



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-137

### **Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

Law Offices of Neal Howard Rosenberg, attorneys for respondents, Marc Gottlieb, Esq., of counsel

## **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 respondent's (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Winston Preparatory School (Winston Prep) for the 2013-14 school year. The appeal must be dismissed.

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

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

§§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

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

In the instant appeal, the student was first diagnosed with developmental disabilities and received "targeted" interventions including speech-language therapy beginning at three years of age (Dist. Ex. 4 at p. 3; see June 11, 2014 Tr. p. 31).<sup>1</sup> The hearing record reflects that the student attended the same public school from kindergarten through the 2012-13 (fifth grade) school year

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<sup>1</sup> The first two volumes of the hearing transcript are not consecutively paginated; accordingly all citations to the hearing transcript are preceded by the date of the transcript being referenced.

(May 16, 2014 Tr. p. 13; June 11, 2014 Tr. pp. 5, 31). During the 2012-13 school year, the student received, among other things, integrated co-teaching (ICT) services in English language arts (ELA), mathematics, and social studies (Dist. Ex. 5 at pp. 12-13).

On June 19, 2013, a CSE convened to conduct the student's annual review and to formulate an IEP for the 2013-14 school year (Dist. Ex. 3). Attendees included a district school psychologist who also served as a district representative, the student's special education teacher, regular education teacher, and speech-language therapist, as well as the student's mother (*id.* at p. 13; *see* June 11, 2014 Tr. p. 10). Having found that the student remained eligible for special education services as a student with a learning disability,<sup>2</sup> the June 2013 CSE recommended continued placement in a general education classroom with ICT services for ELA, mathematics, and social studies (Dist. Ex. 3 at pp. 1, 6). In addition, the June 2013 CSE recommended the related service of speech-language therapy two times per week for 30 minutes in a group of five (*id.* at p. 6). At the time of the June 2013 CSE meeting, the student's mother indicated that the student required ICT support in all subject areas and that the student's performance would be affected by the large class size in a district public middle school (*id.* at p. 11). By letters dated August 15, 2013, and September 23, 2013, the parents notified the district that the June 2013 IEP and placement recommendation received through the "middle school placement process" were not appropriate and they would be unilaterally placing the student at Winston Prep and seeking funding from the district (Parent Exs. B at p. 1; C at p. 1).<sup>3</sup>

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

In a due process complaint notice dated January 31, 2014, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year, Winston Prep constituted an appropriate unilateral placement and equitable considerations weighed in favor of the parents' requested relief (Dist. Ex. 1). With respect to the process by which the June 2013 IEP was formulated, the parents alleged that the June 2013 CSE failed to consider the results of a privately-obtained May 2013 neuropsychological evaluation report, failed to provide the student with a placement recommendation subsequent to the CSE meeting, and failed to respond to the parents' concerns and a request for a classroom profile (*id.* at p. 2). As for the June 2013 IEP, the parents alleged that the IEP did not reflect the results of the evaluative data available to the CSE, that the goals contained therein were insufficient and failed to address the needs of the student, and that the recommended ICT program was inappropriate and would not provide the student with sufficient support to address his "significant deficits" (*id.* at pp. 1-2). The parents also asserted that the recommendation required the student to be inappropriately grouped with mainstream peers (*id.*).

Regarding the assigned public school site, the parents argued that both the proposed classroom and the school environment in general were too large and chaotic and would not provide

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<sup>2</sup> The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this proceeding (*see* 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

<sup>3</sup> In addition, prior to the June 2013 CSE meeting, the parents notified the district by letter dated May 30, 2013, that the student had received a "middle school placement letter" assigning the student to a particular public school site; however, the parents indicated that until a CSE meeting was held, they could not determine the appropriateness of the recommended public school site (Parent Ex. A at p. 1).

the student with the small structured environment necessary for him to make educational progress (District Ex. 1 at p. 2). Moreover, the parents alleged that the assigned school did not offer a multi-sensory approach to reading and the proposed classroom teacher was not trained in a particular instructional methodology (id.). The parents also argued that the student would not be appropriately functionally grouped in the "ICT classroom" and would be mainstreamed with large groups of students throughout the day (id.). Finally, the parents asserted that by not responding to the concerns expressed in their letters, the district "inhibited parental participation in the process" (id. at pp. 2-3). For relief, the parents sought prospective funding for tuition and related services at Winston Prep and transportation (id. at p. 3).

