



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-482

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

Appearances:

Guercio & Guercio, LLP, attorneys for petitioner, by Douglas A. Spencer, Esq.

Barger & Gaines, attorneys for respondents, by Paul Barger, Esq.

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has received diagnoses of hypotonia, motor incoordination, and partial complex seizure disorder characterized by lack of eye contact and non-responsiveness (Dist. Ex. 20 at p. 1). During the 2020-21 school year (sixth grade), the student was 11 years old and attended a district public middle school, where she received special education and related services as a student with an other health-impairment (Dist. Exs. 1 at pp. 1, 2; 20 at p. 1).¹ On March 18, 2021, a CSE convened for the student's annual review, found the student continued to be eligible for

¹ The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

special education as a student with an other health-impairment, and developed an IEP for the 2021-22 school year with a projected implementation date of September 9, 2021 (id.). The March 2021 CSE recommended 12 53-minute periods per eight-day cycle of integrated co-teaching (ICT) services in English language arts (ELA), six 53-minute periods per eight-day cycle of a 15:1 special class in math, six 53-minute periods per eight-day cycle of resource room services in a group of five, six 53-minute periods per eight-day cycle each of direct consultant teacher services in science and social studies, one 30-minute period per six-day cycle of individual occupational therapy (OT), 10 hours per year of individual direct/indirect vision services consultation, and two 30-minute sessions per month of individual counseling consultation (id. at pp. 1, 10). The March 2021 CSE also recommended supports for school personnel on behalf of the student consisting of one 30-minute session per six-day cycle of direct/indirect OT consultation, 10 hours per year of direct/indirect vision consultation, and two 30-minute sessions per month of psychological consultation (id. at p. 13). By prior written notice dated March 18, 2021, the district summarized the recommendations of the March 2021 CSE (Dist. Ex. 5 at pp. 1-2).

The district referred the student for a neuropsychological reevaluation to be conducted through the Board of Cooperative Educational Services (BOCES) (BOCES neuropsychological evaluation) (Dist. Ex. 20). The student was assessed on March 19, 2021 and March 30, 2021 by a psychologist (id. at p. 1).²

The student attended a district public middle school during the 2021-22 school year (seventh grade) (see Dist. Ex. 2 at pp. 1-2). On November 15, 2021, a CSE convened for a program review/reevaluation review meeting to review the student's current functioning and medical needs and the BOCES neuropsychological evaluation (id. at p. 2). By prior written notice dated November 15, 2021, the district summarized the recommendations of the November 2021 CSE (Dist. Ex. 6 at pp. 1-2).

On November 30, 2021, December 1, 2021, and December 9, 2021, a functional vision assessment of the student was conducted (Dist. Ex. 30 at p. 1).

A CSE convened on March 14, 2022 to conduct the student's annual review (Dist. Ex. 3 at p. 2). According to the meeting information included on a June 21, 2022 IEP, the March 2022 CSE met to review the student's current functioning, an updated functional vision assessment, and continued needs (id.).³

On June 21, 2022, the CSE reconvened to review the parents' concerns about the then-current program and to "review that they ha[d] shared with the [d]istrict that they w[ould] be placing the student" at Winston Prep for the 2022-23 school year (eighth grade) (Dist. Ex. 3 at p. 2). According to the meeting information, the parents expressed their appreciation to the staff and stated that they recognized that everyone had worked hard for the student, but "the student need[ed] to be with like learners" (id.).

² The BOCES neuropsychological evaluation report was not dated (see Dist. Ex. 20).

³ The hearing record does not include a March 14, 2022 IEP or prior written notice associated with a March 14, 2022 CSE meeting (see Parent Exs. A-S; Dist. Exs. 1-50).

The June 2022 CSE recommended six 50-minute periods per five-day cycle each of direct consultant teacher services in ELA and science, four 50-minute periods per five-day cycle of a 15:1 special class in math, four 50-minute periods per five-day cycle of ICT services in social studies, 40 minutes per day of resource room services in a group of five, one 30-minute session per six-day cycle of OT in a group of three, and one 20-minute session per five-day cycle of individual counseling (Dist. Ex. 3 at pp. 1, 12). The June 2022 CSE also recommended supports for school personnel on behalf of the student consisting of one 30-minute session per six-day cycle of OT consultation, four hours per year of vision consultation, and one 30-minute session per five-day cycle of psychological consultation (id. at p. 15). By prior written notice dated June 21, 2022, the district summarized the recommendations of the June 2022 CSE (Dist. Ex. 7 at pp. 1-3).

The student began attending Winston Prep on September 7, 2022 (Parent Ex. J). A CSE convened on October 17, 2022 to conduct a program review and "to review a 10-day notice sent on behalf of the parents" (Dist. Ex. 4 at pp. 1-2).⁴ By prior written notice dated October 17, 2022, the district summarized the recommendations of the October 17, 2022 CSE (Dist. Ex. 8 at pp. 1-3).

In May 2023, the district conducted an educational evaluation, a classroom observation, and a social history update (Dist. Exs. 47-49). According to the meeting information included on an August 16, 2023 IEP, a CSE convened on June 12, 2023, to review the updated evaluations, conduct the student's annual review, and develop an IEP for the 2023-24 school year (ninth grade) (Dist. Ex. 45 at p. 2).⁵ During the June 2023 CSE meeting, the parents advised the district that the student had received a diagnosis of attention deficit hyperactivity disorder (ADHD) inattentive type in fall 2022 (id.). The June 2023 CSE recommended an additional reading goal and edited the student's math goals to address her current identified needs (id.). The meeting information further reflected that the June 2023 CSE "recommended a full special education program in the Least Restrictive Environment" (LRE) at the district's high school with the support of special class math, resource room, consultant teacher services, OT, counseling, OT consultation, vision consultation, and psychological consultation (id.). The parents reportedly had "no thoughts" on the program recommendations (id. at p. 3).

A CSE reconvened on August 16, 2023 for a program review and to consider the parents' request for transportation to Winston Prep, which was granted (Dist. Ex. 45 at p. 2). The meeting information indicates that the CSE reviewed the Winston Prep program and the district's recommendations for the 2023-24 school year (id.). The August 2023 CSE recommend a program to be implemented on September 5, 2023 that consisted of six 53-minute periods per eight-day cycle of direct consultant teacher services each in ELA and social studies, six 53-minute periods per eight-day cycle of a 15:1 special class in math, nine 53-minute periods per eight-day cycle of direct consultant teacher services in science, six 53-minute periods per eight-day cycle of resource room services in a group of five, one 30-minute session per six-day cycle of OT in a group of three, and two 20-minute sessions per eight-day cycle of individual counseling (id. at pp. 1, 14). The

⁴ The hearing record does not include a 10-day notice letter or enrollment contract with Winston Prep (see Parent Exs. A-S; Dist. Exs. 1-50).

⁵ The hearing record does not include a June 12, 2023 IEP or prior written notice associated with the June 12, 2023 CSE meeting (see Parent Exs. A-S; Dist. Exs. 1-50).

August 2023 CSE also recommended supports for school personnel on behalf of the student consisting of two 30-minute sessions per six-day cycle of OT consultation, four hours per year of vision consultation, and one 30-minute session per eight-day cycle of psychological consultation (id. at p. 17). By prior written notice dated August 16, 2023, the district summarized the recommendations of the August 16, 2023 CSE (Dist. Ex. 46).

The student attended Winston Prep for the 2023-24 school year (Parent Ex. R).

A. Due Process Complaint Notice

In an amended due process complaint notice dated February 16, 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. The parents alleged that the district continued to recommend the same inappropriate program for the 2021-22, 2022-23, and 2023-24 school years and that the student failed to make progress in the recommended program during the 2021-22 school year (Parent Ex. S at pp. 2, 6, 8-10, 11). The parents argued that the IEPs developed for the 2021-22, 2022-23, and 2023-24 school years failed to address the student's academic and social/emotional needs and contained inappropriate annual goals (id. at pp. 6-11). The parents further contended that they were denied meaningful participation in the development of the 2021-22, 2022-23, and 2023-24 IEPs (id. at p. 12).⁶ The parents alleged that Winston Prep was an appropriate unilateral placement for the student for the 2022-23 and 2023-24 school years and that equitable considerations favor reimbursement (id. at pp. 12-13). As relief, the parents request reimbursement for the total cost of the student's attendance at Winston Prep for the 2022-23 and 2023-24 school years and compensatory education (id. at p. 12).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 3, 2023 and concluded on June 12, 2024, after 10 nonconsecutive hearing dates (Tr. pp. 1-1,338). In a decision dated September 17, 2024, the IHO found that the district denied the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years, that Winston Prep was an appropriate unilateral placement for the student for the 2022-23 and 2023-24 school years, and that equitable considerations weighed in favor of an award of tuition reimbursement (IHO Decision at pp. 12-37).

As relief, the IHO found that, as a result of the denial of FAPE for the 2021-22 school year, the student was "also entitled to compensatory education in the form of tuition reimbursement/funding at" Winston Prep for the 2022-23 and 2023-24 school years (IHO Decision at pp. 38, 39). The IHO also found that the parent was entitled to tuition reimbursement for the denials of FAPE for the 2022-23 and 2023-24 school years (id.). The IHO ordered the district to reimburse the parents or directly fund the cost of the student's attendance at Winston Prep for the 2022-23 and 2023-24 school years (id. at p. 40).

