

On September 16, 2022, the district invited the parents to attend a CSE meeting on September 21, 2022 and on September 18, 2022, the parent signed a district document, waiving the right to five-day notice prior to the upcoming CSE meeting (Dist. Exs. 32; 39).

The CSE reconvened on September 21, 2022 for a requested review with the CSE chairperson noting that the purpose of the meeting was to respond to the parents' September 2, 2023 email (see Dist. Ex. 5). The meeting information noted that the parents indicated that they did not believe the 15:1+1 special class program was appropriate and that the different public school placements they visited were not appropriate (id. at p. 2). According to the meeting information, the school psychologist explained that the CSE could not recommend Shefa because it was not a State-approved school (id.). The CSE made modifications to the student's program modifications and accommodations, testing accommodations, and an annual goal, and continued to recommend daily, 47-minute 15+1:1 special classes in math, language arts, social studies, and science with two 30-minute sessions of small group speech-language therapy per week and one 30-minute session of small group counseling services per week (compare Dist. Ex. 4 at p. 9, with Dist. Ex. 5 at p. 9). The CSE added one 30-minute session of individual speech-language therapy per week and one 30-minute session of individual counseling per week (Dist. Ex. 5 at p. 9). The IEP noted that the student was paternally placed in a nonpublic school and required transportation per special education transportation law (id. at p. 12).⁷

⁶ A prior written notice dated September 2, 2022, indicated that a CSE meeting was held on the same date and that the CSE recommended that the student continue to receive special education services (see Dist. Ex. 7). The prior written notice indicated that the parents had previously received procedural safeguards and provided a contact number if they needed an additional copy (id. at p. 2).

⁷ A prior written notice dated September 21, 2022, informed the parents of the September 21, 2022 CSE recommendations (see Dist. Ex. 8). The prior written notice indicated that the parent had previously received

After the CSE meeting concluded, in an email dated September 21, 2022 the parent attached a recommendation letter from the student's private speech therapist (Dist. Exs. 34; 43; see Parent Ex. C).⁸ The district confirmed receipt of the letter, including that it was sent after the CSE meeting had ended, and indicated that the CSE would schedule another meeting to review the letter (Dist. Ex. 35).

On September 29, 2022, the district invited the parents to attend a CSE meeting on October 21, 2022 (Dist. Ex. 37 at p. 1). In an email dated October 20, 2022, the district indicated that the CSE meeting scheduled for October 21, 2022 had been cancelled by the parent (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated March 24, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A).⁹ The parents raised allegations related to the sufficiency and appropriateness of the district's evaluation; the parents opportunity to participate in the development of the student's educational programs; the description of the student's present levels of performance or deficit areas; ; the adequacy of the program in identifying and addressing the student's learning and social-emotional issues; the adequacy of the recommended annual goals and short term objectives; and the adequacy of the recommended 15:1+1 special class (Parent Ex. A at pp. 1-2).

Specifically with respect to the September 2, 2022 CSE meeting, the parents contended that the CSE failed to conduct a social communication and social skills assessment, and denied the parents meaningful participation by failing to consider or discuss the parents' concerns regarding the student's reading deficits, lack of progress, and need for reading interventions (Parent Ex. A at pp. 2-3). Turning to the CSE recommendations, the parents asserted that the present levels of performance were insufficient as they did not provide a "baseline" from which progress could be measured; the annual goals were not sufficient as they did not address all of the student's academic, social/emotional, language/communication, and behavioral needs and there were no goals to address phonological awareness or reading fluency; the reading and writing goals were vague and not appropriate; the IEP did not include appropriate supports and services; and the 15:1+1 special class recommendation was insufficient and not appropriate (id. at p. 3). The parents further noted that following the September 2, 2022 CSE, they observed the recommended school location and found that it was too large and could not provide the student with sufficient 1:1 and small group instruction raising further concerns related to the functional levels of the other students in the class and the lack of a social/emotional learning curriculum (id. at p. 4).

procedural safeguards and provided a contact number if they needed an additional copy (id. at p. 3).

⁸ The hearing record contains duplicate copies of some exhibits including the private speech therapist's recommendation letter. For purposes of this decision, only the parent's exhibit will be cited to when referring to exhibits where there are duplicates. The IHO is reminded of her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

⁹ The district also entered a copy of the due process complaint notice into the hearing record (see Dist. Ex. 1). For the sake of clarity, the parent exhibit will be referred to.

In relation to the September 21, 2022 CSE meeting and resultant IEP, the parents reiterate the same allegations as raised regarding the earlier CSE meeting (Parent Ex. A at pp. 4-5). The parents further asserted that following the September 21, 2022 CSE, they submitted new information and the CSE failed to reconvene to review the new information (id. at p. 5).

As relief, the parents requested a determination that the student was denied a FAPE for the 2022-23 school year, that Shefa was an appropriate placement for the student, and that they be awarded funding/reimbursement for the student's tuition expenses, inclusive of transportation costs, at Shefa for the 2022-23 school year (Parent Ex. A at p. 6).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 11, 2023 and concluded on March 12, 2024 after six days of proceedings (see Tr. pp. 1-950). In a decision dated July 31, 2024, the IHO found that the student was offered a FAPE for the 2022-23 school year as the IEPs were procedurally and substantively sufficient (IHO Decision at pp. 25, 36).

For the March 31, 2022 CSE meeting, the IHO held that the district met its legal obligations, noting that the meeting was a reevaluation with numerous recent evaluations reviewed (IHO Decision at p. 26). The IHO also credited the "detailed" testimony of the CSE chairperson and indicated that, at the time of the meeting in March, the parents intended to continue the student at HALB (id.).

