



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-569

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

**Appearances:**

Ingerman Smith, LLP, attorneys for petitioner, by Thomas Scapoli, Esq.

Law Offices of Neal H. Rosenberg, attorneys for respondents, by Michael Mastrangelo, Esq.

### DECISION

#### I. Introduction

This State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Southern District of New York (see N.K.M. v. Rye City Sch. Dist., 2024 WL 4803941 [S.D.N.Y. Nov. 15, 2024]). This proceeding initially arose 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), as relevant to this administrative review, previously appealed from the decision of an impartial hearing officer (IHO), which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Windward School (Windward) for the 2020-21 and 2021-22 school years. Having provided the parties with an opportunity to be heard and upon reexamination of the hearing record of the impartial hearing proceedings, the prior State-level submissions and administrative decisions, as well as the District Court's order of remand, the evidence demonstrates that the district offered the student a free appropriate public education (FAPE) for the 2021-22 school year.

## II. Overview—Administrative Procedures

In a due process proceeding conducted pursuant to the IDEA, 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 detailed facts regarding the student's educational history and the prior procedural history of this case at the school district and administrative hearing levels was set forth in Application of the Board of Education of the Rye City School District, Appeal No. 22-098. The parties' familiarity with those matters and the IHO's decision is presumed; however, the judicial review that followed the local and State-level administrative proceedings and the consequent remand by the District Court are set forth below with some pertinent facts repeated from the prior State-level decision to provide the background context for this determination.

The student began attending Windward for the 2017-18 school year, when he was in second grade, and was continuing to attend Windward for the 2021-22 school year at issue, when he was in sixth grade (Parent Exs. C; F; G; L; O). In February 2021, the parents executed an enrollment contract with Windward for the 2021-22 school year (Parent Ex. N).

In spring 2021, as part of the student's triennial reevaluation, the district conducted a speech-language evaluation, an educational evaluation, a social history update, and a psychological evaluation (Dist. Exs. 17-20).

A Committee on Special Education (CSE) convened on April 15, 2021, to conduct a reevaluation and annual review and to develop the student's individualized education program (IEP) for the 2021-22 school year (Dist. Ex. 21 at p. 1). Finding the student eligible for special education and related services as a student with a learning disability, the CSE recommended one 40-minute session per day of integrated co-teaching (ICT) services in each of the following subjects: language arts, math, social studies, and science; a 15:1 special class referred to as an educational support class (ESC) for 40 minutes, daily; two 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of speech-language therapy in a group of five; and one 30-minute session per week of both individual and small group (5:1)

counseling (*id.* at pp. 1, 3, 14).<sup>1</sup> In addition, the April 2021 IEP included annual goals addressing the student's needs in the areas of reading, writing, mathematics, speaking and listening, speech-language development, and social/emotional/behavioral functioning and provided supports and accommodations including checks for understanding, breaking down assignments into manageable tasks with teacher determined deadlines, preferential seating, visual schedule and supports, wait time for oral and written responses, positive reinforcement, pre-teaching and re-teaching, movement breaks, use of a calculator and graphic organizers, assignments and homework modified for quantity, copy of class notes, spelling waived, refocusing and redirection, access to audio books, one 30-minute occupational therapy (OT) consultation per month, and one 15 minute psychological consultation per month (*id.* at pp. 11-17).

In an August 13, 2021 letter, the parents notified the district that based on the student's specific learning profile they did not believe that the district's recommended program was sufficient to meet his needs and that it failed to provide the student with the level of support he required to make appropriate progress (Parent Ex. K at p. 1). The parents referenced the results of a December 2020 private psychological evaluation and stated that they planned to continue the student's enrollment at Windward for the 2021-22 school year and seek tuition reimbursement and transportation (*id.* at pp. 1-2).

By due process complaint notice dated August 20, 2021, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2020-21 and 2021-22 school years (*see* Dist. Ex. 1).<sup>2</sup>

Regarding the 2021-22 school year, with respect to the April 2021 CSE meeting and recommendations contained within the resultant IEP, the parents argued that the program recommendations were substantively and procedurally inappropriate, inadequate, and not reasonably calculated to offer the student an opportunity to make progress, and that the district impeded the parents' opportunity to participate in the decision-making process (Dist. Ex. 1 at pp. 7-8). The parents argued that the IEP failed to address the student's need for small instructional classes, individualized attention, specialized teaching strategies, and multisensory techniques; the program failed to offer the student appropriate peer functional grouping; class sizes were too large and would be distracting; pull-out services would be dysregulating and anxiety-inducing; and the program failed to address the student's executive functioning skills (*id.* at p. 8). Additionally, the parents asserted that the April 2021 IEP did not accurately reflect the results of available evaluations and as a result the CSE failed to identify the student's needs and establish annual goals related to those needs, and that the CSE failed to discuss any appropriate methodologies (*id.* at p. 9). Further, the parents argued that the extensive programming modifications the student required to access the curriculum could not be implemented (*id.*). Next, the parents argued that the IEP was developed without meaningful parental participation and the program was predetermined based on availability rather than the student's needs (*id.*). Finally, the parents alleged the CSE failed to address the student's behaviors that interfered with his learning and was unable to provide the

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<sup>1</sup> The student's eligibility for special education as a student with a learning disability as of April 2021 is not in dispute (*see* 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

<sup>2</sup> The 2020-21 school year is not at issue in the matter on remand.

parents with information related to the implementation of the IEP in the event that the circumstances surrounding the COVID-19 pandemic necessitated continued distance learning or an alternate instruction format (id. at p. 11).

The parents further asserted that Windward was an appropriate unilateral placement and that equitable considerations weighed in favor of the parents' claims for the 2021-22 school year (Dist. Ex. 1 at p. 12). As relief, the parents requested an order for "direct payment/reimbursement" for tuition at Windward, continued transportation for the 2021-22 school year, and reimbursement for all associated costs including independent assessments conducted (id. at p. 13).

Following an impartial hearing related to the parents' August 2021 due process complaint notice, an IHO issued a decision, dated July 1, 2022 (July 2022 IHO decision), which found that the district failed to offer the student a FAPE for the 2020-21, and 2021-22 school years, that Windward was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement for both school years (IHO Decision at pp. 32-43).

In a State-level administrative appeal from the July 2022 IHO decision, the district argued that the IHO erred in determining that it failed to offer the student a FAPE for the 2020-21 and 2021-22 school years (see Application of the Bd. of Educ., Appeal No. 22-098). As relevant herein, the district argued that the IHO erred in determining that it failed to offer a FAPE for the 2021-22 school year. Specifically, the district asserted that the IHO erred in finding the student required a specialized reading program "integrated throughout the day," arguing that testimony showed the student "had a language deficit, so he needed speech-language therapy and he was decoding in the average range, so he did not need a specific reading program to learn phonics," and that the IHO ignored the weight of the evidence. The district also argued that the IHO erred in determining the district did not review the December 2020 private psychological evaluation, noting that it was listed on the IEP, the diagnoses and test results were discussed in the IEP, and the CSE chairperson testified that she compared her results to the test results in the December 2020 evaluation report. The district further argued that the IHO erred in finding the annual goals were improper for the 2021-22 school year. Finally, the district argued that the IHO erred in determining that the CSE failed to have an explicit discussion about how the student's learning needs would be met with the ICT class recommendation. Next, the district argued that the IHO erred in determining that Windward was an appropriate unilateral placement for the student for the 2021-22 school year. As relief, the district requested that the IHO decision be annulled, and the parents' request for relief be denied in its entirety.

On November 10, 2022, the undersigned sustained the district's appeal, in part, finding that the district offered the student a FAPE for the 2020-21 and 2021-22 school years (see Application of the Bd. of Educ., Appeal No. 22-098).

The parents sought judicial review of the undersigned's November 10, 2022 State-level decision in the United States District Court for the Southern District of New York (see N.K.M., 2024 WL 4803941). The parents moved for summary judgment; with the exception of the discrete issues remanded for further administrative review, the District Court denied the parents' motion for summary judgment on their request for tuition reimbursement for the 2020-21 and 2021-22

school years (*id.* at \*1, \*17). On remand, the District Court ordered the SRO to consider whether the student's IEP for the 2021-22 school year sufficiently addressed the student's needs as they related to math, and if not, whether Windward was an appropriate placement and whether the equitable considerations supported the parents' claim (*id.*, at \*1, \*17).

On November 26, 2024, the parents filed the remand order with the undersigned at the Office of State Review and copied the district. Accordingly, as part of the review process and in response to the District Court's concerns, in a letter dated November 29, 2024, the parties were offered an opportunity to be heard by submitting their respective positions regarding the issues remanded.

#### **IV. Arguments on Remand**

Each party submitted a supplemental brief in accordance with the schedule set after remand. In its supplemental brief, the district argues that the April 2021 IEP addressed the student's deficits in math. Specifically, the district asserts that the student's math needs were addressed through a combination of ICT services, a 15:1 special class (ESC), speech-language therapy, and program modifications. According to the district, the recommended program offered 3.5 hours of specialized instruction every day through ICT services and the ESC, as well as intensive speech-language therapy. The district points to evidence that the ESC special education teacher would follow the student to all four ICT classes to provide consistency of specialized instruction throughout the school day. Further, the district notes that the student's ICT classes would include no more than eight students with disabilities in each ICT class, which would allow more individualized attention for the students and better functional groupings. The district further argues that the ICT classes use the Teachers College workshop model, which would offer opportunities for individual and small group instruction throughout the day. The district contends that the student's math deficits would also be supported by speech-language therapy as the student's deficits were in the language of math, including temporal and spatial concepts, multistep directions, and sequencing. The district further explains that the speech therapist and teachers work as a team to address language deficits and to generalize the skills throughout the school day. The district asserts that the recommended program would provide the student access to general education peers, for the purposes of peer modeling and small group pairing, as well as access to high level teaching and a rigorous curriculum. The district notes the testimony of a district witness who indicated—based on the statement of the student's speech therapist at the CSE meeting—that the student did not need a more restrictive setting for math as his weaknesses were in the language of math more than the computation skills, and that such concerns could be met in an ICT setting and with speech-language therapy. The district also points to testimony that the recommended program provided support for the student's math weaknesses and that there would be a special education teacher in the ICT classroom and the ESC would reinforce concepts through reteaching and pre-teaching.

The district further argues that the CSE also recommended modifications to address the student's language and math deficits like repeating directions to make sure the student understood what was expected, wait time to allow him to process language, and modeling language with verbal praise. The district notes that the CSE recommended manipulatives and multiplication charts to support the student's math deficits. The district contends that the professional educators at the

hearing testified the IEP was appropriate because the student had a language deficit and needed speech-language therapy. According to the district, the parents' witnesses, who were not professional educators and who never taught specialized reading, testified incredibly that the student did not need speech-language therapy, despite evaluation reports expressly recommending speech-language therapy and the fact that the parents had obtained private speech-language therapy outside of the school day.

With regard to the appropriateness of Windward, the district argues that the parents failed to present sufficient evidence of what program was used or how it supported the student. The district contends that the parents did not offer any documentary or testimonial evidence of how the student's math needs were addressed by Windward. The district asserts that Windward's own testing demonstrated that the student's math skills declined while he was attending Windward. The district alleges that the decline in the student's math skills demonstrates that the student's grades on his Windward report card lack any probative value and do not provide any useful information on his math performance. The district further contends that despite the student having been very language impaired, Windward did not offer any direct speech-language services. For those reasons, the district argues that Windward was not an appropriate unilateral placement for the student.

In their supplemental brief, the parents argue that the April 2021 IEP was not reasonably calculated to enable the student to make meaningful progress in math and deprived him of a FAPE for the 2021-22 school year, Windward was an appropriate unilateral placement, and that equitable considerations support an award of full tuition reimbursement. The parents contend that, despite the student's need for small class math remediation, the district continued to recommend a large, general education ICT class for math and failed to meet its burden to establish that such a program was appropriate. The parents further argue that the district's witnesses testified broadly to the general benefits of an ICT classroom and failed to explain how the student's significant deficit areas in math would have been remediated in an ICT classroom. The parents assert that the student required significant remediation in math and 1:1 support and that the district's witness was unable to explain how ICT services offered math remediation for the student. The parents contend that placement in a large general education classroom with students performing at or above grade level, without any specific time allotted for math remediation and learning at a pace that was not in line with the instructional pace needed by the student was not reasonably calculated to enable the student to receive educational benefit.

The parents also assert that Windward was an appropriate unilateral placement for the 2021-22 school year. The parents argue that Windward offered the student a full-time, multisensory instructional program designed for students with language-based learning challenges. The parents contend that the student made progress in all academic areas as Windward addressed the skills the student needed to develop in order to make progress. The parents also allege that equitable considerations support a finding that the parents are entitled to full tuition reimbursement for the 2021-22 school year.

## V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132,

quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

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



## VI. Discussion—FAPE-2021-22 School Year

In remanding this matter, the District Court found that neither the IHO nor the SRO separately analyzed the adequacy of the April 2021 IEP in addressing the student's math needs (N.K.M., 2024 WL 4803941, at \*16). Upon remand, review of the hearing record demonstrates that the April 2021 offered appropriate supports to address the student's needs related to math and that the student was offered a FAPE for the 2021-22 school year.

### A. The Student's Needs

In December 2020, the parents privately obtained a psychological evaluation of the student (Dist. Ex. 15; IHO Ex. I).<sup>4</sup> Results of cognitive assessments conducted as part of the December 2020 private psychological evaluation indicated that the student was "functioning overall in the borderline to low average range of intellectual ability" (Dist. Ex. 15 at p. 5). Achievement testing found the student performing in the very low range of ability in broad math skills and specifically in the areas of math calculation skills and math problem solving skills both of which were noted as areas of weakness (id. at pp. 14, 17-18). In sum, the evaluator stated that the student's "profile suggest[ed] continued language impairment and an underlying language-based learning disability" and that academically, the student's "language impairment affect[ed] his learning in all areas" (id. at pp. 31-32). The student received diagnoses of a language disorder, specific learning disorder with impairment in mathematics, specific learning disorder with impairment in reading, specific learning disorder with impairment in written expression, and disruptive mood dysregulation disorder (id. at p. 32).

Recommendations from the December 2020 evaluation report included "placement in a small, structured, supportive full-time special education classroom within a small, full-time special education school" among a group of age-appropriate peers; a multisensory instructional program; a private math tutor, as it was noted that improvement in math fluency skills and basic calculation skills "should be the focus on intervention"; and continued work with the private speech-language pathologist (Dist. Ex. 15 at pp. 33-34). Recommended accommodations included providing extended time for assignments and exams, flexible seating for testing, directions and key information read/repeated/clarified, pairing of oral instructions with demonstrations and visual examples, breaking complex tasks into component parts, and allowing access to a computer (id. at pp. 33-35).

A district March 2021 educational evaluation was conducted by a district special education teacher, which included assessment of the student's math skills and indicated that mathematics was an area of weakness with scores falling in the below average range for numerical operations and

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<sup>4</sup> IHO Exhibit I and District Exhibit 15 are both copies of a December 2020 psychological evaluation report; however, IHO Exhibit I specifically included a recommendation that the student attend Windward while District Exhibit 15 did not include that recommendation (compare IHO Ex. I at p. 33, with Dist. Ex. 15 at p. 33). The evaluator testified at the impartial hearing about a draft of the evaluation report which contained the specific Windward recommendation; in testimony, the parent explained that she requested that the reference to Windward be removed because she wanted the CSE to consider a recommendation that described a specific educational program and not a specific school location (Tr. pp. 505-14, 800-06, 834, 897-900, 928-29; Dist. Ex. 15 at p. 35).

math problem solving, in the low range for math facts fluency for subtraction and multiplication, and in the very low range for addition fluency (Dist. Ex. 18 at pp. 1-4, 6).

According to a March 25, 2021 district psychological evaluation report conducted by a district school psychologist, cognitive testing indicated that the student's overall general ability fell in the very low range of functioning and that he "presented with a large scatter of cognitive skills" (Dist. Ex. 20 at pp. 1, 7). Specifically, the report indicated that the student's verbal comprehension and visual spatial reasoning skills were areas of significant strength (falling in the average range), while the student exhibited significant weaknesses in fluid reasoning and working memory skills (falling in the extremely low range) (*id.* at pp. 7-9). Results of parent-rated behavior assessments found the student in the at-risk range for aggression, anxiety, depression, atypicality, adaptability, social skills, leadership, functional communication, and activities of daily living (*id.* at pp. 8, 10).

Written comments from the April 2021 CSE meeting included reporting from the Windward CSE liaison that the student demonstrated weaknesses in math, was unable to remember math facts, needed scaffolding and modeling with math skills, found classwork and homework challenging, and presented with difficulty when attempting to complete problems independently (Dist. Ex. 21 at p. 2). She added that the student presented with difficulties with focus and that his anxiety could impact his ability to be present but was better organized in math and responded to organization support (*id.*).

The student's private speech-language pathologist stated that the student's math abilities related to weaknesses in temporal and sequential vocabulary, particularly when increased in length or when syntax was complex (*id.*; *see* Dist. Ex. 13). The student's mother reported that the student understood math concepts in class but when home "it's like he's never seen the work before" and noted that the student lacked the confidence to complete the work (Dist. Ex. 21 at p. 2).

The District Court noted that the student's scores from both the December 2020 private evaluation and the March 2021 district educational evaluation indicated the student was "performing for almost every math skill in the bottom 1% and even the bottom 0.1%" and that both concluded that the student was at a "kindergarten to mid-second-grade level" (*N.K.M.*, 2024 WL 4803941, at \*16; *compare* Dist. Ex. 15 at p. 14, *with* Dist. Ex. 18 at p. 2).

The hearing record reflects that the December 2020 private evaluation included grade equivalencies that indicated the student scored at a kindergarten or first grade level for math fluency (Dist. Ex. 15 at p. 14). The district's March 2021 educational evaluation did not include grade equivalencies and the administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III) reflected that the student's composite score in mathematics placed him within the below average range of functioning, and his composite score in math fluency placed him within the low range of functioning (Dist. Ex. 18 at p. 2). Consistent with the District Court's finding, the student's scores on subtests related to mathematics indicated that the student was functioning below the first percentile in math problem solving as well as math fluency for addition, subtraction and multiplication (*id.*). The student's subtest score for numerical operations was at the 12th percentile (*id.*).

On remand, the parents reassert that the parents' private psychologist and the district's special education teacher both concluded that the student was functioning at kindergarten to mid-

second-grade level based on their own assessments (Parent Supp. Br. at p. 2). The parents cite to the cross-examination of the district's special education teacher who had conducted the March 2021 educational evaluation (see Tr. p. 214). Review of the testimony reflects that the parents' attorney directed the district's special education teacher to the December 2020 private psychological evaluation—which included grade equivalencies—and asked if the student's scores on the Woodcock-Johnson IV-Tests of Achievement (WJ-IV ACH) administered by the private psychologist "scored below grade level" and asked that "in math in particular, [the student] performed anywhere between kindergarten level and mid-second grade level" (Tr. p. 214; see Dist. Ex. 15 at p. 14). The district's special education teacher agreed on cross-examination that the December 2020 private psychological evaluation included grade equivalencies, which indicated a range of kindergarten through mid-second grade level (*id.*). The parents' attorney then asked the district's special education teacher "do those scores line up with your testing of [the student] based in the area of math?" to which she responded "Similar, yes" (Tr. p. 214).

The parents' attorney engaged in a similar line of questioning when cross-examining the district's school psychologist, who was the chair of the April 2021 CSE (Tr. pp. 256, 258, 282, 323-24). The parents' attorney directed the district's school psychologist to the December 2020 private psychological evaluation—which included grade equivalencies—and implied in his questioning that the student could not have average scores in basic reading skills if the student was functioning at a mid-fourth grade level (Tr. p. 324). The district's school psychologist testified that the term grade equivalent did not mean equivalent to grade level (*id.*). The district's school psychologist explained that "[g]rade equivalent [wa]s based on the normed population of the test, it's not equivalent to grade level. You're thinking about grade level material, grade equivalent [wa]s not the same thing which [wa]s why it's misleading" (*id.*).

Turning to math skills, the parents' attorney again directed the district's school psychologist to the December 2020 private psychological evaluation and read aloud that the student's "developmental level in broad math [wa]s comparable to that of the average student in grade 1.4" and that the student's "developmental level on math calculation [wa]s comparable to that of the average student in grade 1.5" (Tr. pp. 339-40). To which, the district's school psychologist responded "yes, that's referring to grade equivalents, which are not grade level" and that "[a]gain, it's not grade level, those are grade equivalents, but [the private psychologist] did indicate weaknesses in the area of math skills" (Tr. p. 340). The district's school psychologist further responded that the CSE "developed math goals to address those needs and agreed upon the math ICT classroom to address them" (*id.*). The IHO then asked the district's school psychologist to explain the difference between grade equivalent and grade level (Tr. p. 341). The district's school psychologist stated that "[i]t's very confusing, which [wa]s why [she] d[id not include] them in [her] report. A grade equivalent [wa]s based on the normed sample, how many items correct was the average of students that were that grade level in the normative sample" (*id.*). The district's school psychologist further explained that on many assessments, "grade equivalents only have a few items" for a "whole grade level," that "[i]t's an estimation," and that "[g]rade equivalents [we]re not consistent within academic testing and between different academic tests. So it's very confusing for parents and it's not the same as grade level" (Tr. pp. 341-42).<sup>5</sup>

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<sup>5</sup> I note that relevant authority supports the district school psychologist's testimony that grade equivalent scoring

In addition to evidence concerning the student's standardized testing, the hearing record also shows that at the student's June 2020 CSE meeting, a Windward CSE liaison reported that the student, who was in fourth grade at the time, was being instructed in math using a fourth-grade curriculum.<sup>6</sup> According to the CSE liaison, the student's math group was at "a low grade level" but "follow[ed] the GO Math! sequence for fourth grade and cover[ed] all the topics (Dist. Ex. 23 at p. 5). The liaison explained that the student was in a math group that "move[d] at a slower pace for the fourth grade" and that the student benefitted from the slower pace (Dist. Exs. 23 at p. 5). She explained the group went "in less steps" and the curriculum was modified when needed (id.). Similarly, the Windward CSE liaison reported that for fifth grade the student's teachers followed the fifth-grade math curriculum "but it was very modified" and for sixth grade the student was "exposed to the grade-level math content but [received] a lot of support to break it down" (Tr. pp. 597, 604-05). The Windward CSE liaison estimated that the student's math skills were "two or three years below" grade-level (Tr. pp. 597-98).

## **B. April 2021 IEP**

Here, the district argues in its supplemental written statement regarding the issue on remand that the April 2021 IEP addressed the student's needs, specifically the student's very low to below average skills in math, as described above through a combination of ICT, a 15:1 ESC, speech-language therapy, and program modifications.

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does not equate to the student's understanding of grade level curriculum. While the same authority tends to find the grade equivalency approach to be unduly misleading, the undersigned nonetheless continues to see it relied upon in debates over programming recommendations. The unreliability of age and grade equivalencies has been understood by education officials for decades, and in just a cursory sampling of State Educational Agency (SEA) due process proceedings across the country in the current decade reveal that such reliance has continued to face considerable criticism (see, e.g., In re Baltimore County Pub. Schs., 123 LRP 24961 [SEA MD 2023] [noting that grade equivalents on testing results are not statistically reliable and can be misleading]; In re Independent School District No. 833 (South Washington County School District), 123 LRP 30369 [SEA MN 2023] [noting testimony that warned against the reliance on grade level equivalent data for assessing reading progress, that grade level equivalents are stated in certain assessments like the WIAT and WISC and explaining that grade level equivalents are "incredibly misleading" and statistically unsound, provide "misinformation" because they are based upon regression analysis and data extrapolation, not actual scores]; In re Williamsport Area Sch. Dist., 122 LRP 21678 [SEA PA 2021] [explaining that "this hearing officer is not endorsing the use of grade equivalents as an IEP present level metric"]; In re Morris Sch. Dist. Bd. of Educ., 121 LRP 24140 [SEA NJ 2021] [noting that age equivalency and grade equivalency are not used in special education programs and questioning an evaluator's practice of switching from more reliable standard scores to less reliable age and grade equivalents in order to justify the evaluator's argument in favor of a particular placement]; In re Sharpville Area Sch. Dist., 78 IDELR 179 [SEA PA 2020] [noting that grade-level equivalency scores are a type of developmental score that must be interpreted cautiously and carefully, because they can be misleading for many reasons, including because grade equivalents tend to exaggerate minor variations in performance and vary from instrument to instrument, and even from subtest to subtest, making them quite difficult to compare]). A Minnesota administrative law judge was careful to point out that some assessment publishers also caution against the use of age and grade equivalents quoting one publisher's "warning that: 'Because of the inherent psychometric problems associated with age and grade equivalents that seriously limit their reliability and validity, these scores should not be used for making diagnostic placement decisions'" (In re Independent School District No. 833 (South Washington County School District), 123 LRP 30369 [SEA MN 2023]).

<sup>6</sup> The transcript for the June 10, 2020 CSE meeting is mistakenly dated June 10, 2021 (Tr. pp. 860-61).

As detailed earlier, the hearing record reveals that the April 2021 IEP included the recommendation of one 40-minute session daily of ICT services each for math, language arts, social studies, and science; one 40-minute session per day of a 15:1 special class (ESC); and individual and group speech-language therapy (Dist. Ex. 21 at pp. 1, 14).

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

According to State regulation, a 15:1 special class placement derives from the provision which states that "[t]he maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting shall not exceed 15 students, or 12 students in a State-operated or State-supported school" (8 NYCRR 200.6[h][4][i]).

The district supervisor of secondary education (supervisor) testified that she oversaw the ICT program at the middle school, and that their goal was to "cap" the number of special education students in the classrooms at eight (Tr. pp. 63, 65, 77-78). She explained that they used a team approach and that the special education teacher followed the students to all four content areas as well as the 15:1 special class (ESC) and noted that it was critical because the special education teacher saw the student five times a day (Tr. pp. 78, 132).

The district's special education teacher echoed that the student would have the same special education teacher in his core classes of language arts, math, science, and social studies, and that the same special education teacher would also teach the 15:1 special class (ESC), adding that the student would have the same teacher throughout the school day to do the same level of prompting and to provide support (Tr. p. 189). She further explained that the 15:1 special class (ESC) would provide pre-teaching and reteaching as needed and that, while most of the student's goals could be worked on in the classroom, the ESC allowed for additional opportunity to target the student's goals (id.; see Tr. p. 197). She also noted that the student was able to be a part of mixed ability groups with nondisabled peers and also lots of time within the classroom for small group instruction and individual instruction (Tr. p. 189).

The district's school psychologist testified that the CSE discussed ICT services in language arts, math, social studies, and science, as well as the 15:1 special class (ESC) model during the meeting (Tr. p. 296). She stated that in the ICT setting the student would be with nondisabled students as well as students with disabilities and would have exposure to the general education curriculum, while still being provided with specialized instruction toward his annual goals (Tr. pp. 297-99). The school psychologist stated that the student would have access to peers who had similar cognitive profiles and would be able to work with a special education teacher in small groups and receive modifications (Tr. pp. 297-98). The school psychologist stated that, within the ICT model along with the 15:1 special class (ESC), the student would have opportunities for

instruction in a small group and in an individual setting and noted that the student would have access to the special education teacher, for all core subjects, who could provide reteaching opportunities in a small group right in the classroom and, during the ESC, could reteach and answer any questions from the student (Tr. p. 298).

As noted above the student's private speech-language therapist stated that the student's difficulties in math related to weaknesses in temporal and sequential vocabulary, particularly when increased in length or when syntax was complex (Dist. Ex. 21 at p. 2). The district speech-language pathologist testified that there was constant collaboration between the speech-language pathologist and classroom teachers and that she used what the teachers were doing in the classroom to connect what students were doing in therapy and that this helped with carryover of skills (Tr. p. 391). The April 2021 IEP included speech-language annual goals targeting the student's ability to sequence events, following multistep directions with two to three critical elements, and understand word relationships through use of categorizations, classifications, and association of selected vocabulary (Dist. Ex. 21 at p. 13).

Additionally, the April 2021 IEP included three math annual goals addressing identifying the appropriate operation(s) and solving two-step word problems with the support of highlighters and other tools and visuals, identifying the value of mixed dollars and coins with use of a visual, and solving single- and double-digit equations of one of the four operations (Dist. Ex. 21 at pp. 12-13).

The April 2021 CSE meeting comments stated that the CSE considered a special class setting but determined that it was too restrictive "at this time" (Dist. Ex. 21 at p. 3). The comments also stated that the Windward liaison expressed concern that the student would not make progress in his goals but felt that the ICT services and the educational support class were the best option "at this time" and that all of the student's goals were appropriate (id.).<sup>7</sup>

According to the April 2021 IEP's present levels of performance/management needs the student's delays, including those in the area of mathematics operations and word problems, impacted his ability to be successful within the general education classroom and ICT services could provide for small group and individualized instruction, along with modifications and accommodations in order to allow the student to be successful within the general education classroom (Dist. Ex. 21 at p. 11). The IEP further stated that the 15:1 special class (ESC) would allow for small group instruction based on the student's needs in reading, writing and math (id.).

The April 2021 CSE meeting comments stated that program modifications were recommended to continue with the exception of manipulatives for math and a multiplication chart, which were removed (Dist. Ex. 21 at p. 3; compare Dist. Ex. 11 at pp. 8, 12, 13, with Dist. Ex. 21 at pp. 11, 14-17). The use of a calculator, modified homework and classwork in the areas of math (and writing), and a copy of class notes were added as accommodations (Dist. Ex. 21 at p. 3; compare Dist. Ex. 11 at pp. 8, 11-13, with Dist. Ex. 21 at pp. 15-16).

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<sup>7</sup> The Windward CSE liaison who attended the April 2021 CSE meeting was not the same liaison who attended the June 2020 CSE meeting or testified regarding the student's math instruction (compare Dist. Ex. 11 at p. 1, with Dist. Ex. 21 at p. 1).

Based on the information before the April 2021 CSE, the hearing record demonstrates that the April 2021 IEP addressed the student's identified needs specifically in the area of math by recommending ICT services and a 15:1 special class (ESC), supported by speech-language therapy to address some of the language-based aspects of the student's deficits in math and the accommodations recommended for him in the IEP to assist him with attentional and classroom functioning issues (Dist. Ex. 21 at p. 14). The hearing record demonstrates that, although the district's cognitive testing results did not reference grade equivalencies while the parents' private psychologist, in part, utilized that method when analyzing the student's abilities in math, the cognitive and academic testing conducted by the private psychologist and the district's school psychologist yielded largely the same results, and the district explained through its witnesses at the impartial hearing, and the documentary evidence it submitted, why the CSE recommended the educational programming contained in the April 2021 IEP to address the student's needs as gleaned, in part, from the available evaluative information. Accordingly, while the parents in their briefing related to this remand largely have focused on the grade equivalency findings of the private psychologist, the evaluative information in the record, the present levels of the student's performance as reflected in the April 2021 IEP, the CSE's programming recommendations and the testimony of the district's witnesses, taken together, support a finding that the April 2021 IEP was appropriate to address the student's math needs.

The crux of the dispute in this matter relates to the views of the parents and the private psychologist that the student required a more supportive (and more restrictive in terms of LRE) setting, versus the district's opinion that the student could receive meaningful educational benefit while attending a general education class placement with ICT services, a 15:1 special class (ESC), related services, and supports and accommodations within a district public school. Generally, district staff may be afforded some deference over the views of private experts (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at \*16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at \*6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]).

Additionally, the district was required to offer the student a FAPE in the LRE for the 2021-22 school year. While the parents may have preferred the setting at Windward and believed it was the best learning environment for the student for the 2021-22 school year, 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]). However, the district was required to consider the LRE for the student when recommending a placement for him on the continuum of services, a constraint which does not similarly affect the recommendations of private evaluators. Here, the evidence shows the April 2021 CSE addressed the student's needs, including his math needs, through a variety of recommended services, strategies and supports and,

accordingly, the April 2021 IEP was reasonably calculated to enable the student to receive educational benefits in light of his circumstances, while adhering to the mandate that the student be educated in the LRE.

## **VII. Conclusion**

For the reasons described above, I find that the April 2021 IEP addressed the student's needs in math with an appropriate educational program and, as a result, the district offered the student a FAPE for the 2021-22 school year. Accordingly, the necessary inquiry is at an end.

**Dated:**            **Albany, New York**  
                         **March 14, 2025**

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