⁶ The parents' amended due process complaint notice asserted that the student was "the victim of harassment and bullying" during the 2021-22 school year in the section on the student's educational history (Parent Ex. S at p. 7). However, there is no claim or request for relief associated with the assertion (id. at pp. 11-12).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in finding that it failed to offer the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years. The district further asserts that the IHO erred in finding that Winston Prep was an appropriate unilateral placement for the 2022-23 and 2023-24 school years and that equitable considerations favored reimbursement. The district alleges that the district's IEPs for each of the years at issue appropriately addressed the student's academic and social/emotional needs and that the student progressed during the 2021-22 school year. The district also contends that Winston Prep was not an appropriate unilateral placement and that the parents failed to provide timely 10-day written notice of their intention to unilaterally enroll the student at Winston Prep for the 2022-23 school year and seek public funding. As relief, the district requests reversal of all the IHO's findings and a determination that the student was offered a FAPE for the 2021-22, 2022-23, and 2023-24 school years.

The parents did not interpose a timely answer to the district's request for review.^{7, 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

⁷ In a letter dated November 15, 2024, and sent on behalf of the undersigned SRO, the district's attorney was directed to file with the Office of State Review any document or email evidencing the parents' attorney's consent to accept electronic service of the district's pleadings and the email effectuating service of same. By letter dated November 18, 2024, the district's attorney filed the requested documentation and further provided email correspondence between himself and the parents' attorney. The email correspondence appears to document a request from the parents' attorney to the district's attorney that he consent to an extension of time for the parents to answer the request for review. On November 25, 2024, the parents' attorney filed a memorandum of law, a verified answer, an affidavit of verification and an affidavit of service along with a cover letter dated November 22, 2024. The cover letter stated that "[t]he parties agreed to an extension of time for filing, and as such [the parents'] submission [wa]s timely." The rules of practice before the Office of State Review provide that "[n]o extensions of time to answer the request for review, interpose a cross-appeal, or to reply to an answer will be granted by the State Review Officer unless timely application is made therefor, upon written notice to all parties, and upon good cause shown, which shall be determined in the sole discretion of the State Review Officer" (8 NYCRR 279.10[e]). The regulation further states that such application shall be in writing, addressed to the Office of State Review, must be postmarked no later than one business day prior to the date on which the time to answer or reply will expire, shall set forth in full the reasons for the request, shall indicate whether the student is currently receiving special education services, and shall briefly state whether the other party consents to or opposes the application for extension (*id.*). Lastly the regulation expressly provides that "[t]he time to respond to a pleading may not be extended solely by stipulation of the parties or their counsel" (*id.*). At no time prior to the November 25, 2024 filing date had the parents appeared in this proceeding or communicated with the Office of State Review in any way. Thus, there having been no application by the parents, timely or otherwise, for an extension of time to answer the district's request for review, I find the parents' answer is untimely and I decline to accept it

⁸ The district submitted a reply reiterating its contentions from the request for review. A reply is authorized when it addresses "claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). Accordingly, as the district's reply reiterates arguments raised in the request for review, it is not a proper reply and will not be considered.

independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations

omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see 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, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

The district argues that the IHO erred in concluding that the student was denied a FAPE for the 2021-22, 2022-23 and 2023-24 school years. The district alleges that the IHO misrepresented and/or ignored the testimony and documentary evidence presented by the district and misinterpreted or misapprehended the law and failed to provide a legally sufficient rationale and meaningful support from the record for his determination. The district also asserts that the

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).

IHO erroneously found a disconnect between the student's report cards and formal assessments. The district contends that the IHO failed to appreciate the distinctions between report cards and assessments and failed to consider the differences in data. Overall, the district asserts that the IHO's analysis was flawed and that the district recommended appropriate programming during the school years at issue.

At the outset, I note that the IHO's decision included two sections wherein he made findings of fact (IHO Decision at pp. 5, 6). In the first section, the IHO relied solely on the parent's testimony and did not cite to any documentary evidence (*id.* at pp. 5-6). In a second section entitled "F[indings of] F[act and] C[onclusions of] L[aw]," and a subsection on whether the district provided the student a FAPE, the IHO reviewed the 2020-21 school year (*id.* at pp. 10-12). The IHO noted that the student's special education teacher and the school psychologist "were concerned about [the s]tudent's very low score in applied math" and that the "very low score" had "prompted a referral for a neuropsychological evaluation" (*id.* at p. 12). The IHO concluded his review of the 2020-21 school year with the statement that "[t]here [wa]s a clear disconnect between what the [s]tudent was exhibiting in testing vs grading" (*id.* at pp. 10-12). Turning to the March 18, 2021 CSE, the IHO noted that the recommended "neuropsychological evaluation had not yet been conducted, but there was significant evidence [the s]tudent's anxiety was interfering with her school work and [she] continued to fall behind academically" (*id.*).

The IHO also stated that, according to the March 2021 IEP, the student was inconsistent with her math skills, previously mastered concepts needed to be retaught and practiced, and that the student's anxiety in math was causing the student to struggle with content (IHO Decision at p. 13). The IHO reiterated the student's math goals as set forth on the March 2021 IEP and found that "[t]he CSE was recommending 7th grade goals when [the s]tudent still did not have foundational skills like identifying coins, and was performing below a 4th grade level" (*id.*). The IHO further stated that "[w]hile [the d]istrict correctly point[ed] out [the s]tudent made progress in the STAR scores from a grade level equivalent of 2.7 to a grade level equivalent of 3.8," the student's "significant delays were going to be exacerbated by the 7th grade curriculum and failure to provide more program supports. (Predictably, [the s]tudent's STAR Math a year later on 5/13/22 had a grade level equivalent of 3.7" (*id.*). Next, the IHO discussed the March 2021 CSE's response to the student's growing anxiety, stating that it was discussed and that the CSE "recommended a similar hybrid program for 7th grade," with the addition of a counseling consultation, which was "not individual counseling sessions with the [s]tudent, but rather the counselor might push into the classroom or resource room to see how students [we]re doing and talk to the team" (*id.* at pp. 13-14). The IHO also stated that the CSE did not convene to review the BOCES neuropsychological evaluation until November 15, 2021 and that "[n]o learning strategies or management needs were set forth in the IEP to instruct next year's teachers how to address [the s]tudent's anxiety issues" (*id.* at p. 14).

The IHO noted that the student earned a 55 on her math final and received a B in the class for sixth grade (IHO Decision at p. 14). The IHO found that "[w]hile the report card grade may indicate progress on grade level, the underlying data and testing told a very different story, one in which [the s]tudent continued to fall behind" and that "[t]he CSE overemphasized [the s]tudent's grades and failed to adequately account for what the data, testing, and [the p]arent were telling them: [the s]tudent was walking a precarious tight rope as opposed to the solid surface her grades conveyed" (*id.*). The IHO determined that "[t]he continuation of the 2020/21 year program,

without adequately addressing [the s]tudent's growing anxiety that interfered with her school work, or [the s]tudent's falling further behind in math, was a denial of FAPE and had foreseeable results in [the s]tudent's 2021/22 school year" (*id.* at p. 15).

The IHO then discussed the November 15, 2021 CSE meeting and IEP, when the BOCES neuropsychological evaluation that was conducted in March 2021 was reviewed (IHO Decision at pp. 17-20). The IHO found that the BOCES neuropsychological evaluation "highlight[ed] serious issues faced by [the s]tudent"; however, the November 2021 CSE's recommendations were "not much of a difference in the program recommended from the 3/18/21 IEP to the 11/15/21 IEP" (*id.* at p. 18). The IHO noted testimony that no changes were made to the student's academic program and that the CSE "miss[ed] the gravity of the results" and failed to "react accordingly" (*id.*). The IHO then reviewed the student's performance on STAR math assessments and the student's progress toward her goals in math during the 2021-22 school year (*id.* at pp. 18-19). The IHO also discussed testimony from district personnel relative to the student's anxiety throughout the 2021-22 school year (*id.* at p. 19). The IHO then determined that the district "failed to adequately react to the evolving situation with [the s]tudent" and that "[l]ike [the s]tudent's grades, the recommended program looked good on the surface, but papered over [the s]tudent's falling further behind her peers and increasing social-emotional issues" (*id.* at p. 20). The IHO also found that the district "failed to appropriately modify [the s]tudent's 2021/22 school year program to address the [s]tudent's issues falling further behind in math, increased anxiety and social-emotional issues; and results of the neuropsychological evaluation" and that as a result, "the [d]istrict denied [the s]tudent a FAPE for the 2021-22 school year" (*id.* at p. 20).

With regard to the IHO's consideration of the student's performance during the 2020-21 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 Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

However, the hearing record supports the district's argument that the IHO's analysis was flawed and further that his discussion of the 2021-22 school year incorporated the student's performance under the March 2021 and November 2021 IEPs rather than solely considering whether or not the IEPs were likely to confer educational benefit at the time they were written (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that, in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]).