As to the September 2, 2022 CSE meeting, the IHO determined that the meeting was held to address the parents' concerns about busing/transportation and the CSE chairperson provided "detailed and credible" testimony (IHO Decision at p. 27). The IHO found that the actions and choices of the CSE were "reasonable and appropriate" and noted that there had been no new information provided to the district since the March 2022 CSE (id.). The IHO held that the September 2, 2022 CSE recommended a 15:1+1 special class as a program similar to Shefa so that the student would be eligible for bussing to Shefa and the parent did not object (id. at pp. 27-28). Overall, the IHO found the September 21, 2022 IEP was appropriately created and offered the student a FAPE (id. at p. 28). The IHO also noted that a few hours after the September 2, 2022 CSE meeting, the parents provided the district with notice of their intent to seek public funding for Shefa (id.).

The IHO next found that the September 21, 2022 CSE made changes to the program based on the input at the meeting (IHO Decision at pp. 28-29). The IHO held that the parents' complaints regarding the district program were "disingenuous" and that their objections had no merit (id. at pp. 29-30). Specifically, the IHO noted that the district used a phonics-based reading program, similar to Shefa and that the speculation about class composition prior to the student being in the class was "not helpful" (id. at p. 30). The IHO then dismissed the parents' claims regarding procedural safeguards noting that the parents have participated in meetings every year since the student was three years old and that even if the district did not provide a copy of the procedural safeguards for the time period at issue, there was "no requirement that they do so every school year" and the parent testified she believed she received them at some point (id.). Moreover, the IHO found that the parents were able to clearly express their requests and objections over three meetings, and therefore, there was no merit in the assertion that the lack of the procedural safeguards impeded their right to participate (id. at p. 31).

The IHO also found that the recommendations made by the September CSEs were substantively appropriate to meet the needs of the student (IHO Decision at p. 31). The IHO found that based on the credible testimony of the district special education teacher, the program provided an "emphasis on reading, writing, and math" and would have been able to implement the student's goals (id.).¹⁰ Based on the above, the IHO found that the district met its burden and offered the student a FAPE for the 2022-23 school year (id. at p. 32).

The IHO made alternative findings and held that the parent demonstrated that Shefa was an appropriate placement for the student (IHO Decision at pp. 32-35). However, the IHO noted that she would have reduced the requested tuition for the portion of the school day that included religious instruction (id. at p. 35). As to further equitable considerations, the IHO found that the parents were cooperative and gave prompt notice to the district based on the timing of when they signed the contract with Shefa (id.). Moreover, the IHO found that the parents' signing of the form sent by the district, which was a prerequisite for transportation, did not constitute a waiver of their right to request tuition reimbursement (id. at p. 36). The IHO held that "on balance" there was no equitable bar to the parents' request for relief (id.). However, the IHO dismissed the due process complaint notice as the district offered the student a FAPE (id.).

IV. Appeal for State-Level Review

The parents appeal. The parents argue that the IHO erred in finding that the district met its burden of proving that a FAPE was offered to the student for the 2022-23 school year. The parents assert that multiple procedural violations resulted in a denial of FAPE including, that the district failed to reevaluate the student's reading skills, failed to provide them with the required procedural safeguards, misled them at the September 2, 2022 meeting by informing them the meeting was for a discussion of transportation, predetermined the September 2, 2022 IEP by basing it on the contents of the March 2022 IESP. Turning to the recommendations contained in both September 2022 IEPs, the parents argue that the 15:1+1 special class was only recommended for four periods per day, the CSE failed to recommend small group instruction for the student, and the increase of the student's class size from 5:1 resource room to the 15:1+1 special class was not appropriate. The parents further contend that the CSE deferred the development of a reading program for the student to the proposed school and the IHO improperly relied on retrospective testimony that some small group and 1:1 instruction would have been provided at the school and that some teachers in the school were trained in Orton-Gillingham. The parents argue that in carrying over the student's annual goals from the March 2022 IEP, the September 2022 CSEs predetermined the goals and made inappropriate recommendations as the student had regressed in reading in a smaller class. As to the IHO's finding regarding the unilateral placement, the parents assert that the IHO correctly held that Shefa was appropriate, but improperly found that tuition would have been reduced due to religious instruction. The parents note that they are not appealing the IHO's finding that equitable considerations weigh in their favor. The parents request an order that the district fully reimburse them for the full cost of the student's tuition at Shefa for the 2022-23 school year.

The district submits an answer and cross-appeal. The district argues that the parents' request for review should be dismissed for failure to comply with the regulations governing practice before the Office of State Review. In particular, the district asserts that the parents

¹⁰ The IHO noted that the district 15:1+1 was underenrolled and would have been a smaller class than some of the classes the student attended at Shefa (IHO Decision at p. 32).

improperly raised new allegations on appeal and that the request for review did not contain a clear and concise statement of the issues presented for review. In addition, the district asserts that the parents' request for review "relies on records, events and factual averments that are not a part of the record" and that such new records should be disregarded. As to the merits of the IHO's decision, the district contends that the IHO correctly held that that it offered the student a FAPE for the 2022-23 school year and argues for upholding the IHO's findings.

The district cross-appeals the IHO's alternative finding that Shefa was appropriate placement for the student and that equitable considerations favor the parent. The district contends that Shefa was not appropriate as it did not offer specially designed instruction or appropriate related services. The district also asserts that the student did not make progress while at Shefa. Regarding equitable considerations, the district argues that the parents never intended to place the student within the district and were never actually seeking a FAPE, just transportation. Further, the parents failed to provide 10-day notice of their intent to place the student at Shefa. The district requests that the IHO's finding it offered the student a FAPE be upheld and the IHO's findings as to the unilateral placement and equitable considerations be reversed.

In a reply and answer to the cross-appeal, the parents assert that the request for review was in compliance with the practice regulations. The parents further argue that the IHO properly found that they met their burden that Shefa was appropriate and that equitable considerations should weigh in the parents' favor. The parents repeat their request that the SRO find that the district failed to offer the student a FAPE and order full tuition reimbursement for the 2022-23 school year at Shefa.

In reply to the parents, the district asserts that a number of allegations contained within the parent's answer to the cross-appeal were raised for the first time on appeal or were not based on evidence in the hearing record.

V. Applicable Standards

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

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

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

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

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹¹

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

The district argues that the parents' request for review should be dismissed as it fails to comply with the regulations regarding practice before the Office of State Review.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

State regulation provides that a pleading must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specifies that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21,

¹¹ 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).