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

An impartial hearing convened on May 16, 2014, and after three days of hearings, concluded on June 27, 2014 (May 16, 2014 Tr. pp. 1-86; June 11, 2014 Tr. pp. 1-82; June 27, 2014 Tr. pp. 83-117). In a decision dated July 28, 2014, an IHO held, among other things, that the district failed to meet its burden of proving the appropriateness of its recommended program (IHO Decision). Specifically, the IHO found that while the June 2013 IEP incorporated the results of the private neuropsychological evaluation, "the IEP goals were deficient, in that they failed to address decoding, which is an area of significant difficulty for [the student]" (id. at pp. 5; 9). Additionally, the IHO held that "[s]ubstantively, the recommended program is inappropriate because it fails to provide special education support for [the student] in science, which he would need for the reading requirements of the science curriculum" (id. at p. 9). With respect to this latter finding, the IHO acknowledged that although the parents did not specifically identify special education support in science as a deficiency in the offered program in their due process complaint, she found that it was raised within their argument "that the recommended program failed to provide sufficient support" for the student (id.).

In addition to the above, the IHO found Winston Prep was appropriate to meet the student's needs, and equitable considerations supported the parents' request for tuition funding (IHO Decision at pp. 9-11). In particular, the IHO found that Winston Prep provided the student "with educational instruction specially designed to meet his unique needs" (id. at pp. 10-11), and that the parents cooperated with the June 2013 CSE, provided notice of their intent to unilaterally enroll the student, and the tuition charged by Winston Prep was reasonable (id. at p. 11). Accordingly, the IHO ordered the district to provide funding for the costs of the student's tuition at Winston Prep for the 2013-14 school year (id.).

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

The district appeals and seeks to overturn the IHO's determination that it failed to show that it offered the student a FAPE for the 2013-14 school year.<sup>4</sup> In particular, the district contends the June 2013 CSE properly considered evaluative data regarding the student, and that the resulting IEP was appropriate. The district also argues that the IHO erred in finding that the June 2013 IEP's goals were deficient because they failed to address decoding. According to the district, decoding was not specifically identified by the student's then-teacher as an area of weakness, and it maintains

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<sup>4</sup> The district does not challenge the IHO's determinations regarding the appropriateness of the student's unilateral placement at Winston Prep or that equitable considerations favor the parents (Pet. ¶ 7 n.2).

that the goals in general "address the [s]tudent's needs that result from his disability," noting that the June 2013 IEP includes two speech-language therapy and two reading goals. The district also asserts that "as a whole" the June 2013 IEP addressed the student's decoding needs. In addition, and with respect to the IHO's finding regarding the student's need for ICT services in science, the district contends both that this issue was not properly raised in the parent's due process complaint notice, and that the record establishes that the student would have received sufficient special education support throughout his education program, including for science. In this regard district asserts that the recommendation for ICT services in ELA, math, and social studies, the provision of speech-language therapy, and the recommendation for accommodations, modifications, and strategies to address the student's management needs, would have provided the student with adequate support. Finally, the district contends that the parents' arguments regarding the particular assigned public school, and the manner by which the recommendation for that school was made, are speculative as a matter of law.

The parents answer and allege that the IHO correctly determined that the district did not offer the student a FAPE for the 2013-14 school year. Specifically, and among other things, the parents argue that the June 2013 IEP failed to accurately describe the student and address his individual needs and that an "ICT class" was not a small enough environment to provide the student with the requisite support he needed to make educational progress. Furthermore, the parents assert that while the June 2013 IEP acknowledged that the student has significant deficits with regard to decoding, it failed to address those needs.