Upon review, the parents' amended due process complaint notice contained generalized, vague claims alleging that the district continued to recommend the same program for the student for the 2021-22, 2022-23 and 2023-24 school years. The parents contend that the student did not make meaningful progress during the 2021-22 school year and due to the district continuing to offer the same programming, they were forced to unilaterally enroll the student at Winston Prep for the 2022-23 and 2023-24 school years. The hearing record does not support the parents' contentions and the IHO erred in finding that the March 2021 and November 2021 IEPs did not offer the student a FAPE in the LRE for the 2021-22 school year.

A. 2021-22 School Year

Although the parents did not challenge the sufficiency of the evaluative information considered by the March 2021 and November 2021 CSEs, a review is necessary given that the IHO found that the district "failed to appropriately modify [the s]tudent's 2021/22 school year program to address the [s]tudent's issues [of] falling further behind in math; increased anxiety and social-emotional issues; and results of the neuropsychological evaluation" and that as a result, "the [d]istrict denied [the s]tudent a FAPE for the 2021-22 school year" (id. at p. 20).

According to the hearing record, the March 2021 CSE considered a November 2020 educational evaluation, a November 2020 OT evaluation, a January 2021 observation report, a March 2021 vision progress summary, and March 2021 report card/teacher reports (see Dist. Exs. 1 at pp. 1, 3-5; 5; 9-13).

The student was administered a battery of tests from the Woodcock-Johnson IV Normative Update Tests of Achievement, Form A (WJ-IV-Form A) as part of a November 2020 educational evaluation to determine her "current levels and abilities" (Dist. Ex. 12 at p. 1).¹⁰ According to the test results, the student's overall academic skills were in the average range, her fluency with academic tasks was in the low average range, and her ability to apply academic skills was in the below average range (id. at pp. 2, 4). The sixth-grade special education teacher who evaluated the student reported that the student was cooperative throughout testing, had a positive attitude, and had age-appropriate conversational proficiency (id. at p. 1; see Tr. p. 5). The student's standard

¹⁰ The chart listing the student's scores reflects a heading of "Woodcock-Johnson III Cluster/Test" (Dist. Ex. 12 at p. 1).

score on the applied problems subtest was 60 (very low) and the special education teacher testified that on that subtest the student had difficulty with prerequisite math knowledge, analyzing and solving word problems, and deciding on the operation to use for a given problem (Tr. pp. 131-33; Dist. Ex. 12 at p. 1). Further, the special education teacher testified that this was an area of weakness for the student and "why she's in a self-contained math class" and needed some accommodations and modifications in the classroom (Tr. pp. 134-35).

The November 2020 OT evaluation assessed the student's fine motor, visual motor, visual perceptual, and graphomotor skill development and the occupational therapist reported that the student displayed strengths in her visual memory and sequential memory skills, in addition to her motor planning during gross motor tasks (Dist. Ex. 13 at pp. 4-5). The OT evaluation reported the student's difficulties with visual perceptual skills, visual motor integration, near point copying, and fine motor coordination (id. at p. 5).

The March 2021 CSE also reviewed the January 2021 student support team classroom observation (Tr. pp. 138-143; Dist. Ex. 11).¹¹ The sixth grade special education teacher completed the January 2021 classroom observation and reported observing the student as present in class, along with two teachers, and per COVID protocols, in a cohort with 12 students spaced in rows six feet apart with other students "zooming in" (Dist. Ex. 11 at p. 1). The special education teacher reported the student participated in sharing about her weekend, in addition to sharing a "critical response" writing piece homework assignment (id.). The observation reported the student was prepared with her critical response complete, her computer was open, and she was ready to work (id.). The student also was observed making predictions about the class novel and appearing eager to participate in the class discussion (id.). The special education teacher reported behavioral observations that the student listened to instructions, followed oral directions, began work promptly, stayed on task, and demanded attention, but "not in a negative way" (id. at p. 2). The special education teacher stated the student liked to participate; however, at times needed teacher reminders to raise her hand and wait her turn (id.). It was further noted that the student asked questions before instructions were explained by the teacher, however she was described as eager to please and "on task and did all that was asked of her" (id.).

The March 2021 CSE also considered a March 2021 visually impaired observation and addendum that was completed by a teacher of the blind and visually impaired/certified orientation and mobility specialist (TVI consultant) who provided vision consultation services to support the staff working with the student (Tr. pp. 239-40; Dist. Ex. 10).¹² The TVI consultant's report indicated that she observed the student over zoom due to remote learning, while the student participated in class (Dist. Ex. 10 at p. 1). According to the report, the student did not exhibit any unusual visual behaviors during class, appeared visually engaged, and looked "very comfortable in the class" (id.). The TVI consultant reported the student texted a classmate to remind her to

¹¹ The sixth-grade special education teacher testified that the date of the student support team classroom observation was in error and should be 2021 (Tr. pp. 138, 143).

¹² The TVI consultant testified to working primarily with staff that included the occupational therapist and teachers and having worked with the student for two or three sessions as related to iPad work (Tr. pp. 254-55). The TVI consultant testified that per ophthalmology reports, the student's vision was within normal limits (Tr. p. 259).

come to class and noted that "[w]orking a cell phone visually was not an issue" (id.). The TVI consultant observed that when looking at the monitor, the student sat straight, her head up, and her eyes at midline, and occasionally it appeared that the student peered over her glasses when looking at the monitor (id.). The TVI consultant reported that when math work appeared difficult, the student tended to lean her head or tilt her head to the right, and "tended to rub her eyes and yawn maybe due to math being a difficult area of study for her" (id.). In the addendum to the report, the TVI consultant reported working individually with the student for several sessions related to using the new iPad for the school year (id.). As they met via Zoom, the student had to make changes to the iPad herself following specific verbal and visual instructions as related to font size, brightness, editing the location of apps and ascertaining she had the necessary apps (id. at p. 2). The TVI consultant reported that the student persevered, found the tasks difficult; however, completed the adaptations herself (id.).

As of the March 2021 visually impaired observation and addendum, the TVI consultant concluded that the "[the student] d[id] not appear to need services from a teacher of the visually impaired" (Dist. Ex. 10 at pp. 1, 2). Rather, the TVI consultant recommended consultation on an as-needed basis to the occupational therapist, members of the educational team, and the student (id.). The TVI consultant further stated that if a major change in the student's visual functioning occurred, the situation should be revisited and evaluated (id.). The TVI consultant continued that accommodations recommended were still applicable and included: preferential seating; large and bolder 16-point print; good contrast; bold line paper/graph paper; highlighters; iPad and Apple pencil; 5-inch binder to use as a slant-board; and an updated ophthalmology report (id.).

Further, the March 2021 CSE had report card/teacher data reports from March 2021 (Dist. Ex. 9). As of the CSE meeting the student had then-current grades as follows: ELA (A); science (A/quarter 2, B+/quarter 3); math (B); social studies (B+/A-); foreign language (A) (id. at p. 1). The teacher reports included comments from content area classes that described the student as extremely conscientious in ELA, and asked questions when unsure of something (id.). Also in ELA, the teacher report described the student as well organized and stated the student completed all her work on time (id.). In the area of science, per the March 2021 teacher reports, the student worked very hard and completed work with assistance, and in social studies the student was doing a nice job during the year (id.). The teacher report stated in math, the student "trie[d] very hard and always complete[d] her [homework]"(id.). Additionally, in math, the student struggled with notetaking at times, needed to be monitored to ensure she was placing items in correct sessions, and demonstrated inconsistent performance on tests and quizzes that was not due to a lack of effort (id.). In math, the student did what was asked, and although found math challenging, came to class each day and tried her best (id. at p. 2). Further, the math teacher commented that the student had difficulty applying previously learned material to new material (id.). The math teacher reported the student's math skills to be below average and stated, "we are working on [sixth] grade curriculum as well as skill work to try to close some skill gaps" (id. at p. 3).

Across content areas the March 2021 teacher report described the student as attentive, and who worked effectively in a group, participated in class discussions, faced academic challenges positively and openly, and did not engage in disruptive or avoidant behaviors (Dist. Ex. 9 at p. 1). The March 2021 teacher report reflected that the student benefited from templates and graphic organizers in ELA to plan and execute her writing and had produced several well written essays and critical responses that demonstrated her writing proficiency (id. at p. 3). In ELA the student

also benefited from teacher assisted proofreading, revision, aimed to please and was a strong communicator (*id.*). In the area of math, the March 2021 report stated the student used a calculator to improve fluency during the year; and noted the student solved grade level math with assistance (*id.*). The March 2021 report stated the student had work modified, broken down, and taught in chunks (*id.*). The March 2021 data from teacher reports indicated that across content areas of ELA, science, math, social studies and foreign language the teacher provided program modifications such as repetition of directions, tasks broken down, visual and auditory cues, and preferential seating (*id.*). Math and science classes noted the student had vision accommodations, provided graph paper, revised test format of graphs and charts, and enlarged print (*id.* at p. 4).