2024]; L.J.B. v. N. Rockland Cent. Sch. Dist., 2024 WL 1621547, at *6 [S.D.N.Y. Apr. 15, 2024]; Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]). Moreover, State regulations requires "citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 2789.8[c][3]).

Here, the district asserts that the request for review does not include a clear and concise statement of the issues presented, raises new issues, and relies on evidence that is not a part of the hearing record; however, the district does not specifically refer to any allegations in the request for review or in any way explain the basis for the vague allegations presented on appeal.¹² Review of the request for review shows that it reiterated a number of the objections raised in the due process complaint notice (compare Parent Ex. A with Req. for Rev.). Notably, and as discussed in more detail above, the request for review includes allegations related to the procedural safeguards notice, the sufficiency of the district's evaluations of the student, the sufficiency and appropriateness of the recommended annual goals, and the appropriateness of the recommendation for a 15:1+1 special class. Additionally, the parents did cite to the hearing record throughout the request for review. and the district's assertion that they did not comply with Part 279.8[c][3] Accordingly, the district's undefined assertions are without merit. As such, I decline to dismiss the parents' request for review for failure to comply with the practice regulations.

B. September 2022 IEPS

I note that the parents did not challenge the adequacy of the March 2022 IESP in the due process complaint notice or in the request for review as that IESP was created while the student was parentally placed at HALB. I will address the parents' allegations and contentions that neither the September 2, 2022 CSE nor the September 21, 2022 CSE and IEPs resulting therefrom offered the student a FAPE for the 2022-23 school year.

1. Procedural Safeguards Notice

The parents' claim that they were not given the opportunity to meaningfully participate in the decision-making process is without any merit. 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 E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160

¹² In contrast, the district submits a reply that goes through each allegation of the parent's answer to the district's cross-appeal, asserting what parts of it were raised for the first time on appeal.

[2d Cir. 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [holding 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"]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *18-*20 [S.D.N.Y. Jan. 2, 2013]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["[a] professional disagreement is not an IDEA violation"]; Sch. For Language and Comm'n Development 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").

Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]).¹³

Here, the evidence in the hearing record does not show conclusively that the district provided the parents with the procedural safeguard notice in preparation for the sixth grade school year either prior to or following either September 2022 CSE meeting (see Tr. pp. 63, 208, 763-64, 779, 907-08). However, the failure to provide the procedural safeguards notice each year does not, by itself, result in a finding of a denial of a FAPE. The IHO correctly pointed out that the parents have participated in the CSE process since the student was three years old (IHO Decision at p. 30). Also, the parents acknowledged that they had received the procedural safeguards in the past (Tr. p. 765). The evidence in the hearing record also reflects that the parents had received CSE meeting notices and prior written notices (Dist. Exs. 6; 7; 8; 20; 33). Each of the prior written notices included in the hearing record provided the parents with information as to how the parents could obtain another copy of the procedural safeguards notice if they wished (Dist. Exs. 6-8). Additionally, the parent acknowledged that these notices provided this information and that she did not attempt to obtain a copy of the procedural safeguards (Tr. p. 880).

The parents' main objection related to the district's failure to deliver another copy of procedural safeguards notice to them for the 2022-23 school year was that they were unable to participate in the September 2022 CSE meetings as a result. However, the parents do not indicate how any actions they took during either of these meetings would have been different if they had received a copy of the procedural safeguards notice, but instead just abstractly assert that the lack of the safeguards notice impeded their ability to participate (see Req. for Rev. at ¶¶ 20-23). To be sure, the hearing record does support finding that there was some confusion as to the purpose of the September 2, 2022 CSE meeting as the parents had requested transportation and informed the district they were placing the student in a nonpublic school at their expense, the CSE recommended what appears to be a special education program in a district school, yet the CSE also indicated the student was parentally placed in a nonpublic school (see IHO Ex. I at ¶¶ 16-21; Dist. Exs. 4 at pp. 1, 10, 12; 23; 25). Nevertheless, a review of the September IEPs shows that the parents did participate in both CSE meetings (Dist. Exs. 4; 5). Although the district school psychologist sent the parents an email asking if they were available to discuss bussing on September 2, 2022 (Dist.

¹³ A district may place a copy of the procedural safeguards notice on its website if such website exists (8 NYCRR 200.5[f][4]; see 20 U.S.C. § 1415[d][1][B]). However, the Office of Special Education Programs (OSEP) has provided guidance indicating that "[a]lthough IDEA permits an [district] to post a copy of the procedural safeguards notice on its web site, the public agency would not meet its obligation to provide a parent the notice of procedural safeguards by simply directing a parent to the web site" (Letter to Nathan, 73 IDELR 240 [OSEP 2019], available at <https://sites.ed.gov/idea/idea-files/osep-letter-jan-29-2019-to-nathan/>).

Ex. 25), she also indicated that she had a telephone conversation with the parents on August 31, 2022 during which it was discussed that an IEP would need to be developed for the student in order for the district to provide transportation (IHO Ex. I at ¶¶ 16, 21). Further, the September 2, 2022 IEP indicated that, during the meeting, the chairperson asked the parents how the student was doing at HALB and what led to the parents decision to switch the student to Shefa (Dist. Ex. 4 at p. 1). Only after the parents provided their input did the CSE chairperson indicate that the March 2022 IEP had been developed to support the student at HALB and that now "a more restrictive placement at [the] district would better suit his needs" (*id.* at p. 2). Additionally, although the parents assert that the district did not finalize its placement recommendation as the IEPs indicated the student was parentally placed in a nonpublic school, shortly after the September 2, 2022 CSE meeting, the parents arranged for a visit to district public school site (Tr. pp. 895-96; Dist. Exs. 29-31). After the parents visited the public school, the CSE reconvened on September 21, 2022 and a review of the meeting information on the IEP indicates that the parents shared their concerns with the CSE (Dist. Ex. 5 at pp. 1-2).

