



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-369

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 New Rochelle City School District

Appearances:

Law Office of Neal H. Rosenberg, attorneys for petitioners, by Michael Mastrangelo, Esq.

Ingerman Smith, LLP, attorneys for respondent, by Thomas Scapoli, 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 costs at the Irving Montak SINAI School at SAR Academy (SINAI School) for the 2020-21 and 2021-22 school years. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has received diagnoses of attention deficit hyperactivity disorder (ADHD), language disorder, specific learning disorders in reading (dyslexia) and written expression, and adjustment disorder with anxiety (Dist. Ex. 13 at pp. 13-15). The student initially received speech-language therapy, occupational therapy (OT), and counseling through early intervention (EI) and later received preschool special education services (Dist. Exs. 2 at p. 1; 13 at p. 2). The student received school aged special education services beginning in fall 2018 (kindergarten) (Dist. Ex. 13 at p. 2).¹

¹ The student attended SAR Academy for both kindergarten (2018-19 school year) and first grade (2019-20 school

On June 4, 2020, a subcommittee on special education met to conduct the student's annual review for the 2020-21 school year (see generally Dist. Ex. 9).² The June 2020 CSE found the student eligible for special education services as a student with a speech or language impairment (id. at p. 1). Based upon the student's needs, the June 2020 CSE recommended a special education program consisting of integrated coteaching (ICT) services for one hour per day and a 15:1 special class daily for one hour and 30 minutes per day (id. at pp. 1, 9). Additionally, the June 2020 CSE recommended related services of two 30-minute sessions per week of small group (3:1) speech-language therapy; two 30-minute sessions per week of individual OT; one 30-minute session per week of small group (3:1) psychological counseling services; four 30-minute indirect OT consultations with the student's teacher per year to address the student's sensory diet; and one 60-minute session per month of parent counseling and training (id.). The June 2020 CSE recommended supplementary aids and services, program modifications, and accommodations that consisted of a positive reinforcement plan, movement breaks, reteaching of materials, refocusing, redirection, preferential seating, and checks for understanding of instructions (id. at p. 9).

On July 30, 2020, a CSE convened to conduct a program review to determine the student's eligibility for 12-month services (see generally Dist. Ex. 12). The July 2020 CSE determined that the student had "difficulty with language and processing language which require[d] [e]xtended [s]chool year [s]ervices to prevent substantial regression" through related services (Dist. Ex. 12 at p. 2). The July 2020 CSE recommended one 30-minute session per week of individual counseling, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual speech-language therapy, beginning on August 3, 2020 and continuing through to August 14, 2020 (id. at pp. 1-2, 10).

By letter dated August 25, 2020, the parents notified the district of their disagreement with the recommended program for the student for the 2020-21 school year and of their intent to enroll the student at SINAI School and seek tuition reimbursement from the district (see Parent Ex. O).³ On August 26, 2020, the parents entered into a tuition contract with SINAI School for the student's attendance for the 2020-21 school year (Parent Ex. B). For the 2020-21 school year (second grade) the student attended the SINAI School (Parent Exs. A; B).

On February 21, 2021, the parents executed a tuition contract for the student's attendance at SINAI School for the 2021-22 school year (Parent Ex. D).

Next, on April 28, 2021, a CSE convened for a reevaluation and annual review for the student for the 2021-22 school year (third grade) (see generally Dist. Ex. 21). The April 2021 CSE recommended a 12:1+2 special class in the Positive Alternative Techniques (PAT) program together with two 30-minute sessions per week of small group speech-language therapy, one 30-

year) (Tr. pp. 32, 642-43). According to testimony from the CSE chairperson, SAR Academy was a general education setting (Tr. p. 283).

² This is the only meeting that was identified as a subcommittee on special education meeting rather than a CSE meeting (see Dist. Exs. 9; 12; 21); for ease of reference, this decision will refer to the subcommittee meeting as a CSE meeting unless otherwise noted.

³ SINAI School 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).

minute session per week of individual OT, one 60-minute session per month of parent counseling and training, one 30-minute session per week of small group (3:1) counseling, one 30-minute session per week of small group (2:1) OT, and one 30-minute session per week of individual counseling (id. at pp. 1, 14). In addition to the supplementary aids and services, modifications, and accommodations recommended on the June 2020 IEP, the April 2021 CSE recommended use of a graphic organizer, access to fidget tools, use of visual aids, flexible seating, simplified language in directions and instruction, chunking of information, and access to audio books (id. at pp. 14-15). The April 2021 CSE also recommended assistive technology of access to a computer and access to text to speech software (id. at p. 15). Lastly, the April 2021 CSE recommended four 30-minute OT consultations per year (id.).

On August 18, 2021, the parents notified the district of their disagreement with the program recommended for the student for the 2021-22 school year and of their intent to unilaterally place the student at SINAI School for the 2021-22 school year and seek tuition reimbursement from the district (see Parent Ex. P). The student attended SINAI School for the 2021-22 school year (third grade) (Parent Exs. C; D).

A. Due Process Complaint Notices

In a due process complaint notice dated July 27, 2022 and an amended due process complaint notice dated March 15, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2020-21 and 2021-22 school years (see Parent Ex. Q; Dist. Ex. 1).⁴

The parents alleged that the July 30, 2020 IEP failed to address the student's academic and social/emotional needs; the district failed to conduct updated assessments of the student prior to the CSE meeting; the CSE failed to consider teacher reports from SINAI School, contained generic goals without baselines (method of measurement) or discussion of methodologies to implement the goals, failed to recommend small classes throughout the school day, failed to recommend "intensive" speech-language therapy, and failed to consider the parents' input and made recommendations that were predetermined; and the district failed to provide prior written notice in a timely manner (Dist. Ex. 1 ¶¶ 5-15, 18).

For the 2021-22 school year, the parents alleged that the recommended programming in the April 2021 IEP failed to address the student's academic and social/emotional needs and did not offer "appropriate peer grouping" (Dist. Ex. 1 ¶¶ 24-25). Also, the parents alleged that the CSE failed to recommend "intensive reading and writing instruction" (id. ¶ 26). Further, the parents claimed that the recommended programming did not provide for individual support for the student, the speech-language therapy services were insufficient, the recommendations were developed without meaningful parental participation, the CSE failed to consider the recommendations of a private neuropsychologist, programming recommendations were predetermined, and the prior written notice was untimely (id. ¶¶ 27-28, 31-33).

⁴ For purposes of this decision, only the amended due process complaint notice shall be referenced (see Dist. Ex. 1).

The parents claimed that SINAI School was an appropriate unilateral placement and that equitable considerations weighed in their favor (Dist. Ex. 1 ¶¶ 36-37). As relief, the parents requested direct payment/reimbursement for the cost of tuition at SINAI School for both the 2020-21 and 2021-22 school years (id. ¶ 38).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 29, 2023 and concluded on March 13, 2024 after six days of proceedings (Tr. pp. 1-819). In a decision dated July 21, 2024, the IHO found that the recommendations for the student for the 2020-21 school year were appropriate and the program recommended for the 2021-22 school year was the least restrictive environment (LRE) for the student (IHO Decision at pp. 31, 36-37). Since the IHO found that the district offered the student a FAPE for both the 2020-21 and 2021-22 school years, the IHO did not reach the issues of whether the unilateral placement was appropriate or whether equitable considerations supported the parents requested relief (id. at p. 37). Accordingly, the IHO dismissed the parents' due process complaint notice (id.).

After an overview of the administrative procedures and a discussion of the procedural history of the matter, the IHO provided a factual background of the case, detailed the positions of each party, and set forth the findings of fact and conclusions of law separately for each school year under review (IHO Decision at pp. 4-36). With respect to both the 2020-21 and 2021-22 school years, the IHO first found that the July 2020 and April 2021 CSEs had sufficient evaluative information to develop the student's IEPs, including evaluations from 2018 and anecdotal records from SINAI School all of which "accurately reflected the student's then-present levels of performance, strengths and weaknesses" (id. at pp. 20-22). Next, the IHO addressed the parents' claims pertaining to the July 2020 IEP annual goals, finding that the goals addressed those areas of deficit that were raised by reports from SINAI School and, therefore, appropriately addressed the student's needs (id. at pp. 22-24). As for the parents' claims of predetermination and parental participation for each of the school years under review, the IHO found evidence in the hearing record that the parents participated and expressed their concerns at the CSE meetings and the CSEs considered information from SINAI School and considered other placement options, all of which defeated the parents' claim of predetermination (id. at pp. 24-27). The last procedural challenge discussed by the IHO was the timeliness of the prior written notices (id. at pp. 27-29). The IHO found that the district provided timely prior written notice for the 2021-22 school year; however, for the 2020-21 school year the IHO found that, although the parents were aware of the recommendations made during the June 2020 meeting through an email, there was a lack of timely prior written notice for the 2020-21 school year (id. at pp. 28-29). The IHO held that such untimely notice did not rise to the level of a denial of FAPE because it did not impede the student's right to a FAPE and did not interfere with the parents' participation in the decision-making process (id. at p. 29).