As related to the 2020-21 school year, the sixth-grade special education teacher testified regarding the student's progress towards her IEP goals, progress as reflected in the student's report card, and information reviewed at the March 2021 CSE related to writing samples, STAR scores, and the November 2020 reevaluation (Tr. pp. 119-22).¹³

A CSE convened on March 18, 2021 for an annual review and to recommend a program for the student for the 2021-22 school year (Dist. Exs. 1 at pp. 1-3; 5). The March 2021 IEP reported the student's academic strengths and needs in the areas of reading, writing, math, and study skills (*id.* at pp. 5-6). According to the March 2021 IEP, the student demonstrated a strength in reading (*id.* at p. 5). The IEP cited to the student's recent November 2020 educational evaluation that placed the student's reading comprehension and decoding abilities in the average range, with reading fluency in the lower average range (*id.*). In the classroom, the March 2021 IEP reported

¹³ The student's 2020-21 IEP annual goals progress report indicated that the student progressed satisfactorily and achieved her reading goals to extract relevant details from narrative and information text in content subject areas, and the goal to gather and paraphrase relevant information from multiple sources to answer a research question (Dist. Ex. 31 at p. 1). The student progressed satisfactorily and achieved both writing goals related to writing a paragraph and choosing and applying a prewriting strategy before writing an extended response (*id.* at pp. 1-2). In the area of mathematics, the student progressed satisfactorily and by June 2021 achieved all three goals in mathematics as related to breaking down five multi-step word problems; solving five three by two-digit multiplication problems; and solving five real world or mathematical problems using various operations with fractions (*id.* at p. 3). For the third math goal, the progress report noted although the student achieved the goal, the student needed support and should work on that goal next year as well (*id.* at p. 2). As related to motor skills, by June 2021 the student achieved her goal to demonstrate improved eye-hand coordination and accuracy in graphomotor tasks by completing a maze (*id.* at p. 3). In addition, by June 2021 the student achieved her goal of recognizing the differences and similarities in pictures to assist visual memory and recall of information across academic settings (*id.*). By June 2021 the student progressed satisfactorily in identifying the picture that matched the stimulus from four designs/pictures; and progressed satisfactorily in building a duplicate design provided visual models (*id.*). Further, the hearing record included the student's report card grades for all four quarters, and final exam grades when applicable for the 2020-21 school year (Dist. Ex. 33). The student achieved the following final grades: English 6 (A-); math 6 (B); science 6 (A); social studies 6 (A-); physical education (A); Foreign Language Italian and Spanish 6 (A); music 6 (A) (*id.*). The student received a final exam grade of 86 in English, and 55 in math (*id.*). The special education teacher reviewed the student's grades and testified that the report card comment in math that the student worked hard, struggled with content/skills, and demonstrated perseverance and determination was accurate in describing the student (Tr. p. 114; Dist. Ex. 33). The special education teacher stated that the final exam in math was cumulative for the year and "very difficult," and that she was happy with the student's passing grade of 55 (Tr. p. 115). Although the IHO pointed to the parents' concern that the student's grades were not a reflection of her actual progress or performance levels, in addition to the student's grades; the hearing record included teacher reports per quarter of the student's participation in class, and progress per quarter reflecting the student's consistency, perseverance, participation and determination across content areas (*see* Dist. Ex. 35 at pp. 1-4).

the student read non-fiction and fiction material on grade level (id.). The IEP reported the student looked back to text to answer both literal and inferential questions, made good connections, and had good thoughts when reading (id.). The IEP reported the student worked on her critical thinking skills, and reading beyond text, and could struggle with inferential comprehension questions; however, was successful with support and guidance (id.). The IEP stated that this occurred more in content area classes such as science and social studies when reading non-fiction text (id.). The IEP reported that the student required scaffolding when asked to read and comprehend abstract information (id.).

In the area of writing, the March 2021 IEP reported per recent educational testing the student had average written expression skills (Dist. Ex. 1 at p. 5). The IEP reported the student "really improved in the area of writing this year" and that she demonstrated the ability to write about what she read with strong text evidence and details (id.). Further, the March 2021 IEP reported the student benefited from graphic organizers and teacher models (id.). The IEP stated the student used her planning document, and with support, went back and add details and evidence to improve her writing (id. at p. 6). In addition, the IEP reported the student successfully used all stages of the writing process and had written "some beautiful short and longer pieces" during the current school year (id.). As an area of need, the March 2021 IEP reported the act of writing and typing as "very laborious" for the student, and she benefited from voice-to-text when applicable (id.).

Due to the student's visual perceptual deficits and math reasoning delays, the March 2021 IEP reported math to be "very difficult" for the student during the then-current school year (Dist. Ex. 1 at p. 6). The IEP stated that the student struggled with math, and this presented as her greatest weakness (id.). Recent STAR assessment results reflected in the IEP indicated the student's math skills were at a "3.4" grade level (id.). The IEP reported that on a recent education evaluation, the student achieved calculation scores within the average range, with below average scores in math fluency, and significantly below average scores in the area of applied problems (id.). The IEP reported the student lacked many basic math skills, such as coin recognition, the value of money, and telling time (id.). The IEP reported that use of a calculator helped with speed and accuracy (id.). The March 2021 IEP reported due to vision deficits, the student struggled with math concepts that required visual perceptual and spatial skills such as graphing, and she needed more space to show her work and complete math problems (id.). According to the IEP the student could learn skills and sixth grade math concepts in isolation; however, had difficulty transferring these skills to new information as well as from one unit to another (id.). Further, the student needed mastered concepts to be retaught and practiced (id.). The IEP included that the student benefited from a small math class, with direct instruction, and required math problems to be broken down in order to be successful (id.). The student required lessons and curriculum to be both modified and skill based (id.). The IEP noted that the student "appear[ed] anxious in math and [wa]s very dependent on teacher help" (id.). The IEP reported it was unclear if anxiety caused the student to struggle with content or if content made the student more anxious; however, the IEP noted that "this d[id] seem to cause a mental block with math at times" (id.).

Turning to the student's study skills, the March 2021 IEP reported the student was a strong self-advocate, a conscientious student who took pride in her work, and a well-prepared student who always came prepared with homework assignments completed (Dist. Ex. 1 at p. 6). The IEP reported the student benefited from pre-teaching and reteaching in the resource room for all content

area classes (id.). Further, the IEP stated that although the student prepared for tests and quizzes, her scores were inconsistent (id.). According to the IEP, the student did best on tests that required memorization, and following rules, and struggled most with abstract questions and questions that required application (id.). The IEP reported the student relied on adult support and during the current year educators reported "working towards increase[d] independence this year" (id.). The IEP reported even with obstacles, the student had "made an excellent transition to the middle school" (id.).

The March 2021 IEP reported the student appeared anxious and sometimes shut down if not confident in the material being taught, and asked questions and relied on teacher help when anxious, which happened more as related to math (Dist. Ex. 1 at p. 6). The IEP reported the student put forth best effort in classes, wanted to please and do well, and demonstrated a strength in reading and writing (id.). As related to needs, the IEP reported the student needed scaffolding to read and comprehend abstract information, and graphic organizers and teacher models for her writing (id. at p. 7). For content classes the student required pre-teaching and reteaching (id.). In the area of math, the IEP reported the student needed direct instruction in a small group to address skill deficits and grade level content, and a calculator (id.). Further the student needed assignments broken into smaller parts, modification of visual work, especially in math and science when dealing with graphs, and direct instruction in word problems and multi-step math problems (id.).

In the area of social development, the March 2021 IEP reported the student enjoyed school and interacting with peers and noted the student to be "very social and g[ot] along with peers and teachers" (Dist. Ex. 1 at p. 7). The IEP stated the student appeared anxious at times and that the student could benefit from learning strategies when feeling anxious and overwhelmed in the classroom (id.).

In the physical development section, the March 2021 IEP reported the student's strengths in cooperation and engagement, bilateral motor skills, bimanual skills, and motor planning (Dist. Ex. 1 at pp. 7, 8). Areas of difficulty reported included: holding a pencil correctly, using a mature pincer for small objects, and copying complex geometric shapes and designs accurately (id. at p. 7). The IEP reported the student's keyboarding skills required increased time, effort and concentration (id.). As related to visual perceptual skills, the March 2021 IEP reported the student had difficulty with discrimination, visual figure ground, visual closure, form constancy, and spatial relationships (id.). In math, modifications were used to assist the student in lining up numbers, using color coding, and decreasing the problems on a page (id.). The March 2021 IEP reported that despite these supports, the student continued to struggle with visualization and spatial relations in math problems secondary to her visual perceptual deficits (id. at p. 1).

In the area of vision, the March 2021 IEP reflected that the student wore prescription glasses and last had an ophthalmologist appointment in January 2020 (Dist. Ex. 1 at p. 7). The student's visual acuity (distance vision) was 20/40 in the right and left eyes, and "the acuity was the same with and without [the student's] glasses" (id.). The student did not have "any accommodation issues" at the appointment and had normal eye health (id. at pp. 7-8). The IEP reported the student used her vision to access materials, technology, and people, she made good eye contact with others, and there were no concerns in the area of vision at the time (id. at p. 8).

The March 2021 IEP included management strategies to address the student's identified needs that included preferential seating, refocusing and redirection, tasks broken down into smaller parts, and assignments and directions explained and clarified (Dist. Ex. 1 at p. 8). The IEP reported the student needed work modified in the area of math, as well as graphs and maps in other content area classes (id.). Further, the IEP reported the student benefited from pre-teaching and reteaching in the resource room (id.). The IEP noted the student needed technology to assist with her writing and benefited from voice-to-text when applicable (id.).

