



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-468

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

Appearances:

Law Offices of Susan J. Deedy & Associates, attorneys for petitioners, by Nicole D. Venditti, Esq.

Volz & Vigliotta, PLLC, attorneys for respondent, by Michael G. Vigliotta Esq. and Sarah A. Gyimah, 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 determined that the educational programs respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2021-22, 2022-23, and 2023-24 school years were appropriate and denied their request to be reimbursed for their son's tuition at the Imagine Academy (Imagine) for the 2023-24 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, the student has as a complex medical history and has received diagnoses of intellectual disability, moderate (secondary to a genetic mutation in utero); epilepsy; autism spectrum disorder with accompanying language impairment; attention deficit hyperactivity

disorder, combined presentation (ADHD); an unspecified anxiety disorder; a seizure disorder; cataracts; talipes equinovarus (clubbed foot); hypothyroidism; strabismus; a brain injury; periventricular leukomalacia; and a growth hormone deficiency (Parent Ex. R at pp. 1, 3, 14; see Dist. Exs. 4 at p. 1; 13 at p. 1). The student also underwent cataract surgery and it is unclear whether he has acuity in his right eye (Parent Ex. R at p. 3). Additionally, the student has a history of grand mal seizures with most occurring during sleep, and he has experienced petit mal (non-convulsive) seizures while awake in which his eyes roll back and he becomes limp and unarousable (*id.* at p. 1).

During the 2020-21 school year (kindergarten) the student was found eligible for special education as a student with an other health-impairment, he attended a district early childhood center 12:1+2 special class, received related services in speech-language therapy, occupational therapy (OT), and physical therapy (PT), and received the support of a 1:1 aide who assisted with implementing and collecting data on the student's behavioral intervention plan (BIP) to decrease negative behaviors (Dist. Ex. 24 at p. 1; see Dist. Ex. 27 at p. 1).¹

A CSE convened on March 12, 2021 to formulate the student's IEP for the 2021-22 school year (see generally Dist. Ex. 13). The March 2021 CSE continued to find the student eligible for special education as a student with an other health impairment and recommended a 12:1+2 special class with related services consisting of two 30-minute sessions per six day cycle of individual PT, two 30-minute sessions per six day cycle of individual OT, one 30-minute session per six day cycle of OT in a small group, one 30-minute session per six day cycle of individual speech-language therapy, and one 30-minute session per six day cycle of speech-language therapy in a small group (Dist. Ex. 13 at pp. 1, 11). The March 2021 CSE also recommended supplementary aids and services, program modifications, and accommodations, including the support of a daily 1:1 aide, refocusing and redirection, visual models, and a sensory diet (*id.* at p. 11). The March 2021 CSE also recommended 12-month services consisting of an 8:1+1 special class, two 30-minute sessions per week of speech-language therapy in a small group, one 30-minute session per week of both individual OT and PT, and the support of a daily 1:1 aide (*id.* at pp. 11-12). According to the March 2021 IEP, the CSE recommended strategies, including positive behavioral interventions, supports and other strategies, to address behaviors that impeded the student's learning or that of others but noted that the student did not need a BIP (*id.* at p. 9). However, the IEP included supports for school personnel on behalf of the student consisting of one 30-minute session per week of behavior intervention consultation to assist faculty/staff in the development of behavior strategies, as well as BIP data collection (*id.* at p. 12).

The student attended the district's early childhood center with the recommended programming for the 2021-22 school year (first grade) (see Parent Ex. A at pp. 3, 6-7; Dist. Ex. 27).

¹ The student's eligibility for special education as a student with other health impairment during the 2020-21, 2021-22, and 2022-23 school years is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

A CSE convened on March 8, 2022 for an annual review and to develop the student's IEP for the 2022-23 school year (Dist. Ex. 10).² The March 2022 CSE continued to find the student eligible for special education as a student with an other health impairment and recommended a 12:1+2 special class with related services consisting of one 30-minute session per six day cycle of individual speech-language therapy, one 30-minute session per six day cycle of speech-language therapy in a small group, one 30-minute session per six day cycle of individual OT in the therapy room, one 30-minute session per six day cycle of individual OT in the student's special class, one 30-minute session per six day cycle of OT in a small group, two 30-minute sessions per six day cycle of individual PT, two 45-minute sessions per week of individual vision services, as well as one 60-minute session of parent counseling and training per month for the 10-month school year (id. at pp. 1, 14). The March 2022 CSE also recommended the same supplementary aids and services, program modifications, and accommodations, and supports for school personnel on behalf of the student as the March 2021 CSE except it removed the 1:1 aide services and recommended daily 1:1 teaching assistant services for instructional, health/safety, and behavioral needs and reduced behavior intervention consultation to five hours per year (compare Dist. Ex. 10 at pp. 14-15, with Dist. Ex. 13 at pp. 11-12). The March 2022 CSE also recommended 12-month services consisting of an 8:1+1 special class, one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, one 30-minute session per week of individual PT, and daily 1:1 aide services (Dist. Ex. 10 at p. 15). According to the March 2022 IEP, the CSE recommended strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impeded the student's learning or that of others, and a BIP (id. at pp. 1, 11). The IEP specifically noted that the student needed a BIP to reduce noncompliance, verbal aggression, disruptive behavior, and the student "making physical contact with others" (id.).

The student attended a district elementary school with the recommended programming for the 2022-23 school year (second grade) (see Parent Ex. A at pp. 8-9; Dist. Ex. 25).