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 E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [holding 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"]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *18-*20 [S.D.N.Y. Jan. 2, 2013]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["[a] professional disagreement is not an IDEA violation"]; Sch. For Language and Comm'n Development 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"]).

Here, the evidence in the hearing record supports finding that the parents were afforded meaningful participation in the development of the student's IEPs in September 2022, and that the modifications in programming were based on the parents' input to the CSE regarding the student's changing circumstances. Accordingly, even if I determined that the failure to provide a written copy of the procedural safeguards to the parents in September 2022 was a procedural violation, I do not find that it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process, or deprived the student of educational benefits (see 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).

2. Evaluative Information

The parents assert on appeal that the IHO erred in that she did not find that, despite the parents' concerns regarding the student's severe reading delays, the September 2022 CSEs failed

to consider and discuss the results of the December 2021 achievement testing or a reevaluation of the student's reading skills, which constituted a denial of a FAPE.

Federal and State 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).

Although the March 2022 IESP is not at issue on appeal, the March 2022 CSE had conducted a reevaluation of the student, and that evaluative information provides context for the issues in dispute (see Dist. Ex. 3).¹⁴ The IESP indicated that the March 2022 CSE had available an April 2021 IEP, a December 2021 educational reevaluation report, a December 2021 report card, a February 2022 classroom teacher's report, a March 2022 speech-language reevaluation report, a March 2022 counseling update, a March 2022 updated social history, a March 2022 classroom observation, a March 2022 psychological evaluation report, and a March 2022 educational evaluation report (id. at p. 3; see Dist. Exs. 9-17).

The subsequent CSE meetings, which are at issue, were held on September 2, 2022 and September 21, 2022, respectively (Dist. Exs. 4; 5).¹⁵ The hearing record does not indicate that the

¹⁴ In attendance at the March 2022 CSE meeting were the parents, the CSE chairperson, a HALB school administrator, a district school psychologist, a resource room teacher, a speech-language therapist, a social worker, and a HALB regular education teacher (Dist. Ex. 3 at p. 1). According to the district school psychologist, the resource room, the speech-language, and counseling services were provided to the student by the district at HALB (IHO Ex. III ¶¶ 1, 12). The regular education teacher was from HALB (id.).

¹⁵ The September 2, 2022 CSE included the parents, a district psychologist who also served as the CSE chairperson, and a dually certified regular education/special education teacher (Dist. Ex. 4 at p. 1; see IHO Ex. I ¶ 27). The September 21, 2022 CSE included the parents, a HALB school administrator, a HALB regular education teacher, a district school psychologist, a Shefa special education teacher, a Shefa social worker, a

parents provided the district with any new evaluative information about the student prior to either September 2022 CSE meeting, other than to express their belief that the student was not making sufficient progress at HALB (see Parent Exs. A-K; Dist. Exs. 1-50; IHO Exs. I-IX).

As described below, the September 2022 CSEs had sufficient evaluative information and progress reports in all areas of the student's disability, including cognition, social communication, and social skills, to develop his IEP. The student's September 2, 2022 IEP reflects that the CSE had available the March 2022 IESP including standardized test results, and an August 31, 2022 letter from the parent (Dist. Exs. 4 at p. 3). The September 21, 2022 IEP reflects that the CSE had available the September 2, 2022 IEP including standardized test results, and a September 2, 2022 letter from the parents (Dist. Ex. 5 at p. 3).

According to the December 14, 2021 educational reevaluation report, the resource room teacher administered the Wechsler Individual Achievement Test - Fourth Edition (WIAT-4) to the student and conducted a record review (Dist. Ex. 9 at p. 1). The student's core reading composite score of 80 fell at the 9th percentile, and his reading comprehension score of 74 fell at the 4th percentile, indicating below average sight word vocabulary, and ability to answer literal and inferential comprehension questions (id. at p. 2). On the written expression composite, the student's spelling score of 81 fell at the 10th percentile, and his sentence composition score of 58 fell at the 10th percentile; the evaluator reported that both scores were in the below average range (id.). The student struggled to create sentences when provided with a target word, his ideas were unclear, and his use of punctuation and grammar was inconsistent (id.). On the essay composition subtest, the student wrote only 13 words, and the essay could not be scored due to the minimal word count (id.). On the mathematics composite the student's score of 85 fell at the 16th percentile in the average range (id.). The student's numerical operations score of 94 fell at the 34th percentile, indicating average ability in solving untimed written math problems using addition, and subtraction, multiplication, division, order of operations, and fractions (id.). The student's word problem solving score of 79 fell at the 8th percentile, indicating below average ability in solving word problems presented both verbally and in written format (id.).

The December 15, 2021 report card reflected reports that the student was respectful towards teachers and peers, and had transitioned smoothly into fifth grade (Dist. Ex. 10 at p. 1). At the time of the report card, the student was reading at a "level N," and was working to meet grade level expectations (id.). The student had difficulty making inferences about characters and events in fictional text, was encouraged to read chapter books at his level each night and to practice strategies he learned in class such as making inferences, predictions, visualizing, and using context clues to understand words and phrases (id.). The student benefitted from prompting and refocusing (id.). The student was frequently hesitant to complete written work and was working on becoming a more independent writer (id.). In math, the student was confident in his ability to solve math computation, but due to his difficulty with language, he needed support to solve word problems (id.). The student had shown some growth in his ability to solve single step word problems and was encouraged to continue working on this skill (id.). According to the report card, the student received modified assessments in math (id.). In science the student showed little interest, often

district speech-language therapist, a district regular education/special education teacher, and the district supervisor of pupil personnel services (Dist. Ex. 5 at p. 1; see IHO Ex. IV ¶ 11).

taking a "back seat", and letting other student's complete tasks without his input (Dist. Ex. 10 at p. 2). The student was encouraged to take a more active role in classroom activities (id.).