For the 2021-22 school year (seventh grade), the March 2021 CSE recommended 12 53-minute periods per eight-day cycle of ICT services in ELA, six 53-minute periods per eight-day cycle of a 15:1 special class in math, six 53-minute periods per eight-day cycle of resource room services in a group of five, six 53-minute periods per eight-day cycle each of direct consultant teacher services in science and social studies, one 30-minute period per six-day cycle of individual OT, 10 hours per year of individual direct/indirect vision services consultation, and two 30-minute sessions per month of individual counseling consultation (Dist. Ex. 1 at pp. 1, 10). The March 2021 CSE also recommended supports for school personnel on behalf of the student consisting of one 30-minute session per six-day cycle of direct/indirect OT consultation, 10 hours per year of direct/indirect vision consultation, and two 30-minute sessions per month of psychological consultation (id. at p. 13). The March 2021 IEP included a number of program modifications and accommodations and supplementary aids for the student that included directions repeated; visual and auditory cues; checks for understanding; seizure disorder accommodations; modifications for visual perceptual difficulties of classroom and homework assignments; a calculator; access to copy of class notes; modified visually presented work with enlarged and highlighted graphs, charts, maps, and reduction of visual information per page; and vision accommodations for math and science such as use of large print ruler, graduated, cylinders, scales, talking thermometer, and access to a magnifier to read measuring devices (id. at pp. 10-12). Regarding assistive technology, the March 2021 CSE recommended access to a tablet for all classes (id. at pp. 12-13). Further the March 2021 CSE recommended approximately 11 annual goals to support the student in areas of study skills, reading, writing, mathematics and motor skills (id. at pp. 9-10).

In finding that the district denied the student a FAPE for the 2021-22 school year, the IHO focused in part on the student's "very low" applied problems subtest standard score of 60, and on the student's math STAR assessment that reflected skills at a third-grade level, as well as on the student's lack of foundational math skills such as identification of coins (IHO Decision at p. 20).

The student's sixth grade special education teacher testified regarding the student's low score on applied math, stating that applied math skills were an area of weakness, and noting the student was in a self-contained math class to support this need (Tr. pp. 131-34). Regarding the November 2020 educational evaluation math subtests, the special education teacher testified that the student did better with breakdown of testing, when provided repetition, rereading, and explanation, as provided in class; however, for scoring purposes, during the November 2020 educational evaluation, any supports provided could not count in the student's standard scores (Tr. pp. 133-35). The special education teacher testified that the student "had a hard time" with the applied problems subtest, and opined that the student "had a mental block when it came to this section or froze up" (Tr. pp. 131-32). Although the student's score in applied math was "very low," her calculation score, which measured her ability to solve math computations, such as addition, subtraction, multiplication, division, and could include percentages, fractions and decimals was 90

and within the average range (Tr. p. 135). The special education teacher testified that these were areas addressed during class and although the student left some of the problems blank, those that she attempted she answered correctly (id.). Contrary to the IHO's finding that the district did not take into consideration the student's difficulties, the hearing record included that both the sixth grade special education teacher who evaluated the student, and the school psychologist recommended an updated neuropsychological evaluation due to the student's "very low" standard score of 60 on applied problems, and in part as the student had been previously referred by the district for a neuropsychological evaluation in 2018 (Tr. pp. 151, 349-51; see Dist. Ex. 12 at pp. 1-2).

Further, the sixth-grade special education teacher reported that STAR scores were just one measure reviewed during the student's March 2021 reevaluation in addition to the information noted above in the content areas of English, math, social studies, and foreign language, the classroom observation and the November 2020 educational evaluation (Tr. pp. 121-25; Dist. Exs. 9; 11; 12).¹⁴

The sixth-grade special education teacher described the supports in the self-contained math class that included providing a virtual hybrid component with iPad training, a copy of class notes, and guided practice (Tr. pp. 91-94). The special education teacher also described the modification of curriculum and delivery of instruction for the self-contained class, and the provision of visual support by enlarging the numbers, providing extra spacing, and color coding to "make the numbers friendlier" (Tr. pp. 93-95). The special education teacher testified that although the student was in a 15:1 special class for math, there were only three students in the class, which allowed for even more individualized instruction for the students (Tr. pp. 95-96). Further, the special education teacher testified to working collaboratively with the occupational therapist and TVI consultant to support the student's vision and best delivery of support, whether it be enlarged font, use of the iPad, use of larger graphing paper, or supporting content (Tr. p. 97). The special education teacher testified to using a calculator with the student to support sixth grade content with proper modifications; as well as addressing prerequisite skills, although not IEP goals, as related to identifying coins, telling time, and other areas she struggled with (Tr. pp. 98, 103-104).

The sixth-grade special education teacher testified that she felt "confident that we were recommending a program that would best support her specific needs . . . we created a very supportive program for her across the board" (Tr. pp. 163-64). The sixth grade special education teacher testified that they kept the student in the LRE in areas of strength such as English being

¹⁴ The student's seventh grade special education teacher testified that the student received below level STAR math scores; however, this assessment did not allow the use of a calculator (Tr. p. 689). The seventh-grade special education teacher testified that this score must be viewed with an understanding that students are more capable when given use of a calculator (Tr. p. 688; see generally Dist. Ex. 16). The special education teacher reported that in the classroom, the students did use calculators for math as she taught the students "concepts, not calculations" and described concepts such as determining a discount or a percent or solve for an equation such as perimeter as areas to be solved with use of a calculator (Tr. p. 689). The sixth-grade special education described the reading STAR assessment as more of a screening tool used as an indicator for students' needs, and used with all the students, not just students with IEPs (Tr. p. 85). The sixth-grade special education teacher noted that the assessment was computerized and could be difficult for students with visual perceptual issues (Tr. p. 85). She opined that the STAR assessment was "just one measure to kind of help us see where their [] reading [wa]s and benchmarks to the state standard (Tr. p. 85).

one of them, and for math an area of need they provided a self-contained math class (Tr. p. 164).¹⁵ Further, she testified that the March 2021 CSE felt good regarding the information it had obtained, and the program developed, and it would meet again to discuss the program based on the BOCES neuropsychological evaluation once completed (Tr. p. 165). The March 2021 IEP reported that the CSE awaited results from a BOCES neuropsychological evaluation and reported the evaluation would be reviewed next school year (Dist. Ex. 1 at p. 2).

Based on the foregoing, the evidence in the hearing record supports a finding that the March 2021 IEP was reasonably calculated to confer educational benefit at the time it was written, and the district offered the student a FAPE in the LRE.

Turning to the November 2021 IEP, the hearing record reflects that on November 15, 2021, the CSE reconvened for a program review/reevaluation review meeting to consider the student's current functioning, to review the BOCES neuropsychological evaluation and to review the student's current medical needs (Dist. Ex. 2 at p. 2). The November 2021 CSE discussed the student's verbal strengths, significant visual deficits, and social/emotional needs (*id.*). The November 2021 CSE recommended the addition of counseling, a testing accommodation of breaks, and a modification in the length of the student's classroom assignments and homework (*id.*). The November 2021 CSE also recommended a functional vision assessment to clarify the student's then-current visual needs (*id.*). The November 2021 CSE developed an IEP with an implementation date of December 8, 2021, which continued the program recommendations of the March 2021 IEP, with the addition of one 20-minute session per eight-day cycle of individual counseling (*compare* Dist. Ex. 1 at p. 1, *with* Dist. Ex. 2 at p. 1). The November 2021 IEP indicated that the student's counseling was to be implemented on November 16, 2021 (Dist. Ex. 2 at p. 1).

The CSE chairperson of the November 2021 CSE meeting testified that the CSE convened after the first marking period so that the CSE could review the student's performance to date in the seventh grade program, and to review the BOCES neuropsychological evaluation (Tr. pp. 906-08).¹⁶ The BOCES neuropsychological evaluation report indicated that the student had appropriate attention and concentration during testing with instances of distractibility noted particularly when the student became physically or visually tired during testing (Dist. Ex. 20 at p. 9). The student at times, and particularly when provided with visual perceptual tasks, appeared to give up and seemed to be guessing (*id.*). The BOCES neuropsychological evaluator reported that according to

¹⁵ The sixth-grade special education teacher testified that the November 2020 educational evaluation summed up the student's profile as a student with reading and writing as relative strengths and with scores in letter and word identification—which assessed the student's ability to decode and read words—within the average range (Tr. p. 130). Further the student's score in passage comprehension was in the average range, and reading fluency was in the low average range, and writing yielded scores solidly within the average range (Tr. p. 131).