On April 17, 2023, the CSE convened for a requested review and modified the student's IEP for the 2022-23 school year to include three hours of daily individual behavior intervention services, and supports for school personnel on behalf of the student consisting of two 45-minute sessions per month of team meetings to begin April 24, 2023 (compare Dist. Ex. 8 at pp. 1, 16-18, with Dist. Ex. 10 at pp. 1, 14-15).

The student was evaluated on March 7, 2023, March 26, 2023, April 3, 2023, and April 27, 2023, as part of a private neuropsychological evaluation obtained by the parents (see generally Parent Ex. R). The neuropsychologist recommended, among other things, that the student's classification for special education eligibility be changed to multiple disabilities and that the student required "a 12-month, highly specialized alternate setting with a small student-teacher ratio

² The hearing record contains two copies of the March 2022 IEP (compare Dist. Ex. 10, with Dist. Ex. 12). District Exhibit 10 reflected a projected implementation date of July 4, 2022; in comparison, District Exhibit 12 indicated an implementation date of March 21, 2022 for the purposes of providing the student vision services during the 2021-22 school year (compare Dist. Ex. 10 at p. 2-3, with Dist. Ex. 12 at pp. 1-2). For purposes of this decision, only District Exhibit 10 will be cited when referring to the student's recommended programming for the 2022-23 school year.

that [wa]s highly structured and individualized, and anchored to principles of applied behavior analysis (ABA)" (Parent Ex. R at p. 14).

On June 14, 2023, the CSE convened for the student's annual review and to develop an IEP for the 2023-24 school year (Dist. Ex. 6). According to the June 2023 IEP the CSE found the student continued to be eligible for special education services, but as a student with multiple disabilities (compare Dist. Ex. 6 at p. 2, with Dist. Ex. 8 at p. 1, and Dist. Ex. 10 at p. 1, and Dist. Ex. 13 at p. 1).³ The June 2023 CSE recommended a district 8:1+2 special class with related services consisting of six hours per day of individual behavior intervention services provided by a board certified behavior analyst (BCBA), one 30-minute session per day of individual speech-language therapy, four 30-minute sessions per six day cycle of individual OT, two 30-minute sessions per six day cycle of PT, two 45-minute sessions per six day cycle of vision services, and two 45-minute sessions per month of parent counseling and training (Dist. Ex. 6 at pp. 17, 20). The June 2023 CSE recommended supplementary aids and services, program modifications, and accommodations consisting of refocusing and redirection, visual models, sensory diet, breaks, positive reinforcement strategies in the form of a token system, advanced warnings of transitions to decrease negative behaviors, and peer models (id.). The June 2023 CSE also recommended assistive technology devices and services consisting of a tablet with an all-in-one attached Bluetooth keyboard; software for laptop consisting of a digital annotating program, google suite, keyboarding program, digital worksheets, and handwriting software; a computer assisted reading program; and one 45-minute session per six day cycle of assistive technology services (id. at p. 18). The June 2023 CSE recommended supports for school personnel on behalf of the student consisting of 10 45-minute sessions per year of assistive technology support (id.). According to the June 2023 IEP, the CSE recommended 12-month services consisting of an 8:1+1 special class, three hours per day of individual behavior intervention services provided by a BCBA, three hours per day of individual speech-language therapy, three 30-minute sessions per week of individual OT, one 30-minute session per week of individual PT, and two 45-minute sessions per week of individual vision services (id. at pp. 18-19). The June 2023 CSE also recommended one 30-minute session per week of assistive technology services during the 12-month portion of the school year (id. at p. 18). In addition, the CSE recommended strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede the student's learning or that of others, and a BIP (id. at pp. 2, 14, 18).

On or around June 23, 2023, the district sent a prior written notice and request for parental consent to share information with out-of-district, day school programs (Parent Ex. V). According to the June 23, 2023 prior written notice, the parents disagreed with the June 2023 IEP program recommendations and asked the CSE to consider an out-of-district program for the student for the 2023-24 school year (id.).⁴

³ The student's eligibility for special education as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

⁴ At some point, the parents signed the consent form; however, the signatures are undated and the box providing consent was not checked (Parent Ex. NN at p. 3).

On or around August 16, 2023, the parents signed an enrollment contract with Imagine for the student's attendance for the 2023-24 school year (Parent Ex. EE).⁵ In a notice dated August 22, 2023, the parents, through their attorney, informed the district that they rejected the district's recommended special education programming and services for the 2023-24 school year and they intended to unilaterally place the student at Imagine (Parent Ex. W). The parents also informed the district that they intended to seek payment for the cost of the student's tuition, as well as roundtrip transportation services to Imagine and compensatory education services from the district (id.).

On or about August 30, 2023, an out-of-district Board of Cooperative Educational Services (BOCES) program informed the district that the student was accepted into its program for the 2023-24 school year, which consisted of a 6:1+2 special class and related services of five 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and two 45-minute sessions per week of vision services (Dist. Ex. 31). The BOCES acceptance letter also indicated the student would be provided with 1:1 aide services (id.).

On September 6, 2023, the CSE reconvened for a requested review to amend the student's IEP for the 2023-24 school year recommending the student attend the BOCES program, as indicated in the August 2023 BOCES acceptance letter (compare Dist. Ex. 4 at pp. 2, 16-17, 21, with Dist. Ex. 31). In addition, the September 2023 CSE recommended two 45-minute sessions per month of parent counseling and training and the same supplementary aids and services, program modifications, and accommodations, and supports for school personnel on behalf of the student as the June 2023 CSE (compare Dist. Ex. 4 at pp. 17-18, with Dist. Ex. 6 at pp. 17-18). The September 2023 CSE also recommended the same assistive technology devices as the June 2023 CSE and supports for school personnel of 10 45-minute session per year of assistive technology support, but did not continue the recommendation for assistive technology services for the student (compare Dist. Ex. 4 at pp. 17-18, with Dist. Ex. 6 at p. 18). The September 2023 CSE also recommended the same 12-month services as the June 2023 CSE except it reduced speech-language therapy to one 30-minute session per day (compare Dist. Ex. 4 at p. 18, with Dist. Ex. 6 at pp. 18-19). The September 2023 CSE also recommended strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impeded the student's learning or that of others and a BIP (Dist. Ex. 4 at p. 13).

The student attended Imagine for the 2023-24 school year (see generally Parent Exs. EE; II).

A. Due Process Complaint Notice

In a due process complaint notice dated January 5, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, and 2023-24 school years and raised, among other things, the following allegations: the CSEs failed to develop appropriate annual goals and objectives; the CSEs failed to revise the student's IEP to

⁵ The Commissioner of Education has not approved Imagine as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

address the lack of expected progress; the CSEs failed to appropriately consider evaluative data; the district failed to complete an appropriate functional behavioral assessment (FBA) for the 2021-22 school year; the district failed to develop an appropriate BIP following the January 2022 FBA; the CSEs failed to recommend adequate special education instruction, supports, and services; the CSEs failed to recommend a program tailored to the student's individual needs; the September 2023 CSE failed to offer the student a FAPE in the least restrictive environment (LRE); the CSEs failed to recommend home-based ABA services; and the district failed to conduct an assistive technology evaluation until May 2023 (Parent Ex. A ¶¶ 88-98). The parents also alleged that Imagine was an appropriate unilateral placement for the student for the 2023-24 school year and that equitable considerations weighed in favor of their requested relief (id. ¶¶ 99-100). As relief, the parents requested an order finding the district denied the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years; directing the district to fund the student's unilateral placement at Imagine for the 2023-24 school year, including roundtrip transportation services; directing the district to reimburse the parents for the independent neuropsychological evaluation; and directing the district to provide compensatory education (id. at p. 14).

B. Impartial Hearing Officer Decision

An impartial hearing convened on March 6, 2024 and concluded on May 16, 2024 after seven days of proceedings (Tr. pp. 1-925).⁶ In a decision dated September 10, 2024, the IHO found that the district offered or provided the student a FAPE during the 2021-22, 2022-23, and 2023-24 school years (IHO Decision at pp. 25-28).

For the 2021-22 school year, the IHO reviewed the recommended programming and the testimony of the student's first grade special education teacher indicating the program was appropriate and determined that because the parents did not cross-examine the teacher, they did not directly challenge the appropriateness of the recommended 2021-22 school year program nor did they dispute the accuracy of the teacher's testimony regarding the program (IHO Decision at pp. 9-11). The IHO specifically found the testimony of the student's special education teacher to be credible, stating she "demonstrated a full understanding of [the student's] needs and challenges in the classroom" (id. at p. 11). The IHO also determined that given the district's administration of the FBA in response to the student's increased behavioral needs and the moderate success of the resultant BIP, he was able to improve his reading level, his ability to make gradual progress, and achieve some of his goals (id.). The IHO found that, based on the teacher's credible and undisputed testimony, the IEP for the 2021-22 school year was not only reasonably calculated for the student to make progress but that the program, as implemented, resulted in the student making "modest progress" at school for the 2021-2022 school year (id.).

For the 2022-23 school year, the IHO, after reviewing and crediting the testimony of the district witnesses who testified about the student's recommended programming for the 2022-23 school year, determined that the IEPs developed for the 2022-23 school year were reasonably

⁶ The parties also attended a prehearing conference on February 14, 2024; however, the hearing record includes the IHO's written summary of the prehearing conference instead of a transcript of the prehearing conference (see IHO Ex. I; see 8 NYCRR 200.5 [j][3][xi] [requiring that a "transcript or a written summary of the prehearing conference shall be entered into the record by the [IHO]"]).

calculated for the student to make progress and that, during the school year, the student's BIP was implemented, the direct behavior services were implemented, and the program and services provided to the student were effective in allowing the student to make progress, "albeit, slow toward achieving his goals" (IHO Decision at pp. 12-15).

For the 2023-24 school year, the IHO reviewed the testimony of the psychologist who conducted the private neuropsychological evaluation, the parent, and the district director of special education who chaired the June 2023 CSE meeting and found that the June 2023 CSE gave due consideration to recommendations made in the neuropsychological evaluation and to the psychologist's input at the June 2023 CSE meeting, adopting his recommendation for a smaller classroom, one with no more than eight students, with ABA methods, and recommending vision services (IHO Decision at pp. 15-18).⁷ Further, the IHO addressed the September 2023 CSE's recommendation of the 6:1+2 BOCES program and found that both the district program recommended at the June 2023 CSE meeting and the BOCES program recommended at the September 2023 CSE meeting were appropriate recommendations for the student for the 2023-2024 school year (id. at pp. 18-20).

The IHO also addressed the parents' claims of procedural violation and determined there were no procedural violations which would result in a denial of FAPE for the three school years at issue (IHO Decision at p. 20). The IHO further determined that there was not enough evidence to support the parents' argument that the June 2023 CSE's recommendation of an 8:1+2 special class was predetermined or that the June 2023 IEP could not have been implemented by the district (id. at pp. 20-21).

As a result of the IHO's determinations, she did not address whether the parents' unilateral placement at Imagine was appropriate or whether equitable considerations weighed in their favor (IHO Decision at p. 27). Accordingly, the IHO denied all of the parents' requested relief (id. at pp. 27-28).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues presented for review on appeal, in the parent's request for review and the district's answer thereto, is also presumed and, therefore, the allegations and arguments will not be recited in detail here. Briefly, the parents contend that the IHO erred in determining that the district met its burden of proof to show that it provided the student with a FAPE during the 2021-22 and 2022-23 school years; in determining that the student made progress during the 2021-22 and 2022-23 school years; in not considering evidence of the student's current progress at Imagine during the 2023-24 school year in assessing the district's recommendations; in discounting the testimony of the private psychologist as to pedagogy; in finding that the district met its burden of proving it offered the student a FAPE for the 2023-24

⁷ The IHO also noted that she credited the parents' private psychologist's description of the student's performance on the evaluation and the results of the tests administered to him, but did not credit the psychologist's remark that the student's lower scores on a May 2022 assessment . . . compared to a February 2021 psychological evaluation was due, in part, to "pedagogy" noting the remarks were speculative and unsupported by the record (IHO Decision at p. 15 fn. 14 [citing to Tr. pp. 567-58, and Dist. Ex. 23]).

school year; and in determining that the CSEs recommendations for the 2023-24 school year were the student's LRE. The district responds to the parents' allegations in an answer.⁸

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

⁸ The district argues in its answer that the parents failed to appeal the IHO's determinations concerning the 2021-2022 school year, including that the BIP developed after the March 2022 CSE meeting was moderately successful; that the student made gradual progress over time in some areas and achieved some goals because of the BIP; and that the student's first grade special education teacher's testimony was credible. However, after a review of the parents' request for review, the parents properly raised issues with the IHO's determinations regarding the entire 2021-22 school year. More specifically, the parents raised concerns regarding the student's progress after implementation of the BIP and the IHO's credibility findings. As such, the undersigned does not agree with the district's argument that the parents did not properly appeal these determinations, and the parent's allegations will be addressed in this matter.

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]).⁹

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-

⁹ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters – Burden of Proof

The parents argue that the IHO erred in determining the district met its burden of proof that it offered and/or provided a FAPE to the student for the 2021-22, 2022-23, and 2023-24 school years.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).¹⁰ However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). Ordinarily, however, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 225 n.3 [2d Cir. 2012]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]).

Here, the district's presentation of evidence included twenty-nine exhibits, including the relevant IEPs, prior written notices, and evaluative data, as well as testimony from five witnesses consisting of the student's special education teachers for the 2021-22 and 2022-23 school year, the

¹⁰ Ordinarily, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H., 685 F.3d at 225 n.3; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]).

district's assistant director of special education, and the student's behavior services provider (see Tr. pp. 28-136, 160-336, 341-424; Dist. Ex. 2-14; 16-31).

For the 2021-22 school year, the parents argued the IHO erred by "placing an impermissible burden on the [p]arents to disprove the [d]istrict's recommendations, finding that by not cross examining the first-grade teacher, the [p]arents therefore neither directly challenged the appropriateness of the 2021[-]22 school year program, nor disputed the accuracy of the teacher's testimony" (Req. for Rev. ¶ 8). However, a full reading of the IHO's findings for that school year could more accurately be read as an indication that the district met its burden of proving the appropriateness of its recommended program through the documentary evidence and the testimony of the student's first-grade teacher and the parent did not then rebut the credible evidence presented by the district with contrary evidence (IHO Decision at pp. 9-11). According, this claim which alleges a misallocation of the burden of proof does not challenge the IHO's application of the correct standard but rather concerns the IHO's weighing of the evidence and her ultimate determination that the district did not deny the student a FAPE.

Further, the IHO correctly stated in her decision that the district bore the burden of proof of both production and persuasion as to whether a FAPE was provided to the student (see IHO Decision at p. 22). A review of the hearing record does not support the parents' argument that the IHO impermissibly placed the burden on the parents to disprove the district's recommendations. While the burden does not require the district to call witnesses, it does require the district to defend its recommendations and provide evidence that explains such recommendations. Moreover I have conducted an independent review, applying the standard as required and find no reason to depart from the IHO's conclusions. Thus, as discussed further below, the district through documentary evidence and witness testimony defended its recommendations for the 2021-22, 2022-23, and 2023-24 school years.

B. FAPE – CSE Processes and IEPs

Upon careful review, the evidence in the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached conclusions on the claims raised by the parents relating to the 2021-22, 2022-23 and 2023-24 school years. The IHO accurately identified the issues to be resolved (IHO Decision at pp. 8-9), recounted the facts of the case (id. at pp. 9-21), set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years (id. at pp. 21-24), and applied that standard to the facts at hand (id. at pp. 9-20, 25-27). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that she weighed the evidence and properly supported her conclusions. In particular, the undersigned finds that the following determinations were well-reasoned and supported by the evidence in the hearing record: the March 2021 IEP and March 2022 IEPs were reasonably calculated and resulted in the student making progress during the 2021-22 and 2022-23 school years; the student's BIP was implemented for the entire 2022-23 school year; the June 2023 CSE's recommendations for an 8:1+2 special class and the September 2023 CSE's recommendation for a 6:1+2 BOCES special class were the reasonably calculated to afford the student an educational benefit in the student's LRE; the June 2023 CSE recommendation for a BCBA for six hours per day would have provided the student with ABA methodology; the June 2023 CSE properly considered the April 2023 private neuropsychological evaluation when making its recommendations for the 2023-24 school year; the

June 2023 CSE did not predetermine its recommendations; and the argument that the district could not implement the student's June 2023 IEP was speculative (see IHO Decision at pp. 9-21, 25-27).

Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is not a sufficient basis presented on appeal to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, the conclusions of the IHO are hereby adopted with some further discussion of the parents' specific allegations raised on appeal as set forth below.

1. 2021-22 and 2022-23 School Years

Initially, much of the parents arguments related to the 2021-22 school year center around the student's progress, or more specifically the student's lack of progress, during that school year. According to the parent, the IHO erred in her determination that the student made "moderate" progress during the 2021-22 school year (see IHO Decision at pp. 25-26). However, an assessment of the recommended educational programs for the 2021-22 school year should focus on the information available to the March 2021 CSE when it convened to recommend the student's programming and, accordingly, the student's progress or lack thereof during the 2021-22 school year cannot be relied on to retrospectively assess the March 2021 CSE's recommendations (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"], citing R.E., 694 F.3d at 186–87).

The parents also argue that the BIP implemented in the second half of the 2021-22 school year did not result in any meaningful progress. The student's first grade teacher testified that once the BIP was developed towards the end of the school year the student "was moderately successful" and overall, he "made small, small gains, but he did move forward[,] ma[d]e gains and was productive in school" (Tr. p. 328). She also testified the BIP could not improve upon his arousal level or staminal level, which affected his ability to attend to instruction and be alert (id.).

Although the March 2021 CSE did not recommend a BIP for the student for the 2021-22 school year, it did recommend strategies, including positive behavioral interventions, supports, and other strategies to address the student's behaviors that impeded the student's learning or that of others, such as 1:1 aide services, "proactive and reactive strategies to decrease target behaviors," positive reinforcement refocusing/redirection, and a sensory diet (Dist. Ex. 13 at pp. 8, 9, 12). Additionally, the CSE recommended supports for school personnel on behalf of the student consisting of one 30-minute session per week of behavior intervention consultation to assist faculty/staff in the development of behavior strategies, as well as BIP data collection (id. at p. 12).

The IHO noted that the student's first grade special education teacher testified that the student progressed from a "pre-A" reading level, at which a student might not yet understand the concept of print, to an "A" where a student is just beginning to develop the concept of print, and that level A contains a beginning number of high-frequency words that the student would be able to recognize such as "I," "see," or "go." (IHO Decision at p. 10). The parents argue that the testimony reveals that the student was not able to recognize these words independently, rather, the first grade teacher testified that she prompted the student by showing him the text and told him "I

know you see the word go, you see the word see" and "maybe at the end of the school year he would be able to identify maybe four or five words" (Tr. pp. 301, 310). The parents further argue that the IEP annual goals progress report for the 2021-22 school year corroborated the teacher's testimony that the student was unable to read these words independently and noted that the student struggled to acquire and retain sight words, that the skill was inconsistently demonstrated, and when he did identify the word, he could only do so when given a choice of three words (see Dist. Ex. 28 at pp. 1, 4).

The hearing record shows that based on the testimony of the student's first grade special education teacher and the 2021-22 IEP annual goals progress report, the student showed improvement in his study, reading, math, and social/emotional coping skills (compare Tr pp. 298-302, with Dist. Ex. 28 at pp. 3-5). Similar to the student's progress towards his IEP annual goals noted by the first grade 12:1+2 special education teacher's testimony, the progress report indicated the student achieved a reading goal to listen to a teacher read text and answer two "wh" questions, but he continued to struggle to acquire and retain sight words, to identify letters and remember their names, and to recognize or name numbers higher than three consistently (compare Dist. Ex. 28 at pp. 4-5, with Tr. pp. 298-302). According to the progress report, the student achieved three motor skills goals to descend stairs holding the rail, to hold the bathroom stall door closed while securing the latch, and to push open his classroom door wide enough to walk through safely (Dist. Ex. 28 at pp. 9, 11).

The first grade teacher testified that the student developed an improved and increased awareness regarding in-school expectations and routines, including to raise his hand for a turn and to transition, and although he required prompting to use words and ask for help when emotions were heightened, he learned to request additional time for transitions and ask for help with cueing (Tr. pp. 298, 302-03). The progress report corroborated those findings, noting gradual progress in compliance with teacher directives and reduced non-compliant behavior when offered controlled choices and rewards (Dist. Ex. 28 at p. 3). Consistent with the first grade 12:1+2 special education teacher's testimony, the progress report reflected the student progressed gradually during December 2021 and March 2022 and that, by June 2022, the student was able to request "one more minute" when transitioning from a preferred to a non-preferred activity rather than engage in tantrum behavior and to ask an adult for help during a challenging task, although the report noted the demonstration of those skills was "inconsistent" (compare Dist. Ex. 28 at p. 8, with Tr. p. 302).

Accordingly, a review of the record does not support the parents' argument that the student did not make progress during the 2021-22 school year or provide a basis to overturn the IHO's finding that the district offered the student a FAPE. Additionally, as noted above, while the student's progress during the 2021-22 school year cannot be used to retrospectively assess whether the educational program recommended in the March 2021 was reasonably calculated, at the time, to provide the student with educational benefits, 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](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 Aptakisis-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

Similar to the March 2021 CSE, the March 2022 CSE recommended that the student attend a 12:1+1 special class, with related services including speech-language therapy, OT, and PT and also included similar supplementary aids and services, program modifications, and accommodations (compare Parent Dist. Ex. 13 at p. 11, with Dist. Ex. 10 at pp. 14-15). Notable changes in the IEP included the switch from 1:1 aide services to a 1:1 teaching assistant services, the addition of parent counseling and training, and the addition of individual vision services, as well as identifying that the student required the development of a BIP (compare Parent Dist. Ex. 13 at pp. 9, 11, with Dist. Ex. 10 at pp. 11, 14-15).

The parents' arguments related to the 2022-23 school year, again focus on a contention that the IHO erred in her determination that the student made "modest" progress during the 2022-23 school year while the student attended the recommended program, which, as noted above, is an improper attempt to retrospectively assess the March 2022 CSE's recommendations with information that was not available to it (see C.L.K., 2013 WL 6818376, at *13).

In addition, the parents argue that the IHO erred by determining the student's BIP was appropriately implemented during the entire 2022-23 school year, asserting testimony revealed the use of inconsistent and non-systematic strategies, such as putting in new staff members when the student "would start crying or whining or screaming," which was not recommended as part of his BIP, and there was no testimony that the BIP was implemented in a systematic way to address the student's noncompliance. The parents allege that the only written BIP in the record was dated April 2023, which purports to be an "updated" plan and allege it was not based on the results of the FBA conducted in February 2022, and the record is absent any other behavior plan written prior to April 2023.

The IHO determined that the student's BIP was implemented for the entire 2022-23 school year because the student's behavior-services provider testified the student's BIP was "definitely used with fidelity" and, in her opinion, "[a]ll the key proponents of the BIP, questions, being

granted the break, using the token board appropriately, everything was done with fidelity" (IHO Decision at p. 14; see Tr. pp. 400, 402). The IHO also noted that the student's behavior-services provider testified and explained that during the 2022-23 school year she provided the student's classroom teacher, 1:1 teaching assistant, and other classroom aides with five hours of behavior intervention consultation, pursuant to the student's March 2022 IEP, and that she reviewed and revised the student's BIP during the school year around April 2023 and completed a progress report based on the data that had been collected (IHO Decision at pp. 13-14; see Tr. pp. 390-95; see generally Dist. Ex. 20). The IHO noted that to address the student's behavioral needs, the second grade teaching assistant and classroom teacher, along with other support staff in the classroom, put various accommodations in place for the student including the use of a token board, functional communication training, differentiated work, visual schedule, and providing frequent breaks (IHO Decision at p. 13; see Tr. pp. 168, 171-72, 174). The IHO noted that the accommodations and modifications to the student's IEP in April 2023 were implemented in that classroom, including refocusing and redirection and the use of visual models (IHO Decision at p. 13; see Tr. pp. 173-75). The IHO also noted that the student's second grade teacher testified that the April 2023 CSE's recommended three hours of behavior intervention services were provided to the student beginning April 2023 (IHO Decision at p. 14; see Tr. pp. 207-08, 256).

In their memorandum of law, the parents argue the student's second grade teacher testimony suggests the BIP was not being followed from the beginning of the 2022-23 school year (Parents Memo. of Law at p. 19). The district argues the student's behavior-services provider testified that during the 2022-23 school year the student's BIP was definitely used with fidelity. A review of the transcript indicates that the second grade special education teacher stated that the "strategies" recommended on the BIP were "used with him throughout the [2022-23] school year" (Tr. p. 249). Additionally, there is evidence that the district was collecting data pursuant to a BIP throughout the 2022-23 school year, specifically during the time period from September 2022 to May 2023 (see Dist. Ex. 29).

Consistent with the second grade teacher's testimony, the 2022-23 BIP data reflected that in response to an increase in aggression towards service providers and his "1:1" as demands were placed on him, a new protocol was implemented to keep a demand placed on the student, but have it presented by a new staff member, further noting the student displayed little to no aggressive response toward the new staff member when the new staff member placed the same demand on the student (compare Dist. Ex. 29 at pp. 1-2, with Tr. p. 258). Specifically, the data indicated that while physical aggression towards staff still occurred, the immediate removal of the target person was working to decrease the length of the student's aggressive episodes (Dist. Ex. 29 at pp. 1-2). Consistent with the graph reflected in the 2022-23 BIP data, the student's second grade teacher further testified that with the incorporation of the new strategies and the revised BIP, they saw some of the student's physical behaviors decrease (compare Dist. Ex. 29 at p. 1, with Tr. p. 209). Further, according to the 2022-23 BIP data, the student's overall noncompliance had decreased from an average of 6.1 instances down to 2.4 instances from April 2023 to May 2023 (Dist. Ex. 29 at pp. 1-2). Accordingly, overall, the hearing record shows that the district was implementing a BIP for the student during the entirety of the 2022-23 school year, although the only BIP entered into evidence was dated April 2023.

Specific to the student's progress during the 2022-23 school year, the parents argue the IHO erred in determining the student made progress towards his annual goals for the 2022-23 school

year because the IEP goals progress report reflected that the student was unable to match quantities to numerals 1-6, was unable to match pictures to the beginning sounds, and was unable to spell his own name.¹¹

In her decision, the IHO credited the testimony of the student's second grade special education teacher, who explained which of the student's needs corresponded to which annual goal recommended on the March 2022 IEP, how those goals were implemented in the classroom, and the student's progress towards each of the goals (IHO Decision at pp. 13-15; see Tr. pp. 163, 179-88; Dist. Ex. 10; see generally Dist. Exs. 25-26).

The 2022-23 IEP annual goals progress report reflected that the student successfully met several goals, including completing a morning routine, naming letters in his name, making representational drawings, making three topic-related statements during lessons, and beginning academic tasks promptly (see Dist. Ex. 26 at pp. 1, 3-9). The report noted that the student achieved annual goals related to motor skills, such as reproducing a tangram pattern, pulling up his pants with verbal prompts, and descending stairs with alternating feet (id. at pp. 10-11). Regarding a social/emotional/behavioral annual goal to use a learned strategy to make appropriate choices in response to limit-setting, denial/delay of gratification, or frustration in at least three situations in the classroom per day, the progress report indicated that in December 2022, the student made inconsistent progress whereas in March 2023 he was progressing gradually and in June 2023, he was progressing satisfactorily (id. at p. 9). Overall, the progress report reflected a comprehensive overview of the student's progress, emphasizing both achievements in his study skills, reading, social/emotional, motor, and behavior skills and areas needing further development such as math and speech articulation (see generally id. at pp. 3-12).

Consistent with the progress noted above, the student's second grade teacher testified that by the end of the 2022-23 school year, the student achieved his annual goals to complete his morning routine, make a representational drawing in response to a teacher provided writing prompt, and to begin academic tasks when directed (compare Dist. Ex. 26 at pp. 3, 5, 9, with Tr. pp. 179-88, and Dist. Ex. 10 at pp. 12-13). Specifically, the student's second grade teacher's testimony reflected that the student progressed satisfactorily on his annual goal to use a learned strategy to make appropriate choices in response to limit-setting, denial/delay of gratification, or frustration in at least three situations in the classroom per day, e.g., take deep breaths, refer to mood chart, use contingency map, ask for help (Tr. p. 187).

¹¹ 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]).

Accordingly, a review of the evidence in the hearing record does not support the parents' argument that the student did not make progress during the 2022-23 school year or provide a basis to overturn the IHO's findings that the district offered the student a FAPE.

2. 2023-24 School Year

Initially, according to the parents, the June 2023 CSE predetermined the student's program. As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. 2015 WL 4597545, at *8-*9; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D.-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]). Here, the evidence in the hearing record supports the IHO's finding that, without more, there was insufficient evidence to conclude the June 2023 CSE predetermined the student's educational program (IHO Decision at pp. 20-21; see Tr. pp. 86-87; Parent Ex. KK). Although a review of the email cited by the parents to prove the June 2023 IEP was predetermined shows that the assistant director did not hold a particularly high view of the psychologist who conducted the private neuropsychological evaluation, it does not indicate that she was not open to consideration of possible recommendations at the CSE meeting (see Parent Ex. KK). To the contrary, it actually indicates that the assistant director believed the CSE could provide at least some of the private psychologist's recommendations in a district 8:1+2 special class (id.). Such an interpretation is consistent with the June 2023 CSE recommendations as the CSE incorporated the psychologist's recommendation for a "setting with a small student-teacher ratio that is highly structured and individualized, and anchored to principles of (ABA)" by recommending that the student receive the support of individual BCBA services for six hours per day (Parent Ex. R at p. 14; Dist. Ex. 6 at p. 17).¹² Additionally, the student's parent and grandparent were present at the June 2023 CSE meeting in addition to parents' attorney and the private psychologist, all who were able to provide input and recommendations to the CSE

¹² To the extent that the parents assert, on appeal, that the recommendation for individual BCBA services for six hours per day is not a program "anchored in ABA," such an argument makes little sense as it is representative of an individual service designed to deliver individual behavioral support to the student throughout the school day. Review of the psychologist's testimony regarding what he intended when he recommended a program "anchored in ABA" shows that he indicated he expressed a concern about the 8:1+2 special class, but does not show an objection to the recommendation for individual BCBA services (Tr. pp. 577-79). Additionally, in his description the psychologist identified his preferred program for the student as a program where the staff "working with [the student] hav[ing] formal training, background, expertise, credentials in working with youth on the autism spectrum" (Tr. p. 577); something that would be addressed by having a BCBA with the student six hours per day. The parent's arguments to the contrary are belied by the evidence and not plausible.

(Dist. Exs. 6 at p. 2; 7 at p. 1).¹³ As such, the IHO was correct that the student's June 2023 IEP was not predetermined.

The parents also assert that the IHO erred in determining that both the district's 8:1+2 special class and the BOCES 6:1+2 special class were programs within the student's LRE, arguing that the special classes did not contain appropriate peers.¹⁴ However, the parent's arguments are more related to a claim that the student would not have been grouped with other special education students with similar needs rather than an LRE argument, as the parent does not contend that the student should have been placed in a general education classroom or question the extent to which

¹³ The parent argues the IHO erred by finding the private psychologist was not credible. Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). Here, the IHO gave credit to the private psychologist's description of the student's performance on the evaluations and the results of the tests administered but did not give credit to the private psychologist's testimony regarding "pedagogy" (IHO Decision at p. 15 fn. 14). A review of the hearing record, including the specific examples cited by the parents, does not support the parents' contention that the IHO's credibility determination should be overturned based on the documentary evidence or the hearing record read in its entirety. Further, it is worth noting that the psychologist did not cite pedagogy as the sole factor in the student's academic struggles, specifically noting the student was struggling "for a multitude of reasons; some having to do with language, some having to do with behavior, and some potentially having to do with the approach taken to his pedagogy" (Tr. pp. 567-68). Additionally, as determined by the IHO, the June 2023 CSE considered and responded to the recommendations made by the psychologist, including the addition of BCBA support for six hours per day (see IHO Decision at pp. 15-17). Accordingly, to the extent that the psychologist had concerns over the pedagogy used with the student during prior school years, the June 2023 CSE was not recommending the same program for the student.

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

the student would have had access to nondisabled peers (34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; R.B. v. New York Dep't of Educ., 603 Fed App'x 36, 40 [2d Cir. Mar. 19, 2015][stating that "[t]he requirement that students be educated in the least restrictive environment applies to the type of classroom setting, not the level of additional support a student receives within a placement"; see T.C. v. New York City Dep't of Educ., 2016 WL 1261137 at *13 [S.D.N.Y. Mar. 30, 2016] [finding that the IHO's application of LRE requirement to a ratio dispute was improper, stating that "[a] less restrictive environment refers to the ratio of special education to general education students in the same classroom, not the ratio of special education students to teachers"]¹⁵).

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

However here, the student never attended the district 8:1+2 special class nor the 6:1+2 BOCES program. When a student has not yet attended the proposed classroom at issue, claims related to functional grouping tend to be speculative in nature (J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016] [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP", quoting R.E., 694 F.3d at 195; see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]). Various district courts have followed this precedent post M.O. (G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016] [same]; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at *4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"]¹⁶). Accordingly, there is no basis for finding that the 6:1+2 BOCES program or the 8:1+2 special class would not have contained students with similar needs as the student, such that they would have been inappropriate placements for the student.

¹⁵ The Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (T.M., 752 F.3d at 161-67 [applying Newington two-prong test]; Newington, 546 F.3d at 119-20; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]).

¹⁶ The district submitted a document into the hearing record that purports to be a class profile for the 6:1+2 BOCES class the student would have attended for the 2023-24 school year (see generally Dist. Ex. 30). To the extent that the parent's functional grouping claim is not speculative, based on the class profile, the profile does not show that the student would have been inappropriately grouped within that class.

The parents also raise claims relating to the district's ability to implement the six hours per day of BCBA services recommended in the June 2023 IEP. As briefly noted above, the June 2023 CSE recommended an 8:1+2 special class with six hours per day of behavior intervention services provided by a BCBA; assistive technology devices; related services including OT, PT, speech-language therapy, and vision services; supports for school personnel on behalf of the student, as well as parent counseling and training (Dist. Ex. 6 at pp. 17-19). The assistant director testified that "[a] certified BCBA would be in the classroom with the student every day, all day, attending therapies, traveling in the building, all and any activities [with the student] throughout the school day" (Tr. p. 57).

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). The parents argue that the evidence shows there was "significant doubt" that the BCBA services were going to be provided (see Parent Ex. OO); however, doubt, without more, is not a sufficient basis to hold that a district could not implement the services recommended in the student's IEP and thus the parents' argument must fail.

The parents also argue the IHO erred in determining the 6:1+2 BOCES special education class was an ABA program. However, it is worth noting that the district canvassed out of district programs at the parents' request for the district to do so (Parent Exs. V; NN). After one of the programs accepted the student, the CSE then reconvened in September 2023 to offer the parents a recommendation for that program; however, at that time, the September 2023 CSE did not recommend that the student receive six hours per day of BCBA services; instead, the CSE changed the student's individual support back to six hours per day of 1:1 aide services (Dist. Ex. 4 at p. 17). At that point, for the purpose of the district implementing an educational program for the student for the 2023-24 school year, the parents could have opted for either the district's 8:1+2 special class with the support of individual BCBA services, which as discussed above was an ABA program, or the September 2023 IEP which recommended a 6:1+2 special class at a BOCES and did not include BCBA or ABA services in the IEP (Dist. Exs. 4; 6). What the parents could not do is compel the district to implement an educational program that it had not recommended, i.e. the provision of ABA services at the BOCES program. Claims regarding an assigned school's ability to implement an IEP must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5).

Nevertheless, if I were to address the parent's argument, the principal of the BOCES program the student was recommended to attend testified that the 6:1+2 special class offered at BOCES was an ABA program that served students up to age eleven, which was "completely individualized for each student" and that individualization was seen throughout the day in all aspects such as "goal work within their data binders with discrete trial; that could include the differentiation if it [wa]s small group or whole group" (Tr. pp. 342, 345-50). According to the

principal, whole group, small group, and 1:1 instructional models were "embedded in all classrooms, so that students have the experience of working in all of those environments (Tr. p. 351). Behavioral strategies used in the 6:1+2 special class included visual schedules, token economies, and individual-specific reinforcers (Tr. p. 353). Further, the principal testified "[w]e use data to shape behavior in supporting our students, including discrete trial instruction with individual goals, if that [is] what the student requires[,] [and] [w]e do have out of classroom support teachers supporting the specific behaviors" (Tr. p. 376). Additionally, the principal testified "[w]e implement behavior plans and really taking the data to drive instruction" (Tr. p. 376).

Accordingly, a review of the record supports the IHO's finding that the district offered the student a FAPE in the LRE for the 2023-24 school year and there is no basis to overturn such finding.

VII. Conclusion

Having determined that the IHO correctly determined that the student was offered and/or provided a FAPE for the 2021-22, 2022-23, and 2023-24 school years, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 9, 2024**

**JUSTYN P. BATES
STATE REVIEW OFFICER**