Next, the IHO discussed the parents' substantive challenges to the July 2020 IEP and found that, based upon the credible testimony of the district witnesses and evidence in the hearing record, the recommendations for the student for the 2020-21 school year were appropriate (IHO Decision at pp. 29-31). With respect to the substantive challenges to the April 2021 IEP, the IHO found that the CSE reviewed the private neuropsychological evaluation that the parents provided to the district in spring 2021, developed annual goals to "target deficits identified during the

reevaluation," and offered small group and one-to-one instruction, dialectical behavior therapy (DBT) skills groups to assist the student with managing emotions, appropriate related services, and program modifications, accommodations, and assistive technology to meet the student's needs (*id.* at pp. 31-36). Therefore, the IHO found that the recommendations for the student for the 2021-22 school year were "reasonably calculated to provide the student with meaningful educational benefit in the least restrictive environment" (*id.* at p. 36).

IV. Appeal for State-Level Review

The parents appeal the IHO's findings that the district offered the student a FAPE for both the 2020-21 and 2021-22 school years, including the IHO's denial of the parents' requested relief. With regard to both school years, the parents allege that the IHO misconstrued the evidence in the hearing record. For the 2020-21 school year, the parents assert that the recommended program offered less support than the prior school year and that the IHO improperly determined that the program was appropriate for the student. The parents contend that the recommended program failed to address the student's academic and social/emotional needs. The parents also allege that the IHO erred in relying on retrospective testimony with respect to the subject areas that would be addressed with the ICT services and 15:1 special class, which were not listed in the IEP.

Next, the parents assert that the recommendation for the 12:1+2 special class for the 2021-22 school year was too large for the student and would have been comprised of other students with emotional dysregulation, which would have created distractions for the student and interfered with his ability to make progress. The parents also argue that the IHO improperly relied on retrospective testimony from a district special education teacher who did not have firsthand knowledge of the PAT program recommended for the student.

The parents contend that SINAI School was an appropriate unilateral placement and that equitable considerations weighed in favor of the parents' requested relief because the parents cooperated with the CSEs and provided timely notice of their unilateral placement of the student. As relief, the parents seek an award of direct funding/reimbursement of the tuition at SINAI School for the 2020-21 and 2022-23 school years.

In an answer, the district denies the material allegations contained in the parents' request for review. The district requests that the IHO's decision be affirmed in its entirety.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits

(Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may 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]).⁵

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

The parents have not appealed the following findings of the IHO: that the CSEs had sufficient evaluative information to make a program recommendation; that the IEPs annual goals were appropriate; that the parents were not denied meaningful participation in the CSE process; that the CSEs did not predetermine the recommended programs; that the prior written notice for the 2020-21 school year was untimely but did not deny the student a FAPE; and that the prior written notice for the 2021-22 school year was timely. Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The crux of the parents' allegations advanced in this appeal relate to the program recommendations and related services for both school years at issue.

Turning to the substance of the parents' appeal, upon careful review, the hearing record reflects that the IHO, in a well-reasoned decision, correctly reached the conclusion that the July

⁵ 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).

2020 IEP offered the student a FAPE for the 2020-21 school year and the April 2021 IEP offered the student a FAPE for the 2021-22 school year (see IHO Decision at pp. 29-36). The IHO accurately recounted the facts of the case, addressed the specific issues identified in the parents' due process complaint notice, and set forth and applied the proper legal standards to determine whether the district offered the student a FAPE (id. at pp. 16-20). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and properly supported his conclusions (id. at pp. 29-36). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Accordingly, the conclusions of the IHO are hereby adopted taking into account the additional discussion set forth below specific to the parent's arguments on appeal.

A. 2020-21 School Year

For the 2020-21 school year, the CSE met and developed two IEPs in close proximity on June 4, 2020 and July 30, 2020. The Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unliterally] place" their child (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]). The parties agreed that for the 2020-21 school year the July 2020 IEP should be treated as the operative IEP for purposes of assessing the district's offer of a FAPE (see Tr. p. 101).

The parent asserts that the special education program recommended for the 2020-21 school year was not appropriate for the student and offered less special education support than the student's program at SAR for the 2019-20 school year (Req. for Rev. ¶ 6).⁶ Additionally, the

⁶ Comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE; rather it must be determined whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint notice, and whether the IEP developed by its CPSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (Rowley, 458 U.S. at 189, 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "'the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent'"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at *8 [S.D. Cal. Feb. 14, 2013] [noting that "'[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits'"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at *5 [S.D. Cal. Mar. 14, 2011]).

parent argues that the IHO erroneously relied upon retrospective testimony with respect to the program recommended by the district.

The IHO found that, based upon the evidence in the hearing record and the "credible testimony of the CSE chairperson, the school psychologist, and the speech[-]language pathologist" the recommendations contained in the July 2020 IEP were appropriate (IHO Decision at p. 31).⁷ More specifically, the IHO found that the program of a general education classroom, with 60-minutes per day of ICT services and 90 minutes per day of instruction in a 15:1 special class with two 30-minute sessions of small group (3:1) speech-language therapy per week, two 30-minute sessions of individual OT per week, four 30-minute indirect OT consults with the student's teacher per year for a "sensory diet," one 30-minute session of small group (3:1) psychological counseling services per week, and one 60-minute session of individual parent counseling and training per month recommended by the June 2020 CSE and set forth in the student's July 2020 IEP was appropriate to meet the student's needs (IHO Decision at p. 31; Dist. Ex. 9 at p. 7).^{8,9}

In developing the recommended special education program for the 2020-21 school year, the June 2020 CSE reviewed the January 2020 SINAI School progress report,¹⁰ 2018 evaluations, and information provided by the parents during the CSE meeting (Tr. pp. 278-80, 337-38; see Dist. Ex. 9 at pp. 3-4).¹¹ The hearing record shows that the evaluative information available to the July 2020 CSE indicated that the student had a Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) general ability index standard score of 122 (93rd percentile), and that he was functioning in "the superior or very high range of intelligence" (Dist. Ex. 2 at pp. 2, 4). His

⁷ Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this instance, neither non-testimonial evidence in the hearing record nor the hearing record read in its entirety compels a contrary conclusion with regard to the credibility of the witnesses.

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

⁹ State regulation describes a 15:1 special class placement as the "maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]).

¹⁰ Although the IEP referenced a January 31, 2020 progress report, the school psychologist testified that the CSE relied on the SINAI School anecdotal report dated February 2020 (Tr. pp. 104-05; Dist. Exs. 7 at p. 1; 9 at p. 3).

¹¹ Although the July 2020 is the operative IEP for the 2020-21 school year, the hearing record shows that the recommendations for the 10-month school year were developed at a prior CSE meeting held in June 2020 (see Dist. Exs. 9; 12). The July 2020 CSE was held specifically to review regression statements provided by the parent and recommend extended school year (ESY) services (Tr. pp. 306-07, 343-44; Dist. Ex. 12 at pp. 1-2).

adaptive skills were in the "solidly" average range, and his subtest scores on the Young Children's Achievement Test ranged from 92-100 (Dist. Exs. 2 at p. 2; 6 at pp. 2-4).

According to the SINAI anecdotal report dated February 2020, which the June CSE had available to it, the student was in "below grade level" instructional groups for academics and was "meeting grade level expectation with support" or "progressing toward grade level expectation with support" in math, reading and writing (Dist. Ex. 7 at pp. 3-5). In math, the student benefitted from "time to think problems through without feeling rushed or overwhelmed," and the use of manipulatives for direct instruction (*id.* at p. 4). In reading, the student's instruction was based on a "methodological approach to decoding through direct phonics instruction," and reading and writing were taught together, "consistent with a multi-sensory program" (*id.* at pp. 4-5). He was learning to read phonics-based decodable texts and his consonants were not fully automatic and he relied on pictures that matched the letter sound to recall letters and sounds (*id.*). The student could usually answer comprehension questions but did not always pick out the relevant information and had difficulty staying on topic, especially for text-to-self connections (*id.*). When writing, the student needed to say his thoughts out loud before writing in order to help organize himself, sounded words out, frequently omitted letters or words, did not form letters properly, and needed support to form complete sentences and use punctuation (*id.* at p. 5).

The June 2020 CSE also had available for review the results of a March 2018 evaluation of the student's speech-language skills (Dist. Ex. 9 at pp. 3-4). The evaluation report indicated student's overall expressive and receptive language skills as measured by the Clinical Evaluation of Language Fundamentals-Preschool-Second Edition (CELF-Preschool-2) were within the average range compared to peers his age (Dist. Ex. 4 at pp. 2, 4-5). On the CELF-Preschool-2 pragmatics profile, a rating scale completed by the parent, the student exhibited social-pragmatic skills "significantly" below the criterion score for his age (*id.* at pp. 4-5). Based on additional testing the student demonstrated articulation skills in the below average range (*id.*).

According to a March 2018 social history, the student exhibited sensory issues, resisted making transitions, was set in his ways, and "found comfort" in routines with a known schedule, and, when there was a change, the student would melt down, hit, kick, tantrum, and refuse to comply (Dist. Ex. 3 at p. 2). The February 2020 Sinai anecdotal report considered by the CSE indicated the student experienced intense emotions, both positive and negative (Dist. Ex. 7 at p. 1). His body "burst[] with excitement and energy" when playing his favorite class game but when frustrated or worried the student would "cry quietly to himself or become more upset and even agitated" (*id.*). In addition, the student's "thinking c[ould] get stuck" at which point he benefitted from "a private quiet place where he c[ould] clam down" (*id.*). The Sinai report stated that the student benefitted from repeated explanations and specific strategies that targeted each skill being taught, and when he received attention, support, and positive feedback, he was capable of completing class work (*id.*). The student was most successful working in small groups where he was supported academically and emotionally and during "whole class or larger group" meetings, lessons, and discussions, it was important for the student to "sit next to a teacher where he [could] receive the necessary support to understand the class conversation, maintain focus, and alleviate anxiety" (*id.*). Socially, during recess, the student ran around with peers, played soccer, or played on the jungle gym and when unsure of what to play with peers, would "hang out" near his teachers and engage them in personal stories, talk about superheroes, or other topics on his mind (*id.*). During choice time, the student usually engaged in creative or imaginative play by himself (*id.*).

The CSE chairperson testified that, during the June 2020 CSE meeting, the parents indicated that the student was struggling at SAR Academy and "require[d] more support both emotionally and academically," was very anxious, had trouble sustaining focus, was below grade level, and benefitted from small group instruction (Tr. pp. 280-82, 283-84; see Dist. Ex. 9 at pp. 1-2).

The IHO found that the CSE discussed that the special class would address the student's English language arts (ELA) instruction, and the ICT services would address math instruction (IHO Decision at p. 30). This is supported by the hearing record which shows that, although not specifically identified in the July 2020 IEP, instruction in the 15:1 special class was for ELA and ICT services were for math, and this distinction was discussed at the June 2020 CSE meeting (Tr. pp. 110, 289-90, 292, 341, 359-60). The parent argues that the IHO improperly relied on retrospective testimony in this regard. The Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unilaterally] place" their child before the beginning of a school year (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 [indicating that "[a]t the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]). Generally, R.E. stands for the proposition that a district cannot rely on after the fact testimony to rehabilitate a deficient IEP (see R.E., 694 F.3d at 186-88). In grappling with the permissibility of retrospective evidence in R.E., the Second Circuit squarely held that the question of whether an IEP was reasonably calculated to enable the student to receive education benefits "must be evaluated prospectively as of the time [the IEP] was created" (R.E., 694 F. 3d at 184-88 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). Although the Second Circuit has held that 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 (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]). Here, given that the academic subject areas that would be addressed by the services were discussed at the CSE meeting, the evidence in the hearing record indicates that the testimony of the CSE chairperson did not materially alter the content of the IEP but rather, at most, explained the services listed in the IEP consistent with discussions had during the CSE meeting, which was not a denial of a FAPE.

In addition, the evidence in the hearing record shows that the programming and services recommended in the IEP were appropriate to meet the student's needs as known to the CSE. Although the parent reported to the CSE that the student was struggling at SAR, the CSE also had information before it that the student was "meeting grade level expectation with support" or "progressing toward grade level expectation with support" in math, reading and writing (Dist. Ex. 7 at pp. 3-5). Accordingly, the CSE adjusted the student's recommended programming taking into account the student's LRE. The CSE chairperson testified that the June 2020 CSE discussed the

student's needs and whether the student required more support than was previously recommended and determined that "additional support and a special class, specifically in the area of reading" was appropriate based on the student's "overall level of functioning" (Tr. p. 2889). The CSE chairperson reported that the recommended special class was 90 minutes long and had a class ratio of 15 students to 1 teacher (Tr. pp. 289-90). According to the CSE chairperson, the 15:1 special class focused on reading and writing and would have provided the student with small group instruction and explicit instruction in reading and decoding, skills that would carry over into the general education environment (Tr. pp. 290, 300-01). The CSE chairperson additionally testified that the ICT classroom was a general education setting with a general education curriculum and standards and the special education teacher's role was to provide modifications based on the student's needs and IEP goals (Tr. pp. 292-93). Students could be "functionally grouped" based on their needs and were provided specialized instruction, modifications, and accommodations (Tr. pp. 293, 358-59).

The hearing record further shows that during the portions of the school day not covered by the 15:1 special class and ICT services, the general education teacher would have provided the modifications and accommodations in the student's IEP including a positive reinforcement plan, movement breaks, reteaching of materials, refocusing and redirection, preferential seating, and checks for understanding instructions (Tr. pp. 110-12, 298-300; Dist. Ex. 9 at p. 9). In addition, the student would have received speech-language therapy, school-based psychological counseling services, and OT to address his language, fine motor, sensory, and social/emotional needs (Tr. pp. 296, 301; Dist. Ex. 9 at p. 9). The CSE also recommended parent counseling and training for the parents (Dist. Ex. 9 at p. 9). The CSE chairperson explained that the recommendation was made "based on the parent's discussion in regard[] to how [the student] was struggling both at home and in school, some of the topics for parent counseling and training would support those areas" (Tr. p. 297).

Based on the foregoing, there is insufficient basis in the hearing record to disturb the IHO's decision that the district offered the student a FAPE for the 2020-21 school year.

B. 2021-22 School Year

The parents contend that the program recommendation for the 2021-22 school year failed to address the student's academic and social/emotional needs. Further, the parents argued that the IHO relied on retrospective testimony of a special education teacher who did not have direct knowledge of the recommended 12:1+2 special class.

Turning to the program recommended for the 2021-22 school year, the IHO found that the 12:1+2 special class PAT program, along with the recommended related services and program modifications, was reasonably calculated to provide the student with meaningful educational benefit in the LRE (IHO Decision at p. 26).¹²

¹² State regulation provides that "the maximum class size for special classes containing 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, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]).

Here, the hearing record shows that the April 2021 CSE relied on the results of an August 2020 private neuropsychological evaluation and evaluations conducted in April 2021, including an OT evaluation, a psychological evaluation, a social history, a speech-language evaluation, a classroom observation, and an educational evaluation, as well as progress reports from SINAI and parent report (Tr. pp. 312-13, 316-17; Dist. Ex. 21 at pp. 1-5). The student's performance on the April 2021 educational evaluation was consistent with the student's academic performance on the August 2020 private neuropsychological evaluation and established that the student demonstrated low average to average cognitive ability, and below average academic performance, with his academic skills falling at the kindergarten or early first grade level (Tr. pp. 66-68; see Dist. Exs. 13; 14).

The August 2020 neuropsychological evaluation found the student's expressive and receptive language deficits warranted a diagnosis of language disorder; however, the April 2021 educational evaluation yielded a Wechsler Individual Achievement Test-Third Edition (WIAT-III) oral language composite standard score of 102 (55th percentile), in the average range, and the April 2021 speech-language evaluation yielded a Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) core language score of 90 (25th percentile) (Dist. Exs. 13 at pp. 13-14; 14 at pp. 5-7; 18 at pp. 2-4). Despite the overall average scores on the WIAT-II and CELF-5, the assessments showed the student demonstrated weaknesses in receptive vocabulary, word structure, and formulating sentences (Dist. Exs. 14 at pp. 5-6, 7, 8; 18 at pp. 2-4).

The student also struggled with social/emotional skills, executive functioning, and sensory processing (see Dist. Exs. 13; 16; 19). The August 2020 neuropsychological evaluation report noted that the student had a short attention span, was easily distracted, and was more active and physically restless than his peers (Dist. Ex. 13 at p. 11;). The student struggled to modulate his emotions and "clinically significant elevations" were noted regarding the student's self-control at school (id.). He had difficulty coping with challenges or changes in routine (id.). Similarly, the April 2021 psychological evaluation report indicated parent and teacher concerns with regard to "[a]ttention [p]roblems, [a]typicality and [w]ithdrawal, [a]daptability, [s]ocial [s]kills, [l]eadership, [f]unctional [c]ommunication, emotional control and set shifting (Dist. Ex. 19 at pp. 3-6).

The hearing record shows that, to address the student's needs, the April 2021 CSE determined that the therapeutic PAT program, which was a small, self-contained 12:1+2 special class for students with significant emotional dysregulation, was appropriate to meet the student's needs (Tr. pp. 82-83, 143, 323; Dist. Ex. 21 at p. 3).¹³ As previously mentioned, the testimony of the special education teacher, who was present at the April 2021 CSE meeting, served to explain the 12:1+2 special class in the PAT program and did not offer testimony for the purpose of rehabilitating the IEP (see R.E., 694 F.3d at 186-88). The therapeutic PAT 12:1+2 special class had a maximum of 12 students with one teacher, a teaching assistant, and a teacher aide and used

¹³ The hearing record shows that the April 2021 CSE also discussed other program options, including a 15:1 special class and ICT services, but rejected these options because the student required support in reading, writing, and math along with social/emotional support to address the anxiety that impacted his acquisition of new skills (Tr. pp. 322-23; Dist. Ex. 21 at p. 3). The April 2021 CSE also discussed a 12:1+1 special class but rejected this option because the student was "cognitively and academically" not appropriate for that special class (Tr. p. 323; Dist. Ex. 21 at p. 3).

DBT, an evidence-based curriculum that helped students regulate their emotions, and "built-in" counseling from a dedicated school psychologist (Tr. pp. 83-84, 323-25). The PAT program focused on small group and one-to-one instruction based on the student's needs (Tr. p. 145). The school psychologist testified that the PAT program provided group counseling twice per week through a DBT skills group in the classroom which taught specific skills related to managing emotions, tolerating distress, and being mindful, and all classroom staff were trained in DBT (Tr. pp. 84-85, 88). The PAT program also included instruction using the Rethink social/emotional learning curriculum, which focused on social skills, feeling, likes and dislikes, how to communicate with peers, family structures, and daily living skills, and the student would have also received the individual counseling recommended in his April 2021 IEP (Tr. pp. 148-49; see Tr. pp. 88-89).

To address the student's academic needs, the PAT program offered instruction individually or in small groups of two or three students to one teacher based on the students' academic needs (Tr. pp. 88, 145, 325). The PAT program included reading instruction using Preventing Academic Failures and Leveled Literacy Intervention (Tr. p. 149). In addition, the PAT program was a "tier three" program, which provided instruction either individually or in small groups (Tr. pp. 145, 170). Instruction was based on the student's grade level and scaffolded based on student needs, and students were assessed daily in each academic area (Tr. p. 149). The district special education teacher testified that the PAT program would have been able to address the student's reading needs, which were then-currently two grades below grade level (Tr. p. 175).

Although the August 2020 private neuropsychological evaluation indicated that a "class staffing ratio of 8:1:1 should not be exceeded" for the student (Dist. Ex. 13 at p. 15), the CSE was not required to adopt the recommendations of the private evaluator (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]). The ratio of eight students to two adults (one adult for every four students) referenced in the private evaluation is not that dissimilar to the CSE's recommendation for a special class consisting of 12 students to three adults (also one adult for every four students) (compare Dist. Ex. 13 at p. 15, with Dist. Ex. 21 at p. 14), and the district was not merely required to replicate private programming preferred by the parents in the student's IEP (M.E. v. New York City Dep't of Educ., 2024 WL 1514299, at *5 [S.D.N.Y. Apr. 8, 2024]) As to the private evaluator's testimony that a placement with more students in a classroom would pose difficulty for the student (Tr. p. 765), I defer to the IHO's determination that the testimony was not credible on this point given that the evaluator was not familiar with the district's programs and had not observed the student in a classroom setting (IHO Decision at pp. 35-36; see Carlisle Area Sch., 62 F.3d at 524, 528-29; P.G., 2015 WL 787008, at *16; M.W., 869 F. Supp. 2d at 330; Bd. of Educ. of Hicksville Union Free Sch. Dist., 84 A.D.3d at 796).

In addition to the supports built into the PAT program, the hearing record demonstrates that the student would have received the modifications and accommodations described in his April 2021 IEP, which included a positive reinforcement plan, movement breaks, reteaching, refocusing and redirection, preferential seating, checks for understanding instructions, use of graphic organizers, access to fidget tools, use of visual aids, flexible seating, simplified language in directions and instructions, chunking of information, and access to audio books, and through assistive technology including access to a computer during independent work, and access to text to speech software for writing assignments (Tr. p. 155; Dist. Ex. 21 at pp. 14-15). He would have had access to his general education peers during specials and lunch and also opportunities to go into a general education setting for academic instruction if appropriate (Tr. pp. 95-96, 152, 326). The student would also have received speech-language therapy to address his receptive, expressive, and pragmatic skills, and OT to address his fine motor and sensory processing needs as specified in the April 2021 IEP (Tr. pp. 218-19; Dist. Ex. 21 at p. 14).

Several of the parents' concerns raised on appeal relate to the other students in the PAT program, which the IHO correctly found to be speculative as deficiencies in functional grouping when a student has not yet attended the proposed classroom at issue tend to be speculative in nature (J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016] [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP"], quoting R.E., 694 F.3d at 195; see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]). Various district courts have followed this precedent post M.O. (G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016] [same]; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at *4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"]).¹⁴

Even if the parent's grouping claims were not speculative, the hearing record does not demonstrate that the student would have been inappropriately grouped. To the extent that the parents argue that the PAT program was composed of students whose regulatory challenges would have created ongoing distractions for the student, the school psychologist testified that, while all students in the PAT program had "significant levels of anxiety," low frustration tolerance, and social needs, they primarily exhibited "internalizing rather than externalizing behaviors" (Tr. pp. 86-87). The parents also contend that the student would have been "significantly below grade level in academics," whereas the PAT program was for students who had difficulty with emotional regulation but had average cognitive abilities with academic performance that was "not too far below grade level" (Dist. Ex. 21 at p. 3). However, the hearing record shows that the students in the PAT program had average or slightly below average cognitive abilities with below average or

¹⁴ With regard to what is often called "functional grouping," State regulations provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]).

average academic skills whose social/emotional deficits impacted their ability to access the curriculum and were below grade level because of interfering behaviors (Tr. pp. 145-46, 324-25, 355). Consistent with the profile of students in the PAT program, the CSE chairperson testified that "based on the information . . . provided by SINAI," the student's deficits included "a combination of dysregulation, self-doubt statements, as well as the anxiety and the anxiousness combined with the difficulty with reading" (Tr. p. 356).

As stated by the IHO, the evidence in the hearing record supports finding that the district offered a program that was "reasonably calculated" to provide meaningful educational benefit to the student (IHO Decision at p. 36). While I empathize with the parents that they preferred a placement for the student at SINAI School, as noted above, the IDEA ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132). Accordingly, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE for the 2021-22 school year.

VII. Conclusion

Having determined that the IHO correctly determined that the student was offered a FAPE for the 2020-21 and 2021-22 school years, the necessary inquiry is at an end.

I have considered the parents' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 18, 2024**

**JUSTYN P. BATES
STATE REVIEW OFFICER**