¹⁶ The hearing record did not make clear when the district received the BOCES neuropsychological evaluation report; the BOCES evaluation was not dated and according to her testimony, the evaluator typically completed reports in two to four weeks following testing (Tr. pp. 541, 573-74; *see generally* Dist. Ex. 20). As this report occurred during the year following the COVID-19 pandemic, the evaluator did not recall if her report took longer; she testified to recalling a third testing date although it was not listed on the evaluation (Tr. pp. 555, 573). Further, the evaluator reported that she did not submit the report directly to the district or the parent following completion, and rather, she sent the report to BOCES as she contracted with them; and BOCES in turn sent reports to the district (Tr. pp. 573-74).

administration of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), the testing yielded more variability in results with the student's full-scale intelligence quotient (FSIQ) in the low average range (81) (Tr. p. 559; Dist. Ex. 20 at p. 9). The evaluator reported the student's FSIQ was a poor indicator of overall functioning and should be interpreted with caution due to the extreme variability of her scores (Dist. Ex. 20 at p. 9). Additionally, the evaluator reported that the student demonstrated strengths in verbal comprehension and working memory skills, with visual spatial and fluid reasoning skills negatively impacted by inconsistent task approach (*id.*). The student's processing speed was an area of significant weakness with extremely low scores (*id.*). According to the Wide Range Assessment of Memory and Learning – Second Edition (WRAML-II) results, the student had average overall memory skills with a relative weakness in visual spatial memory (*id.*). On selected subtests of the Neuropsychological Assessment for Children (NEPSY-II) the student appeared to struggle seeing the details in the cards and thus struggled on this task of basic concept formation (*id.* at p. 10). The BOCES neuropsychological evaluator testified that the student's low average range FSIQ score was a little lower than expected given the prior testing; however, the student's strengths in verbal comprehension and working memory outpaced her weaknesses in visual spatial fluid skills and processing speed (Tr. p. 559).¹⁷ Recommendations based on this evaluation included providing the student with copies of class notes, encouraging the student to ask questions to best understand assignments, reteaching of core math concepts, and assessing visually presented materials for legibility (Dist. Ex. 20 at p. 10).

With regard to the recommendation for direct counseling services, the school psychologist noted that the NEPSY-II social perspective tasks gave the CSE "quite a bit of information about how someone c[ould] interact with other people and what they perceive," noting that it may have been "because of [the student's] visual spatial and visual perceptual difficulties that she scored so low" (Tr. p. 424). According to the school psychologist, the student's performance on the social perspective section raised concerns, and was why the school psychologist believed the student should have counseling services (Tr. p. 425). In addition to psychological consultation services for staff, the November 2021 CSE recommended that the student receive one 20-minute session per eight-day cycle of individual counseling services beginning November 16, 2021 (Dist. Ex. 2 at pp. 1, 12, 15).¹⁸ During the 2021-22 school year, the counselor recalled concerns that the student had a seizure over the summer prior to seventh grade, and concerns as shared by the student that she felt left out of her social group (Tr. pp. 475, 478-79). The counselor reported talking through the student's problems with her, and role playing to practice what she could say to people (Tr. p. 479). The social worker who provided the direct counseling services starting in November 2021 looked to the student's 2021-22 social/emotional annual goal to discuss why the student received

¹⁷ The BOCES neuropsychological evaluation included results of the evaluator's previous evaluation in March 2018 with an FSIQ of 91 (Dist. Ex. 20 at p. 1). The evaluator reported the results of her previous testing to be a poor indicator of overall functioning due to the extreme variability of the student's scores with strengths in working memory skills and average conceptual skills, with low average processing speech, which was negatively impacted by the student's visual perceptual skills (*id.*).

¹⁸ The student was known to the counselor from interactions during the 2020-21 school year; specifically, the school counselor testified that the student was first assigned to her when the student entered middle school for sixth grade (2020-21 school year), when students attended a hybrid program of three days of remote instruction and two days of in-person instruction (Tr. pp. 449, 461-62). The counselor also recalled speaking to new sixth grade students individually and in small groups about their expectations for middle school, their feelings about the COVID-19 pandemic, and about being back at school (Tr. p. 462).

individual counseling services (Tr. pp. 742-43, 799-800). The social worker testified that counseling services were to provide the student with a consistent basis to discuss strategies to address feelings of anxiety or feeling overwhelmed due to academic or social triggers (Tr. p. 800).

The hearing record reflects that the district conducted a program review to consider the results of the BOCES neuropsychological evaluation and to review the student's then-current functioning at the conclusion of the first marking period for the 2021-22 school year. In response to the evaluative information considered by the November 2021 CSE, the student's program was modified by adding individual counseling to address the changes in the student's social/emotional needs, and continuing the recommendation for a self-contained special class to support the student's academic needs in math. It was reasonable for the CSE to provide the student with access to her nondisabled peers in classes where she was stronger academically and then to provide a special class for math and resource room in a 5:1 ratio to supplement the student's instruction in the general education environment. This strategy balanced the need for appropriately supportive instruction in specialized classes that were individualized to the student's needs while also providing most of her academic instruction alongside her nondisabled peers to the maximum extent appropriate (see Newington, 546 F.3d at 120). Notably, the IHO did not conduct an analysis of the proposed programming in terms of the IDEA's mandate to place the student with nondisabled peers to the maximum extent appropriate, even if that was not viewed as ideal by the parents.¹⁹ Based on the foregoing, I find that the district offered the student a FAPE in the LRE for the 2021-22 school year.

¹⁹ To apply the principles in IDEA's LRE requirements, 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]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to:

- (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom;
- (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class;
- and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.

(Newington, 546 F.3d at 120; 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., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).

B. 2022-23 School Year

The CSE convened on March 14, 2022 to conduct the student's annual review (Dist. Ex. 3 at p. 2). According to the meeting information included on a June 21, 2022 IEP, the March 2022 CSE met to review the student's current functioning, a January 2022 updated functional vision assessment, and the student's continued needs (id.).

Over three dates in November and December 2021, the TVI consultant who had conducted the student's March 2021 visually impaired observation conducted a visually impaired functional vision assessment and prepared a report dated January 2022 (compare Dist. Ex. 10, with Dist. Ex. 30). The functional vision assessment report reviewed by the March 2022 CSE indicated that the student wore glasses, had learning and health issues, and was not considered a student with a visual impairment (Dist. Ex. 30 at p. 5). The TVI consultant reported that the student used her vision functionally; however, demonstrated visual perceptual issues and lacked systematic scanning skills (id.). The TVI consultant reported that "it [wa]s unclear if [the student] ha[d] a field deficit on her left side or if she neglect[ed] that side unconsciously" (id.). The TVI consultant reported that graphing was difficult for the student, and it appeared that she worked on using a strategy to persevere (id. at p. 3). The student's handwriting was large and when given passages to read, she read fluently and preferred larger font and bold print (id. at pp. 4, 5). The TVI consultant reported the student had no issues with identifying colors, or variations of colors with some contrast, and the student appeared very well oriented to the school building and traveled independently to and from classes with no difficulty negotiating her environment (id. at pp. 4-5). The TVI consultant reported the student had limited keyboarding skills and used a hunt and peck method which required her to look down and up when typing (id. at p. 5).

Recommendations provided following the functional vision assessment included encouraging the student to visually scan from left to right and top to bottom to insure she did not miss information; learning correct keyboard hand placement, or a verbal dictation software if keyboarding was not a realistic goal; using plain font and font sizes of 16 to 18; and using bold line graph paper and highlighters for complicated graphs (Dist. Ex. 30 at pp. 5-6). The recommendations also included for the education team to be made aware of the student's difficulty with perceptual skills that affected graphing and mapping skills, and for continued use of the iPad and apps such as calculator, writing, dictionary and audible books, and adjustment of the student's glasses as they slipped down on her nose (id. at p. 6). The TVI consultant continued to report that the student did not require direct services from a teacher of the blind and visually impaired and continued consultant services on an as needed basis for team members, while noting that any change in the student's visual functioning should be discussed and reviewed (compare Dist. Ex. 10 at p. 2, with Dist. Ex. 30 at p. 6).

The March 2022 CSE discussed that the student was progressing academically, had good study habits and was a hard worker (Dist. Ex. 3 at p. 2). Reading was reportedly a strength, while math and visual/perceptual skills were significant weaknesses (id.). The student was described as lacking confidence and needing a lot of confirmation (id.). The student was noted to be very respectful to adults and could minimize what was difficult for her (id.). The CSE discussed the student's social issues and her need for continued social/emotional support to develop the skills necessary to be assertive, when necessary (id.). The CSE recommended that the student be graded as pass/fail in foreign language and added speech-to-text and audio books to the IEP (id.).

On June 21, 2022, the CSE reconvened to review the parents' concerns about the then-current program and to "review that they ha[d] shared with the [d]istrict that they w[ould] be placing the student" at Winston Prep for the 2022-23 school year (Dist. Ex. 3 at p. 2). According to the meeting information, the parents expressed their appreciation to the staff and stated that they recognized that everyone had worked hard for the student, but "the student need[ed] to be with like learners" (*id.*). The meeting information further indicated that the parents shared the student's academic struggles and social issues from the prior school year and reported that the student had said she did not want to live (*id.*). The meeting information reflects that the district social worker "reported on a follow-up with the student and family on this statement" (*id.*).²⁰ At the meeting, the regular education teacher reported that the student was a conscientious student who found the fourth quarter challenging and had received low test and quiz grades (*id.*). The regular education teacher also stated that the student appeared to be more restless, "though her overall grades were similar" (*id.*). The special education teacher described the student as a very hard worker who went for extra help as needed (*id.*). The meeting information reflected that the June 2022 CSE considered "a more restrictive placement" but found that it was unnecessary to address the student's academic needs in light of her overall academic progress (*id.*). While discussing the student's social/emotional needs, the parents indicated that the decision to enroll the student in a private placement "was not due to the student's social emotional needs, but so the student could be with similar students experiencing a Nonverbal Learning Disability" (*id.*). The parents also stated that they did not think another public school therapeutic or special class program was necessary, that the student was not improving, the current program was not working, and that public school was not conducive to the student and could not address her educational and social problems (*id.*).

The June 2022 CSE recommended six 50-minute periods per five-day cycle each of direct consultant teacher services in ELA and science, four 50-minute periods per five-day cycle of a 15:1 special class in math, four 50-minute periods per five-day cycle of ICT services in social studies, 40 minutes per day of resource room services in a group of five, one 30-minute session per six-day cycle of OT in a group of three, and one 20-minute session per five-day cycle of individual counseling (Dist. Ex. 3 at pp. 1, 12). Supplementary aides and services and program modifications/accommodations recommended included directions repeated; refocusing and redirection; tasks broken down into smaller units; visual and auditory cues; preferential seating; check for understanding; re-teaching; seizure disorder accommodations; modified classroom assignments and homework; calculator; access to copy of class notes; grading accommodation in foreign language; modified visually presented work; and vision accommodations (*id.* at pp. 12-15). Assistive technology recommendations were for the student to have access to a tablet, speech to text software, and access to audiobooks (*id.* at p. 15). The June 2022 CSE also recommended supports for school personnel on behalf of the student consisting of one 30-minute session per six-

²⁰ The social worker testified that the CSE chairperson reported that the student's father reached out prior to the meeting and "they had a phone call about [the student] having some suicidal ideation outside of school" (Tr. p. 777). The social worker testified that she believed during this conversation the CSE chairperson let the parent know he would reach out to alert her as she was the student's provider in school (*id.*). The social worker testified that the CSE chairperson alerted her of this situation and from there, the social worker conducted an informal risk assessment, along with the school counselor (Tr. p. 778). At that time, the social worker testified, "there was no imminent risk of [the student] doing something to herself" and the student also stated that she talked with her private therapist about her thoughts (Tr. pp. 778-79).

day cycle of OT consultation, four hours per year of vision consultation, and one 30-minute session per five-day cycle of psychological consultation (id. at p. 15).

According to the meeting information, the recommendation for the increase in psychological consultation was a change from the March 2022 CSE's recommendation and was for the purpose of "more closely monitor[ing] and support[ing] the student's overall social emotional functioning" (Dist. Ex. 3 at p. 2). The recommendation for individual counseling also represented an increase in frequency as it was changed from once per eight-day cycle to once per five-day cycle (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 2 at p. 1). The June 2022 CSE continued the accommodations recommended by the March 2022 CSE of pass/fail in foreign language, speech-to-text and audio books to support the student and address her educational needs (Dist. Ex. 3 at p. 2).

The IHO determined that the June 2022 CSE continued to recommend the same substantive program for the 2022-23 school year that had already proven to be ineffective for the student. The IHO found that the student had not made meaningful progress during the 2021-22 school year and that the district's recommendations for the 2022-23 school year denied the student a FAPE (IHO Decision at pp. 23-24).

The hearing record does not support the IHO's determination. As discussed above, the June 2022 CSE recommended changes to the student's programming with increased counseling services and psychological consultations to address the student's social/emotional needs. Contrary to the IHO's finding that the student did not make progress during the 2021-22 school year, the hearing record included the student's 2021-22 IEP annual goals progress report, the student's report card, quarterly progress information as related to content area subjects, teacher reports related to content areas, which included information on the student's behaviors and accommodations, as well as a classroom observation of the student during reading and writing activities in her seventh grade class (Dist. Exs. 15; 21; 32; 34; 36). The IHO erroneously relied primarily on the student's performance on the STAR assessments and standardized test scores, rather than reviewing or considering the student's report card grades, and progress described in content area reports, IEP progress reports and observations describing the student's classroom performance.

The CSE meeting summary and June 21, 2022 prior written notice indicated that the June 2022 CSE considered the student's 2021-22 seventh grade report card, a January 2022 vocational interest survey completed by the student, STAR annual math and reading progress reports from October 2021 through January 2022, the January 2022 functional vision assessment, and February and May 2022 writing samples (Dist. Exs. 3 at p. 3; 7 at pp. 1-3; see Dist. Exs. 24-25; 27-30; 34).²¹

²¹ The hearing record also included the November 2021 classroom observation that provided information on the student's performance in a class with 22 students, two teachers and activities of reading, watching lesson/video on the smartboard, and drafting a writing piece (Dist. Ex. 15). The student's seventh grade special education teacher's behavioral observations followed a rubric, where the evaluator marked a behavior as "not evident," "evident," "fairly constant," or "excessive" (id. at p. 2). The special education teacher indicated that it was "not evident" that the student copied others' work, disturbed other children, or demanded attention (id.). The special education teacher also indicated that it was "evident" that the student listened to instructions, followed oral directions, began work promptly, stayed on task, was easily distracted, and that the student was daydreaming (id.). During the observation the student read silently, appeared engaged in her book, created an annotation post-it, and recorded homework in her planner (id. at p.

According to the seventh grade (2021-22) report card the student received the following final grades: English 7 (B); Math 7 (B) with a final exam grade of 73; science 7 (B+); social studies 7 (B+); physical education (A); chorus 7 (A); Spanish 7 (B) with a final exam grade of 60 (Dist. Ex. 34 at p. 1). In addition, the hearing record included quarterly teacher progress reports on the student's participation, and progress within content area classes (Dist. Ex. 36). The student received consistent positive feedback from teachers in content area classes, such as that the student exhibited a positive outlook and attitude in class, demonstrated perseverance and determination, consistently completed homework and assignments, and exhibited frequent and meaningful classroom participation (*id.* at pp. 1-8). The hearing record also included a June 2022 fourth quarter teacher progress report in the content areas of ELA, math, science, and social studies, noting that the student was expected to achieve fourth quarter grades of a "B" for ELA, math, and science and a "B+" for social studies (Dist. Ex. 21 at p. 1). In addition to the grade information, the progress report included information on the student's behaviors and performance in class, areas of need, program modifications, and accommodations provided within the classroom setting (*id.* at p. 3).

The IHO noted the student's gradual or inconsistent progress toward her social/emotional goal in finding that the student "failed to meet her IEP goals for the 2021-22 school year" (Tr. pp. 758, 775; *see* IHO Decision at p. 21). The hearing record contained the student's IEP annual goal progress report, that included her performance toward 12 annual goals in the areas of study skills, reading, writing, mathematics, social/emotional/behavioral, and motor skills (Dist. Ex. 32 at pp. 1-4). Contrary to the IHO's finding, by the April or June 2022 progress reporting period, the student achieved or progressed satisfactorily for 9 of the 12 identified annual goals (*id.*). Specifically, by June 2022, the student achieved her goal to read grade level reading material and answer literal and inferential questions without assistance for the Shakespeare unit (*id.* at p. 1). In the area of writing, by April 2022 the student made satisfactory progress related to the goal of editing and revising written work, and adding evidence and details that support a claim with comments for the third quarter that "[t]hroughout the novel test evidence was collected" (*id.*). In relation to the writing goal that the student would use her technology to assist with her writing assignments, by June 2022 the student achieved this goal with comments that as the year progressed the student became proficient with her iPad (*id.* at p. 2). The student progressed satisfactorily for all three mathematics goals as identified on the 2021-22 progress report, during the November 2020, February 2022, and April 2022 marking periods; and by June 2022 the student achieved these goals (*id.*). Specifically, the student achieved the mathematics goal to identify what operation to use when presented with seventh grade math problems, and the goal to break down word problems in order to solve seventh grade word problems correctly (*id.*). Further, the student achieved the math goal to apply previously learned math concepts to new material presented by the June 2022 marking period, noting that the student earned a 73 percent on her math final that had concepts from multiple units (*id.*).

3). The student required prompting to face the board to watch a class video, and correctly answered a question as related to a graphic organizer and was observed to sustain attention and raise her hand one time to volunteer information (*id.* at pp. 3-4). During the observation, the special education teacher noted that the student fidgeted with her mask prior to signing out of the room (*id.* at p. 4). Upon return, the student engaged in an activity with students related to the direction to write in an organizer, draft in a writer's notebook and then type, with report that the student "began drafting on enlarged organizer provided" (*id.*).

In relation to motor skills, IEP annual goals progress report indicated that by the June 2022 marking period the student made satisfactory progress for three of the four motor goals (Dist. Ex. 32 at p. 3). The progress report detailed that in the area of motor skills, the student progressed satisfactorily in visual closure skills by being able to determine from four incomplete forms, which one would be the same as the completed form; progressed satisfactorily in correctly finding a visual stimulus among a busy background or worksheet in order to demonstrate improvement in visual figure ground; and the student progressed satisfactorily in using a paper and pencil to copy moderately complex shapes/designs with air accuracy to demonstrate improved spatial relations and motor accuracy (*id.*). The progress report reflected that for one motor goal that addressed the student's ability to display increased individuation of digits to facilitate her ability to perform touch typing, the student made inconsistent progress during all four marking periods (*id.*). In the area of study skills, the progress report indicated that the student was progressing gradually toward a goal that she attempt to complete assignments on her own without asking for adult help, and November 2021 and June 2022 marking period comments included that the student would "work independently for the most part and asks few questions" and that she "w[ould] frequently ask clarifying questions without fully reading the instructions first" (*id.* at p. 1).

As noted in the IHO decision, the student's IEP annual goals progress report identified that the student made gradual progress related to her social/emotional/behavior goal that addressed her ability to identify and appropriately use a coping strategy to work through a situation and lessen the feelings of anxiety when overwhelmed due to an academic or social trigger (Dist. Ex. 32 at p. 3). The social worker testified, and the November 2021 IEP identified that the student received counseling individually for one 20-minute session per eight-day cycle, as well as consultation with staff two times per month (Tr. pp. 756, 759; Dist. Ex. 2 at pp. 1, 12, 15). The social worker testified that in reporting the student "progressed gradually" toward her social/emotional goal, it could have been that the student still did not use strategies consistently to lessen her anxiety, "[b]ut if she were to use the strategies more consistently and actively, that could meet the goal" (Tr. p. 775). In relation to increasing the student's counseling services for the 2022-23 school year, the social worker testified that "[i]f a frequency [wa]s increased, it would be because there [was] continued need that we want[ed] to meet with [the student] more frequently to help reenforce the strategies" (Tr. p. 776). The social worker reported that she agreed with the increase in services "[t]o help [the student] feel more comfortable and not feel as anxious throughout her day" (Tr. pp. 776-77).

The student began attending Winston Prep on September 7, 2022 (Parent Ex. J). The CSE convened on October 17, 2022 to conduct a program review and "to review a 10-day notice sent on behalf of the parents" (Dist. Ex. 4 at pp. 1-2). The meeting information reflected that the October 2022 CSE reviewed the student's then-current program at Winston Prep (*id.* at p. 2). A teacher from Winston Prep who attended the CSE meeting "described the student's program of small classes including a cohort of eleven (nine in math) students with disabilities and a daily, individual Focus class" (*id.*). The Winston Prep teacher indicated that the school program did not include any related services (*id.*). The parents reported that the student was receiving private OT and counseling, and that "the student [wa]s now completely with like learners and the program [went] at a pace that [wa]s comfortable for the student" (*id.*). The October 2022 CSE reviewed the student's recommended IEP and considered the information provided to the CSE during the meeting (*id.*). The CSE recommended additional goals in the areas of study skills, writing, mathematics, social/emotional/behavioral and motor skills, as well as an increase in OT consultation to two sessions per six-day cycle to further support the student's visual needs (*id.*).

The parents disagreed with the recommendations during the meeting (id.). The meeting information further stated that "[t]he CSE expressed to the parents that the [d]istrict continue[d] to offer the student a full special education program in the [LRE] at the [district] with the support" of OT, counseling, OT consultation, vision consultation, and psychological consultation (id.).

As described in detail above, the IHO's findings with regard to the student's progress during the 2021-22 school year and determination that the district continued to recommend the same inappropriate program for the 2022-23 school year are not supported by the hearing record. As in preparing for the 2021-22 school year, the March 2022 CSE, June 2022 CSE, and October 2022 CSE offered the student a FAPE in the LRE for the 2022-23 school year.

C. 2023-24 School Year

For the 2023-24 school year, the IHO again found the district failed to offer the student a FAPE, noting that while the district added annual goals, it recommended a substantively similar program as was recommended in prior years, and because the student was still significantly below grade level in math, the district did not provide evidence that the program would have any different outcomes than prior years in which the student fell behind and experienced escalating social/emotional issues. However, the evidence in the hearing record does not support the IHO's conclusion.

In May 2023, the district conducted an educational evaluation, a classroom observation, and a social history update (Dist. Exs. 47-49). According to the meeting information included on an August 16, 2023 IEP, the CSE convened on June 12, 2023, to review the updated evaluations and conduct the student's annual review (Dist. Ex. 45 at p. 2). The Dean at Winston Prep shared the student's current functioning, noting the student had made gains in regulation and attending in class, although noted the student had difficulty with inferential skills (id.). The Dean reported the student needed to work on self-monitoring and perspective taking, though the student presented as a more confident student (id.). At Winston Prep, the student presented "with average writing skills, but math [wa]s an area of challenge" (id.). The Dean described the student's program as consisting of students all diagnosed with learning challenges and reported that the program had limited homework and tests and did not provide related services (id.). The parent reported that the student received private OT and counseling services outside of Winston Prep (id.). During the June 2023 CSE meeting, the parent advised the district that the student had received a diagnosis of attention deficit hyperactivity disorder (ADHD) inattentive type in the fall 2022, and since initiation of medication, the parent reported seeing improvement with the student's anxiety (id.). Additionally, the parent expressed concern about the student's ability to progress through a NYS Regents algebra curriculum (id.). Following review and update of the district's IEP in the academic and social/emotional areas, the CSE recommended adding an annual goal in the area of reading and to edit the math goals to address the student's current identified needs (Dist. Ex. 45 at p. 2; compare Dist. Ex. 45 at pp. 12-14, with Dist. Ex. 4 at pp. 11-12). The meeting information further reflected that the June 2023 CSE continued to offer the student "a full special education program" in the LRE at the district's high school with the support of OT, counseling, OT consultation, vision consultation, and psychological consultation (Dist. Ex. 45 at p. 2). The parent reportedly had "no thoughts" on the program recommendations (id. at p. 3).

The CSE reconvened on August 16, 2023 for a program review and to consider the parents' request for transportation to Winston Prep (Dist. Ex. 45 at p. 2). The meeting information indicated that the CSE reviewed the Winston Prep program and the district's recommendations for the 2023-24 school year (id.). According to the meeting information, the parents' request for transportation was initially denied; however, given the "very low standard" communicated from the NYS Commissioner's Office on this issue, the CSE "did grant the parent[s]' request for transportation" (id.).

The August 2023 CSE recommended programming to be implemented on September 5, 2023, which consisted of six 53-minute periods per eight-day cycle of direct consultant teacher services each in ELA and social studies, six 53-minute periods per eight-day cycle of a 15:1 special class in math, nine 53-minute periods per eight-day cycle of direct consultant teacher services in science, six 53-minute periods per eight-day cycle of resource room services in a group of five, one 30-minute session per six-day cycle of OT in a group of three, and two 20-minute sessions per eight-day cycle of individual counseling (Dist. Ex. 45 at pp. 1, 14). Supplementary aides and services and program modifications/accommodations recommended included directions repeated; refocusing and redirection; tasks broken down into smaller units; visual and auditory cues; preferential seating; check for understanding; re-teaching; seizure disorder accommodations; modified classroom assignments and homework; calculator; access to copy of class notes; grading accommodation in foreign language; modified visually presented work; and vision accommodations (id. at pp. 14-17). Assistive technology recommendations were for the student to have access to a tablet, speech to text software, and access to audiobooks (id. at p. 17). The August 2023 CSE also recommended supports for school personnel on behalf of the student consisting of two 30-minute sessions per six-day cycle of OT consultation, four hours per year of vision consultation, and one 30-minute session per eight-day cycle of psychological consultation (id.). By prior written notice dated August 16, 2023, the district summarized the recommendations of the August 16, 2023 CSE (Dist. Ex. 46).

The CSE chairperson testified that the CSE determined this to be an appropriate program for the student moving forward for the 2023-24 school year and testified that the recommended program "was a return to the program that really had served her well in [seventh] grade" (Tr. pp. 984-85, 990-91, 997).

Contrary to the IHO's decision, the district offered the student a FAPE in the LRE for the 2023-24 school year. While the parents may believe that the setting at Winston Prep was the best environment for the student for the 2022-23 and 2023-24 school years, it was not necessary for the district to recreate that precise environment in order to offer the student a FAPE (M.E. v. New York City Dep't of Educ., 2024 WL 1514299, at *5 [S.D.N.Y. Apr. 8, 2024]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]). The evidence shows the June 2023 and August 2023 CSEs addressed the student's needs in an individualized manner and her IEP was reasonably calculated to enable the student to receive educational benefits in light of her circumstances, and it did so while adhering to the mandate that the student be educated in the LRE.

VII. Conclusion

In summary, the IHO erred in finding that the district failed to address the student's needs during the 2021-22 school year, and that the district continued to recommend the same inappropriate program for the 2022-23 and 2023-24 school years. Furthermore, the IHO did not conduct an adequate analysis of the district's responsibility to offer appropriately supportive programming while adhering to the IDEA's LRE requirements. Having determined that the evidence in the hearing record leads to the conclusion that the district did not deny the student a FAPE for each of the school years at issue, the necessary inquiry is at an end, and it is not necessary to reach a determination of whether Winston Prep was an appropriate unilateral placement for the 2022-23 and 2023-24 school years or whether equitable considerations supports the parents' requested relief (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated September 17, 2024, is modified by reversing those portions which found that the district failed to offer the student a FAPE in the LRE for the 2021-22, 2022-23 and 2023-24 school years; and,

IT IS FURTHER ORDERED that the IHO's decision, dated September 17, 2024, is modified by reversing those portions which ordered the district to reimburse or directly fund the costs of the student's tuition at Winston Prep for the 2022-23 and 2023-24 school years.

Dated: **Albany, New York**
 November 29, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER