



# The University of the State of New York

## The State Education Department

State Review Officer

[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 24-383

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

**Appearances:**

Ingerman Smith, L.L.P., attorneys for petitioner, by Christopher Venator, Esq.

Law Offices of Susan J. Deedy & Associates, attorneys for respondent, by Richard F. Corrao, Esq.

### DECISION

#### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which found that it denied the respondent's (the parent's) son a free appropriate public education (FAPE) for the 2021-22, 2022-23 and 2023-24 school years and ordered it to reimburse the parent for his son's tuition costs at the Winston Preparatory School (Winston Prep) for the 2022-23 and 2023-24 school years. The appeal must be sustained.

#### II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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**

On March 11, 2021, the CSE convened for the student's annual review and to develop an IEP for the student for the 10-month, 2021-22 school year (8th grade) (Dist. Ex. 4). The March 2021 CSE found the student eligible for special education services as a student with an other health impairment (OHI) and recommended a program consisting of five 43-minute periods per week of integrated co-teaching (ICT) services in both math and English, three 43-minute periods per six-day rotation of direct consultant teacher services in both science and social studies, three 43-minute periods per six-day rotation of resource room in a group (5:1), and two 30-minute sessions per

month of individual counseling services (*id.* at pp. 1, 7). The district sent a prior written notice to the parent dated March 11, 2021 summarizing the March 2021 CSE's recommendations (Dist. Ex. 5).

On April 29, 2021, the CSE reconvened for a requested review to review a speech-language evaluation dated March 15, 2021 and to update the student's IEP for the 2021-22 school year (*see* Dist. Ex. 9).<sup>1 2</sup> The April 2021 CSE recommended the same program as the March 2021 CSE with the addition of one 30-minute session per week of speech-language therapy in a small group (5:1) (*compare* Dist. Ex. 9 at p. 7, *with* Dist. Ex. 4 at p. 7). The district sent the parent a prior written notice dated April 29, 2021, summarizing the April 2021 CSE's recommendation to add speech-language therapy to the student's IEP (Dist. Ex. 10).

The student attended the recommended district program for the 2021-22 school year (Parent Ex. A ¶ 7; *see generally* Dist. Ex. 15).

On February 17, 2022, the CSE convened for the student's annual review and to develop the student's IEP for the 10-month, 2022-23 school year (9th grade) (Dist. Ex. 13). The February 2022 CSE continued to find the student eligible for special education services as a student with an OHI and recommended that he receive five 42-minute periods per week of integrated co-teaching (ICT) services in math, English, science, and social studies, two 30-minute sessions per month of individual counseling services, and one 30-minute session per week of speech-language therapy in a small group (5:1) (*id.* at pp. 1, 7-8). The district sent the parent a prior written notice dated February 17, 2022 summarizing the February 2022 CSE's recommendations and also explaining its decision to remove resource room for the 2022-23 school year, noting that additional general education supports would be provided to assist the student in writing and math along with increased support in science and social studies (Dist. Ex. 14).

During summer 2022, the student attended an enrichment program at Winston Prep (Parent Ex. A ¶ 97; *see* Tr. p. 735; Parent Exs. I; AA at p. 7; BB). On August 22, 2022, the parent executed an enrollment agreement with Winston Prep for the student to attend the school during the 2022-23 school year (Parent Ex. U).

On August 30, 2022, the parent sent a letter to the district indicating her disagreement and rejection of the student's February 2022 IEP, her intention to enroll the student at Winston Prep for the 2022-23 school year, and her intention to file an "Impartial Hearing Request" to obtain tuition reimbursement and roundtrip transportation from the district (Parent Ex. K).

The district sent a letter to the parent in response to her August 2022 rejection letter, dated September 9, 2022 and postmarked September 20, 2022, encouraging the parent to pursue supports

---

<sup>1</sup> The March 11, 2021 IEP also contained information from the March 15, 2021 speech-language evaluation (*see* Parent Ex. 4 at pp. 2, 4); however, the district school psychologist explained during the impartial hearing that such information was a clerical error (Tr. pp. 56-57).

<sup>2</sup> With respect to citations to the impartial hearing transcripts in this decision, the parties proceeded to two prehearing conferences and those transcripts are paginated separately from the rest of the hearings; accordingly, for ease, any references to the transcripts of the prehearing conferences will include the date (Oct. 18, 2023 Tr. pp. 1-48; Nov. 29, 2023 Tr. pp. 1-31).

and services offered by the district and also offered the parent an opportunity to reconvene the CSE to discuss her concerns and the student's needs (Parent Ex. L). On February 27, 2023, the parent sent the district an email indicating that she sought a "FAPE" from the district for the student for the upcoming 2023-24 school year (Parent Ex. M). On March 1, 2023, the parent executed an enrollment agreement with Winston Prep for the 2023-24 school year (Parent Ex. V).

On July 20, 2023, the CSE convened for the student's annual review and to develop the student's IEP for the 10-month, 2023-24 school year (10th grade) (Dist. Ex. 18). The July 2023 CSE continued to find the student eligible for special education services as a student with an OHI and recommended the same frequency of ICT services and speech-language therapy as recommended in the prior February 2022 IEP, as well as one 30-minute session per week of counseling services, and five 42-minute sessions per week of resource room in a small group (5:1) (compare Dist. Ex. 18 at pp. 1, 10-11, with Dist. Ex. 13 at pp. 1, 8-9).

On August 22, 2023, the parent sent a letter to the district indicating her disagreement and rejection of the student's July 2023 IEP, her intention to enroll the student at Winston Prep for the 2023-24 school year, and her intention to file an "Impartial Hearing Request" to obtain tuition reimbursement and roundtrip transportation from the district (Parent Ex. O). The student attended Winston Prep during the 2023-24 school year and the Winston Prep enrichment summer program during the 2023 summer (Dist. Ex. 19 at p. 2; see Parent Ex. A ¶ 128).

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

In a due process complaint notice dated September 12, 2023, the parent alleged that the district denied the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years (Parent Ex. A ¶¶ 10, 157). More specifically, the parent alleged that the district: failed to appropriately evaluate the student; failed to conduct evaluations on a triennial basis; failed to consider evaluative data; failed to complete a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP); failed to consider positive behavioral interventions; based the student's IEPs on insufficient evaluative data; failed to adequately document the student's functioning; failed to develop appropriate goals and objectives; failed to include measurable annual goals on the student's IEPs; failed to consider its obligation to provide a full continuum of services to the student; recommended substantively inadequate instruction, supports, and services for the 2021-22, 2022-23, and 2023-24 school years; failed to offer a program tailored to the student's individual needs; failed to recommend parent counseling and training; failed to recommend appropriate reading support; failed to recommend appropriate writing support; failed to provide appropriately intensive services to meet the student's speech-language needs; failed to recommend sufficient counseling; failed to recommend appropriate social skill interventions; failed to recommend sufficient executive functioning interventions; failed to recommend sufficient support for adaptive functioning; failed to offer methodologies and/or strategies based on peer-reviewed research; provided insufficient academic intervention services (AIS) and response to intervention (RTI) supports; failed to consider or recommend compensatory education services for the services the student missed due to the COVID-19 pandemic; failed to consider the student's eligibility for 12-month services; failed to review and revise the student's IEPs in a timely manner; failed to offer anti-bullying or a safety plan; predetermined the student's program for the 2022-23, and 2023-24 school years; and denied the student a FAPE both procedurally and substantively for the 2021-2022, 2022-23, and 2023-24 school years (id. ¶¶ 129-158). The parent also alleged that Winston

Prep was an appropriate unilateral placement and that the equitable considerations favored her requested relief (id. ¶¶ 160-163).

As relief, the parent requested an order: finding the district denied the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years; directing the district to reimburse her for the costs associated with a private independent evaluation she obtained; directing the district to fund independent educational evaluations (IEEs) consisting of a reading assessment, a math skills assessment, an occupational therapy (OT) assessment with sensory component, a physical therapy (PT) assessment, an audiological assessment, and an assistive technology assessment with providers of the parent's choosing; directing the district to reimburse the parent for the student's tuition at Winston Prep for the 2022-23 and 2023-24 school years; directing the district to reimburse or directly pay for the student's transportation to and from Winston Prep for the 2022-23 and 2023-24 school years; directing the district to reimburse the parent for private cognitive behavioral therapy (CBT); and awarding the student compensatory education services (Parent Ex. A at p. 20).

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

The parties proceeded to two prehearing conferences on October 18, 2023 and November 29, 2023 (Oct. 18, 2023 Tr. pp. 1-48; Nov. 29, 2023 Tr. pp. 1-31). An impartial hearing convened on December 6, 2023 and concluded on April 5, 2024, after six days of proceedings (see Tr. pp. 1-837). In a decision dated July 30, 2024, the IHO found that the district denied the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years; that Winston Prep was an appropriate unilateral placement; and that the equities favored the parent's request for tuition reimbursement (IHO Decision at pp. 48-54).

More specifically, for the 2021-22 school year, the IHO determined that the district did not meet its burden to demonstrate that it provided the student a FAPE (IHO Decision at p. 37). The IHO noted that the student was previously recommended for an FBA and BIP and that the March 2021 and April 2021 CSEs removed such recommendation without providing an explanation (id. at pp. 37-38). The IHO also noted that the parent made the district aware that the student was suspected of having autism during the 2020-21 school year and the IHO determined that the district should have therefore performed further evaluations in all areas of the student's suspected disability (id. at pp. 38-39). The IHO also noted that the student had significant struggles with his social emotional functioning and that the district did not increase his counseling services nor assess the student further in such domain (id. at p. 40). The IHO further determined that the parent was deprived of the right to meaningfully participate in the development of the student's special education program for the 2021-22 school year because the district held learning support team (LST) meetings during the 2020-21 school year to discuss the student without the parent present (id. at pp. 40-41).

Regarding the 2022-23 school year, the IHO also found that the district did not meet its burden of showing that it offered the student a FAPE (IHO Decision at p. 41). The IHO noted that despite the ICT services, resource room and AIS, the student significantly struggled during the 2021-22 school year, yet the February 2022 CSE continued to recommend the same program with the exception of removing resource room from the student's IEP (id. at pp. 41-42). The IHO also noted the student's social/emotional deficits and that no changes were made to the student's

counseling services (id. at p. 42). The IHO also determined that the district should have reconvened the CSE to update the student's IEP for the 2022-23 school year or requested further testing based on the student's spring 2022 English language arts (ELA) assessment and math assessment (id.). The IHO further determined that the student required a specialized reading class in a small group and that ICT services did not provide sufficient supports to the student (id. at pp. 42-43).

Regarding the 2023-24 school year, the IHO found that the district did not meet its burden of showing that it offered the student a FAPE (IHO Decision at p. 43). The IHO noted that the student attended a private school for the 2022-23 school year and underwent an evaluation by a licensed psychologist who recommended a small, structured classroom setting with similar peers with individually modified instruction and opportunities for 1:1 assistance (id.). The IHO determined that there was no testimony that explained how the recommended ICT services provided any structure or a supportive environment to meet the student's needs (id. at p. 44). The IHO also determined that the July 2023 CSE did not consider the student's new autism diagnosis as the CSE did not change the student's educational classification from OHI to autism nor did the CSE recommend any supports related to autism such as behavior supports, positive reinforcements or parent counseling and training (id.). The IHO noted that the July 2023 CSE added resource room back to the student's IEP, but it failed to add a specialized reading class relying on additional general education supports of labs instead (id. at pp. 44-45). The IHO also determined that the district professionals who worked with the student every day missed or ignored the signs of autism, as well as the student's continued struggles with reading, executive functioning, and social interactions, despite noted concerns in each area by teachers and the parent (id. at p. 45). Thus, the IHO found the district denied the student a FAPE for the 2023-24 school year (id.).

Regarding the appropriateness of Winston Prep, the IHO determined that Winston Prep provided the student with the supports, services, and interventions that he required in order to make meaningful progress in all areas of educational, social, and emotional needs and that Winston Prep was an appropriate placement for the student during the 2022-23 and 2023-24 school years (IHO Decision at pp. 48-53). The IHO also determined that the equities favored the parent because, to the extent possible, the parent participated in all aspects of the student's special education process and communicated her concerns to the district (id. at p. 54).

Additionally, the IHO determined that the parent was not entitled to reimbursement for the private evaluation she obtained because she did not previously disagree with any district evaluations; that the parent was not entitled to reimbursement for the private summer enrichment programs during the summer 2022 or summer 2023 at Winston Prep because there was no evidence the student suffered substantial regression that required 12-month services; and that the parent was not entitled to transportation reimbursement (IHO Decision at p. 54).

As relief, the IHO ordered the district to reimburse the parent and/or directly pay Winston Prep for the student's full tuition and fees for the 2022-23 and 2023-24 school years and for the district to conduct comprehensive evaluations in reading, OT with a sensory component, auditory processing, and an FBA (IHO Decision at p. 55).

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

The parties' familiarity with the particular issues for review in the district's request for review and the parent's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited in detail. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. whether the IHO erred in determining that the parent was denied meaningful participation in the student's educational planning process during the March 2021 and April 2021 CSEs;

2. whether the IHO erred in determining that the district did not sufficiently evaluate the student in all areas of suspected disability for the 2021-22 and 2022-23 school years;

3. whether the IHO erred in determining the CSE should have reconvened to update the student's IEP for the 2022-23 school year after the student's spring 2022 assessments;

4. whether the IHO erred in determining the student required an FBA and BIP to address his behaviors;

5. whether the IHO erred in determining ICT services as recommended in the March 2021, April 2021, February 2022, and July 2023 IEPs did not provide enough individualized support to the student to enable him to make meaningful academic progress;

6. whether the IHO erred in determining the student required more counseling than what was recommended in the March 2021, April 2021, February 2022, and July 2023 IEPs;

7. whether the IHO erred in determining the student required specialized reading instruction to address his reading needs;

8. whether the IHO erred in determining that Winston Prep was appropriate to address the student's needs; and

9. whether the IHO erred in ordering the district to preform various comprehensive evaluations of the student.

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

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the



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

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



200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>3</sup>

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**

At the outset, the parent argues that the district's appeal improperly attempts to incorporate by reference factual assertions and arguments in its memorandum of law in support of the district's request for review and was too vague to raise for review specific findings of the IHO.

State regulations provide that "the request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length" and that "[a] party shall not circumvent page limitations through incorporation by reference" (8 NYCRR 279.8[b]). State regulations further provide 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

---

<sup>3</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

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, 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]). Pursuant to State regulations, documents that do not comply with the pleading requirements "may be rejected in the sole discretion of a State Review Officer" (8 NYCRR 279.8[a]).

Here, I exercise my discretion and decline to reject the district's pleadings in this case. The district's request for review sufficiently identifies the IHO's "findings, conclusions, and orders" to which it takes exception (see 8 NYCRR 279.4[a]). Each of the district's claims in its request for review has a heading that indicates the grounds on which the district is looking for review and reversal (see Req. for Rev. at pp. 2-5). In addition, the district submits a memorandum of law in support of its request for review, which sets forth additional arguments with citations to relevant evidence, statutes, regulations, and case law to argue that the district offered the student a FAPE for the 2021-22, 2022-23 and 2023-24 school years (see Dist. Memo. of Law at pp. 2-16). Accordingly, an independent review of the request for review does not support the parent's arguments that the district makes broad, conclusory, and imprecise claims or that the district fails to identify the grounds for reversal or modification (Answer ¶¶ 6-9).

## **B. CSE Process**

### **1. Parent Participation & Predetermination**

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see 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 Commc'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"]).

For the 2021-22 school year, the IHO found there was evidence in the hearing record that the parent was deprived of the right to meaningfully participate in the development of the student's special education program. The IHO determined that the parent was not invited to the December 2020 LST meeting, where team members discussed concerns raised by the parent related to the student's academic performance and potential need for a foreign language exemption. The IHO noted that the LST reviewed updated academic and cognitive testing from an October 2020 psychological report and determined the student should undergo a speech-language evaluation. Moreover, the IHO found that the parent was not invited to review the results of the October 2020 testing until five months later at the March 2021 CSE meeting. Based on the above, the IHO determined that the district failed to provide the parent with meaningful participation in the student's academic planning (IHO Decision at pp. 40-41). The district argues that such finding has no bearing on the appropriateness of the IEP developed for the 2021-22 school year (see Parent Memo. of Law at pp. 4-5).

Here, the district is correct that the IHO erred by holding the lack of parent participation at the LST meeting denied the parent a meaningful opportunity in the development of the IEPs for the 2021-22 school year. School district staff are permitted to engage in preparatory activities to develop proposals or respond to parental concerns without the parents' presence, as long as these activities are not final decision-making activities (see T.P., 554 F.3d at 253; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F.Supp.2d 130, 136 [E.D.N.Y. 2011]).

A review of the hearing record shows that the district LST convened on December 16, 2020 because a school counselor requested the review for consideration of language deferment for the student (Dist. Ex. 1). The district school psychologist described the LST as a team meeting held at the building level with administrators such as herself and the principal, assistant principal, the school counselor, and related services providers such as the speech/language pathologist, social worker, and, at times, a teacher (Tr. pp. 34-35). The school psychologist further explained that the student underwent an educational evaluation in October 2020 which was discussed at the December 2020 LST meeting in which the LST recommended an additional evaluation in the form of a speech-language evaluation (Tr. pp. 40-41). The school psychologist further testified that at the time of the March 2021 CSE meeting, the speech-language evaluation was not completed but the meeting continued because there were other evaluations that had been conducted to review (Tr. pp. 45-47).

According to the student's March 2021 IEP, the CSE reviewed an October 2020 educational evaluation and an October 2020 psychological report (Dist. Ex. 4 at p. 2). The parent was a member of the March 2021 CSE and according to the prior written notice dated March 11, 2021, contributed to the discussion, and planning of the student's academic program for the 2021-22 school year and agreed with the recommendations (Parent Exs. 1 at pp. 1; 5; see Tr. p. 59). For example, according to the March 2021 prior written notice, the parent asked about additional wait time and breaking down information when presented to the student which the CSE responded to by adding wait time as a program modification in addition to "break directions and tasks into smaller components" (Dist. Ex. 5 at p. 2).

According to the student's April 2021 IEP, the CSE reconvened for a requested review to discuss the recent speech-language evaluation which was completed on March 15, 2021 (Dist. Ex. 9; see Tr. p. 67; Dist. Ex. 7). The April 2021 CSE recommended the addition of one 30-minute

session per week of speech-language therapy to begin during the 2020-21 school year in May 2021 (Dist. Exs. 9 at p. 1; 10; see Dist. Ex. 24). The parent was noted as a member of the April 2021 CSE and according to the April 2021 prior written notice, the parent participated in the meeting and agreed with the recommendations (Dist. Exs. 9 at p. 1; 10 at p. 2).

Thus, the hearing record does not show that the district predetermined the student's program by holding LST meetings without the parent present or that the district significantly impeded the parent from the opportunity to meaningfully participate in the creation of the student's March 2021 and April 2021 IEPs (see T.P., 554 F.3d at 253; B.O., 807 F.Supp.2d at 136). Rather, the hearing record supports a finding that the LST meetings constituted preparatory meetings preceding the CSE meetings referred to above, the parent fully participated in the CSE meetings and the other members of the CSE kept the requisite "open mind" when discussing the student's educational programming. Accordingly, contrary to the IHO's determination, the hearing record does not support a finding that the CSE predetermined the student's program and placement or otherwise impeded the parent's ability to participate in the IEP development process.

## **2. Sufficiency of Evaluative Information**

Next, 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).

### **a. March 2021 and April 2021 CSEs**

With respect to the 2021-22 (eighth grade) school year, as indicated above, the CSE met twice, once in March 2021 and then again in April 2021 to review an updated speech and language evaluation (Dist. Exs. 4-5; 9; 10). At both the March and April 2021 CSE meetings, participants

included the district school psychologist who served as chairperson (school psychologist), a special education teacher, a general education teacher, a school counselor, and the student's parent; with the addition of the speech-language therapist at the April 2021 CSE meeting (compare Dist. Ex. 4 at p. 1, with Dist. Ex. 9 at p. 1). According to the April 2021 prior written notice, the CSE considered reports and evaluations as listed on the student's April 2021 IEP that included: February 2020 Northwest Evaluation Association (NWEA) progress reports in math and reading; the October 2020 psychological report, the October 2020 educational evaluations, a January 2021 transition assessment, the student's February 2021 report card, a February 5, 2021 progress report, and the March 15, 2021 speech-language evaluation (Dist. Exs. 9 at p. 1; 10 at p. 1).<sup>4</sup> In addition, the April 29, 2021 prior written notice listed the April 15, 2021 "learning support team (LST) [r]eview" (Dist. Ex. 10 at p. 1).

The March 2021 CSE reviewed the results of the October 2020 psychological reevaluation and included information from the evaluation in the present levels of performance of the student's April 2021 IEP (compare Dist. Ex. 2, with Dist. Ex. 4 at pp. 3-4). According to the report, previous cognitive testing conducted in April 2018, using the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V), yielded a full scale IQ of 102, indicating abilities in the average range (Dist. Ex. 2 at p. 2). In addition, the testing yielded composite scores of 92 for processing speed, 94 for working memory, and 97 for fluid reasoning, indicating abilities in the average range; and scores of 111 in verbal comprehension and visual spatial, corresponding to high average intellectual abilities (id.). A second administration of the WISC-V, conducted as part of the October 2020 psychological reevaluation yielded a full scale IQ of 95, and composite scores of 94 for working memory, 106 for fluid reasoning, and 98 for verbal comprehension, indicating intellectual abilities within the average range (id.). The student's composite score of 111 on the visual spatial index indicated high average abilities, while his composite score of 80 for processing speed indicated low average abilities (id.).<sup>5</sup> The October 2020 psychological reevaluation report provided information on the student's behavior and general emotional state as measured by the Behavior Assessment System for Children, Third Edition (BASC-3) (Dist. Ex. 2 at p. 6). Per the self-report form of the BASC-3, the student's responses fell within the average range as related to his interpersonal relationships and overall personal adjustment, and he did not indicate any

---

<sup>4</sup> The student's April 2021 IEP reflected his February 2020 NWEA scores with an English/Language Arts score of 190 (RIT) and corresponding percentage score of 5, and a NWEA mathematics score of 211 (RIT), with a percentage score of 24 (Dist. Ex. 9 at p. 3). The hearing record did not include the January 2021 transition assessment; however, the district introduced transition assessment information for the following year dated December 2021 and February 2022 (see Dist. Ex. 23).

<sup>5</sup> During the impartial hearing, the school psychologist testified regarding the drop in the student's processing speed index score from 92 in 2018 to 80 in 2020 (Tr. pp. 201-04). The school psychologist noted that the second evaluation was conducted during the pandemic (Tr. pp. 201-02). She also testified that there was "a piece of motivation with regard to processing speed that comes into play," and explained that the student's graphomotor skills could vary significantly (Tr. pp. 202-04). Further, the psychologist testified that the confidence interval would have placed the student's scores with 96 percent probability between 73 to 91 if taking the test more than once, which was not far outside the reliability (Tr. p. 202). The school psychologist testified in general that the district did not re-test students solely on Covid protocols such as masking and distancing being in place (Tr. pp. 203-204).

elevations or report concerns related to anxiety, depression, attention, somatization, self-esteem, self-reliance or social stress (id.).<sup>6</sup>

Additionally, in October 2020, the student's academic skills were assessed using multiple subtests of the Woodcock-Johnson IV Tests of Achievement Form B and Extended (WJ IV ACH) and considered by the April 2021 CSE as well as reflected in the student's present levels of performance in areas of reading, writing, and mathematics skills (compare Dist. Ex. 3, with Dist. Ex. 9 at pp. 3-4). According to the October 2020 testing using the WJ IV ACH, the student, on the approximately 20 selected cluster/subtests, received a majority of scores within the average range with standard scores ranging from 91 to 107 in areas of reading, mathematics, math calculation skills, written language, written expression, academic skills, letter-word identification, applied problems, spelling, passage comprehension, writing samples, and math facts fluency (Dist. Ex. 3 at p. 1). On the subtests of sentence writing fluency, sentence reading fluency, broad reading, and academic fluency, the student received low-average standard scores of 82, 84, 87, and 88, respectively (id.).

The hearing record included progress reports for the student's 2020-21 school year as related to goal progression and/or achievement in areas of study skills, reading, writing, math, speech-language and social/emotional skills, documentation of the student's consistent growth in academic intervention services (AIS) in the area of reading; as well as the student's 2020-21 seventh-grade report card (Parent Ex. X; Dist. Exs. 11; 12).<sup>7</sup> The March 2021 and April 2021 IEPs indicated that the CSEs reviewed the student's February 2021 progress report and February 2021 report card (Dist. Exs. 4 at p. 2; 9 at p. 2). Therefore, in terms of the February 2021 progress report, the March and April 2021 CSEs would have had information regarding the progress the student made toward his IEP goals for the first two quarters of the 2020-21 school year (November 2020 and January 2021), and the first two quarters of report card grades (see Parent Ex. X; Dist. Ex. 12). Specifically, the 2020-21 progress report stated that by January 2021 the student had progressed gradually toward his study skills goal and reading goal; and progressed satisfactorily towards his writing, mathematics, and social/emotional/behavioral goals (Parent Ex. X at pp. 1-7). Per the first two quarters of the student's 2020-21 report card, the student had grades as follows: English 7 (65, 65); Italian 7 (60, --); math 7 (65, 91); science 7 (85, 88); social studies (70, --); physical education 7 (100, 89); and music 7 (80, 90) (Dist. Ex. 12).

On March 15, 2021, as included within the April 2021 IEP, a speech-language evaluation was completed for the student (compare Dist. Ex. 7, with Dist. Ex. 9 at pp. 2, 4). Results of testing indicated an overall core language score on the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5) in the average range with a standard score of 90 (Dist. Ex. 7 at p. 10).<sup>8</sup> On

---

<sup>6</sup> In the IHO decision, the IHO pointed out that there was no evidence that the parent or teacher were given the BASC-3 rating scale to complete during the October 2020 evaluation (IHO Decision at p. 40). The IHO contended that there was a disconnect between how the student saw himself in comparison to his parents and teachers and this should have triggered further assessment (id.).

<sup>7</sup> A review of the hearing record shows that District Exhibit 11 contains some of the same information as Parent Exhibit X; for purposes of this decision only the parent's exhibit will be cited (compare Parent Ex. X, with Dist. Ex. 11).

<sup>8</sup> On the CELF-5, testing revealed weaknesses on the subtests of word classes and understanding spoken

the Test of Language Development-Intermediate: Fifth Edition (TOLD-I:5), the student performed variably across subtests, with subtests combined to evaluate five composite areas in listening, organizing, speaking, semantics, and grammar, and a sixth composite score of spoken language that represented overall oral language ability (id. at pp. 7-9). The speech-language evaluation report indicated that on the TOLD-I: 5, the student received average composite scores in areas of listening, organizing, and semantics with index scores of 91, 97, and 106, respectively; and below average composite scores in speaking and grammar with corresponding index scores of 74 and 68 (id. at pp. 8-9). The speech-language evaluation report noted that the student's spoken language score with an index score of 86 and percentile of 18 fell below average and might limit the student's ability to understand the speech of others, express himself orally, or interfere with his academic performance and social interactions (id. at pp. 7, 10).

Further, the hearing record included an April 15, 2021 LST report, which was also reviewed by the April 2021 CSE (compare Dist. Ex. 6, with Dist. Ex. 10 at p. 1). According to the report, the LST recommended that the student receive speech-language therapy, and that he attempt the world language class the following year, with exemption considered if the student struggled (Dist. Ex. 6 at p. 2). The April 2021 CSE recommended the student receive speech-language therapy for 30 minutes one time per week in a group (5:1) with an implementation date of May 5, 2021, for the 2020-21 school year, and beginning September 9, 2021, for the 2021-22 school year (Dist. Exs. 9 at pp. 1, 6; 10 at p. 1; 24 at pp. 1, 8). The school psychologist testified that she drafted the minutes from the LST meeting, and confirmed that the LST recommended to the CSE that the student receive speech- language therapy and attempt the world language class (Tr. pp. 63-66; Dist. Exs. 6; 9; 24).

The school psychologist testified that the March 2021 CSE reviewed the October 20, 2020 psychological report, and the October 27, 2020 academic component of the district's reevaluation (Tr. pp. 45, 48). According to the school psychologist, she reviewed the psychological evaluation while the district special education teacher reviewed the results of academic testing (Tr. pp. 45-470). The special education teacher noted that the student demonstrated average skills in reading, writing, and math with the exception of sentence reading and sentence writing fluency in which deficits were noted (Tr. pp. 45-47). The school psychologist testified that per her memory and in review of the March 2021 prior written notice, that the March 2021 CSE discussed the student struggled to complete assignments on time, the student required support of the additional teacher in class to complete assignments, and the student did not take advantage of using notes during tests even though allowed (Tr. pp. 48-49). Further, the school psychologist testified in reviewing the March 2021 prior written notice, that the counselor attended the CSE meeting and shared "[t]hat she felt [the student] was making good progress and recommended that we continue the counseling service" (Tr. pp. 49-50). The school psychologist testified that the program identified on the March 2021 IEP was recommended at the CSE meeting (Tr. p. 52; Dist. Ex. 4 at p. 1).

The hearing record did not contain information that the parent disagreed with the October 2020 psychological reevaluation, or the March 2021 speech-language evaluation. During the impartial hearing, the parent testified that prior to initiation of the privately obtained evaluation

---

paragraphs, with scaled scores of four and six, respectively; on the subtests formulated sentences, and recalling sentences, the student received scaled scores of 9, and on the subtest semantic relationships, a scaled score of 12 (Dist. Ex. 7 at p. 2).



for the student she did not send a written request to the district for an individual educational evaluation and reimbursement, nor did she request reimbursement of the private June 2023 evaluation at its completion (Tr. p. 746-47).<sup>9</sup>

Here, I find that the district, for the 2021-22 school year relied on sufficient evaluative information and discussed this information at the March and April 2021 CSE meetings in making recommendations for the student's eighth grade school year. The October 2020 psychological and academic evaluations, in addition to the March 2021 speech-language evaluation provided updated information as related to the student's needs, and the record supports that the CSE discussed this information in making recommendations for the student's 2021-22 school year.

### **b. February 2022 CSE**

At the student's February 2022 CSE meeting, participants included the school psychologist who again served as chairperson, the special education teacher, the regular education teacher, the counselor, the speech-language therapist, the district social worker, the student, and the parents (Tr. pp. 74-75; see Dist. Ex. 13 at p. 1). For the student's 2022-23 (ninth-grade) school year, according to the February 2022 prior written notice, the CSE considered a transition inventory, IEP progress report and a report card all dated February 2022, in addition to previous evaluative information in areas of cognition, academics, and speech-language development as reviewed above (Dist. Ex. 14 at p. 2).

The February 2022 CSE considered information from the February 2022 transition inventory related to the student's employment/career goals, interests, and current likes/dislikes and needs at school (Tr. p. 79; Dist. Ex. 23 at pp. 4-13; see Dist. Ex. 14 at p. 2). The school psychologist testified that the student's post-secondary goals and interests, as well as transition needs were documented on the February 2022 IEP as related to the transition inventory completed by the student and parent (Tr. pp. 79-81; compare Dist. Ex. 13 at p. 6, with Dist. Ex. 23). Specifically, with regard to the student's strengths and interests, the parent reported the student was "mechanically inclined" and demonstrated interests in robotics, and putting things together, such as bicycles (Dist. Ex. 23 at p. 1) The parent reported the student "always wanted to be an [e]ngineer" and noted that as the student loved cars his friend wanted him to modify them (id.). Further, the parent reported the student engaged in activities that included robotics, taekwondo, playing the drums in a performance band, basketball, bicycling, skateboarding, motorbiking, and playing videogames (id. at p. 2). As related to community living, the parent anticipated the student would attend a four-year college, and following graduation the student would live independently or with friends in a housing situation and underlined that the student "w[ould] be" his own legal guardian (id.). Likewise, the student reported he "would like to be a car mechanic or car engineer," that he planned on going to a two or four year college or vocational training/trade school, would like to live independently when older, and reported being involved in the activities as stated above

---

<sup>9</sup> The IHO noted the district did not further evaluate the student once the parent made the district aware that his pediatrician suspected autism (IHO Decision at p. 38; see Tr. pp. 690-91). At that time, the student did not have a formal diagnosis of autism (see Tr. p. 680; Parent Ex. N). However, while understandable that a parent seeks information about the "underlying cause" of the student's special education needs, it is not the district's obligation as part of the evaluation process to identify specific diagnoses or the "underlying cause" of the student's disability." (see *M.N. v. Katonah Lewisboro Sch. Dist.*, 2020 WL 7496435 at \*14 [S.D.N.Y. Dec. 21, 2020] citing 8 NYCRR 200.4[b][1], 34 CFR 300.304[b][1]).

in addition to enjoying going to "weight room," playing volleyball in physical education, and drawing airplanes and cars (id. at pp. 4, 6-7). The student stated that fixing cars and making them better is something he "really want[ed] to do with my friend" (id. at p. 4). The student noted that he fixed his motorized bike, shoveled snow for an allowance, and reported that from these work experiences he "learned that if you keep trying, you eventually succeed" (id. at p. 5). In relation to school, the student reported he liked physical education, math, socializing with friends, and Spanish (id.). As related to things he did not like in school he explained "I do not like to work. I do not like to write – read a little bit. I do not like to do paperwork or Social Studies" (id.). According to the transition inventory, when asked what he finds hard, he reported: "I find it hard to focus" (id.). As related to expressing himself to others, he reported that he "communicated with friends by talking to them" (id. at p. 6). When asked if he had the ability to listen carefully to others in order to complete assignments he reported "[m]ost of the time" and "it is very rare that I can't listen carefully" (id.). In relation to areas the student wanted to improve, he reported "paying attention" and "completing work and job skills" (id.).

The hearing record included the student's end of year 2021-22 report card and IEP progress reports; the February 2022 CSE had information from these reports as indicated through February 2022 (Parent Ex. Y; Dist. Exs. 14 at p. 2; 15; 16).<sup>10, 11</sup> The 2021-22 IEP progress report in its entirety, provided progress information as related to IEP goals in areas of study skills, reading, writing, math, speech/language development and social/emotional/behavioral functioning (Dist. Ex. 15). The February 2022 CSE had before it the information for the first two marking periods of November 2021 and January 2022 (see Dist. Exs. 14 at p. 2; 15 at pp. 1-3).

Specifically, with regard to the student's study skills goal, the 2021-22 progress report indicated that the student was progressing satisfactorily in November 2021 and January 2022 toward his ability to learn two strategies to stay on task when completing assignments, projects and tasks (Dist. Ex. 15 at p. 2). As pertaining to a reading goal of answering text dependent questions by providing evidence in the reading, the 2021-22 progress report stated that for the November 2021 marking period, the student was progressing satisfactorily and commented "[the student] [wa]s working on using text evidence to support his answers in English and resource room" and reported the need for teacher assistance (id.). During the January 2021 marking period, the progress report stated the student was progressing gradually and commented the student "need[ed] adult assistance to find evidence in the text" (id.). As related to the writing goal, the progress report in November 2021 reported that the student was progressing satisfactorily in relation to working on editing/writing skills with teacher support; and then progressing gradually

---

<sup>10</sup> A review of the hearing record shows that District Exhibit 16 contains part of the information within Parent Exhibit Y; for purposes of this decision only the parent's exhibit will be cited (compare Parent Ex. Y, with Dist. Ex. 16).

<sup>11</sup> The hearing record included the student's final report card for the 2021-22 school year with attached AIS reading progress report information; however, it is unclear whether the February 2022 CSE had access to the mid-year AIS report as part of the student's report card (compare generally Dist. Ex. 13 at p. 2; 14 at p. 2, with Parent Ex. Y) The mid-year AIS reading progress report indicated the student made "[c]onsistent [g]rowth" on four out of six unit objectives and gradual growth for the remaining two objectives (Parent Ex. Y at p. 1). Comments per the mid-year report noted the student was making gradual progress but stated he continued to need reminders to stay focused and on task because he often got distracted or was on the computer rather than focused on his work (id.),

in January 2022 as the student "continue[d] to need adult assistance to follow the writing process" (*id.*). Further, the report included that per the November 2021 marking period the student was progressing satisfactorily as related to solving multi-step math problems with reminders to show each step in solving the equation, and in January 2022, the student was progressing gradually and provided the comment that the student benefited from having a model to use as a reminder of the steps to follow (*id.* at p. 3). With regard to the student's speech-language development, and social/emotional/behavioral functioning, for each targeted goal the progress report noted the student to be "progressing satisfactorily" (*id.*). Specifically, the speech-language goal stated the student would use an active listening strategy to comprehend a short paragraph from text or a peer and contribute two reciprocal on topic responses (*id.*). As related to the social/emotional/behavioral goal that targeted his ability to verbalize two positive strategies to maintain positive relationships with peers, during the first quarter, the student's counselor commented that they had seen tremendous growth and that the student recognized that face to face conversations with peers were essential to developing friendships (*id.*).

Additionally, the February 2022 CSE had before it the student's mid-year 2021-22 report card with information that the student maintained passing grades for both the first and second marking periods in both ICT classes of English (82, 70) and math (87, 84) as well as in Spanish 1A (98, 98); science 8 (75, 85); and physical education (96, 97). In social studies 8 the student received grades of 63, 54; and for health 8, the student received grades of 90, 50 (Parent Ex. Y at p. 4).

The February 2022 prior written notice reported comments made at the February 2022 CSE meeting by the regular education teacher, special education teacher, speech-language therapist, counselor, and the student (*see* Dist. Ex. 14 at p. 1). According to the prior written notice, the regular education teacher reported the student did well in math that year, and demonstrated motivation to succeed, although he did not always make good choices to complete homework consistently (Dist. Ex. 14 at p. 1). The teacher further reported that overall the student did a better job staying on task on his Chromebook, did best when working on the computer, but could also become distracted on his computer (*id.*). The special education teacher also noted that the student's computer could be a distraction, and reported the student did well in Spanish and science classes, and needed support in English class to write essays, edit and expand written responses (*id.*). The prior written notice also included comments by the speech-language therapist that the student demonstrated progress toward the goal to maintain topic and stay on task when speaking with others (*id.*). Further, the school counselor reported during the CSE meeting that the student "made great progress socially and academically" and improved in his ability to express his feelings and self-advocacy skills (*id.*). At the February 2022 CSE meeting, the student self-reported on his feelings toward his own improvement socially and academically (*id.*). According to the February 2022 prior written notice, the CSE considered and reviewed all evaluative materials and school reports, in recommendation of the services listed on the student's IEP (Dist. Ex. 14 at p. 1-2; *see generally* Dist. Ex. 13 at pp. 1-3, 7-8).

Again, here I find that the February 2022 CSE relied on sufficient evaluative information and discussed this information at the February 2022 CSE meeting in making recommendations for the student's 2022-23 (ninth-grade) school year. The CSE had before it information from previous testing completed in October 2020 and March 2021 with regard to the student's cognition, academics, and speech-language needs; and in addition had updated information related to the

student's progress toward his IEP goals, the February 2022 transition assessment with information from the student and parent, and the student's February 2022 report card, in addition to input from the CSE that included the student, regular education teacher, special education teacher, and related service providers.<sup>12</sup>

### c. July 2023 CSE

In planning for the student's 2023-24 school year, the July 2023 CSE meeting participants included the district high school psychologist who served as chairperson (high school psychologist) and the psychologist who conducted a May 2023 classroom observation of the student, as well as a regular education teacher, special education teacher, social worker, district administrator, attorney for the school district, attorney for the family, two Winston Prep representatives, a speech-language pathologist, and the student's parent (Dist. Ex. 18 at p. 1). According to the July 2023 prior written notice, the July 2023 CSE reviewed the May 2023 classroom observation and a private June 2023 psychological evaluation, and in addition staff from Winston Prep provided information regarding the student's performance at the school during the 2022-23 school year (*id.* at p. 2). Further, as listed on the July 2023 IEP, additional information reviewed included parent and teacher input at the July 2023 CSE meeting; a June 2023 report card and June 2023 educational evaluation; and the February 2022 transition inventory and March 2021 speech-language evaluation both described in detail above (Dist. Ex. 18 at p. 1; *see* Dist. Ex. 19 at p. 3).

At the July 2023 CSE meeting, the district psychologist who conducted the May 2023 classroom observation reviewed the observation report (Dist. Ex. 19 at p. 2). The May 2023

---

<sup>12</sup> The IHO's determination that the district's failure to reconvene the February 2022 CSE after the student's standardized testing at the end of the 2021-22 school year contributed to the denial of FAPE for the 2022-23 school year is also not supported by the hearing record (IHO Decision at p. 42). In addition to the district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; *see* 34 CFR 300.503; 8 NYCRR 200.5[a]). Here, there is no evidence that the parent provided additional information to be considered by the CSE or that the parent requested the CSE to reconvene because she thought the student's program was no longer appropriate (*see generally* Parent Exs. A-CC; Dist. Exs. 1-24). The parent in her post-hearing brief argues the CSE did not reconvene to address her concerns after she sent her August 30, 2022, 10-day letter rejecting the February 2022 IEP (Parent Post-Hr'g Brief at p. 28; *see* Parent Ex. K). However, after a review of the parent's August 2022 10-day letter, it does not appear that the parent requested for the CSE to reconvene but rather indicated she was placing the student in a non-public school and would be filing an impartial hearing request seeking tuition reimbursement and roundtrip transportation (Parent Ex. K). Moreover, the district sent a letter in response to the 10-day letter which was received by the parent on or around September 20, 2022 encouraging her to pursue supports and services from the district which the parent did not do at the beginning of the 2022-23 school year (Parent Ex. L). As such, the IHO erred when she determined the CSE was required to reconvene at the end of the 2021-22 school year as the February 2022 CSE had sufficient evaluative information before it to make a recommendation for the student's 2022-23 school year.

observation report occurred at the private school, Winston Prep, during a literature class with seven students present (Dist. Exs. 19; 21). During the observation, the student participated in a group of three students to answer questions regarding a novel (Dist. Ex. 21 at p. 1). Upon first observation, the student appeared lethargic; however, following redirection from the teacher, the student became increasingly involved in answering questions with peers and presented his group's response to the class (id.). During the observation, the student did not raise his hand; however, he responded correctly to teacher inquiries on four occasions, followed teacher direction to turn the lights off during a video that referenced the novel, and attended to the video presentation (id.). The student appeared motivated to maintain eye contact and participate in the class lesson during the follow-up conversation and asked two relevant questions during the discussion (id.). The psychologist who conducted the observation concluded that overall the student maintained attention and participated appropriately during the literature lesson (id.).

The July 2023 CSE reviewed the June 2023 private psychological evaluation and included the updated cognitive and academic testing and diagnostic information in the July 2023 IEP (compare Parent Ex. N, with Dist. Ex. 18 at pp. 1-7). The July 2023 IEP reflected the results of the student's performance on the Woodcock-Johnson IV, Test of Cognitive Abilities (WJ-IV), and noted that the student's overall cognitive abilities fell within age expectations, visual processing skills fell in the high average range, and processing speed fell in the low average range and represented an area of weakness for the student (compare Parent Ex. N at pp. 1, 6-10, with Dist. Ex. 18 at pp. 1, 4, and Dist. Ex. 19 at p. 2).<sup>13</sup> Further, the July 2023 IEP indicated that the student's performance on the WJ IV ACH fell within age-expectations in most areas including overall reading where he attained a standard score of 96, and written language and math skills where he attained standard scores of 100 (compare Parent Ex. N at pp. 1, 11-14, with Dist. Ex. 18 at pp. 1-6 and Dist. Ex. 19 at p. 2). The student demonstrated a strength on the word-attack subtest, with a standard score of 113 in the high average range, and slight weaknesses in oral reading and sentence reading fluency with standard scores of 85, and 87, respectively, in the low average range (compare Parent Ex. N at pp. 1, 11-14, with Dist. Ex. 18 at pp. 1-6 and Dist. Ex. 19 at p. 2). The July 2023 IEP reported that assessments conducted during the June 2023 private evaluation indicated the student experienced social communication weaknesses and significant deficits in inferencing skills, and various rating scales administered indicated weaknesses in pragmatic language and socialization, executive functioning, attention, and adaptive daily living skills (compare Parent Ex. N at pp. 1, 14-21, with Dist. Ex. 18 at pp. 1-3, 7 and Dist. Ex. 19 at p. 2). The July 2023 CSE reviewed and included on the IEP findings of the June 2023 private evaluation that the student received the diagnoses of autism spectrum disorder (ASD) and attention deficit/hyperactivity disorder (ADHD) – combined presentation (compare Parent Ex. N at pp. 14-21, with Dist. Ex. 18 at pp. 1, 7 and Dist. Ex. 19 at p. 2). According to the prior written notice, the July 2023 CSE discussed the student's educational classification in light of the new diagnosis of ASD and agreed to keep the educational classification of OHI "to best describe [the student] as a whole child and the nature of his disabilities" (Dist. Ex. 19 at p. 3). The July 2023 CSE noted that special education support as related to the ASD diagnosis could still be provided even with the student's educational disability classification remaining OHI (id.).

---

<sup>13</sup> Specifically, the student received a general intellectual ability standard score of 101, a visual processing standard score of 115, and a standard score of 85 on the cognitive processing speed cluster test (see Parent Ex. N at pp. 6-7).



The evaluation/reports section of the July 2023 IEP indicated a June 23, 2023 educational evaluation, and report card information from Winston Prep, provided additional documentation of the student's needs (Parent Ex. W at pp. 30-33; see Dist. Ex. 18 at p. 2). According to the Winston Prep report card for the 2022-23 school year, the student received final grades as follows: language skills (86); literature (93); integrated mathematics III (92); ancient history (84); earth science (89); focus (85); art (85); and physical education (93) (Parent Ex. W at p. 33). A spring assessment conducted by Winston Prep included testing using the Wechsler Individual Achievement Test – Fourth Edition (WIAT – 4) with results comparable to the June 2023 private evaluation with testing using the WJ-IV ACH (compare Parent Ex. W at p. 32, with Parent Ex. N at pp. 11-12).

Further, at the July 2023 CSE meeting staff from Winston Prep reviewed the student's functioning at the school during the 2022-23 school year (Dist. Exs. 18 at pp. 5-7; 19 at p. 2). Winston Prep staff reported classes were small with around eight students, no larger than 12, and students were grouped according to their learning profile (Dist. Exs. 18 at p. 5; 19 at p. 2). The student participated in a "focus" class daily to address individual needs (Dist. Exs. 18 at p. 5; 19 at p. 2). The July 2023 IEP noted that according to teacher feedback from Winston Prep, the "main focus of [the student's] program was to develop his time management and organizational skills in and out of the classroom" and "[the student's] weak executive function skills hindered his ability to implement strategies consistently both in and out of the classroom" (Dist. Ex. 18 at p. 5). As recorded in the IEP, the Winston Prep teacher also reported that the student required supports such as checklists and color-coded folders to complete homework and classwork organization; however, with supports removed the student did not maintain organization and had missing assignments, and would report completing tasks during "focus" sessions even if he had not (id.). Overall, the Winston Prep staff reported the student made progress in classes and with focus sessions during the 2022-23 school year and received grades in the "mid 80s to 90s" (id.). Additionally, the July 2023 IEP indicated that Winston Prep staff reported the student benefited from visuals, explicit instruction, repetition, and use of breaks (id.). The staff further reported the student showed task avoidance of undesired tasks and had difficulty with thinking flexibly but indicated his ability to recover when presented with a perceived challenge was notable after periods of transition from unstructured/more stimulating environments to a content class (id.). With regard to reading, Winston Prep staff reported the student improved in reading aloud, had difficulty with inferential reading, and benefited from scaffolding, and pre-teaching of concepts with visuals (id.). In terms of writing, Winston Prep staff stated that the student benefited from use of a graphic organizer and required moderate support throughout the writing process of planning, writing, and revising (id. at p. 6). The IEP indicated that, according to testing, the student scored in the high average range for math and his parent expressed the student enjoyed math and viewed it as a strength of his (id.). The IEP noted that teachers at Winston Prep indicated the student benefited from the use of visuals, reference guides with explicit instruction, practice, and reinforcement and received 1:1 support, reteaching, scaffolded assignments, and time flexibility which had proven beneficial to the student's progress (id.).

The July 2023 prior written notice stated that at Winston Prep "speech/language supports [we]re embedded within the program" (Dist. Ex. 19 at p. 2). The July 2023 IEP indicated that the most recent speech-language testing, conducted in 2021, showed that the student presented with weaknesses in sentence combining, word ordering, and morphological comprehension and stated that "[the student's] pragmatic language skills and conversational skills should be areas of focus during future therapy sessions" (Dist. Ex. 18 at p. 6). According to the prior written notice, teachers

at Winston Prep reported the student continued to develop language, socialization and pragmatic skills, and had made progress with peer relationships (*id.* at p. 7). Specifically, the teachers reported the student's figurative language and inferencing skills had improved through targeted instruction and teacher models, although they noted these skills needed to be generalized to social situations (*id.*). The July 2023 IEP stated the student had opportunities to participate in extracurricular activities at Winston Prep that involved cooking, coding, drama, and community service activities and that he participated in a local youth group, all of which helped with his socialization skills (*id.*). Additionally, the prior written notice indicated that Winston Prep staff reported that the student lacked awareness of how his hygiene impacted others and discussed how the school addressed the student's hygiene skills by sequencing tasks and emphasizing the importance of each task (Dist. Ex. 19 at p. 2).

Based on the above, I find that the July 2023 CSE relied on sufficient evaluative information in making recommendations for the student for the 2023-24 school year.

### **3. Special Factors – Interfering Behaviors**

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP.

Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also *E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist.*, 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; *A.C.*, 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]).

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

include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing



consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

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

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

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

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

The district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

The IHO stated in her decision that the hearing record included IEPs that noted "the [s]tudent required support to complete independent work and a behavior plan to maintain appropriate behavior" however found no evidence that the district ever recommended a behavior plan (IHO Decision at p. 37). The IHO further stated that the student's need for positive behavior interventions carried over to the March and April 2021 IEPs, although the need for a behavior plan was removed and the hearing record did not explain this, even though the record showed the student continued to have deficits with coping, frustration and managing his emotions (id. at pp.

37-38).<sup>14</sup> The district argues there is no evidence that the student required a behavior plan during the school years at issue.

The September 2019, April 2020, March and April 2021, February 2022, and July 2023 IEPs all included the notation that the student needed interventions, supports and strategies to address behaviors, but did not need a BIP (see Parent Exs. B at p. 6; D at p. 6; Dist. Exs. 4 at p. 5; 9 at p. 5; 13 at p. 5; 18 at p. 8).<sup>15, 16</sup>

The evaluation reports, detailed above, included reporting that the student presented as cooperative and friendly, demonstrated good conversational skills, and had an overall positive and cooperative attitude, and that during testing the student transitioned easily, generally engaged in tasks presented, and engaged in ongoing conversation between formal tasks, although rarely asked the examiner for information or input (Parent Ex. N at p. 5; Dist. Exs. 2 at p. 2; 7 at p. 1). As related to behaviors, in a general review of the student's 2021-22, 2022-23 and 2023-24 IEPs, the student was described "as a likeable and capable young man who relate[d] well to his teachers and his classmates" (Parent Exs. B at p. 5; D at p. 5; Dist. Exs. 9 at p. 5; 13 at p. 4; 18 at p. 7). With regard to the student's coping, frustration and ability to manage emotions, the April 2021, February 2022, and July 2023 IEPs reported that the student's class performance could vary depending on his level of frustration and on how he managed that frustration at a given time (Dist. Exs. 9 at p. 5; 13 at p. 4; 18 at p. 7). The IEPs reported that when frustrated, the student sometimes struggled to cope effectively and became overly emotional, and the student also appeared to lack self-confidence in his ability to make friends (Dist. Exs. 9 at p. 5; 13 at p. 4; 18 at p. 7). In the area of strengths, the IEPs reported the student to be friendly, and respectful, with a variety of age-appropriate interests that he enjoyed talking about with adults and his classmates (Dist. Exs. 9 at p. 5; 13 at p. 5; 18 at p. 7).

The April 2021 and February 2022 IEPs stated the student needed to continue to work on developing coping skills to effectively manage his feelings of frustration as they arose at school and needed to develop improved self-confidence in his abilities as a student and in development of peer relationships (Dist. Exs. 9 at p. 5; 13 at p. 5; 18 at p. 7). The July 2023 IEP stated that the student needed to continue to develop inferencing skills, social pragmatic skills, and improved abilities to interact with peers (Dist. Ex. 18 at p. 7). The student's IEPs for the school years at issue noted the student's continued need for assistance to keep up with assignments, attend to class lessons, and complete independent work (Dist. Exs. 9 at p. 4; 13 at p. 4; 18 at p. 6). To address these needs, the April 2021, February 2022, and July 2023 IEPs provided special education

---

<sup>14</sup> In her decision, the IHO pointed out that the previous September 2019 IEP reported in the area of management needs that "the student require[d] a behavior plan to maintain appropriate behavior;" however, this statement did not carry over to the subsequent April 2020, or the March and April 2021 IEPs (compare Parent Ex. B at p. 5, with Parent Ex. D at p. 5, and Dist. Ex. 4 at p. 5, and Dist. Ex. 9 at p. 5).

<sup>15</sup> The September 2019 and April 2020 IEPs are included in the hearing record; however, the school years associated with these IEPs are not at issue in this matter (see generally Parent Exs. B; D).

<sup>16</sup> The March 2021 and April 2021 IEPs both refer to the student's 2021-22 school year, with the April 2021 IEP being the controlling IEP as it contained updated speech-language testing, and the March 2021 IEP referenced in relation to the discussion and testimony related to the March 2021 CSE meeting (Dist. Exs. 4; 9; see Dist. Exs. 5; 10).

programming and related services, goals, and supplementary aids, services, program modifications and accommodations (Dist. Exs. 9 at pp. 1, 6-9; 13 at pp. 1, 6-9; 18 at pp. 1, 9-12).

In relation to the student's 2021-22 school year, the counselor testified that she was present at the March 2021 CSE meeting and reported on the student's social/emotional/behavioral needs (Tr. pp. 235-36). The counselor reported that she informed the March 2021 CSE that the student had met his goals related to maintaining social interactions, and the ability to state positive qualities about himself (Tr. p. 236; see Dist. Ex. 5 at p. 2). In addition, the counselor reported that the student demonstrated increased ability to advocate for himself and displayed less frustration such as crying (Tr. p. 236; see Dist. Ex. 5 at p. 2). Further, the counselor reported to the CSE that the student could verbalize his frustration appropriately and had recognized and developed strategies to articulate his needs to the counselor (Tr. p. 236). At the March 2021 CSE meeting, the counselor recommended continued individual counseling sessions, twice monthly, with a focus on relating to peers and decreasing social anxiety (Tr. pp. 236-37; see Dist. Ex. 5 at p. 2). The hearing record included the 2020-21 progress report that recorded the student's progress and achievement of his social/emotional/behavioral goal to identify positive qualities and verbalize how they impacted his successful accomplishment of tasks, and use of appropriate coping strategies to self-advocate for assistance (Parent Ex. X at p. 7). Specifically, during the November 2020 and January 2021 marking periods the progress report noted the student had "[p]rogress[ed] [s]atisfactorily" and during the April and June 2021 marking periods, the report noted the student "[a]chieved" this goal (id.).

The following school year, at the February 2022 CSE meeting, the district counselor reported the student "ha[d] made great progress socially and academically" and reported improvements in the student's ability to express himself, and improved self-advocacy skills (Dist. Ex. 14 at p. 1). At the February 2022 CSE meeting, "[the student] spoke about his feelings towards his own improvement socially and academically" (id.). The hearing record included a progress report from 2021-22 school year that reported on the student's social/emotional needs and progress (Dist. Ex. 15 at p. 3). In November 2021, the progress report identified the student as progressing satisfactorily in relation to verbalizing two positive strategies to foster and maintain positive relationships with peers, and by June 2022 the student achieved the goal (id.). Associated comments indicated that the counselor had observed "tremendous growth" in the student during the year, that the student was recognizing face-to-face communication with peers as essential in developing positive friendships, and that the student was able to incorporate positive strategies with regards to approaching and conversing with peers (Tr. pp. 240-41; Dist. Ex. 15 at p. 3).

The student's special education teacher for the 2021-22 school year testified that she worked with the student as his ICT English teacher, in addition to being his resource room teacher (Tr. p. 298). The special education teacher described the student as "well-behaved" during the ICT English class and did not see any behavioral issues (Tr. p. 305). The special education teacher testified that reading, staying on task, and writing could be difficult for the student and therefore "[w]e provided graphic organizers and we scaffolded the instruction" and "provided supports for [the student] in the class as well as the other students in the class" (Tr. pp. 305-06). During resource room, the special education teacher reported that she worked on IEP goals with the student, organized work for lessons and assignments for other classes, and helped him complete missing assignments (Tr. pp. 299-300, 302-03). The special education teacher testified that in resource room class "[the student] was always cooperative," although he could get distracted when working

on the Chromebook if he had access to sites such as YouTube (Tr. 299-300). In relation to completing missing assignments and tasks, the special education teacher would have the student bring up assignments that needed to be completed and following completion of the task, provided him "two to three minutes of toy time where he could choose what he wanted to do" (Tr. p. 303).

For the 2021-22 school year, the special education teacher testified she worked on the student's study skills goal, monitored his progress, and "helped him with the attention strategies that he learned that year" (Tr. p. 307; see Dist. Ex. 15 at p. 2). The special education teacher reported that she talked with the student about ways to maintain attention and stay on task such as using headphones to block out extraneous noise, or completing a task and then receiving a reward (Tr. pp. 307-08; see Dist. Ex. 15 at p. 2). The special education teacher reported that as the year progressed the student became more independent with choosing a strategy to pay attention, and that he achieved the goal by the end of the school year (Tr. pp. 308-09; see Dist. Ex. 15 at p. 2).

Based on the foregoing, while the evidence shows that the student required supports to increase attention, complete assignments, apply his self-advocacy skills, articulate his frustrations, and increase his ability to relate to and interact with peers, the student's behaviors did not impede his learning or that of others such that it would necessitate an FBA, and the CSE's adequately identified the student's needs in the April 2021, February 2022, and July 2023 IEPs and addressed the areas of concern with program and related service recommendations, goals, supplementary aids and services, program modifications and accommodations as described above (Dist. Exs. 9 at pp. 1, 6-9; 13 at pp. 1, 6-9; 18 at pp. 1, 9-12). As such, the IHO's determinations to the contrary were an error and must be reversed. Next, I will address the appropriateness of the district recommendations for the 2021-22, 2022-23, and 2023-24 school years.

## **C. Educational Placement**

### **1. Integrated Co-Teaching**

In her decision, the IHO's determination that the district denied the student a FAPE for the 2021-22, 2022-23 and 2023-24 school years was largely based on her finding that the district failed to appropriately address the student's needs by continuing to recommend ICT services, from which the student did not seem to obtain educational benefit, for all three years, even with additional supports of resource room, and/or AIS reading support. The district argues that the IHO erred in her finding that the student struggled with ICT services and contends that the programming provided to the student was appropriate for the 2021-22, 2022-23 and 2023-24 school years.

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]).

State regulation defines resource room as a "special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day"

(8 NYCRR 200.1[rr]). Resource room programs "shall be for the purpose of supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]).

First, the hearing record contains the student's April 2020 IEP for the 2020-21 (seventh-grade) school year in which the student received ICT services for math and English classes, along with resource room support, and included information on the student's needs and supports provided to him during his sixth-grade school year (see generally Parent Ex. D). Specifically, as related to reading, the April 2020 IEP indicated the student had difficulty answering higher level comprehension questions and required assistance with locating relevant text evidence to support critical thinking questions (Parent Ex. D at p. 4). As related to writing, the IEP indicated the student demonstrated success when using graphic organizers (id.). However, it also indicated the student needed support expanding his writing to include descriptive details and relevant information, and moderate levels of support to edit and revise his writing (id.). As related to math, the IEP indicated the student needed frequent review to retain skills, responded well to adult assistance, attempted to work independently, asked for support when needed, and used strategies taught in class such as re-reading, underlining, and setting up problems (id.). Overall, with regard to academics, the April 2020 IEP indicated the student worked well when tasks were broken down into smaller segments, liked to earn breaks when tasks were completed, and required teacher redirection to maintain focus when completing work (id.).

According to the April 2020 prior written notice, the student's regular education teacher reported that the student had "progressed emotionally and developmentally since the start of the school year" (Parent Ex. E at p. 1). The regular education teacher reported the student struggled with using technology appropriately and had a hard time disengaging; however, noted student improvement in this area (id.). Further, the regular education teacher reported the student demonstrated inconsistent academic performance in preparation for class and tests, although she reported student improvement in this area as well, and noted the student had become more accepting of teacher directions and appeared more willing to follow these directions (id.). Additionally, according to the April 2020 prior written notice, the special education teacher for the student's sixth-grade year reported "social and academic growth over the school year" and noted the student improved in his ownership of his academic performance (id.). The special education teacher reported the student independently transitioned from audio books to reading physical books and noted improvement in the student's reading skills including his ability to analyze texts. The special education teacher reported that writing presented a challenge for the student and reported the student needed teacher support to expand his responses, organize his thoughts, and to use a graphic organizer effectively (id.). Moreover, the prior written notice stated the student's growth in his social and emotional functioning warranted a change in counseling services to twice monthly due to his improvement (id. at p. 2).

As described above, the district had information that the student made some progress during the 2019-20 school year with ICT services and additional resource room support. Moreover, as explained more fully below and contrary to the IHO's findings, the district did not deny the student a FAPE for the three school years at issue because it continued to recommend ICT services and resource room (see IHO Decision at pp. 39, 41-45).

For the 2021-22 (eighth grade) school year, the March 2021 CSE recommended the student receive ICT services in math for five 43-minute classes weekly; direct consultant teacher services for science class for 43 minutes three times per six-day cycle; resource room (5:1) for 43 minutes three times per six day cycle; direct consultant teacher services for social studies for 43 minutes three times per six day cycle; and ICT services in English for five, 43 minute classes weekly, as well as the related service of two individual 30-minute counseling sessions per month (Dist. Ex. 4 at pp. 1, 6). At the April 2021 requested review, the CSE additionally recommended one 30-minute speech-language session per month in a group (5:1) (Dist. Ex. 9 at p. 1, 6). With regard to the student's management needs, the April 2021 IEP indicated the student required a structured environment with clearly defined limits in order to increase his completion of classwork, tasks broken down, and teacher reinforcement to stay on task (id. at p. 5). Additional supports included wait time to answer questions in class and positive reinforcement of task completion (id.).

In making the recommendation for the student's 2021-22 (eighth grade) school year, the school psychologist testified that the March 2021 CSE reviewed the October 2020 psychological and academic evaluations, with regard to information that the student performed in the average range for academics in areas of reading, writing, and math with the exception of sentence reading, and sentence writing fluency (Tr. pp. 43, 45-49; Dist. Ex. 5 at p. 1). At the meeting, the special education teacher reported the student as very productive in resource room, with the need for supervision to remain on task (Dist. Ex. 5 at p. 1). The regular education teacher reported the student required additional support to complete assignments and the student benefited from teacher support in the classroom (id.).

As described above, the student's 2020-21 IEP progress report, reviewed by the March 2021 CSE, indicated that the student had made progress toward his IEP goals related to study skills, reading, writing, math, speech-language development, and social/emotional/behavioral functioning and by the third and fourth marking period the student was progressing satisfactorily or had achieved his goals (Parent Ex. X; Dist. Exs. 5 at p. 2; 10 at p. 1; see Dist. Exs. 4 at p. 2; 9 at p. 2). Specifically, with regard to study skills, the progress report indicated the student made inconsistent progress by November 2020 in his ability to learn strategies related to remembering material and applying the strategies when completing assignments, projects and tests (Parent Ex. X at p. 2). The provider indicated that the student's progress was hindered due to "lack of participation during distant learning days" (id.). For the January 2021 and April 2021 marking periods, the provider indicated the student made gradual progress and by June 2021 the student was progressing satisfactorily toward this study skill goal (id.). Likewise, as related to the writing goal for the November 2020 marking period, the student progressed inconsistently due to lack of participation during distance learning days; however, for the following marking periods of January, April and June 2021, the student progressed satisfactorily (id. at p. 4). As to the student's goals related to mathematics and social/emotional/behavioral functioning, by January 2021, the student progressed satisfactorily, and for the following marking periods of April and June 2021, the student achieved these goals (id. at pp. 5, 7). In the area of reading, where the student's goal addressed his ability to understand the central idea of a text and to use key details for support, the student progressed gradually for the first two marking periods, and by April and June 2021, the student progressed satisfactorily (id. at p. 3). Speech-language therapy was added for the fourth quarter marking period and the student achieved his speech-language goal of using an active listening strategy to understand information shared from text or a peer and then contributing a connected response (id. at p. 6). The school psychologist described the 2020-21 IEP progress



report as documenting the student's progress toward IEP goals and objectives and monitored quarterly (Tr. pp. 70-71). Further, the hearing record included the final report card for the 2020-21 school year with the student receiving passing grades in all subject areas as follows: English 66; math 86; science 81; social studies 73; technology 68; physical education 89; and home care 95 (Dist. Ex. 12).

The school psychologist testified that the CSE reviewed the student's performance, and then recommended ICT services in math and English for the 2021-22 school year as the student presented with some difficulties in those areas and described those classes as having two teachers, a regular education teacher, and a special education teacher (Tr. pp. 52-53). Further, the CSE recommended direct consultant teacher services, as well as resource room (Tr. pp. 53-54).

The school psychologist described the direct consultant teacher model as a special education teacher providing support to the student and specific students assigned on alternating days and specified "[t]hey are not delivering curriculum, but they are supporting the curriculum in that classroom[,] so they focus their attention on the specific students assigned to them in that classroom" (Tr. pp. 52, 53). As related to ICT services, the school psychologist testified that both the special education and regular education teacher collaborated to present curriculum in those classes, that "they provide[d] a lot of support in that class for all of our students to meet success," and noted the special education teacher was there the "entire time" (Tr. pp. 53-54). The school psychologist reported that the resource room typically was recommended to support the direct consultant teacher model or for any goals that could not be met in the classroom setting, and the CSE had a consensus that the student needed resource room for eighth grade (Tr. p. 54). The school psychologist testified that the recommendations made at the CSE meeting were appropriate for the student's 2021-22 school year (Tr. pp. 72-73).

Overall, the evidence in the hearing record shows that the March 2021 CSE recommended an educational program for the student for the 2021-22 school year that was designed to confer educational benefit and enable the student to make progress in the general education curriculum, with ICT services, consultant teacher support, resource room, and related services. Notably, the student demonstrated progress in a similar program recommended by the CSE for the prior school year. As the hearing record supports finding that the student made some progress during the prior school year, the March 2021 CSE acted reasonably when it recommended programming for the 2021-22 school year that was similar to what the student received during the 2020-21 school year (see *S.H. v. Eastchester Union Free Sch. Dist.*, 2011 WL 6108523, at \*10-11 [S.D.N.Y. Dec. 8, 2011] [decision to recommend continuation of the same program student had made progress in for prior school year was appropriate and a more restrictive placement was not necessary]).

For the student's 2022-23 (ninth-grade) school year, the February 2022 CSE had information as related to the student's eighth-grade year within the district that included testimony from the district special education teacher and school psychologist, the student's progress report for the 2021-22 school year, and the student's 2021-22 report card.

For the 2021-22 (eighth-grade) school year, the district special education teacher testified that she served as the student's resource room teacher and ICT English teacher (Tr. pp. 298-99). In addition she reported that she served as the student's case manager and acted as the liaison between teachers to make sure they were implementing and following the student's IEP (*id.*). She



also monitored the student's progress and communicated with teachers to gather input regarding the student's progress on his IEP goals (*id.*). The special education teacher described the ICT English class as containing around 25 students, with six or seven students with IEPs and reported she co-taught the class with another teacher, and delivered lessons in small group, large group, and station instruction (Tr. p. 305). The special education teacher described that "[s]ometimes we broke the class into two groups, and then when the other teacher was teaching, I would walk around and make sure that [the student] was on task. I would redirect students or provide assistance as needed" (*id.*). As described above, the special education teacher stated the student's areas of difficulty in the ICT English class included reading and staying on task, and therefore the teachers provided him graphic organizers, scaffolded instruction, and supports within the class (Tr. pp. 305-06). As part of resource room, the special education teacher worked with the student to complete assignments related to reading, writing, and class assignments from other classes, in addition to working on IEP goals such as editing skills and reading strategies (Tr. pp. 301-03). Further, as described previously, the special education teacher reported helping the student complete missing assignments (Tr. pp. 302-03). The special education teacher testified that the student made progress in his academic instruction during his eighth-grade school year (Tr. p. 306).

The hearing record included the 2021-22 progress report, as described in detail above, that reported on goals in areas of study skills, reading, writing, speech-language, social/emotional/behavioral (Dist. Ex. 15). The February 2022 CSE had information before it that the student had made progress toward all identified goals (*id.* at pp. 1-3). Specifically, for the November 2021 marking period, the progress report indicated that in the area of study skills the student progressed satisfactorily in practicing a strategy to complete class assignments, projects or tests; in reading, the student progressed satisfactorily in using text evidence to support his answers in English and resource room when provided teacher assistance; in writing, the student used the writing process of revising and rewriting with teacher support; in math, the student did well in solving multistep math problems and continued to need reminders to show each step in solving an equation; in speech, the student made satisfactory progress in comprehending information from a text or a peer and contributing connected responses to the topic; and as related to the his social/emotional/behavioral goal, the student made tremendous growth in recognizing the importance of face-to-face communication with peers in developing positive friendships (*id.*). By the April 2022 marking period, the special education teacher or service provider reported that the student was progressing satisfactorily or had achieved the targeted goals (*see* Dist. Ex. 15 at pp. 1-3). The student's 2021-22 report card recorded passing final grades in six of his seven classes, with the exception of social studies (*see* Parent Ex. Y at p. 4). The student received final grades as follows: English 8 (75); Spanish 1A (91); math 8 (82); science 8 (77); social studies 8 (61); health 8 (68); physical education (97) (*see id.*).

During testimony, the school psychologist described 15:1 and 12:1 special classes available at the middle and high school as designed to work at a slower pace to meet the needs of the enrolled students (Tr. p. 83). The school psychologist testified she did not believe the February 2022 CSE specifically discussed the self-contained class as an option for the student instead of ICT services going into high school (Tr. pp. 83, 126-27). However, the school psychologist testified that the self-contained class would not have been appropriate for the student at the time of the February 2022 CSE meeting as "[b]ased on his performance at the time in February . . ." "[h]e was meeting with success in the program that he was in" and further stated during cross examination that "[b]ased on what information was presented at the meeting, the ICT program would have been the

most appropriate program for [the student]" (Tr. pp. 83-84, 127). Further, the school psychologist reported that the CSE "added a little more support moving into the high school to make that change" (Tr. p. 84).

For the 2022-23 school year, the February 2022 CSE continued to recommend related services of counseling and speech-language therapy, as well as ICT services for math and English; however, rather than direct consultant teacher services in areas of science and social studies, the February 2022 CSE also recommended ICT services in those classes (compare Dist. Ex. 13 at p. 1, with Dist. Ex. 9 at p. 1). Specifically, the February CSE recommended that the student receive ICT services for five 42-minute classes weekly in each of the following subject areas: math, science, social studies, and English (Dist. Ex. 13 at pp. 1, 6-7).

The February 2022 prior written notice stated per the regular education teacher that the student did well in math, and per the special education teacher that the student was doing well in Spanish and science, with supports in English for editing and to expand written responses (Dist. Ex. 14 at p. 1). Further, the prior written notice reported the removal of resource room for the upcoming school year "as additional general education supports will provide assistance in writing and math as well as his increased support in science and social studies" (id.).

The school psychologist testified that for the 2022-23 school year, the February 2022 CSE recommended to continue the ICT model for ninth-grade and noted that the ninth-grade ICT English class and ICT math classes included an additional lab period that met every other day so the student would receive "a period and a half of English every other day" and "a period and a half of math every other day" (Tr. p. 76). The school psychologist reported that the ICT model for English and math provided the lab period for "support" and "extend[ed] the time that they are provided personal needs" (id.).

The parent testified that in resource room the special education teacher "[p]rimarily ca[ught] him up on assignments from classes. It was across all classes. They worked on a lot of ELA because that [wa]s an area that [the student] struggle[d] with as well as history assignments. Very heavy ELA, not as often math" (Tr. pp. 727-28). In response to the CSE's removal of resource room for ninth-grade, the parent testified that "[t]hey can't take that away from him because that was a tremendous amount of support for him to be able to keep up with the curriculum" (id.). The parent reported that she expressed this at the CSE meeting (id.). The special education teacher that provided the student resource room in eighth-grade testified that "[w]e felt with the co-taught classes, with two teachers in each class and the support of the labs that that would be enough support for [the student] to meet his needs" (Tr. p. 324).

The February 2022 prior written notice stated in lieu of resource room for the upcoming school year, additional general education supports would provide the student with assistance in writing and math, and noted that supports were also increased in science and social studies (Dist. Ex. 14 at p. 1; see also Tr. pp. 77-78). The school psychologist testified that in looking at the student as "a whole child my recollection would be that [the CSE was] looking to provide areas of where [the student] could have maybe more elective support, or because of other remedial services he may have had a lot of support that the resource room was no longer required" (Tr. p. 78). The school psychologist testified that at the February 2022 CSE meeting, the student shared with the committee that he felt he had a better school year, and he had friends (id.). The school psychologist

testified that the program recommended by the February 2022 CSE was appropriate and the least restrictive environment for the student (Tr. p. 82).

Although the IHO found the district did not provide the student a FAPE for the 2022-23 ninth-grade school year, the hearing record provided evidence that the district again recommended a program similar to the previous year in which the student demonstrated some progress across IEP goals and maintained passing grades in his ICT classes of English and math. Whereas, the student's eighth-grade program included consultant teacher services for social studies and science, the February 2022 CSE had information before it that the student was not passing his social studies class, and for the 2022-23 ninth-grade school year, the CSE recommended additional ICT classes in science and social studies. Accordingly, I find that the February 2022 CSE was reasonable in expecting the student to continue to make progress toward his IEP goals, and in its recommendation that the student receive ICT services in all core classes, particularly in social studies, where the student had failed the first and second quarter marking period with only consultant teacher services provided. Therefore, I find that the district did provide the student a FAPE for the student's 2022-23 ninth-grade year.

For the 2023-24 (tenth-grade) school year, the July 2023 CSE recommended the student receive ICT services in math, science, social studies, and English classes, for five 42-minute classes per week in each subject; resource room (5:1) for five 42 minute classes per week; as well as the related services of one individual 30-minute counseling session per week, and one 30-minute speech/language therapy session per week in a group (5:1), in addition to one 30-minute speech/language consultation session per month provided to school personnel to assist teachers in meeting the student's needs within the classroom setting (Dist. Exs. 18 at pp. 1, 10-12; 19 at pp. 1-3). The July 2023 prior written notice indicated that "math and science classes ha[d] every other day lab as part of the class" and "[a]n English support lab was recommended to support reading and writing skills, although this [wa]s a general education support that [wa]s not listed as part of the special education program" (Dist. Ex. 19 at pp. 2-3).

The July 2023 prior written notice reported participation and input of the parent, Winston Prep staff, the district psychologist who conducted the observation at the private school, and review of the June 2023 private psychological evaluation (Dist. Ex. 19 at pp. 1-2). As described in detail above, the prior written notice summarized findings of the June 2023 private evaluation and reported the student's overall cognitive abilities and academics, including overall reading, written language, and math skills, were in the average range with low average skills in areas of oral reading and sentence reading fluency (*id.* at p. 2). The prior written notice further reported that additional testing indicated social communication weaknesses, deficits in inferencing, and various scales indicated weaknesses in pragmatic language, socialization, executive functioning, attention, and adaptive daily living skills (*id.*).

The high school psychologist testified that she felt the recommendations made at the CSE meeting were appropriate and indicated that she considered information from the student's previous IEP, documentation from the student's private school, and the June 2023 private psychological evaluation (Tr. pp. 392-93). The high school psychologist reported that the private school staff "did not express any disagreement with those recommendations" at the CSE meeting (Tr. p. 393). However, the prior written notice stated that the parent expressed concern that the student had no room for electives in his schedule (Dist. Ex. 19 at p. 3).

The IHO noted the CSE did not adopt the recommendations from the June 2023 private evaluation and did not consider the student's new autism diagnosis (IHO Decision at pp. 44-45). However, 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 psychologist who conducted the June 2023 private psychological evaluation recommended that the student required a small, structured classroom setting with peers of similar capabilities, individually modified instruction, and opportunities for 1:1 assistance (Parent Ex. N at p. 22); however, 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]). Although not present at the July 2023 CSE meeting, the private evaluator testified that she did not recommend an ICT class for the student because he had always been in an ICT class, had not been successful, and failed different subject areas (Tr. pp. 477-78). The private evaluator opined that based on the student's executive functioning deficits, as well as his lack of self-awareness, it would be very challenging for the student's needs to be met in an ICT class (Tr. p. 478). She noted that the student required constant monitoring with regard to his engagement, a very high level of flexibility to stimulate his brain, and constant prompting or availability of fidgets to assist with attending (Tr. pp. 478-79). The private evaluator stated that the student struggled with social interactions and needed very close monitoring and for adults to be present and see who he was interacting with because he was susceptible to undue influence (Tr. pp. 479-80). The private evaluator opined that modifying materials would be challenging in an ICT class, and that the student would have difficulty generalizing skills learned in a group outside the classroom and required support at the "point of performance" and therefore recommended a small, structured classroom setting (Tr. pp. 478, 480-81; Parent Ex. N at p. 22).

The high school psychologist testified that although the June 2023 private psychological evaluation report stated that the student required a small, structured classroom setting it did not specify any ratio (Tr. p. 395). The high school psychologist further testified that the CSE did consider a smaller special class as an option; however, based on the presented information felt that ICT services would provide the best academic support for the student (id.).

According to the July 2023 prior written notice, the July 2023 CSE considered a 15:1+1 special class as an option for one or most subjects due to parent concerns regarding the student's literacy skills, executive functioning, and processing speed, as well as his previous difficulties in an integrated setting; however, the committee discussed the profile of students in the 15:1+1 as having more significant cognitive and academic delays (Dist. Ex. 19 at p. 3). The prior written notice indicated that the parent "fe[lt] that [the student] need[ed] to be with peers of similar cognitive ability" (id.). Based on the student's cognitive and academic profile, the July 2023 CSE

recommended ICT services, with general education supports of academic labs, resource room and related services of counseling and speech-language therapy (id.).

The July 2023 prior written notice indicated that "[a]fter much deliberation" the CSE agreed on ICT services for English, math, science, and social studies, with math and science including lab every other day as part of the class (Dist. Ex. 19 at p. 2). The July 2023 prior written notice noted that "[a]n English support lab was recommended to support reading and writing skills, although this [wa]s a general education support that [wa]s not listed as part of the special education program" (id. at p. 3). The July 2023 prior written notice indicated the CSE recommended the student receive daily resource room to support his executive functioning, and academic skills; and counseling and speech-language therapy to support the student's social and pragmatic skills (id. at p. 2). The prior written notice indicated that in addition the CSE recommended speech-language consultation services as a support for school personnel to assist teachers in the classroom in meeting the student's speech-language needs (id. at p. 2).

Therefore, contrary to the IHO's finding, the hearing record included sufficient explanation of the information relied on at the July 2023 CSE meeting in making recommendations for ICT services and programming to support the student for his 2023-24 school year. As detailed above, the CSE considered information from the student's previous IEP, documentation for the student's private school, and the June 2023 private evaluation.

## **2. Counseling Services**

Next, I turn to the district's contentions that the IHO erred in her determination that the level of counseling services was insufficient to meet the student's needs.

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

The April 2021 and February 2022 CSE's recommended that the student receive two 30-minute sessions per month of individual counseling (Dist. Ex. 9 at pp. 1, 7; 13 at pp. 1, 8).<sup>17</sup> The parent contends that the levels of counseling were insufficient and misused as in sixth grade the student saw the counselor daily, which far exceeded the mandate, and the student often used the counseling office to catch up on work (Answer ¶ 10). Specifically, during testimony, the parent stated that during the 2019-20 school year the student needed more support, and the parent requested more support (Tr. p. 714). The parent testified that the district stated when the student had difficulty, he received more support from the counselor; however, the parent did not know if the student received this extra support, as it was not documented (Tr. pp. 714-15).

---

<sup>17</sup> The July 2023 CSE recommended the student receive one 30-minute session per week of individual counseling (Dist. Ex. 18 at pp. 1, 11).

The district middle school counselor testified to first providing the student mandated counseling services in August 2019 when he transitioned to the middle school in sixth grade (Tr. pp. 224-25). The counselor described the typical stressors of students in sixth grade that included entering a new building, using Chromebooks, and noted that the student had the added stress of being new to the district, and a sensitive student (Tr. pp. 226-27). Further, the student struggled because of his disability and the demands of sixth grade that included moving from class to class and navigating multiple teachers (Tr. p. 227). The counselor reported that during seventh grade she provided the student mandated counseling individually, two times per month and was also the grade-level counselor for the student's cohort which involved coteaching lessons, observing students in seventh-grade classes, and providing lunch supervision (Tr. p. 228). The counselor testified that it allowed her to not only support the student in the 1:1 counseling setting but also to observe the student with his peers and teachers (Tr. p. 229). The counselor reported that during the 2020-21 (seventh-grade) school year counseling sessions focused on building the student's self-confidence, helping him learn to advocate for himself, and helping the student understand how to problem-solve and to use healthy coping strategies whether at school or at home (Tr. pp. 231-33; Parent Ex. X at p. 7).

As described in detail above, the counselor testified that she participated in the student's March 2021 CSE meeting and advised the CSE that the student had met his goal related to maintaining social interactions, improved his ability to advocate for himself, and improved her ability to appropriately articulate frustrations and needs as opposed to crying (Tr. 235-36; Dist. Ex. 5 at p. 2). The counselor testified that the student "made great progress from the year before, even during the pandemic" and made the recommendation for continued counseling services twice monthly as the student needed to be in class, struggled with task completion, and "in consult with mom I believe we both agreed that [the student] had access to me anytime he needed, but in terms of mandated counseling...it would be in his best interest to have him pulled twice a month" (Tr. pp. 236-37). The counselor testified this level to be sufficient as the mandated counseling focused on the goal that needed to be achieved, although the student could access the counselor regularly (Tr. p. 237).

In relation to progress during the 2021-22 school year, the counselor testified that the goal on the student's March 2021 IEP addressed how to use strategies to move forward in making friendships and connecting with his peers (Tr. pp. 237-39). The counselor testified that she witnessed the student's growth in the three years working with him and in eighth-grade he started to really develop some friendships in an appropriate way and achieved the social/emotional goal on his 2021-22 IEP (Tr. p. 239; see Dist. Ex. 15 at p. 3). The counselor reported at the February 2022 CSE meeting that the student had made academic and social gains during the 2021-22 school year (Tr. pp. 242-43; Dist. Ex. 14 at p. 1). In relation to academic gains, the counselor reported the student began to understand the correlation between completing assignments and his good grades and took accountability (Tr. p. 243).

For the student's 2022-23 school year, the counselor again recommended counseling services for two individual 30-minute sessions per month in anticipation that the move into high school would be another big transition and the counselor "wanted [the student] to have a go-to person at the high school" (Tr. pp. 241-42; Dist. Ex. 14 at p. 1). The counselor reported discussing this level of support with the parent, discussing not wanting the student to miss high school level classes weekly, and ultimately recommended two times a month to support the student (Tr. p. 242).



Moreover, the counselor testified that the recommendations for counseling for the 2022-23 school year were appropriate (*id.*).

Although the parent argued, and the IHO's decision found, that the student's counseling services were not sufficient, the hearing record included progress reports for both the 2020-21 and 2021-22 school years that documented the student's achievement of goals in the area of social/emotional/behavioral needs (Parent Ex. X; Dist. Ex. 15). Further, the counselor testified to the student's progress, and goal achievement, and reported that the levels of services were appropriate for the student to meet his goals (*see* Tr. pp. 235-37, 239-42). Of note, the student's private school did not provide the related service of counseling, or any related services to the student, or have licensed clinical staff of social workers, psychologists, or psychiatrists on staff (Tr. p. 646). The head of school at Winston Prep testified that services were integrated into the school program and if the student needed support beyond what was offered at Winston Prep that it was then up to the family to provide (Tr. pp. 646-47).

Here, I find that the IHO erred in finding the counseling services recommended by the district for the student's 2021-22 and 2022-23 school years were not sufficient. Rather, as reviewed above, the mandated recommendation for counseling services addressed the student's areas of need and allowed for the student to make progress and achieve his social/emotional/behavioral goals.

### **3. Reading Services**

The IHO in her decision found it unclear why the district did not recommend a specialized reading class for the student and rather placed the student in an AIS general education reading class for three years, without evidence of progress, and with the student continuing to struggle. As indicated above, the IHO erred when she held that the district's failure to reconvene the CSE after obtaining the student's scores on state assessment in spring 2022 and not reconvening a CSE or reassessing the student with knowledge that the student's scores did not meet state standards in reading or math denied the student a FAPE (IHO Decision at p. 42; *see* Parent Ex. H).<sup>18</sup> The district in its request for review asserts the AIS reading program provided to the student was appropriate and that the IHO's conclusion that the student did not progress in reading during his middle school years is not supported by the evidence.

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs, as defined in subdivision 2 of section 4401 of the Education Law, in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). Education Law § 4401(2), in turn, sets for the definitions of "[s]pecial services or programs," which includes, among other things, special classes, resource rooms, consultant teacher services, and related services. Consistent with the reference to the various special services or programs included in the definition of special education under State

---

<sup>18</sup> The IHO decision also pointed out scores from a reading plus program generated by the student's reading teacher during the student's 2021-22 school year and extrapolated that although the student's scores at end of term assessment in May 2022 improved from the initial assessment in September 2021, the student's overall reading proficiency was at a 4.2 grade level (IHO Decision at p. 42; *see* Tr. pp. 310-11, 342-43; Parent Ex. AA at pp. 2, 4, 8-10).



Law, State guidance notes that specialized reading instruction could be recommended in the IEP of the student as a special class, direct consultant teacher service, related service, resource room program ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Requirements," at p. 31, Office of Special Educ. Mem. [Updated Oct. 2023], available at [https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development\\_0.pdf](https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development_0.pdf)).

First, the district had evaluative evidence related to the student's reading skills obtained during the October 21, 2020 educational evaluation, in addition to updated evaluative reading information obtained during the private June 2023 psychological evaluation (see Dist. Ex. 3; Parent Ex. N). As described above, the October 21, 2020 evaluation report indicated that according to testing, the student presented with average reading skills on the WJ IV ACH with standard scores in the average range for the following clusters and subtests: reading skills (93), written language (96), written expression (91), letter word identification (94), spelling (94), writing samples (100), and passage comprehension (92) (Dist. Ex. 3 at p 1). The student received low average scores on tests of broad reading, academic fluency, sentence reading fluency, and sentence writing fluency, with standard scores of 87, 88, 84, and 82, respectively (*id.*). The June 2023 private psychological evaluation included academic testing and also an administration the WJ IV ACH with findings that "[a]cademic testing produced scores within the average range across [r]eading, [m]athematics, and [w]ritten [l]anguage domains, suggesting that [the student] possess[ed] general knowledge and skills [] consistent with age-based expectations for these broad subject areas" (Parent Ex. N at p. 20). Testing yielded standard scores in the average range for reading (96), written language (100), letter-word identification (99), word attack (113), passage comprehension (92), spelling (95), writing samples (105) and sentence writing fluency (91) (*id.* at pp. 11-12). Low average scores were obtained on tests of oral reading, and sentence reading fluency, with standard scores of 85, and 87 (*id.*). The examiner detected slight weaknesses in the student's reading fluency as the student performed in the low average range when required to read increasingly complex passages aloud ( oral reading test) quickly determine whether simple sentences were true or false (sentence reading fluency) (*id.* at p. 20).

As reported in the hearing record, the district initiated AIS for the student beginning with the second quarter of his 2020-21 (seventh-grade) school year and he received AIS in eighth-grade (Parent Exs. X at pp. 8-9; Y at pp. 1, 2, 4; Dist. Ex. 12). Further, the district also recommended AIS reading services for the student's 2023-24 (ninth-grade) school year (Tr. p. 357; Parent Ex. AA at p. 4).

According to the student's 2021-22 (seventh-grade) report card, the student received AIS for the second, third and fourth marking periods (Tr. p. 146; Dist. Ex. 12). The AIS quarterly report card indicated that the student made "consistent growth" in the multisensory AIS reading class for units one and two that worked on three to six sounds, blending, decoding words, spelling words, decoding phrases, and knowledge of rules related to sounds and syllables (Parent Ex. X at p. 8). The AIS quarterly report card noted that "units do not correlate with a grade level" and "[e]very student begins at [u]nit [one] regardless of grade level" (*id.*). Fourth quarter comments stated that the student should continue to develop the skills that were addressed, including reading rate and fluency, and the student should continue to read and write daily over the summer (*id.*). The student's seventh-grade report card included comments for AIS reading that indicated the student was making satisfactory progress and demonstrated a general understanding of course

concepts, and was actively engaged in all or most learning opportunities in AIS reading (id. at p. 9). However, a further comment noted the student had difficulty staying on task (id. at p. 10).

The hearing record contains the student's 2021-22 AIS reading progress report for eighth-grade with mid-year data showing gradual and consistent growth for a unit that addressed vowel/consonant/e syllables and end of year data that the student made consistent growth in this unit, as well as a unit on open syllables and another unit on r-controlled syllables (Parent Ex. Y at p. 1). The student's reading teacher commented mid-year that the student made gradual progress as he needed reminders to stay focused on work rather than distractions on his computer (id.). The reading teacher noted the student should use "Reading Plus to improve reading rate, fluency, vocabulary and reading comprehension skills" (id.). The reading teacher included end of year comments that the student continued to make gradual progress, needed to stay focused, and needed to remember to use spelling options and noted to review the current unit nine the following year (id.). The student's report card included comments from the reading teacher that the student was a pleasure to have in class, he demonstrated satisfactory performance, and that he needed more regular practice (id. at pp. 2, 4).

The school psychologist testified that the student participated in AIS reading during his seventh and eighth-grade school years (Tr. p. 72). The school psychologist described AIS reading as an academic intervention service provided as a general education support and reported that AIS "[wa]s a highly specialized reading program that follows the Just Words program" (id.). The school psychologist stated that the AIS reading was smaller than regular classes and testified to the appropriateness of the AIS reading class the student for the 2021-22 school year (Tr. pp. 72-73). The school psychologist testified that the Just Words program was designed to improve decoding and encoding skills and reported that the program was phonics-based (Tr. p. 147). The school psychologist stated that the student received this program as indicated on his report card in that it reflected "year one reading" in seventh grade and received year two of the reading program in eighth-grade (Tr. pp. 148-51; see generally Parent Exs. X at pp. 9-10; Y at pp. 2, 4). In relation to specialized reading instruction, the school psychologist testified that the district could provide specialized reading instruction through an IEP but if the student made progress in AIS, the district would keep the student at that level of support (Tr. p. 192).

In addition to AIS support, the student's IEPs for the 2021-22, 2022-23, and 2023-24 school years identified goals to address the student's needs in reading and writing (Dist. Exs. 9 at p. 6; 13 at pp. 6-7; 18 at p. 9). In relation to goals, the special education teacher reported recording the student's progress towards the student's 2022-23 study skills, reading, and writing goals, and as the case manager, included input from the student's teachers in relation to reading, and writing goals (Tr. pp. 307, 309-12, 345). Specifically, the 2022-23 school year (eighth-grade) goal for reading stated that when presented with narrative or informational text from content area subjects, the student would answer text dependent questions by providing evidence in the reading (Dist. Ex. 9 at p. 6). The student's eighth-grade writing goal targeted the student's ability to use writing processes of editing, revising, and rewriting, when given a writing assignment (id.). As related to the reading goal, the special education teacher reported that she supported the student in answering text evidence questions in English class and resource room, helped the student find and highlight the evidence, and reported the student became more independent as the year went on and needed less assistance (Tr. pp. 309-10). The special education teacher testified that she worked on the student's writing goal as his ICT teacher in writing class, and also worked more individually with

writing in resource room (Tr. p. 311). The special education teacher reported the student made progress toward both the reading and writing goals; however, did not master the goals as he continued to need support or assistance (Tr. pp. 310-12; see Dist. Ex. 15 at p. 2).

The special education teacher testified that in addition to the supports she provided to the student in reading, the student received AIS reading services from a certified reading teacher who worked on decoding, encoding and comprehension and recalled the reading teacher using the program Just Words, as well as a computer-based program Reading Plus as an assessment tool (Tr. pp. 310-11, 342-43). Further, the special education teacher testified that for ninth grade, recommendations were made for the student to receive AIS support in two forms: the English lab, as well as the AIS reading class for Just Words (Tr. pp. 355, 357). She reported that not all students enrolled in ICT English were recommended for the English lab and that this support therefore had less students than the average class size of 25 (Tr. p. 355).

During the impartial hearing, the high school psychologist discussed options available to support students with reading needs (Tr. p. 400). The high school psychologist testified that there was a special class for English in a 15:1+1 special class setting, academic intervention services available for reading, and an English lab that served as support for reading and writing (Tr. pp. 399-400). The high school psychologist described the AIS reading support as a class with no more than 15 students (Tr. pp. 400-01). In addition, the high school had specialized reading instruction available as a related service provided individually or in a small group (Tr. p. 401). The high school psychologist recalled that the CSE discussed "special class English as an option and the academic intervention supports" however, committee members did not discuss the option of specialized reading (*id.*). Further, the high school psychologist testified that the CSE did not consider a specialized reading program for the student because it felt that the recommended program was sufficient to meet the student's needs and specialized reading was typically recommended only if the other interventions were unsuccessful (Tr. p. 407). The high school psychologist testified that "[the student] was making adequate progress with the other supports" (*id.*). In relation to the private June 2023 psychological evaluation and other assessments reflected on the student's IEP, the high school psychologist reported that most of the student's "assessments were within normal limits or were just mildly below" and as such the CSE did not feel that significant intervention such as specialized reading to be necessary (Tr. pp. 407-08). The high school psychologist testified that "we felt that the recommended program of the academic intervention support was sufficient in meeting his needs" (Tr. p. 408).

The hearing record as detailed above, indicates that contrary to the IHO's decision, the student made some progress in AIS reading, in that the student's seventh and eighth-grade AIS reports indicated "consistent growth" in targeted units. Further, as previously discussed, the student's most recent and previous academic assessments in reading and writing indicated that the student's scores were generally found to be in the average range, with some low average scores. Here, the high school psychologist noted that the CSE did not feel specialized reading was necessary because the student's scores were within normal limits or just mildly below. Moreover, the hearing record, contained testimony from the middle school psychologist, the high school psychologist, and the special education teacher as related to the available supports for reading, the supports provided, and the recommendations made to continue AIS reading support as the student was making adequate progress. In review of the evidence, I find that the hearing record supports

the finding that AIS reading provided the student the instruction necessary to meet the student's needs when considered in the context of the student's overall educational programming.

Based on the foregoing, the evidence in the hearing record demonstrates that the district's recommendations for ICT services and supporting programming, related services, and AIS support for reading for the 2021-22, 2022-23, and 2023-24 school years were appropriate and the IHO's determination that the district denied the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years must be reversed.

#### **D. Relief – District Evaluations**

As to the IHO's order requiring the district to conduct evaluations, given the determination herein that the district offered the student a FAPE for the 2021-22, 2022-23 and 2023-24 school years, there is no basis for an order of relief in the form of district evaluations and, accordingly, the IHO's order in this regard shall be vacated.

#### **VII. Conclusion**

Having determined that the district offered the student a FAPE for the 2021-22, 2022-23 and 2023-24 school years, the IHO's ordered relief of tuition reimbursement at Winston Prep for the 2022-23 and 2023-24 school years and for the district to conduct evaluations of the student must be reversed.

#### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated July 30, 2024, is modified by reversing those portions which found the district failed to meet its burden to prove it offered a FAPE to the student during the 2021-22, 2022-23 and 2023-24 school years; and

**IT IS FURTHER ORDERED** that the IHO's decision, dated July 30, 2024, is modified by vacating the IHO's orders directing the district to reimburse the parent for the costs of the student's tuition at Winston Prep for the 2022-23 and 2023-24 school years and directing the district to conduct comprehensive evaluations of the student in reading, occupational therapy with sensory component, auditory processing, and functional behavior assessment.

**Dated:** Albany, New York  
November 6, 2024

---

**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**