According to a February 24, 2022 classroom teacher's report, the student was struggling in class (Dist. Ex. 11 at p. 1). The student had shown some improvement in reading; moving from level N to level O, but was still "significantly" below grade level (id. at pp. 1-2). According to the report, the student required a "great deal" of refocusing and redirection, and benefitted from one-to-one support (id.). The student was below grade level in writing and needed "considerable" guidance during writing activities as he was unwilling to engage in written work independently (id.). The teacher reported that the student benefitted from both auditory and visual instruction, graphic organizers, positive reinforcement, preferential seating, and having tasks broken down and directions simplified, and that the student used headphones while working independently on "Achieve 3000" (id.). Further, the report reflected that the student's social/emotional functioning was below average, as he did not interact with his peers in class, and did not contribute to discussion during group activities (id.).

The March 2, 2022 speech-language evaluation report reflected that the district speech-language pathologist administered the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) to evaluate the student's receptive and expressive language skills (Dist. Ex. 12 at p. 1). The student showed strength in understanding words of the same semantic class and object function, but had difficulty with synonyms and opposites, scoring at the 16th percentile on the word classes subtest (id.). On the following directions subtest, the student's score was in the 25th percentile, and he had difficulty following three to four level commands presented with serial orientation and one to two modifiers (id.). On the formulated sentences subtest, the student's score was in the 4th percentile, which indicated that the student struggled to successfully integrate semantic and syntactic linguistic rules to produce spoken narratives and create written text (id. at p. 2). On the recalling sentences subtest, the student's score was in the 5th percentile, indicating that he benefitted from simplifying and repeating directions and auditory information (id.). On the understanding spoken paragraphs subtest, the student's score in the 25th percentile indicated that he had difficulty answering questions about the main idea, details, and sequence, as well as making predictions (id.). On the word definitions subtest, the student's score was in the 25th percentile, due to his difficulty with social studies related vocabulary (id.). On the sentence assembly subtest, which evaluated the student's ability to formulate grammatically correct and meaningful sentences from words he was given, the student's score was in the 5th percentile (id.). Finally, on the semantic relationships subtest, which measured his ability to interpret sentences that make comparisons, identify location or direction, specify time relationships, or were expressed in passive voice, the student's score was in the 25th percentile (id.). The student's core language score of 75 fell at the 5th percentile, indicating an overall language ability in the low range of functioning, with receptive language, comprehension and listening skills in the average range (id. at pp. 2-3). The student's expressive language index score of 65 indicated very low oral expression skills, and his semantic knowledge score was in the borderline range (id. at p. 3). The student's language content index score indicated that his memory dependent language skills were in the low range (id.). Based on the informal assessment of oral motor skills, the student's facial and oral motor structures, overall intelligibility in connected speech, and his voice and fluency were within normal limits (id.).

According to the March 14, 2022 counseling update, the student was at times frustrated and annoyed about attending counseling sessions, and occasionally struggled to act in a "prosocial

manner" when interacting with peers (Dist. Ex. 13). In addition, the report noted that the student was often uncooperative when playing games and demonstrated some "negative competitive actions," which made his peers reluctant to play with him (id.). The student's counseling sessions focused on recognizing how his behavior affected others, identifying, and managing his emotions during various social situations, and engaging with peers and adults appropriately (id.). The student had reportedly made progress in his awareness of how his behaviors impacted his relationships with peers, and in using appropriate coping skills to calm down (id.).

In the March 16, 2022 updated social history, the parent reported noticing very little improvement in the student's anxiety, competitiveness, withdrawal, comprehension, and low self-esteem (Dist. Ex. 14 at pp. 1, 2). The student had a few friends in school, was struggling to make more friends, and did not understand social boundaries or behavior cues (id. at p. 2). In addition, the student was distractible, tended to be a sore loser, and had difficulty completing schoolwork independently (id.). Finally, the student needed frequent prompts to complete tasks (id.).

According to the March 23, 2022 classroom observation report checklist, the student was observed for 20 minutes during English language arts (ELA) instruction at his private school (Dist. Ex. 15). During the observation, the student did not exhibit motivation, concentration, participation, self-initiation, attention, or on-task behavior (id.). Additionally, the student was reported to exhibit hyperactive, social, distractible, disorganized, and uncoordinated behaviors, and inappropriate reactions (id.). The student was reportedly unfocused, did not attend to the class discussion, and told his teacher he was doing his work, when in fact, he was not (id.).

The March 25, 2022, psychological evaluation report indicated that the school psychologist administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), the parent and teacher versions of the Behavior Assessment System for Children-Third Edition (BASC-3), and conducted a review of records to evaluate the student (Dist. Ex. 16 at pp. 1, 3). The student's WISC-V full-scale IQ of 83 was within the low average range (id. at p. 1). On the verbal comprehension index, which measured the student's verbal concept formation and expression, word knowledge, long-term memory, cognitive flexibility, and abstract reasoning, his score of 76 fell within the very low range (id. at p. 2). On the similarities subtest, which measured the student's ability to describe how two words were alike, his score of 5 fell in the very low range (id.). On the vocabulary subtest, which measured his ability to define words read aloud to him, the student's score of 6 fell in the very low range (id.).

On the WISC-V visual spatial index, which measured the student's visual perception and organization, spatial relations, and nonverbal concept formation and reasoning, his score of 92 fell within the average range (Dist. Ex. 16 at p. 2). On the timed block design subtest, the student's score of 7 fell in the low average range (id.). On the visual puzzles subtest, the student's score of 10 fell in the average range, and he performed "significantly better" when given choices rather than creating his own model (id.).

The evaluation report reflected that on the WISC-V fluid reasoning index, the student's score of 88 indicated low average abilities in applying basic mathematical skills to analyze and interpret new information (Dist. Ex. 16 at p. 2). On the matrix reasoning subtest, the student's score of 7 indicated a low average ability to choose a missing portion of an incomplete picture matrix (id.). On the figure weights subtest, the student's score of 9 indicated an average ability in selecting the option that would keep a scale balanced (id.).

On the WISC-V working memory index, the student's score of 85 indicated a low average ability to hold and use information in his immediate awareness (Dist. Ex. 16 at p. 3). On the digit span subtest, the student's score of 9 indicated an average ability to recall auditory information (id.). On the picture scan subtest, the student's score of 6 indicated very low visual working memory, attention, and visual processing skills (id.). The student's significantly better score on the digit span subtest suggested better recall of auditory information than visual information (id.).

The student's WISC-V processing speed index score of 89 indicated low average speed and accuracy of visual identification, decision making, and decision implementation (Dist. Ex. 16 at p. 3). On a timed coding assessment, the student used a key to copy symbols that corresponded within shapes, and his score of 11 indicated average abilities, a personal strength, and was significantly better than his very low range performance on the symbol search subtest, which measured the student's ability to identify the presence or absence of a target symbol within a group of symbols (id.).

Also at that time, the school psychologist assessed the student's social/emotional development assessed using the BASC-3, clinical behavior assessment, clinical interview, and teacher reports (Dist. Ex. 16 at p. 3). The BASC-3 teacher rating scale yielded scores within the at-risk range in the areas of withdrawal, social skills, and functioning communication (id.). According to his teacher, the student was often unclear when expressing his ideas, did not initiate conversations, preferred to play alone, and had difficulty making new friends (id.). The BASC-3 parent rating scale yielded scores within the at-risk to clinically significant range in the areas of internalizing problems, aggression, withdrawal, and adaptive skills (id.). According to his mother, the student frequently displayed behaviors related to worry, nervousness, and/or fear, and was at times withdrawn or pessimistic (id.). In addition, the parent reported that the student displayed health concerns that could be an indication of an underlying emotional problem (id. at pp. 3-4). Further, the parent reported that the student had difficulty adjusting to change, exhibited poor communication skills, argued when he did not get his way, and often teased others (id. at p. 4).

According to a March 29, 2022 educational checklist/progress report, the student needed remediation in decoding, reading comprehension, math computation, and written and oral expression (Dist. Ex. 17 at p. 1).¹⁶ The student consistently attended resource room prepared to participate, and was respectful and motivated but needed redirection, positive reinforcement, and encouragement to complete tasks (id.). The report indicated that the student exhibited steady progress toward achieving his goals, and his decoding skills and fluency had improved (id. at p. 2). The student used a rubric and a graphic organizer to help him with punctuation and content during writing tasks (id.). In math, the student was working on "identifying key points" and solving multi-step word problems (id.). The teacher reported that the student functioned well in a small group setting, was "very diligent and organized," and had a "great memory" (id.). The student's handwriting was "beautiful," and he always ensured his writing was legible (id.). Further, the report reflected that the student had difficulty completing assignments independently and required encouragement to complete difficult assignments (id.). In addition to using a rubric and graphic organizer, the student used strategies such as highlighting key information, underlining, reading line by line with an index card, and chunking (id.).

¹⁶ The document indicated that it was used "for teacher who did not administer updated testing" (Dist. Ex. 17 at p. 1).

On appeal, the parents specifically allege that the IHO should have found that the CSE's failure to "perform or consider an evaluation of [the student's] reading skills and deficits constitute[d]" a denial of a FAPE. However, as discussed in detail above, the September 2022 CSEs had sufficient evaluative information regarding the student's reading skills, including standardized reading assessment results from December 2021 that were reflected in the student's September 2022 IEPs (compare Dist. Ex. 4 at p. 4, and Dist. Ex. 5 at p. 4, with Dist. Ex. 9 at p. 2). Therefore, the evidence in the hearing record does not support the parents' contention that the CSE failed to evaluate the student in all areas of suspected disability.

Regarding the parent's claims that the September 2022 CSEs failed to consider or discuss the evaluative information about the student's reading skills, those allegations are without merit. In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). A CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight or adopt their recommendations (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

Review of the September 2022 IEPs shows that both CSEs allowed the parents to express their concerns and the September 21, 2022 CSE considered the input of the non-district members of the CSE (Dist. Exs. 4 at pp. 1, 2, 4, 5; 5 at pp. 1, 2, 5, 6). Specifically, September 2, 2022 meeting information and the IEP present levels of performance indicated that the "father shared that [the student's] reading skills [we]re quite deficient," the student was not making enough progress, and that the parents felt the student needed support in the area of reading (Dist. Ex. 4 at pp. 2, 5). According to the September 2, 2022 IEP, the CSE chairperson shared that the student had been "tested this past school year" and that "testing was reviewed" (id. at p. 5). The CSE identified that the student needed to be able to correctly decode words, make inferences from literature and content area texts, and identify key words when solving math word problems (id.). Regarding the September 21, 2022 CSE meeting, review of the meeting information shows that both the parents and Shefa representatives discussed their concerns regarding the student's skills and the type of programming they opined he required (see Dist. Ex. 5 at pp. 2, 5, 6).

As such, the evidence does not support the parents' contention on appeal that the September 2022 CSEs failed to consider the student's evaluative information.

3. Annual Goals

Next, on appeal the parents argue that the CSE failed to develop "new goals" and that the September 2022 CSEs "predetermined" that the student's March 2022 IESP annual goals would be "carried over to the September 2022 IEPs." The parents allege that the student "regressed in reading" with the March 2022 "IESP goals in a 5:1 setting" and therefore it "made no sense for the CSE to use the same goals" in a "larger" 15:1+1 setting.

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

Review of the March 2022 IESP and the September 2022 IEPs reflects that, with one exception, the student's annual goals were identical (compare Dist. Ex. 3 at pp. 7-8, with Dist. Ex. 4 at pp. 7-8, and Dist. Ex. 5 at pp. 7-8). Specifically, the CSEs developed annual goals to address the student's needs in the areas of reading vocabulary, written language, math word problems, study skills, receptive and expressive language, and social/emotional skills (Dist. Exs. 3 at pp. 7-8; 4 at pp. 7-8; 5 at pp. 7-8). The September 21, 2022 CSE revised one of the student's writing annual goals based on input from his teacher, to reflect a goal of writing an opinion piece of one paragraph rather than three paragraphs (Tr. p. 210; compare Dist. Ex. 4 at p. 7, with Dist. Ex. 5 at pp. 2, 7).¹⁷ Additionally, regarding the parents' concerns about the sufficiency of the student's reading instruction, review of the annual goals shows that they were designed to improve the student's ability to decode informational texts from content area subjects, use unknown and multiple meaning words from literature and content area subjects, quote accurately from texts when explaining what the text said, and show comprehension of a text by responding to inference and prediction, using text to support his responses (Dist. Exs. 4 at pp. 7-8; 5 at pp. 7-8).

Regarding the parents' claim that the September 2022 IEP annual goals were deficient because they were to be implemented in a "larger" instructional setting, a determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). To hold otherwise would suggest that the CSE should preselect an educational setting on the continuum of alternative placements and/or related services and then draft annual goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and

¹⁷ Overall, review of the September 2022 IEP annual goals shows that the district complied with the requirements set forth for annual goals, including that each goal contained evaluative criteria (i.e. 75 percent success on three separate occasions), evaluation procedures (i.e. teacher devised tests or worksheets, observation checklists), and schedules when progress would be measured (i.e. monthly) (Dist. Exs. 4 at pp. 7-8; 5 at pp. 7-8).

Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010 (Rev. 2023)], available at <https://www.nysed.gov/sites/default/files/programs/special-education/guide-to-quality-iep-development-and-implementation.pdf> [stating, among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the least restrictive environment" [emphasis added]].

4. 15:1+1 Special Class

On appeal the parents assert that the IHO erred in finding that the September 2022 IEPs were substantively appropriate, as the 15:1+1 special class recommendation was "too large" given the student's need for refocusing and redirection, and the CSEs "limited the 15:1+1 class recommendation to four periods per day," which could have resulted in the student being placed in general education classes for the remainder of the school day, something the parents contend was inconsistent with the student's IEPs' mainstreaming provisions regarding "instructional time." Additionally, the parents argue that the CSEs failed to include small group or 1:1 reading instruction, or specify Orton-Gillingham or similar methodologies in the student's IEPs, and that the IHO erred by relying on retrospective testimony in finding these features may have been components of the student's district programming. Further, the parents allege that the CSEs predetermined the 15:1+1 special class recommendation, and did not discuss or consider recommending a smaller class size.

The September 2022 CSEs recommended a 15:1+1 special class placement for the student to receive instruction in language arts, math, social studies, and science (Dist. Exs. 4 at p. 9; 5 at p. 9).¹⁸ State regulation provides that a 15:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). In turn, "management needs" are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's "management needs" shall be determined by factors which related to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (see 8 NYCRR 200.1[ww][3][i][a]-[d]).

The September 2, 2022 CSE meeting information shows that the parents discussed the student's reading needs and agreed the student needed "a more restrictive placement" than he had been receiving at HALB (Dist. Ex. 4 at p. 2). According to the September 2, 2022 CSE

¹⁸ The parents assert that the September 2022 IEPs were internally inconsistent because the CSEs recommended special class instruction for only four periods per day, with the potential for placement in general education classes for the remainder of the school day. The September 2022 IEPs state that "[t]he student require[d] special instruction and w[ould] not participate in the regular class during instructional time. He w[ould] be mainstreamed during lunch and recess at a minimum" (Dist. Exs. 4 at p. 11; 5 at p. 12). The student's September 2022 IEPs provide special class instruction for the four core academic classes: language arts, math, social studies, and science, and related services in the therapist's office/classroom (Dist. Exs. 4 at p. 9; 5 at p. 9). Accordingly, the IEPs are not internally inconsistent as the student was recommended for special classes for academics. Additionally, review of the evidence in the hearing record does not indicate that it was inappropriate for the student to be mainstreamed for non-academic classes and activities (see e.g. Dist. Exs. 3-5; 16; 17).

chairperson, the recommendation for 15:1+1 special class programming was based on the student's needs and annual goals as outlined in the March 2022 IESP, and "discussion and review" that occurred during the September 2, 2022 CSE meeting, including that the student's IQ fell in the low average range, his language skills were "the area of greatest deficit," and that his academic skills generally fell in the low or below average range (IHO Ex. I ¶¶ 38, 39; see Dist. Ex. 4 at p. 1). The CSE chairperson also testified that "a general education class, even with support and resource pull out, would be insufficient to address [the student's] needs" (IHO Ex. I ¶ 39). The September 2022 IEPs indicated that the student "ha[d] significant delays and require[d] a small teacher-to-student ratio program with minimal distractions in order to academically progress" (Dist. Exs. 4 at p. 6; 5 at p. 6).¹⁹

In affidavit testimony, the chairperson of the September 2, 2022 CSE meeting stated that "[t]o the best of [her] recollection," she explained and described the district's 15:1+1 special class program with the parents, indicating that core classes were departmentalized, and in each of those classes there could be no more than 15 students, with one special education teacher and one aide (IHO Ex. I ¶ 37). The CSE chairperson additionally testified that, at the CSE meeting, she explained that the curriculum material was differentiated and individualized to students' needs, and the aide was able to help refocus the students as needed (id.). According to the CSE chairperson, when compared to a general education class, the language in the 15:1+1 special class was broken down, the pace was slower, and information was repeated more often to help students make adequate progress at their individual level (id.). In conjunction with the special class instruction, the September 2022 IEPs provided supplementary aids and services/program modifications, including: positive reinforcement by teacher(s), refocusing and redirection, simplified language, checks for understanding, copy of class notes, and use of a graphic organizer and/scaffolding in writing (Dist. Exs. 4 at p. 9; 5 at p. 9). The September 21, 2022 IEP also included preferential seating, scheduled breaks, visual aids, checklists, work broken down into smaller parts, and scaffolding of presented material (Dist. Ex. 5 at pp. 9-10).

Further, the September 2, 2022 CSE initially recommended that the student receive two 30-minute session per week of group speech-language therapy, and one session per week of group counseling services (Dist. Ex. 4 at p. 9). In addition to the group related services, the September 21, 2022 CSE also recommended one 30-minute session per week each of individual speech-language therapy and individual counseling for the student (compare Dist. Ex. 4 at p. 9, with Dist. Ex. 5 at p. 9).²⁰

The parents' substantive argument relates in part to the IHO's reliance on information produced at the hearing regarding how the student's reading needs would have been addressed in

¹⁹ The parents' preference for "small group instruction" versus their perception of how instruction is delivered in the "much larger" 15:1+1 special class illustrates a common predicament: that often what is considered "small" in terms of class size is in the eye of the beholder (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012] [holding "[t]hat the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits"], aff'd, 725 F.3d 131 [2d Cir. 2013]), but a parent's decision to provide a smaller classroom ratio is not in and of itself conclusive evidence of the question of whether a public placement provides appropriate services to meet a student's needs (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015]).

²⁰ I note that one of the student's speech-language annual goals addressed his need to improve his reading comprehension skills (Dist. Exs. 4 at p. 8; 5 at p. 8).

the district. The parents assert that the IHO should not have relied on testimony from the CSE chairperson about the services and methodologies that might have been provided in the proposed program, as opposed to the program and services set forth in the student's September 2022 IEPs. While a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP," testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (see R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'" [internal citations omitted]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]). The prohibition against retrospective testimony is intended to reflect the fact that "[a]t the time the parents . . . choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on" (R.E., 694 F.3d at 186). Therefore, "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and . . . reasonably known to the parties at the time of the placement decision" (id. at 187).

Even without the CSE chairperson's testimony at the hearing, review of the September 2022 IEPs shows they were reasonably calculated to enable the student to receive educational benefits at the time they were developed. Meeting information shows that at the September 2, 2022 meeting the CSE chairperson explained that the 15:1+1 special class programming was a more supportive environment than the resource room and related services the student was receiving at HALB, and the student would receive all of his academic instruction in a special class setting rather than pulled out of the classroom for resource room services (Dist. Exs. 5 at pp. 1-2; 17 at p. 1).²¹ Given the supports and services described above, the evidence in the hearing record supports the IHO's conclusion that the district offered the student appropriate programming for the 2022-23 school year.

To the extent that the parents assert on appeal that the September 2022 CSEs failed to recommend "reading instruction utilizing Orton-Gillingham (or a similar) methodology," it appears that the first time the CSE was informed that the student was using Orton-Gillingham with a tutor was at the September 21, 2022 CSE meeting (Dist. Ex. 5 at p. 2). Generally, an IEP is not required to specify the methodologies used with a student and the precise teaching methodologies to be used by a student's teacher are usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-

²¹ As noted above the student's IESP called for resource room for 40-minutes per day, which is less supportive than the special class setting for all core subjects in the September IEPs (see Dist. Ex. 3 at p. 9).

94). Indeed, a CSE should take care to avoid restricting school district teachers and providers to using only the specific methodologies listed in a student's IEP unless the CSE believes such a restriction is necessary in order to provide the student a FAPE. However, when the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).

The September 21, 2022 CSE meeting information reflected that the student's father expressed concerns that the student was "unable to read," that the Orton-Gillingham methodology "seem[ed] to be working" for the student, and the student's mother reported that the student "had an Orton-Gillingham tutor" (Dist. Ex. 5 at p. 2). According to the meeting information, the CSE also discussed that the district had "PAF [t]rained teachers and reading specialists in the district" (id. at pp. 2, 5).²² Although the September 21, 2022 CSE discussed the student's apparent success with the Orton-Gillingham methodology, as discussed above, review of the other evaluative information about the student's reading abilities the September 2022 CSEs had available to it did not indicate that he specifically required Orton-Gillingham or another reading methodology in order to receive a FAPE (see e.g. Dist. Exs. 3; 4; 9-17).²³ Therefore, the evidence in the hearing record does not support a finding that the lack of a recommendation for Orton-Gillingham or "PAF" instruction on the student's September 2022 IEPs resulted in a denial of a FAPE.

Regarding the parents' predetermination claim, review of the September 2022 CSEs' meeting information summaries and IEPs' present levels of performances shows that the parents were afforded the opportunity to participate in their son's IEP development process (see Dist. Exs. 4 at pp. 1-2, 5-6; 5 at pp. 1-2, 5-6). At the September 2, 2022 CSE meeting, "[t]he parents were asked if they felt that the CSE recommended placement was comparable to Shefa," to which "[t]he parents agreed" (Dist. Ex. 4 at p. 6). According to the September 2, 2022 prior written notice, the

²² PAF refers to Preventing Academic Failure, which was described as a "multisensory reading program that integrates reading, and spelling" (Parent Ex. G at p. 3). The district supervisor of pupil personnel services testified that PAF was a similar program to Orton-Gillingham (IHO Ex. IV ¶ 22).

²³ I note that after the conclusion of the September 21, 2022 CSE meeting, the parent emailed the district a letter dated the same day from the student's private speech therapist stating that between December 2019 and July 2021, the therapist had worked with the student twice per week, he had made "significant progress" in reading with an Orton-Gillingham approach, and that he would "greatly benefit from a school program that incorporate[d] and use[d] the Orton-Gillingham methodology (or PAF) throughout their day" (Parent Ex. C; Dist. Ex. 43; IHO Ex. I ¶ 62). The district scheduled a meeting to discuss that letter; however, the parent cancelled the meeting and at that point, the student was attending Shefa (Dist. Ex. 37; see Tr. p. 918).

CSE considered more and less restrictive options for the student's placement, but rejected those due to the student's current functioning levels and skills (Dist. Ex. 7 at p. 2). Overall, as discussed above, the evidence in the hearing record supports upholding the IHO's determination that the 15:1+1 special class placement, together with supplemental supports/program modifications and related services was appropriate to address the student's needs.

VII. Conclusion

Having found that the evidence in the hearing record supports the IHO's finding that the district offered the student a FAPE for the 2022-23 school year, the necessary inquiry is at an end and there is no need to determine whether Shefa was an appropriate placement for the student for the 2022-23 school year and whether equitable considerations weighed in favor of the parents' request for tuition reimbursement.

I have considered the parties' remaining contentions and find I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
February 4, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER