



# 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. 24-451

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

### **Appearances:**

Law Office of Michelle Siegel, PLLC, attorneys for petitioners, by Lesley Berson, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of their son's tuition at the Stephen Gaynor School (Stephen Gaynor) for the 2023-24 school year. The district cross-appeals from those portions of the IHO's decision which found that Stephen Gaynor was an appropriate unilateral placement for the student for the 2023-24 school year and which found that equitable considerations weighed in favor of the parents' requested relief. The appeal must be dismissed. The cross-appeal must be dismissed.

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

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

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

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

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

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

Evidence in the hearing record indicates that the student in this matter was found eligible to receive special education in November 2018, during the 2018-19 school year, as a preschool student with a disability (see Parent Ex. B at p. 1). As a result of subsequent reevaluations in 2019, the student received diagnoses of attention deficit hyperactivity disorder (ADHD, combined presentation, moderate), speech sound disorder, and developmental coordination disorder (id.). For kindergarten, during the 2019-20 school year, the student attended a district public school in a

general education placement with the support of integrated co-teaching (ICT) services (id.).<sup>1</sup> The student transferred into another district for first grade (2020-21 school year), but then returned to the district to attend second grade (2021-22 school year) and third grade (2022-23 school year) in an "ICT classroom" (id.; see Tr. pp. 164-65).

With respect to third grade during the 2022-23 school year, the student—who was eligible to receive special education as a student with an other health impairment—was recommended to receive the following special education program pursuant to a June 2022 IEP: ICT services for English language arts (ELA) (10 periods per week), mathematics (five periods per week), and social studies (five periods per week); one 30-minute session per week of individual counseling services and one 30-minute session per week of counseling in a group; two 30-minute sessions per week of individual occupational therapy (OT) and one 30-minute session per week of OT in a group; and the services of a full-time, group paraprofessional for behavior support (see Dist. Ex. 1 at pp. 1, 13-14).<sup>2, 3</sup>

In December 2022, the district conducted a functional behavioral assessment (FBA) of the student (see Dist. Ex. 6 at p. 1). Several district staff members participated in the FBA process, including an occupational therapist, a school counselor, a paraprofessional, the student's then-current special education and regular education teachers, and a science teacher (id.; see Tr. pp. 32-34). At that time, the FBA identified the student's targeted problem behaviors as task or work avoidance and his response to general frustration (see Dist. Ex. 6 at p. 1). According to the FBA, the classroom supports and interventions used to address his behavior included the provision of OT and counseling services, the support of his special education and regular education teachers in the classroom, intervention by the school counselor or OT when the student's behavior became disruptive, and the support of a behavior paraprofessional during the school day (id. at p. 5).

In January 2023, the district developed a behavioral intervention plan (BIP) for the student (see Dist. Ex. 7 at p. 1). The same district staff members who participated in the development of the student's FBA also participated in the development of the student's BIP (compare Dist. Ex. 6

---

<sup>1</sup> 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]).

<sup>2</sup> One document in evidence reflects that, during the 2022-23 school year, the student received OT services (when not absent) from approximately March 20, 2023 through June 1, 2023 (see Dist. Ex. 2 at pp. 1, 20). At the impartial hearing, the student's special education teacher during the 2022-23 school year testified that he received OT services on a push-in basis (see Tr. pp. 31-33, 47). She also testified that the student's initial OT provider during the 2022-23 school year took child care leave and then another OT provider began delivering services to the student "sometime in March" 2023 (see Tr. p. 49). The special education teacher did not recall if the student missed OT services while the initial OT provider was out on leave or if a "break in the actual service" occurred during the 2022-23 school year (see Tr. pp. 49-50).

<sup>3</sup> According to the June 2022 IEP, the parent reported that the student had begun taking medication for his ADHD "about a month" prior to the meeting (Dist. Ex. 1 at p. 4).

at p. 1, with Dist. Ex. 7 at p. 4). According to the BIP, a review date of the plan was scheduled to occur on March 6, 2023 (see Dist. Ex. 7 at p. 4).<sup>4</sup>

In addition to the district's development of a BIP for the student in January 2023, the parents privately obtained a neuropsychological evaluation of the student over the course of three days in January and early February 2023 (February 2023 neuropsychological evaluation) (see Dist. Ex. 8 at p. 1). According to the February 2023 neuropsychological evaluation report, the purpose of the evaluation was to "gain a better understanding of [the student's] cognitive profile along with his educational and psychological progress" and to "assist in the development of a treatment plan that best address[ed] his needs" (id.). As part of the evaluation process, the evaluator administered the following to the student: the Behavior Assessment System for Children, Third Edition (BASC-3), Parent and Teacher Forms; the Child Developmental History Form; the Conners Continuous Performance Test, Third Edition (CPT-3); the Gray Oral Reading Tests, Fifth Edition (GORT-5), Form A; the Kaufman Test of Educational Achievement, Third Edition (KTEA-3), Form A; the Wechsler Individual Achievement Test, Fourth Edition (WIAT-4); and the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) (id. at p. 2). In addition, the evaluator conducted clinical interviews and performed a record review (id.).

Based on the administration of the WISC-V to the student—which assessed his overall level of cognitive functioning—testing results yielded a full-scale intelligence quotient (IQ) score of 106, which fell within the average range compared to his same-aged peers (see Dist. Ex. 8 at pp. 3, 11).<sup>5</sup> To assess the student's reading abilities, the evaluator administered subtests focusing on "word identification, basic reading and comprehension skills, and reading fluency" from the WIAT-4, KTEA-3, and the GORT-5 (id. at pp. 5, 11-12). On the WIAT-4 subtests, which assessed the student's academic skills in the areas of reading, written expression, and mathematics, the student achieved an overall reading composite index score of 99 (average range) (id. at pp. 5, 11). On the individual WIAT-4 subtests specific to reading—pseudoword decoding, word reading, decoding fluency, and reading comprehension—the student achieved the following index scores: pseudoword decoding, 86 (low average range); word reading, 85 (low average); decoding fluency,

---

<sup>4</sup> At the impartial hearing, the parent testified that she had never seen the district's December 2022 FBA until a few weeks prior to the impartial hearing "when we had asked for it" (Tr. pp. 156-58; see generally Dist. Ex. 6). She testified that she had not seen the district's January 2023 BIP until it had been submitted into evidence at the impartial hearing (see Tr. pp. 158-59; see generally Dist. Ex. 7). For the purpose of clarity, use of the term "parent" in the singular in this decision refers solely to the student's mother.

<sup>5</sup> As reflected in the February 2023 neuropsychological evaluation report, standard scores from 90 to 109 and scaled score from 8 to 11 were considered to be within the average range on the WISC-V (see Dist. Ex. 8 at p. 3). However, in the appendix attached to the evaluation report, it was noted that, for the WISC-V, the mean (M) was 100 and the standard deviation (SD) was 15, which indicates that standard scores from 85 to 115 were considered to be within the average range on the WISC-V (id. at p. 11). Similarly, the appendix reflected that for the WISC-V, the mean was 10 and the standard deviation was 3, which indicates that scaled scores from 7 to 13 were within the average range on the WISC-V (id.). Additionally, the appendix reflects that the mean and the standard deviation were the same, i.e., M=100 and SD=15, with respect to the standard scores on the WIAT-4, the KTEA-3, and the GORT-5 administered to the student (id. at pp. 11-12). In this context, the only standard scores that fell below the average range of 85 to 115 were the following in the area of written expression: sentence composition (SS of 77), sentence building (SS of 82), sentence combining (SS of 79), and essay composition (SS of 60), which resulted in an overall written expression composite index standard score of 78 (id.). Similarly, none of the student's scaled scores fell below the average range of 7 to 13 on any of the assessments administered (id.).

92 (average range); and reading comprehension, 115 (high average range) (*id.* at pp. 5, 11-12). Turning to the results of the KTEA-3 silent reading fluency subtest administered to assess the student's reading fluency, the student achieved a standard score of 97 (average range) (*id.* at pp. 5, 12).<sup>6</sup> Finally, the administration of the GORT-5 subtests to the student to assess his oral reading fluency resulted in an overall index score of 94 (average range) (*id.* at p. 12).<sup>7</sup> Based on the student's testing results, the evaluator found that the student continued to meet the diagnostic criteria for an ADHD (combined presentation), and further met the criteria for a diagnosis of a specific learning disorder (impairment in reading) and a specific learning disorder (impairment in written expression) (*id.* at p. 8).

To address the student's needs, the evaluator recommended that the student attend a "specialized school placement" that could provide him with appropriate "executive functioning and language-based supports, academic challenges, and stimulation, alongside peers of similar abilities" (Dist. Ex. 8 at p. 8). The evaluator noted that, "despite a great deal of support in and outside of school along with his attention medication, [the student wa]s not making appropriate progress," which contributed to his "feeling different and negatively impact[ing] his sense of self" (*id.*). More specifically, the evaluator recommended a "full-time special education school with smaller class sizes and opportunities for direct instruction in an environment that [wa]s calm and with minimal distractions" and "teachers who [we]re able to continue to support his self-regulation, attention, processing, and social development" (*id.*). According to the evaluator, such placement was "critical to ensure appropriate progress and prevent regression" (*id.*). Additionally, the evaluator recommended classroom interventions and accommodations to support the student's attention and executive functioning needs (*id.* at pp. 8-9). To address the student's reading needs, the evaluator indicated that he required a "more intensive reading program" and to work with a "multi-sensory learning specialist to remediate his reading skills" (*id.* at p. 9 [emphasis in the original]). The evaluator further indicated that an "approach such as Orton Gillingham or Wilson would allow [the student] to learn proper phoneme-grapheme correspondence and other fundamentals of reading development" (*id.*). The evaluator also made specific recommendations to address the student's written expression needs and to provide "additional support with the fundamentals and mechanics of written language including correct syntax and grammar" (*id.*).

On March 14, 2023, a CSE convened to conduct the student's annual review and to develop an IEP for the 2023-24 school year (fourth grade) (*see* Parent Ex. A at p. 4; Dist. Exs. 4 at pp. 7-9, 22; 5 at p. 1).<sup>8</sup> At the impartial hearing, the student's third grade special education teacher testified that, because the March 2023 CSE meeting was an "annual review, [the CSE] c[ould] not

---

<sup>6</sup> In the area of mathematics fluency, the student achieved a standard score of 98 (average range) based on the administration of the KTEA-3 (*see* Dist. Ex. 8 at p. 12).

<sup>7</sup> The student also achieved index scores that fell within the average range on GORT-5 subtests assessing his reading rate, reading accuracy, and reading comprehension; however, he achieved a score within the low average range on the reading fluency subtest (*see* Dist. Ex. 8 at p. 12).

<sup>8</sup> Although the evidence in the hearing record reflects that a CSE convened in March 2023, the hearing record does not include a separate IEP developed at the March 2023 CSE meeting (*see generally* Tr. pp. 1-171; Parent Exs. A-O; Dist. Exs. 1-9; IHO Exs. I-II). Instead, the hearing record includes one IEP, which included information obtained at the March 2023 CSE meeting as well as information obtained at the subsequent CSE meeting held in May 2023 (*see generally* Dist. Ex. 4).

make programmatic changes," but the CSE reviewed present levels of performance, and adjusted annual goals, testing accommodations, and management needs (Tr. pp. 95-96). She also confirmed that "there were no evaluations conducted in connection with that annual review" (Tr. p. 96).<sup>9</sup>

On April 10, 2023, the student returned to the evaluator who conducted the February 2023 neuropsychological evaluation for "another session to progress monitor" (April 2023 updated neuropsychological evaluation) (Parent Ex. B at p. 1). At that time, the evaluator administered the KTEA-3 Form A to the student, as well as the Tests of Written Language, Fourth Edition (TOWL-4) Form A (*id.* at p. 13).<sup>10</sup> More specifically, the evaluator noted that, at the April 2023 follow-up, the student completed three reading assessments to examine his progress (*id.* at p. 5). An administration of two additional KTEA-3 subtests in the area of decoding yielded the following testing results: on the letter and word recognition subtest, the student achieved a standard score of 88 ("Below Average" range); and on the nonsense word decoding subtest, he achieved a standard score of 82 ("Below Average" range) (*id.* at pp. 5, 13). On the reading comprehension subtest, the student achieved a score of 100, with fell within the average range (*id.* at pp. 5, 13). In addition, on the TOWL-4, the student achieved a standard score of 71 on the spontaneous writing subtest (poor range, student independently using word processor) and a standard score of 90 on the same subtest (average range, evaluator acting as a scribe) (*id.* at pp. 6-7, 13). Based on the updated testing results, the evaluator found that the student's "avoidant behavior" in writing was a symptom of "significant language-based deficits" and required "intensive and individualized instruction to close the gaps between [the student's] current academic functioning and his age-level expectations" (*id.* at p. 8).<sup>11</sup> The evaluator had "no concerns" with respect to the student's mathematical abilities (*id.*). At that time, the evaluator continued to find the student met the criteria for diagnoses identified in the February 2023 neuropsychological evaluation (compare Parent Ex. B at p. 8, with Dist. Ex. 8 at p. 8).

On April 13, 2023, the student's father executed an "Enrollment Contract" for the student's attendance at Stephen Gaynor for the 2023-24 school year (Parent Ex. J at pp. 1, 8).

---

<sup>9</sup> Evidence in the hearing record reflects that the district implemented the annual goals in the March 2023 IEP through the conclusion of the 2022-23 school year (see Tr. pp. 98-100; Dist. Ex. 4 at pp. 12-15).

<sup>10</sup> In the April 2023 updated neuropsychological evaluation report, it was noted that, when the student returned for the follow-up, he was "initially excited to use the computer to write a story when completing the TOWL-4 but became frustrated with the task demands" (Parent Ex. B at p. 3). According to the evaluator, when the student "later completed the task by dictating his response to the evaluator, he was engaged, and he appeared to enjoy creating his response verbally" (*id.*).

<sup>11</sup> Other than adding a narrative concerning the student's difficulties in the area of writing within the April 2023 updated neuropsychological evaluation report, the evaluator did not otherwise modify the previous summary of his findings provided in the February 2023 neuropsychological evaluation report (compare Parent Ex. B at pp. 7-8, with Dist. Ex. 8 at pp. 6-8). In addition, the evaluator made the same recommendations to address the student's needs in both the February 2023 neuropsychological evaluation report and in the April 2023 updated neuropsychological evaluation report (compare Parent Ex. B at pp. 8-10, with Dist. Ex. 8 at pp. 8-9).

On May 24, 2023, a CSE reconvened to review and discuss the parents' privately-obtained neuropsychological evaluation of the student (see Dist. Exs. 4 at pp. 1-3, 22; 5 at p. 1).<sup>12</sup> Finding that the student remained eligible to receive special education as a student with an other health impairment, the May 2023 CSE recommended the following special education program for the 2023-24 school year: ICT services for ELA (10 periods per week), mathematics (five periods per week), and social studies (five periods per week); one 30-minute session per week of counseling services in a group; two 30-minute sessions per week of individual OT; one 30-minute session per week of OT in a group; and the services of a group paraprofessional for behavior support (see Dist. Ex. 4 at pp. 15-16).

In a letter dated August 23, 2023, the parents informed the district of their disagreement with the student's special education program recommended at the March and May 2023 CSE meetings for the 2023-24 school year (see Parent Ex. C at pp. 1-3).<sup>13</sup> In addition, the parents notified the district of their intention to unilaterally place the student at Stephen Gaynor for the 2023-24 school year and to seek reimbursement for the costs of the student's placement from the district (id. at p. 3).

Evidence in the hearing record indicates that the student began attending Stephen Gaynor on or about September 7, 2023 (see Parent Ex. K).

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

By due process complaint notice dated January 8, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 and 2023-24 school years (see Parent Ex. A at pp. 1-2).<sup>14</sup> With respect to the 2022-23 school year, the parents indicated that the district failed to provide "many of [the student's] OT sessions," the student struggled with reading and decoding, and he failed to make progress (id. at p. 3). With respect to the 2023-24 school year, the parents asserted that the recommendation for ICT services with related services and a group paraprofessional was not appropriate, as it had "already proven to be insufficient" for the student in the past (id. at p. 4). More specifically, and as relevant to this

---

<sup>12</sup> The parent testified that the evaluator provided her with a copy of the April 2023 updated neuropsychological evaluation report "within a few days" after the assessment, and she provided the district with a copy of the evaluation report on the same day that she received it in April 2023 (Tr. pp. 160-61; see generally Parent Ex. B). The parent further testified that she provided the district with the evaluation report prior to the CSE meeting held in May 2023 (see Tr. p. 161). However, in the evaluation results section of the May 2023 IEP, the documented results of the neuropsychological evaluation do not include the additional KTEA-3 subtests or the TOWL-4 subtests administered to the student in April 2023, and only identified the testing dates from January and February 2023, when the student was initially evaluated (compare Dist. Ex. 4 at pp. 1-3, with Parent Ex. B at p. 13, and Dist. Ex. 8 at pp. 1, 11-12). Moreover, the prior written notice related to the May 2023 CSE meeting, dated May 25, 2023, identified the neuropsychological evaluation relied upon at the meeting as being dated February 2023 (see Dist. Ex. 9 at pp. 1-2). These discrepancies are not explained in the hearing record (see generally Tr. pp. 1-171; Parent Exs. A-O; Dist. Exs. 1-9; IHO Exs. I-II).

<sup>13</sup> Evidence in the hearing record indicates that the parents had paid the full costs of the student's tuition at Stephen Gaynor for the 2023-24 school year by July 24, 2023 (see Parent Ex. K).

<sup>14</sup> It appears that the date of the due process complaint notice—that is, January 8, 2023—is an error and instead, it should reflect the date as January 8, 2024 (compare Parent Ex. A at p. 1, with Tr. pp. 11-12, 18).

appeal, the parents asserted that the CSE impermissibly engaged in predetermination and made recommendations contrary to the input from the parents and the evaluator who conducted the student's neuropsychological evaluation, as well as inconsistent with the consensus of the evaluative information available to the CSE (id. at pp. 4-5). The parents also asserted that the CSE failed to provide an explanation for the recommendation of ICT services, failed to discuss the annual goals and management needs in the IEP, and failed to develop an appropriate FBA and BIP for the student (id. at p. 5). Next, the parents alleged that the IEP did not accurately describe the student's present levels of performance, the annual goals were not appropriate, and the related services were not appropriate (id. at p. 6). With regard to the annual goals, the parents indicated that they did not address the student's weaknesses in word reading and decoding, and the IEP failed to "state [the student's] need for evidence-based instruction to remediate his reading skills" (id.). Next, the parents noted that the "class size and the student to teacher ratio" were too large for the student, the CSE failed to "follow the continuum of services," and the CSE did not meaningfully consider the privately-obtained evaluation of the student (id. at p. 7).

As relief, the parents sought an order directing the district to fund the costs of the student's unilateral placement at Stephen Gaynor for the 2023-24 school year based on the district's failure to offer the student a FAPE for the 2023-24 school year (see Parent Ex. A at p. 8). Alternatively, the parents requested an award of compensatory educational services in the form of tuition reimbursement for the 2023-24 school year based on the district's failure to offer the student a FAPE for the 2022-23 school year (id.).

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

On February 20, 2024, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) for a prehearing conference (see Tr. pp. 1-5; see also Pre-Hr'g Conf. Summ. & Order at pp. 1-3). The impartial hearing resumed on March 21, 2024, and concluded on June 17, 2024, after four days of proceedings (see Tr. pp. 6-171). In a decision dated September 6, 2024, the IHO—after reciting the background of the matter, the procedural history, a synopsis of the findings, the applicable legal standards, and his findings of fact—initially addressed the parent's request for compensatory educational services in the form of tuition reimbursement for the 2023-24 school year as relief for the district's alleged failure to offer the student a FAPE for the 2022-23 school year (see IHO Decision at pp. 1-7, 14). The IHO noted that the purpose of a compensatory educational services award was to put the student in the place he would have been but for the failure to offer the student a FAPE (id. at p. 6). The IHO also noted that the parents had not provided any "legal support for this position, nor any argument how tuition reimbursement for the following school year [wa]s an appropriate remedy for the alleged substantive denial of FAPE for the 2022-2023 school year" (id.). According to the IHO, the parents' requested relief was a "claim for prospective tuition reimbursement" based on the district's alleged failure to offer the student a FAPE for a prior school year (id. at pp. 6-7).

In reviewing the parents' claim for compensatory educational services, the IHO examined the Court's decision in Bird v. Banks, 2023 WL 8258026 (S.D.N.Y. Nov. 29, 2023) (see IHO Decision at p. 7). The IHO indicated that, in Bird, the Court "held that a full year of tuition c[ould]not be awarded as compensatory education pursuant to the IDEA," as "such an award [wa]s indistinguishable to a claim for monetary damages, which [wa]s not permitted under the IDEA" (id., citing Bird, 2023 WL 8258026, at \*6). The IHO determined that the parents in this matter did



"not seek specific compensatory education for the alleged denial of FAPE during the 2022-2023 school year," but instead, sought to "make an end-around the established Burlington/Carter test applied to requests for tuition reimbursement" (IHO Decision at p. 7). The IHO noted that, having been "persuaded by the reasoning in Bird, . . . any alleged denial of FAPE for the 2022-2023 school year [wa]s irrelevant to [the parents'] sole requested relief in this case, tuition at [Stephen Gaynor]" (id.). Consequently, the IHO "decline[d] to make any finding as to the 2022-2023 school year" (id.).

Next, the IHO examined the parents' claims with respect to the 2023-24 school year (see IHO Decision at pp. 7-12). With respect to the procedural requirements, the IHO found that the "CSE team was duly constituted, and undoubtedly took into account the concerns and recommendations of [the parents] and the [p]rivate [evaluator]" who conducted the neuropsychological evaluation of the student (id. at pp. 7-8). The IHO also found that, contrary to the parents' contention, the district created a BIP for the student in January 2023 that would have been in place during the 2023-24 school year (id. at p. 8). The IHO determined that the parents had not identified "any other alleged procedural violation in their argument" (id.). The IHO indicated that, based on the evidence in the hearing record, the parents and the private evaluator "participated in the meetings and had ample opportunity to voice their opinions and disagreements" (id.). The IHO further indicated that this was "evident both by the fact that the IEP team reconvened in light of the [p]rivate [evaluator's] updated report, and by the IEP meeting minutes provided by [the district], which demonstrate[d] a professional exchange or recommendations and ideas between all involved in the meeting" (id.). The IHO concluded that it was also "evident that the [CSE] considered the private neuropsych[ological] evaluation and the recommendations of [the p]rivate [evaluator] informing their recommendations" (id.). As a result, the IHO found that the student's IEP was "procedurally sound" (id.).

With respect to the parents' claims that "they were not notified" about the FBA the district had completed and had "not receive[d] a copy" of the BIP, the IHO found that, even if this rose to the level of a procedural violation, it did not "rise to the level of a substantive violation" (IHO Decision at p. 8).

Next, the IHO turned to the substantive appropriateness of the student's IEP for the 2023-24 school year (see IHO Decision at pp. 8-17). Citing the parents' closing brief, the IHO summarized the parents' claims concerning the size and student-to-teacher ratios of the "ICT classroom," as well as the overstimulation of such a large classroom for the student; the "insufficient supports" to address the student's "severe weaknesses in essay composition, spontaneous writing, and sentence composition"; the failure to provide for "appropriate interventions" to address the student's behaviors, and not having a BIP in place or properly implemented; and the failure to appropriately address the student's needs in reading (id. at p. 8).

Overall, the IHO concluded that the student's IEP for the 2023-24 school year provided a "thorough statement of [his] present level of academic achievement and functional performance and accurately assessed his strengths and weaknesses" (IHO Decision at p. 9). The IHO also found that the "description of the student's needs in the IEP aligned with the evaluative information," and the present levels of performance section of the IEP included the evaluation results from the privately-obtained neuropsychological evaluation, "as well as classroom-based assessments" (id.). The IHO noted that the IEP included descriptions of the student's "abilities and limitations as well

as strategies employed to motivate" the student with respect his "classroom navigation and organization"; descriptions of the student's "reading abilities in the classroom," including that the student was "meeting benchmark expectations at the time of the IEP (Fountas and Pinnell Level P)"; descriptions of the student's writing abilities, noting that he could "'sustain about 20 minutes of writing and c[ould] independently write about a half a page to a page's worth of on-genre writing"; descriptions of the student's "struggles with writing and strategies employed to address those struggles"; "extensive strategies employed" with respect to the student's management needs; and how the student's disability affected his ability to access, be involved with, and make progress in the general education curriculum, which pointed to the student's inattentiveness, hyperactivity, impulsivity; his need for OT and counseling services; and his need for a group paraprofessional to support his "emotional regulation" throughout the school day (id.).

Next, the IHO turned to the annual goals in the student's IEP for the 2023-24 school year (see IHO Decision at p. 10). The IHO found that the annual goals included a "specified criteria to determine if the goal[s] w[ere] achieved" and targeted the student's needs in the areas "task initiation, revision, elaboration, social/emotional/behavioral, attention/self-regulation, and writing/organization/planning" (id.). In addition, the IHO found that the annual goals were "specific, measurable, and attainable" and the student was "making progress towards their achievement" (id.).

After briefly examining the annual goals in the student's IEP, the IHO analyzed the appropriateness of the May 2023 CSE's recommendation for ICT services for instruction in ELA, mathematics, and social studies for the 2023-24 school year (see IHO Decision at pp. 10-11). The IHO pointed to testimony elicited from the student's third grade special education teacher, who participated at the May 2023 CSE meeting, noting that the student was attending a similar program—a general education placement with the support of ICT services—at the time of the May 2023 CSE meeting (id.). The IHO indicated that, based on the special education teacher's testimony, the student's teachers during the 2022-23 school year "employed small group targeted instruction, employing parallel teaching and smaller teaching stations" (id. at p. 10). The IHO further indicated that, based on testimony, the student's writing needs were addressed within the classroom in "small groups where [he] received support and individualized attention for his writing with the use of graphic organizers and writing plans" (id.). In addition, to address the student's behavior needs, an FBA had been completed and a BIP had been implemented in the classroom during the 2022-23 school year (id.). The IHO found that, based on testimony, the student "'made a ton of progress' and was reading on grade level and approaching grade level in math" during the 2022-23 school year with the "supports and strategies utilized in the ICT classroom" (id.). In addition, the IHO noted that the special education teacher testified the student also "made a ton of progress in writing, which was his biggest area of weakness" (id.).

With respect to the development of the student's IEP, the IHO noted that the student's third grade teacher—who participated at the May 2023 CSE meeting—testified that the CSE "reviewed his classroom based assessments, the neuropsychological evaluation and recommendations, evaluations and assessments performed by a literacy coach, as well as input from the school psychologist and related service providers" (IHO Decision at p. 11). The IHO further noted that the IEP included the "[a]dditional phonics and decoding assessments" performed by the district "after they [had] reviewed" the neuropsychological evaluation report (id.). As found by the IHO, the CSE "noted some of the recommendations" from the neuropsychological evaluation report

"within the goals and made adjustments to management needs" (id.). With regard to the private evaluator's recommendation that the student required a "smaller class size," the IHO found that the CSE considered both a 12:1 and a 12:1+1 special class, but had rejected them as being "too restrictive" for the student (id.). According to the testimony, the IHO found that the CSE felt these special class placements were too restrictive for the student because he was "extremely bright," and the special classes would have deprived the student of an opportunity to have "access to neurotypical peers due to the growth [the s]tudent made in the 2022-2023 school year" (id.).

Given the evidence in the hearing record, the IHO concluded that the "ICT classroom" was appropriate for the student and was "reasonably calculated to enable [the s]tudent to make progress appropriate in light of his circumstances and was indeed the least restrictive option available to the CSE" (IHO Decision at p. 11). In support of this conclusion, the IHO noted that, based on the neuropsychological evaluation, the student functioned in the "average range of intelligence," his full-scale IQ together with the "testing data that measure[d] the student's General Abilities Index (GAI) factors provide[d] a more comprehensive outlook on the student's cognitive functioning" and "[a]ll" of the "GAI factors were within the high average range," and the student was "also on grade level in math and reading" (id.). Consequently, the IHO found that the recommended placement "gave [the s]tudent a reasonable opportunity to make progress" (id.).

Next, the IHO concluded that the May 2023 CSE's recommended special education program "comport[ed] with their duty" to adhere to the least restrictive environment (LRE) for the student (IHO Decision at p. 11). The IHO found that the student was "able, from an academic standpoint to be educated in the general classroom, with the use of supplemental aids, strategies, and supports" (id.).

Finally, the IHO examined the parents' claims with regard to the BIP developed by the district in January 2023 (see IHO Decision at p. 12). The IHO found that the BIP was designed for the student and included "strategies to employ to mitigate the concerns raised" (id.). The IHO rejected the parents' contentions that the BIP was "stale or otherwise not valid for the IEP meeting in May 2023, or for the beginning of the school year" (id.). With regard to the parents' claim that they had never received a copy of the BIP, the IHO found that "this did not materially impede their ability to meaningfully participate in the IEP meeting, and d[id] not result in a denial of FAPE" (id.).

Having determined that the district offered the student a FAPE in the LRE for the 2023-24 school year, the IHO nonetheless examined whether Stephen Gaynor was an appropriate unilateral placement and whether equitable considerations weighed in favor of the parents' requested relief (see IHO Decision at pp. 12-14). Here, the IHO found that Stephen Gaynor was appropriate and that equitable considerations weighed in favor of the parents' requested relief (id.). However, given that the IHO determined that the district offered the student a FAPE, the IHO denied the parents' request to be reimbursed for the costs of the student's tuition at Stephen Gaynor for the 2023-24 school year (id. at p. 14).

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

The parents appeal, alleging that the IHO erred by finding that the district offered the student a FAPE for the 2022-23 school year.<sup>15</sup> Relatedly, the parents contend that the IHO erred by finding that caselaw precluded an award of compensatory educational services of tuition reimbursement for the 2023-24 school year as relief for the district's failure to offer the student a FAPE for the 2022-23 school year. Next, the parents argue that the IHO erred by finding that the district offered the student a FAPE for the 2023-24 school year. More specifically, the parents assert that the IHO erred by finding that the recommendation for ICT services was an appropriate placement for the 2023-24 school year. Next, the parents contend that the IHO erred by finding that the FBA and BIP were procedurally appropriate. Accordingly, the parents assert that the cumulative procedural violations significantly impeded their ability to participate in the decision-making process, as they had no information or knowledge about the student's behaviors or how those behaviors impacted the student's ability to learn. In addition, the parents argue that the IHO erred by finding that the FBA and BIP were substantively appropriate. The parents also argue that the student's IEP did not adequately or appropriately support the student's interfering behaviors or his social/emotional needs. Next, the parents assert that the IHO erred by finding that the annual goals were appropriate because the annual goals did not include any reading goals. Finally, the parents argue that the IHO erred "throughout his [d]ecision by failing to consider, analyze, or grapple with testimonial and documentary evidence" they presented and overwhelmingly relied on the district's evidence. As relief, the parents seek to reverse the IHO's finding that the district offered the student a FAPE for the 2023-24 school year or remand the matter to the IHO to "analyze the contested or un-addressed evidence." The parents also seek determinations that the district failed to offer the student a FAPE for the 2022-23 school year, that they are entitled to compensatory educational services consisting of an award of tuition reimbursement for the 2023-24 school year based on the district's failure to offer the student a FAPE for the 2022-23 school year, and a finding that they are entitled to an award of tuition reimbursement for the costs of the student's tuition at Stephen Gaynor for the 2023-24 school year for the district's failure to offer the student a FAPE for the 2023-24 school year.<sup>16</sup>

---

<sup>15</sup> The request for review is dated October 16, 2024; however, the verification of the request for review was notarized on October 14, 2024. The execution of a verification prior to the execution of the document being verified can call into doubt the veracity of such a verification; however, in this instance both documents were executed by the parent and there is no allegation that the parent did not read the request for review, know the contents of the request for review, and attest that the contents of the request for review were true. Nevertheless, the parties and their attorneys are advised that, in submitting pleadings to the Office of State Review, care should be taken to ensure that pleadings are properly verified as such an irregularity may result in the discretionary dismissal of a pleading.

<sup>16</sup> To the extent that the parents do not appeal or otherwise challenge the IHO's findings adverse to them, including that the May 2023 CSE was properly composed, the May 2023 CSE adequately considered the parents' and the evaluator's concerns and opinions expressed at the meeting, the May 2023 CSE provided the parents with an opportunity to participate at the meeting, the May 2023 IEP provided a thorough and accurate description of the student's present levels of performance and reflected the results of the neuropsychological evaluation, and the May 2023 IEP included extensive strategies to address the student's management needs (compare IHO Decision at pp. 8-9, with Req. for Rev. ¶¶ 3-9), these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's determination that the district offered the student a FAPE for the 2023-24 school year. With respect to the 2022-23 school year, the district contends that the IHO properly denied making any findings as the only purported relief sought was for the subsequent school year, to wit, compensatory educational services of tuition reimbursement for the 2023-24 school year. The district contends that the hearing record was devoid of evidence that the district failed to offer the student a FAPE for the 2022-23 school year, that the student regressed during the 2022-23 school year, or that the parents' requested form of relief was anything more than an improper claim for monetary damages. Alternatively, the district argues that the student's June 2022 IEP was both procedurally and substantively appropriate and offered the student a FAPE. As a cross-appeal, the district argues that the IHO erred by finding that Stephen Gaynor was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parents' request for tuition reimbursement. Next, the district contends that the IHO's denial of relief should be found final and binding with regard to the parents' transportation claims, which were not raised on appeal.

In a reply and answer to the district's cross-appeal, the parents generally argue to uphold the IHO's findings that Stephen Gaynor was an appropriate unilateral placement and that equitable considerations weighed in favor of their requested relief.

## **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" (Andrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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>17</sup>

---

<sup>17</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

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. 2022-23 School Year**

Initially, the parents misconstrue the IHO's determination with respect to the 2022-23 school year. The parents contend on appeal that the IHO erred by finding that the district offered the student a FAPE for the 2022-23 school year when, in fact, the IHO declined to make any findings with regard to this school year because the IHO found that the parents could not receive an award of tuition reimbursement for the 2023-24 school year as relief for any alleged failure by the district to offer the student a FAPE for the 2022-23 school year (compare Req. for Rev. at pp. 1-2, with IHO Decision at pp. 6-7).

Putting aside whether the IHO properly found that the parents could not obtain tuition reimbursement as relief, the parents generally argue on appeal that the district failed to present a cogent and responsive explanation for the recommended special education program for the 2022-23 school year, but without pointing to any specific issues with regard to the student's program for the 2022-23 school year upon which to conclude that the district failed to offer the student a FAPE in the LRE (see generally Req. for Rev.). Within the accompanying memorandum of law, the parents reargue an issue raised in their due process complaint notice—that is, the student's alleged failure to make progress during the 2022-23 school year—and point more specifically to his ability to manage his behaviors and his lack of progress in reading and writing, as evidenced by his annual goals (see Parent Memo. of Law at pp. 16-18; Parent Ex. A at p. 3).

When an IHO has not addressed claims set forth in the due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10 [c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were

---

ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at \*9 n.4 [S.D.N.Y. Nov. 27, 2012]). In order to avoid a remand, the hearing record needs to include sufficient evidence to support an appropriate award. Generally, an allegation targeted at the results of the district's provision of special education to a student with a disability, on its own, cannot support a finding of a denial of a FAPE (see Walczak, 142 F.3d at 133 [stating that "IDEA requires states to provide a disabled child with meaningful access to an education, but it cannot guarantee totally successful results"]; M.H., 685 F.3d at 245 [noting that the "[t]he purpose of the Act was instead 'more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside' [citations omitted]]. Moreover, an independent review of the hearing record reflects that it contains sufficient evidence to address the parent's claims and, based on that review, to conclude that, contrary to their contentions, the student made progress during the 2022-23 school year. There being no other allegation from the parent, there is no basis for a finding that the district denied the student a FAPE in the LRE for the 2022-23 school year.

In this case, although the hearing record does not include progress reports related to the student's annual goals, evidence of whether the student made progress during the 2022-23 school year can be found embedded within the student's May 2023 IEP developed for the 2023-24 school year—which includes the first progress reports on his annual goals developed in March 2023, goals that were implemented during the final months of the 2022-23 school year—and which reflects the student's present levels of performance at the conclusion of the 2022-23 school year. When viewed in comparison to the student's present levels of performance in his June 2022 IEP—developed for the 2022-23 school year at the conclusion of the 2021-22 school year—a picture of the student's progress during the 2022-23 school year emerges from the evidence and supports a finding that the student made progress in the areas of reading, writing, mathematics, and behavior while attending second grade in a general education placement with the support of ICT services, related services, and a group paraprofessional (behavior support). In addition, the hearing record includes testimony about the student's progress elicited from his special education teacher for the 2022-23 school year while attending third grade in a general education placement with ICT services, related services, and a group paraprofessional (behavior support).

Turning first to the information within the student's June 2022 IEP, the evidence reflects that, during second grade in the 2021-22 school year, the student "made great progress in reading," noting specifically that in September 2021 the student was reading at "level E" and, by May 2022, he was reading at "level L," which was characterized as being "slightly below the grade level benchmark" (Dist. Ex. 1 at pp. 1-2).<sup>18</sup> According to the June 2022 IEP, the student had "great comprehension when reading books on his level and when listening to read alouds"; it was also noted that the student "often ma[d]e connections to his own life" and could "make inferences and predictions about the characters" (id. at p. 2). However, the IEP indicated that, when the student

---

<sup>18</sup> The evidence indicates that, in second grade reading, students worked on "reading with more fluency and phrasing," "using a variety of decoding strategies for figuring out tricky words," and "dealing with more complex vocabulary and literary structure (e.g. untagged dialogue, figurative language, etc.);" (Dist. Ex. 1 at p. 1). As part of second grade reading, students were also expected to "communicate their understanding of the big message, make inferences, and communicate what they believe[d] the author's intentions" were when reading fiction texts (id.). When reading nonfiction texts, second grade students were "expected to notice text features, compare different types of nonfiction books, and communicate what they [we]re learning" (id. at pp. 1-2).



read "out loud, he often read[] quickly and w[ould] omit words," and he needed to "work on slowing down" and to "stop after chunks"—such as after a chapter or section of a book—to make sure he was "absorbing what he read" (id.). Finally, it was noted that the student "enjoy[ed] reading on a device and should have access to audio books and/or ebooks on programs such as Epic" (id.).

In the area of writing, the June 2022 IEP reflected that the student was performing "below grade level" at the conclusion of the school year, but further indicated that the student "work[ed] best when given independent [writing] projects" in areas of interest to him (Dist. Ex. 1 at p. 2).<sup>19</sup> The student had difficulty switching from one writing piece in a specific genre to a new piece of writing, "especially when [beginning] a new unit" (id.). The IEP indicated that the student "benefit[ed] from reminders to reread his piece before beginning to write again," and "need[ed] reminders to revise and edit, especially to check for punctuation and capitalization" (id.).

In mathematics, the June 2022 IEP reflected that the student was performing "slightly below grade level" at the conclusion of the 2021-22 school year, but also that he demonstrated a "strong conceptual understanding of [sec]nd grade math" (Dist. Ex. 1 at p. 2).<sup>20</sup> According to the June 2022 IEP, the student had difficulty showing his work, and became "frustrated and [would] refuse to complete the work" at times (id.). The June 2022 IEP also reflects that the student "need[ed] to be encouraged to work in partnerships and benefit[ed] from being paired with a friend" and being given "differentiated math work that allow[ed] him to feel really successful in the beginning, before offering [him] a challenge" (id.).

Finally, in the area of behavior, the June 2022 IEP indicated that the student received OT services to address "self-regulatory, cognitive-perceptual, graphomotor, executive function, sensory processing [and] body awareness, social-emotional, and coping skills" (Dist. Ex. 1 at pp. 3-4).<sup>21</sup> According to the IEP, the student exhibited "inconsistent levels of alertness and regulation

---

<sup>19</sup> Second grade expectations in the area of writing included the ability to "write a variety of pieces including narratives, nonfiction pieces, realistic fiction pieces, and lab reports" (Dist. Ex. 1 at p. 2). In addition, second grade writing included the process of writing, such as "planning ideas, drafting, revising, editing, and publishing multiple times" (id.). Furthermore, students in second grade writing "gain[ed] more independence in writing by using their knowledge of spelling patterns, blends, digraphs, vowel teams, r-controlled syllables, and sight words to spell words independently" (id.).

<sup>20</sup> Expectations for second grade mathematics students included the ability to "add and subtract two and three-digit numbers up to 1,000 by the end of the year" (Dist. Ex. 1 at p. 2). In addition, second grade mathematics focused on the students' ability to "show a variety of strategies when solving equations to show computational fluency" (id.). Students were also expected to demonstrate the ability to "articulate [their] answer, how [they] got [the] answer, and why [they] chose a particular strategy . . . [as a] part of being able to explain [their] math reasoning to a peer" (id.). In addition, second grade mathematics included being "introduced" to a variety of topics, such as "[t]ime, money, and geometry" (id.).

<sup>21</sup> In the area of social development, the June 2022 IEP reflects that the student could be "extremely caring, thoughtful, and friendly" and enjoyed "sharing stories" about his life, but could also be, at times, "intentionally aggravat[ing to his] friends by doing things he kn[ew] they dislike[d] (following them, touching their materials, taking their things, telling them what to do, etc)" (Dist. Ex. 1 at p. 3). According to the IEP, the student would continue to engage in this behavior even if his friends became angry and unless an adult intervened (id.). During periods of "high emotion," the student had difficulty self-regulating, and he would "often refuse to listen to directions" if he was "very frustrated or upset" (id.). In addition, the student would, at times, "walk or run around the classroom," "tear paper and/or charts," "kick and/or push furniture," "leave the classroom, and/or hide in the

on a day-to-day basis," which made "progress difficult to maintain and monitor both inside and outside the classroom" (*id.* at p. 4).<sup>22</sup> However, the June 2022 IEP indicated that, during the 2021-22 school year, the student made progress in his ability to self-regulate when given the supports of sensory tools and strategies, and the student made progress in his graphomotor and fine motor skills (i.e., handwriting) (*id.*). At the conclusion of the 2021-22 school year, it was noted in the June 2022 IEP that, "[w]ith practice and maturity, it [wa]s expected that [the student] w[ould] continue to demonstrate progress in this area" (*id.*). It was also noted that the student benefitted from "frequent movement and sensory breaks throughout the school day" (*id.*).

Overall, the June 2022 IEP included a description of the student's performance within a general education placement with ICT services during the 2021-22 school year, noting that he enjoyed participating and sharing "about his life outside of school" (Dist. Ex. 1 at p. 1). It further noted that the student struggled, at times, with his ability to "self-regulate in times of intense emotion," and could "become inflexible and refuse[d] to complete the given task [or] assignment," if things did not "go his way" (*id.*). However, the student benefitted from "small group instruction, breaks, and strategies to help independently regulate his emotions"; the use of positive praise"; and the support of a paraprofessional for "academic task time, transitions, and moments of intense emotion" (*id.*).

Given the student's progress during the 2021-22 school year, together with the student's then-present levels of performance, the June 2022 CSE recommended a general education placement with ICT services for instruction in ELA (10 periods per week), mathematics (five periods per week), and social studies (five periods per week); related services of OT and counseling; annual goals in the areas of social/emotional/behavior, reading, writing, mathematics, and attention/self-regulation; strategies to address his management needs; and the support of a behavior paraprofessional (*see* Dist. Ex. 1 at pp. 4-14). The IEP further noted that the student required a BIP and to "[s]ee [the] attached FBA/BIP" (*id.* at p. 5).

As reflected by the evidence in the hearing record, the student attended a district public school for third grade during the 2022-23 school year. At the impartial hearing, the student's special education teacher during the 2022-23 school year (third grade) testified (*see* Tr. pp. 31-109). Initially, she explained that, as part of her duties and responsibilities, she provided "access to the general education curriculum through modifications or universal design to provide all students with access to the general education curriculum" (Tr. p. 32). During the 2022-23 school year, the special education teacher shared responsibility for instruction within the classroom with a regular education teacher through the use of "small group instruction," which comprised the

---

closet" when frustrated or upset (*id.*). The June 2022 IEP further noted that the student had difficulty "de-escalat[ing] in these situations and require[d] the support of an adult"; the student often presented with these behaviors "when he [wa]s given a non-preferred task or when he d[id not] get something he want[ed]" (*id.*). Socially, the student's strengths included "helping out," "playing with friends at recess," and "performing gymnastic routines" (*id.*). At that time, the parent "did not express any concerns in regard[] to his social development" (*id.*).

<sup>22</sup> It was also noted in the June 2022 IEP that the student could be "distracted by both external stimuli (ex-a pen, peers, noise), and by internal stimuli (ex-unrelated thoughts as to what [wa]s being taught or being worked on) throughout the day," which "interfere[d] with his ability to fully participate in therapies and school-based activities" (Dist. Ex. 1 at p. 4).

"majority of [the] day in [their] ICT classroom" (Tr. pp. 34-35). She also testified that she and the regular education teacher used "parallel teaching [in the classroom], where the entire class [wa]s separated into two homogenous groupings [in order to] teach the same lesson just in a smaller group size" (Tr. p. 35). In addition, the special education teacher testified that they also used "station teaching" within the classroom, "where [the] class was split up into three smaller groups" and the students "rotated" to each station; station teaching allowed for instruction in "much smaller group size[s] and more targeted instruction" (*id.*). The third station was generally considered an "independent station," which could be overseen by the paraprofessional who worked in the classroom for added support (Tr. pp. 35-36).

When describing the student during the 2022-23 school year, the district special education teacher identified his strengths as being a "very energetic, happy student," who "often made [them] laugh and smile every day" and who shared a story with them "every morning" (Tr. pp. 36-37). She also testified that, when the student "really enjoyed a topic that was being discussed, he loved being a leader, [and] having a job" (Tr. p. 37). With regard to his challenges, the special education teacher noted that his "writing was a big area of difficulty," and it was "dependent" on "external stimuli," such as "sleep or hunger, motivation, external rewards, or the topic that he was writing about" (Tr. pp. 37-38). She explained that the student was "definitely motivated by choices or by fun rewards, but the idea of sitting and writing for an extended period of time was a little bit challenging for him" (Tr. p. 38). The student was also challenged by "revising his work" (*id.*). Additionally, the special education teacher testified that "[b]ehavior also played a big role in [the student's] day and academic output," and she referenced the "external stimuli" of hunger or sleep, as well as "motivation and that behavioral piece," as playing a "role in his academic performance" (Tr. pp. 38-39). She also testified that a BIP was used with the student during instruction, which allowed them to observe the "function of his behavior," to develop "smaller, achievable goals" for the student, and to create "school behavioral plans" so the student could "earn some rewards or some sort of external reinforcer" (Tr. pp. 39-40). According to the special education teacher, the student "experienced a lot of growth" in his behavior during the 2022-23 school year, however, "consistent attendance, definitely played a part in his ability to master some of these skills" (Tr. p. 40; *see* Dist. Ex. 4 at p. 1).

As noted previously, the student's June 2022 IEP, for the 2022-23 school year, included annual goals, as relevant herein, in the areas of reading, writing, and social/emotional/behavior (*see* Dist. Ex. 1 at pp. 9-13). More specifically, the annual goal in reading targeted the student's ability to respond to wh questions—both literal and inferential—for a "just right level story," and to provide "evidence from the passage paired with a verbal explanation" (Dist. Ex. 1 at p. 9). According to the IEP, the student made progress on this annual goal when it was introduced for the second report of progress (*id.*). In writing, the IEP included annual goals targeting the student's ability to write at least three sentences per page across four to five pages; the annual goal for editing and revising targeted the student's ability to use a checklist for capitalization, punctuation, and spelling (*id.* at pp. 10-11). As noted in the IEP, the student made progress on the first annual goal when it was introduced for the second report of progress, but made less progress (i.e., "Little progress made") on the second annual goal for editing and revising when introduced for the second report of progress (*id.*). Additionally, as related to writing, the IEP included an annual goal that addressed the student's ability to organize and plan written work, which focused on his ability to "independently plan and initiate a novel multi-step writing task, with clear story parts, placement of upper and lowercase letters, and punctuation" (*id.* at p. 12). As reflected in the IEP, the student

made progress on this annual goal when it was introduced for the second report of progress (*id.* at pp. 12-13).

As related to attention and self-regulation skills (social/emotional/behavior), the annual goal in the June 2022 IEP targeted the student's ability to independently use a strategy from a "menu of options" during times of "dysregulation" or "inattention" in order to "return to the group with improved self-regulation and attention skills for at least 10 minutes" (Dist. Ex. 1 at p. 12). Progress reporting within the June 2022 IEP reflected that the student made progress on this annual goal when introduced for the second report of progress (*id.*).

At the impartial hearing, the district special education teacher explained that the use of "small group instruction" and scheduling the student to meet with a teacher "more frequently during the week"—together with the support of a paraprofessional—helped the student to make progress in writing (Tr. pp. 40-41). Assistive technology was also implemented to "support his writing outcome" because the "physical act of writing" was seen as a "barrier[]" to his productivity" (Tr. p. 41). In addition, the student was provided with "external rewards"—such as "drawing or playing a different game"—to improve his performance in writing, as well as providing him with "checklists," "mentors," and "gamified instruction" (Tr. pp. 41-42).

When working on the student's annual goals during the 2022-23 school year, the district special education teacher testified that, in writing, they "focused heavily on creating graphic organizers and writing plans to allow him to be able to use that to independently navigate the writing process" (Tr. p. 46). In mathematics, they "chunked math into even smaller teachable moments" so the student could "better access the curriculum" and they "honed in on that small group instruction" (*id.*). The special education teacher testified that the student "greatly benefited" from the small group instruction that occurred in the "ICT classroom" during the 2022-23 school year (*id.*). Further, the special education teacher testified that the student made "a ton of progress" during the 2022-23 school year and noted that, by the end of the 2022-23 school year, he was "reading on grade level," and was "approaching [grade level], in math" (Tr. pp. 46-47). Moreover, the special education teacher testified that, although writing was the student's greatest area of weakness during the 2022-23 school year, he "had made a ton of progress from where he started the year to where he ended the year" (Tr. p. 47). Finally, the special education teacher testified that the student received related services of counseling and OT during the 2022-23 school year, and she frequently communicated with service providers through "monthly, if not bimonthly, meetings to discuss his progress, where he was at, and how to push him to the next level" (*id.*; *see* Tr. pp. 48-49).

Based on the evidence in the hearing record, the student's third-grade special education teacher participated at the May 2023 CSE meeting (*see* Tr. p. 51). Consistent with her testimony, and as reflected in the May 2023 IEP for the 2023-24 school year (fourth grade), the student—by the conclusion of the 2022-23 school year—was "currently meeting benchmark expectations" in reading, which meant that he was leaving third grade on a Fountas and Pinnell "Level P" (Dist. Ex. 4 at pp. 1, 4).<sup>23</sup> In addition, the May 2023 IEP, consistent with the special education teacher's

---

<sup>23</sup> According to the May 2023 IEP, third grade students were "expected to enter third grade on a Level M, and leave third grade on a Level P" (Dist. Ex. 4 at p. 4). The May 2023 IEP indicated that, it was presumed that third grade students could "fluently decode" and "ask and answer questions to demonstrate understanding of a text,

testimony, reflected that, by the end of the 2022-23 school year, the student made progress in writing and could "sustain about 20 minutes of writing" and "independently write about half a page to a page's worth of on-genre writing" (id. at p. 5).<sup>24</sup> With regard to the student's social/emotional and behavior needs, the May 2023 IEP noted progress in his ability to self-regulate, but also noted continued needs in the areas of attention and sensory integration (id. at pp. 8-9). Due to the overlapping nature of his attention and sensory processing issues, the May 2023 IEP indicated that it was "difficult to distinguish" whether the student's issues arose due to sensory processing or were, instead, "linked" to attention (id.). However, as noted in the IEP, the parent "agreed to reconvening (having another IEP meeting) in the fall to discuss reducing paraprofessional support given the team's report that the duration and severity of [the student's] behaviors ha[d] decreased" (id. at p. 8).

### **B. 2023-24 School Year: May 2023 IEP**

The May 2023 IEP is the operative IEP to be reviewed in connection with determining whether the district offered the student a FAPE for the 2023-24 school year, as that is the IEP that was in effect when the parent made her decision to place the student at Stephen Gaynor for the 2023-24 school year (see Bd. of Educ. of Yorktown Cent. Sch. Dist., 990 F.3d at 173; R.E., 694 F.3d at 187-88).

At the impartial hearing, the district special education teacher who attended the May 2023 CSE meeting testified that, in preparation for the meeting, the "school-based support team" reviewed the student's "classroom-based assessments"; "information that was gathered at the annual IEP [meeting], which was held a month prior"; the neuropsychological evaluation report and the recommendations therein; district assessments conducted by a district "literacy coach"; and observations of the student made by a district school psychologist and as part of his related services (Tr. pp. 51-52).

Evidence in the hearing record reflects that, at the May 2023 CSE meeting, the CSE considered both the neuropsychological evaluation of the student and the district assessments of the student, which included the administration of an "Acadience screener," the "MAZE assessment," and a "decodable reading assessment" (Dist. Ex. 4 at p. 3).<sup>25</sup> According to the

---

while referring to the text as the basis for their answers" (id.). In addition, third grade students were expected to demonstrate the ability to "describe how each successive part [of a book] buil[t] on earlier sections, to synthesize a deeper understanding of a book" as the "books bec[a]me longer and more complex" (id.). Additionally, third grade students were expected to be able "to determine the main idea of a text and recount how the key details support[ed] the main idea" when performing "information reading" (id.).

<sup>24</sup> In writing, third grade students were expected to "use their knowledge of narrative, informational and opinion-based texts to support their writing work within each genre, linking their reading work closely to their writing work" (Dist. Ex. 4 at p. 5). Third grade students were also expected to "work through the writing process (generating, planning, drafting, revising, editing and publishing) as they wr[o]te, using student-teacher created rubrics and continua" (id.).

<sup>25</sup> At the impartial hearing, the student's special education teacher during the 2022-23 school year testified that, after having reviewed the parents' neuropsychological evaluation of the student, the district made a determination to have a district "literacy coach" conduct "some additional evaluations and assessments" of the student and for a

Acadience assessment—which had been administered to the student in October, February, and May—the student's "oral reading fluency with words read correctly from [the] 29th percentile to [the] 38th percentile (60 words in a minute on average to 98 words a minute on average)" (*id.*). It was also noted that the student's "accuracy within a passage had increased by [two percent]," and when the student was "asked to read 3 passages, each passage for a minute, in the third passage he read 69 words correct[ly] in 1 minute, in the second passage he read 107 words correct[ly] in 1 minute, [and] in the third passage he read 69 words correct[ly] in 1 minute" (*id.*). With respect to the MAZE assessment, the CSE noted that the student's "errors [we]re based on modifications made to the sentence to make it make sense" and that the student "relie[d] less on comprehension and more on potential syntax of what the sentence could say" (*id.*). And finally, on the decodable reading assessment, the CSE indicated that the student "passed the CVC decodable assessment in short vowels as well as consonant blends and silent e words, all with minimal to [zero] errors" (*id.*).

The May 2023 CSE recommended that the student receive the support of ICT services for ELA for 10 periods per week, mathematics for five periods per week, and social studies for five periods per week, as well as one 30-minute session per week of counseling services in a group, two 30-minute sessions per week of individual OT, one 30-minute session per week of OT in a group, and the services of a group paraprofessional for behavior support (*see* Dist. Ex. 4 at pp. 15-16).<sup>26</sup>

The May 2023 CSE also recommended the following strategies to address the student's management needs: a seat in close proximity to teachers during whole and small group lessons; refocusing breaks during independent work times when needed; preview of all lessons with keywords present; modeling and prompting of new skills and strategies; teacher check-ins when completing classroom assignments; visual and verbal reminds (to attend, slow down); checklists for assignments and routines; directions repeated and rephrased; access to graphic organizers and editing checklists with visual cues for writing tasks; use of keywords in lessons (repeated often); access to a word wall or personalized sight word chart (throughout academic lessons); movement breaks; frequent, individualized praise, encouragement, and external rewards when in the classroom; access to technology for writing tasks; and access to headphones or a quiet space to work (*id.* at pp. 9-10).

The May 2023 CSE developed annual goals targeting the student's needs in the areas of task initiation, revising and elaborating written work, social/emotional and behavior skills, his ability to attend and self-regulate, and organizing and planning written work (both handwriting

---

district school psychologist to conduct an observation of the student (Tr. pp. 51-53). The special education teacher explained that the district made this determination because of concerns about the student's "phonics" skills noted within the neuropsychological evaluation (Tr. p. 53). She pointed to the May 2023 IEP evaluation results, which included a description of the district's assessment results (*id.*; *see* Dist. Ex. 4 at p. 3).

<sup>26</sup> The May 2023 IEP indicated that the duration of the paraprofessional services was "0.8" (Dist. Ex. 4 at p. 16). In their due process complaint notice, the parents alleged that "the IEP [wa]s not clear about the length of the paraprofessional services" (Parent Ex. A at p. 6); however, this claim has not carried through on appeal and the only allegation related to the recommendation for group paraprofessional services is that the IEP does not identify how the paraprofessional would effectively address the student's behavioral and social needs (Req. for Rev. ¶8).

and typing) (see Dist. Ex. 4 at pp. 12-15). The CSE noted that the student required "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" (*id.* at p. 4). The May 2023 CSE indicated in the IEP that the student required a BIP and referenced an: "attached FBA/BIP" (*id.*).

In addition, the May 2023 CSE recommended assistive technology devices and services, which consisted of a "[c]loud based computer with the support of word processing, auditory feedback, dictation, and PDF annotation" as needed both in school and at home (see Dist. Ex. 4 at p. 16). Recommended testing accommodations in the May 2023 IEP included the use of breaks, on-task focusing prompts, a separate location or room (to minimize distractions), the use of aids and assistive technology (to increase the volume and improve legibility of written work), the use of word prediction software (to assist with writing tasks and spelling), and the use of masks and markers (to track his place on a test and bubble sheet) (*id.* at pp. 18-19).

### **1. Annual Goals**

The parents contend that the IHO erred by finding that the annual goals in the May 2023 IEP were appropriate when the IEP did not include any annual goals in reading "despite identifying [the student's] significant reading deficits." As an example, the parents point to what they characterize as a "negligible" increase in the student's reading fluency skills and his reliance on "potential syntax of what the sentence could say" in reading comprehension. In addition, the parents argue that the May 2023 CSE ignored evidence of the student's significant needs in reading described in the neuropsychological evaluation report, which indicated that he struggled to decode words with two or three letters and a short vowel sound.

In response, the district asserts that reading, writing, revision, and elaboration are interdependent skills, and that the annual goals in the May 2023 IEP targeted the student's underlying areas of need. Moreover, the district asserts that, when read as a whole, the May 2023 IEP was appropriate to meet the student's needs and cured any alleged missing annual goals or management need.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Generally, the IDEA does not require that a district create a specific number of goals for each deficit, and the failure to create an annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need. (*J.L. v. New York City Dep't of Educ.*, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]; see *C.M. v. New York City Dep't of Educ.*, 2017 WL 607579, at \*20-\*21 [S.D.N.Y. Feb. 14, 2017]).

Consistent with the parents' assertion, the May 2023 IEP did not include any annual goals specific to reading (see Dist. Ex. 4 at pp. 12-15). However, based on information provided at the time of the May 2023 CSE meeting, the student was reportedly meeting the curriculum benchmark expectations for third grade students in reading (id. at p. 4). More specifically, the present levels of performance in the May 2023 IEP—which the parents do not dispute on appeal—described the student as "meeting benchmark expectations" in reading, and further noted that the student read like a storyteller, with fluency and expression, and he demonstrated the ability to respond accurately to both literal and inferential questions related to story text (id. at pp. 4-5). In addition, the present levels of performance reflect that the student could "verbally respond with accurate recounts from the text" when he was "asked a series of questions about a book" (id.). Further the May 2023 IEP indicates that, when reading a nonfiction text, the student provided the main idea with supporting details (id. at p. 5).

Evidence in the hearing record reveals that, at the May 2023 CSE meeting, the parents reported concerns about the student's academic performance especially in the areas of reading and writing (see Dist. Ex. 4 at p. 7). The parents were also concerned that the student's use of assistive technology would prevent him "from developing his foundational writing skills (i.e., handwriting, spelling, etc.)" (id.). As noted in the May 2023 IEP, the parents reported concerns about the student's "new reading disability diagnosis and how it w[ould] impact his ability to read more complex texts in future grades" (id.).

A review of the 2023 CSE meeting minutes indicates that the CSE discussed the student's "new DSM-5 diagnosis" of a specific learning disability in reading (Dist. Ex. 5 at pp. 1-2). At that time, the district school psychologist who attended the meeting questioned the "specification and severity" of the diagnosis in order to more fully "understand how [the student] met the [diagnostic] criteria," especially given that the student was "reading at or above grade level" and that, therefore, "his difficulties in decoding [we]re not 'substantially or quantifiably below those expected' (as per DSM-V language)" (id. at p. 2). In response, the evaluator who conducted the student's neuropsychological evaluation—and who also attended the May 2023 CSE meeting—indicated that the student "struggled with single word decoding and nonsense word decoding on two different measures and at two different times, especially words out of context" (id.). The school psychologist "reiterated the DSM-V criteria discrepancy" in response to the evaluator, and noted that the "areas of phonetic awareness and decoding [we]re not substantially and quantifiably low enough for his age and d[id not] cause significant interference" with the student's reading, as he was "reading at or above grade level" (id.). The school psychologist also raised the question of whether the student's ADHD would better explain the student's evaluation results (id.). Although the evaluator acknowledged that the student had "attention issues," he persisted with his opinion that the student's "phonetic skills [we]re still below grade level" (id. at p. 3). Turning to consider the district's assessments of the student, the meeting minutes noted that the results did not "seem quantifiably and substantially low enough," and moreover, the student had made only one "decodable error" when reading the word "'sprawled' but [correctly read] other high frequency words based on syntax" (id.).

Upon review of the neuropsychological evaluation—and noting that the May 2023 IEP included the testing results—the student's scores in reading, overall, fell within the average range, with the only outlier being the results obtained from the administration of the KTEA-3 subtest in April 2023 for nonsense word decoding, which was below average with an index score of 82 (see



Parent Ex. B at pp. 11-13). Yet, on the district's decodable reading assessment, the student "passed the CVC decodable assessment in short vowels as well as consonant blends and silent e words, all with minimal to [zero] errors" (Dist. Ex. 4 at p. 3). In addition, based on the district's assessments, the student had improved his oral reading fluency with words read correctly from the 29th percentile to the 38th percentile and his "accuracy within a passage increased by 2 [percent]" (*id.*).<sup>27</sup>

Although the May 2023 IEP did not include an annual goal targeting the student's reading, other supports in the IEP were designed to support the student in the area of reading (see *J.B. v. New York City Dep't of Educ.*, 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017] [explaining that an IEP need not identify annual goals as the only vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE]). For example, the May 2023 IEP described the student's present levels of performance in reading and continued need for adult support during reading workshop in the form of frequent reminders to write information about the character or story he was reading, and reminders from an adult to ensure he wrote at least one thing about the text he read (see Dist. Ex. 4 at p. 5). The May 2023 IEP provided for strategies to address the student's management needs that encompassed supports for the student's reading and writing, including the following: preview all lessons with keywords present, use of keywords in lessons repeated, access to a word wall or personalized sight word chart throughout academic lessons, access to graphic organizers and editing checklists with visual cues for writing tasks, and access to technology for writing tasks (*id.* at p. 10). Additional supports in the area of management needs included: sitting in close proximity to teachers during whole and small group lessons, refocusing breaks during independent work times when needed, modeling and prompting of new skills and strategies, teacher check-ins when completing classroom assignments, visual and verbal reminders to attend and slow down, checklists for assignments and routines, directions repeated and rephrased, movement breaks, frequent individualized praise, encouragement and external rewards when in the classroom, and access to headphones or a quiet space to work (*id.* at pp. 9-10).

Based on the foregoing, the evidence in the hearing record reflects that the May 2023 IEP identified the student's needs in the area of reading and recommended supports related thereto and that the CSE was not required to include a specific reading goal for the student in the IEP in order to offer a FAPE.

---

<sup>27</sup> In the request for review, the parents argue that the "mere" two percent increase in the student's reading accuracy on the district's Acadience assessment supported their assertion that the IHO ignored evidence of the student's regression with ICT services (Req. for Rev. ¶ 5). However, while the referenced assessment showed that the student's reading accuracy increased only two percent over seven months, it also showed that the student's oral reading fluency moved from the 29<sup>th</sup> percentile to the 38<sup>th</sup> percentile such that overall the testing showed that the student maintained a roughly equivalent reading accuracy with increased fluency (Dist. Ex. 4 at p. 3). The parents also argue that the student's neuropsychological evaluation results in decoding and comprehension decreased between the January 2023 and the April 2023 testing sessions, which demonstrated regression and which the IHO ignored in finding that the district offered the student a FAPE in the LRE for the 2023-24 school year (Req. for Rev. ¶ 5). However, while a review of the neuropsychological evaluation report does show that the student had weaknesses in decoding skills, both in decoding fluency and word decoding, and the student did score lower on tests involving reading comprehension from January to April 2023, the student still scored at the 50<sup>th</sup> percentile in reading comprehension in April 2023 (Parent Ex. B at p. 5). The evaluator specifically noted that the student's decoding deficits impacted his ability to answer comprehension questions, but also noted that "although decoding [wa]s not coming easily to [the student], he clearly has compensatory strategies that allow him to understand test when given the opportunity to take his time and reread the passages" (*id.*).

## 2. Interfering Behaviors—December 2022 FBA and January 2023 BIP

Here, the parents argue that the IHO erred by finding that the FBA and BIP were procedurally and substantively appropriate.<sup>28</sup> Additionally, the parents argue that the May 2023 IEP failed to adequately or appropriately support the student's interfering behaviors or his social/emotional needs.

In response, the district argues to uphold the IHO's determinations, asserting that the FBA supported the student's behavioral and social/emotional needs, addressed comprehensively targeted behaviors, outlined supports and interventions, and mandated informal progress monitoring through the BIP.

Initially, neither party disputes that the student exhibited interfering behaviors or that the student required a BIP. The parents contend that the FBA was procedurally inappropriate because it failed to include all of the elements required by State regulations, pointing specifically to the district's alleged failure to produce the direct data of the behaviors at issue and the FBA's alleged failure to describe replacement behaviors or how they would be taught to the student.

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

---

<sup>28</sup> To be clear, the parents did not raise any issues in the due process complaint notice with respect to the December 2022 FBA or the January 2023 IEP; instead, the parents asserted that the district failed to develop an appropriate BIP because the district failed to conduct an updated FBA (last FBA in November 2021) and failed to develop an updated BIP (last BIP in June 2022) and then claimed, at the impartial hearing, that they had not seen either the December 2022 FBA or the January 2023 BIP until the parties exchanged disclosures at the impartial hearing (see Parent Ex. A at p. 5; see also Tr. pp. 158-59; Parent Ex. C at p. 3 [repeating the same allegations from the due process complaint notice about the absence of an updated FBA and an updated BIP in the parents' 10-day notice of unilateral placement]). Contrary to the parents' contentions in the due process complaint notice, and as already noted, the district completed an FBA in December 2022 and developed a BIP in January 2023 (see generally Dist. Exs. 6-7). Additionally, the May IEP included a notation to "[s]ee attached FBA/BIP" and the parents have not alleged that they did not receive a copy of the May 2023 IEP (Dist. Ex. 4 at p. 10).

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 the direct data of the student's behaviors, State regulation requires that an FBA "shall, as appropriate be based on multiple sources of data" and thereafter lists examples of potential sources of such data (8 NYCRR 200.22[a][2]). A review of the district's FBA reflects that the document, itself, appears to require that the indirect and direct data sources—after being identified within two separate checklists—were to be attached to the FBA (see Dist. Ex. 6 at pp. 1-2). The December 2022 FBA entered into evidence does not include any attached documentation (id. at pp. 1-5).

At the impartial hearing, the district special education teacher was asked during cross-examination about whether the indirect and direct data identified in the December 2022 FBA were attached to the FBA. The special education teacher testified that data sources would not actually be attached to the physical document, but instead, were "linked into SESIS, the online platform that [housed] all of [the student's] IEP information" (Tr. pp. 70-73; see Dist. Ex. 6 at pp. 1-2). She also testified that the "entire team" was responsible for collecting data about the student's behaviors for the FBA, and the information was collected through the use of a "Google Excel sheet" (Tr. pp. 72-73).

The parents do not cite to any State regulation that requires a district to produce the data obtained when completing an FBA of a student, and a review of the relevant regulations does not support a finding that the district's alleged failure to produce the direct data of the student's behaviors at issue at the impartial hearing would necessarily result in a determination that the resulting FBA was either procedurally or substantively inappropriate (see, e.g., Req. for Rev. ¶¶ 6-7; 8 NYCRR 200.1[r]; 200.22[a]). Additionally, the hearing record does not indicate that the parents requested a review of the data used in completing the FBA at any point prior to or during the hearing.

Next, with respect to the claim that the December 2022 FBA failed to describe replacement behaviors or how they would be taught to the student, review of the FBA belies this assertion. Notably, the December 2022 FBA indicates that the student would be "able to utilize a coping strategy inside the classroom when he beg[an] to feel frustrated or disinterested and then return to the task at hand" (Dist. Ex. 6 at p. 5). The FBA also notes that replacement behaviors would "be taught throughout the school day and visual tools w[ould] be provided as an additional support" (*id.*). According to the FBA, the student was receiving behavioral supports and interventions in the form of both OT and counseling services, and both teachers in his classroom addressed his behaviors (*id.*). The FBA further notes that the "school counselor and [occupational therapist] often intervene[d] when [the student's] behavior bec[ame] disruptive," and the student's IEP included the "support of a full time para[professional] who assist[ed] and intervene[d] frequently throughout the day" (*id.*). Additionally, the FBA indicates that the student was given "modified school work throughout the day within his level of tolerance" (*id.*).

In addition, even if the parents did not receive a copy of the December 2022 FBA as they allege, the May 2023 IEP includes information about the student's behaviors. For example, the IEP indicates that the student's behaviors "often impact[ed] his ability to fully participate in activities throughout the school day," and noted that it was "difficult[] for [him] to change his mindset when things d[id] not go the way he anticipate[d] them to [go]" and he would "shut down by getting quiet or angry, tense up, or hide under the sink or in the closet" (Dist. Ex. 4 at p. 3). According to the IEP, it could take "at least 10 minutes or more" for the student to return to the activity or "redirect to another activity [or] task" (*id.*). However, the student could, at times, return to the "group or activity rather quickly and sudden demands or changes d[id] not impact his behavior," but this depended on the student's "mood, sleep, time of day, hunger, change in routine, [and] motivation level" (*id.*). In addition, the May 2023 IEP indicates that the student would "exhibit avoidant behaviors such as tearing up his papers, throwing them on the floor, crumpling his papers up, stapling his papers, putting his head down on the desk, hiding in the closet, or hiding under the sink" rather than asking for help to finish his work or when asked to "edit or revise his work" (*id.* at p. 4). The May 2023 IEP further indicates that the student, when working together with peers, often had differences of opinion about how do complete the work; the student would then become frustrated and use unkind words when things did not go the way he envisioned (*id.* at p. 7). Moreover, the May 2023 IEP reflects that, when tired or when things did not go his way or when in a negative mood, the student would shut down, become argumentative, use unkind words towards adults, and needed adult support to make a positive choice (*id.*).

Turning to the January 2023 BIP, the parents argue that the BIP was procedurally invalid because the district allegedly failed to produce evidence demonstrating that the district conducted any progress monitoring and the district failed to provide the parents with a copy of the BIP or with any progress monitoring as required by State regulation.

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).

In support of their assertions, the parents cite to 8 NYCRR 200.22(b)(5), which mandates, in relevant part, that the "implementation of a student's [BIP] shall include regular progress monitoring" and that the "results of the progress monitoring shall be documented and reported to the student's parents and to the CSE . . . and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

A review of the January 2023 BIP reflects that, consistent with the State regulation cited by the parents, the BIP includes a schedule for progress monitoring, which noted that the "team identified in [the BIP] should meet to analyze data and evaluate the BIP no later than [two] weeks after [the] initiation of the plan" (Dist. Ex. 7 at p. 3). According to the BIP, "[t]hereafter, the schedule to measure [the] effectiveness of the BIP w[ould] be followed as specified" (id.). The progress monitoring schedule in the BIP reflects that progress monitoring would occur every six weeks beginning on January 18, 2023 and concluding on March 6, 2023, with a planned review date of March 6, 2023 (id. at pp. 3-4). Furthermore, the BIP reflects that a review meeting occurred on January 28, 2023, and at that time, it was determined to continue the BIP—because the student had "shown success with the plan but need[ed] more time with it"—and the student's BIP was modified to the extent that the student would "now have to earn [eight] dots instead of [four dots] in order to earn his end of day incentive" (id. at pp. 4-5). The BIP further indicates that, if the BIP was modified, the "updated plan" must be sent to the parents (id. at p. 5).

At the impartial hearing, the student's third-grade special education teacher testified during cross-examination that the January 2023 BIP was a "revised version" of the student's BIP from second grade (Tr. pp. 62-63). She acknowledged that she participated in the development of the

student's January 2023 BIP, which had a "start date" of January 18, 2023 (Tr. pp. 63-64).<sup>29</sup> In addition, the special education teacher testified that progress monitoring had occurred and data had been gathered, but that the data had not been produced with the district's evidence at the impartial hearing (see Tr. pp. 64-65). When asked specifically about progress monitoring and whether it was documented and reported to the parents and to the CSE, the special education teacher explained that "it was talked about at the IEP meeting, where both the annual review and then the reevaluation [meeting]" that was held (Tr. pp. 69-70). She further explained, however, that neither the BIP nor the FBA had been "updated because the [student's targeted] behaviors had[ not] changed" (Tr. p. 70). Subsequently, the special education teacher testified that "parts" of the student's BIP were discussed at the May 2023 CSE meeting (Tr. pp. 106-07).

A review of the May 2023 CSE meeting minutes reflects that, consistent with the special education teacher's testimony, the CSE's discussions included noting that the student's teachers had observed "a lot of growth in his social emotional well[-]being in the classroom"; that "[h]unger play[ed] a big role in [the student's] behavior, but he ha[d] been on a positive trajectory"; that it had been "challenging to ensure this continued trajectory because of his absences," but the "consistency of structures, routines, expectations, and for all adults in the classroom in terms of language, approach and behavioral expectations" had been helpful in meeting this challenge; that the "latency and intensity of his behavior ha[d] also seen tremendous growth"; and that the school counselor had observed a "decrease" in the "frequency and duration of his behaviors" (Dist. Ex. 5 at p. 2). It was also noted in the CSE meeting minutes that the evaluator who completed the student's neuropsychological evaluation did not "feel more counseling sessions would be helpful" to the student and he was specifically asked for "any goals or recommendations" for the student in the area of social/emotional support (id. at p. 4). In addition, the meeting minutes reflect that, after the May 2023 CSE discussed the student's absences during the past three school years, and the difficulty students with an ADHD had when missing "this much instruction," the evaluator expressed that he also wanted the student to "be in school more consistently" (id.). Finally, the meeting minutes reflect the CSE's decision to "touch base" with the parents in September with respect to "reducing [the] full-time para[professional services] to part-time [paraprofessional services]" (id.).

Based on the foregoing, even if the district failed to provide the parents with the progress monitoring information collected as part of the student's BIP, the hearing record does not support finding that any such violation resulted in a deprivation of educational benefits to the student. The parents assert that the FBA and BIP were not substantively appropriate because the hearing record lacked evidence that the student's behavior improved as a result of implementing the January 2023 BIP for approximately five months. While the hearing record does not include any specific document or data on this point, the hearing record, as described above, includes sufficient anecdotal information gleaned from the student's IEPs and from the special education teacher's testimony that the student made progress behaviorally.

---

<sup>29</sup> The district special education teacher also explained that the reference to second grade in the heading of the January 2023 BIP was a typographical error (see Tr. pp. 63-64; Dist. Ex. 7 at p. 1).

### 3. ICT Services

The parents argue that the IHO erred in finding that the May 2023 CSE's recommendation for ICT services was appropriate in light of the student's distractibility and what they described as his need for a small class size.

Within the April 2023 neuropsychological evaluation, the private evaluator recommended that the student attend a specialized school placement with appropriate levels of executive functioning and language-based support, academic challenge, and stimulation and alongside peers of similar abilities (Dist. Ex. 8 at p. 14). The neuropsychological evaluation recommended a full-time special education school with smaller class sizes and opportunities for direct instruction in an environment with minimal distractions (*id.*).

The May 2023 CSE considered programming consistent with those recommendations but found them inappropriate for the student (*see* Dist. Ex. 4 at p. 24). In particular, the CSE considered a 12:1 or a 12:1+1 special class setting for the student but rejected those options as too restrictive given that the student was extremely bright and would not have access to nondisabled peers in a special class (Tr. p. 57; Dist. Ex. 4 at p. 24). The CSE also considered a State-approved nonpublic school or day school for the student, but again determined such a recommendation would not provide the student access to nondisabled peers and, therefore, would be too restrictive (Tr. p. 57; Dist. Ex. 4 at p. 24).

The parents also assert that the student had "regressed in an ICT class setting" and that, therefore, the IHO erred in finding that the student could make progress in a placement with ICT services for the 2023-24 school year.

It is well settled that a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (*see* H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; *see also* "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Revised Sept. 2023], available at <https://www.nysed.gov/sites/default/files/programs/special-education/guide-to-quality-iep-development-and-implementation.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (*see* Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir. 2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year, courts have been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch.

Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]; N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at \*9 [D.D.C. July 30, 2021]; James D. v. Bd. of Educ. of Aptakasic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

As summarized above, the hearing record supports a finding that the student made progress in his special education program during the 2022-23 school year—that is, a general education placement with ICT services for instruction in ELA, mathematics, and social studies, together with related services—and therefore, the May 2023 CSE's recommendation of a similar, if not the same, special education program for the 2023-24 school year was reasonably calculated to enable the student to enable the student to make progress.

The crux of the dispute in this matter relates to the views of the parents and the private neuropsychologist that the student had the capacity to make more progress if he was placed in a more supportive setting, versus the district's opinion that the student was making progress commensurate with his abilities and, therefore, could receive meaningful educational benefit while attending a general education class placement with ICT services, related services, and supports and accommodations within a district public school. Generally, district staff may be afforded some deference over the views of private experts (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at \*16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at \*6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]).

The May 2023 CSE considered both views but had information before it demonstrating that the student was advancing from grade to grade and making academic progress in a general education class with ICT services in a district public school. The CSE was not obligated to adopt the recommendations of the private evaluator in this instance (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]). This is particularly so given that the district staff who contributed to the IEP development had been working directly with the student and that, in addition to considering what supports and services the student needed in order to receive educational benefits, the district was mandated to consider placing the student with his nondisabled peers in light of the IDEA's LRE requirements. Where, as here, the student could be educated satisfactorily in a general education classroom with supplemental aids and services, the placements recommended in the May 2023 IEP represented the student's LRE (see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 119-20).



Based on the foregoing, there is no basis to disturb the IHO's finding that the recommendation for ICT services was appropriate to meet the student's needs and was reasonably calculated to enable the student to make progress appropriate in light of his circumstances.

**VII. Conclusion**

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2022-23 and 2023-24 school years, the necessary inquiry is at an end and there is no need to reach the issues of whether Stephen Gaynor was an appropriate unilateral placement or whether equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
February 20, 2025

\_\_\_\_\_  
**STEVEN KROLAK**  
**STATE REVIEW OFFICER**