## **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. 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; 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10

[S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at \*15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No.

07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Scope of Review**

As an initial matter, the district argued at the impartial hearing, and now argues on appeal, that the parents' failure to specifically raise in their due process complaint notice the issue of special education support for the student in science bars them from raising that issue. However, while the district is correct in that the parents' due process complaint notice does not explicitly reference a need for support in science, it does challenge the district's recommended program as being "substantively inappropriate" and, as the IHO noted, alleges that the IEP does not provide sufficient support for the student (Dist. Ex. 1 at p. 1). At the hearing before the IHO, therefore, the district had the burden of proving otherwise (see Educ. Law § 4404[1][c]). Accordingly, the question presented revolves not on whether the student received sufficient support in his science class, but whether the district adequately established that the program being offered (which here includes the provision of ICT services for three specific academic classes) was sufficient to address the student's needs. This is especially true where, as here, the hearing record reflects that the alleged lack of support "in all classes/subjects" was raised as an issue at the June 2013 CSE meeting (Dist. Ex. 3 at p. 11). Accordingly, I decline to find that the IHO's consideration of how the student would have been supported in other classes, which is relevant to the question of whether the program offered to the student was sufficient, was an error.

## **B. June 2013 IEP**

As noted above, the district argues that the IHO erred in finding that it failed to establish that it offered the student a FAPE for the 2013-14 school year. Specifically, the district argues that the June 2013 CSE adequately considered the results of the May 2013 neuropsychological evaluation in formulating the June 2013 IEP goals, and that the June 2013 IEP as a whole addressed the decoding needs of the student. In addition, the district argues the record establishes that the student would have received sufficient special education support throughout his educational program, including for science. However, upon careful consideration, I find that while the hearing record supports the district's position that the June 2013 CSE considered the results of the May 2013 neuropsychological evaluation, and to an extent the report of that evaluation is reflected in the June 2013 IEP, I am unable to find that the June 2013 CSE adequately considered and addressed the student's decoding needs (May 16, 2014 Tr. pp. 14, 45; Dist. Ex. 2 at p. 3), or that the student would have received "sufficient special education support throughout his educational program," as the district suggests.

Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). Furthermore, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]).

According to the May 2013 private neuropsychological evaluation report, the student was referred for the evaluation to "elucidate his overall neuropsychological functioning, as well as to describe the specific nature and extent of his neuropsychological challenges; specifically, his failure to progress academically" (Dist. Ex. 4 at p. 1). As part of the neuropsychological evaluation, an administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) indicated the student's cognitive abilities fell within the average to high average range of intellectual functioning, with variability in his cognitive abilities (id. at pp. 1-2; see Parent Ex. A). The evaluator reported that the "disparity in [the student's] intellectual functioning [was] due to a learning disability borne out of a number of neurocognitive deficits" (Dist. Ex. 4 at p. 2). The evaluator reported that the student had an information processing disorder that affected both his verbal and non-verbal (visual-spatial) abilities (id. at p. 2). In addition, the report reflects that the student exhibited reading, writing, spelling, and mathematics deficits, as well as difficulty in multiple areas of executive functioning (id. at pp. 9-10). The evaluator reported that the student's social skills fell within the high average range of functioning, although emotionally he was beginning to demonstrate frustration and a negative mood related to the impact of his cognitive difficulties (id. at p. 10).

With regard to reading, the evaluator assessed the student's word reading, reading comprehension, and pseudoword decoding skills and reported that the student functioned within the below average range for overall reading ability (Dist. Ex. 4 at pp. 5, 9-10). The May 2013 neuropsychological evaluation report specified that the student's reading rate was "slow and better



than only five percent of his same age peers" (id. at p. 10). In addition, the report reflected that the student's oral reading accuracy was better than only eight percent of his peers (id.). The report indicated that on a brief re-evaluation of the student's ability to read single words, the student performed at the third grade level (id.). The evaluator concluded that the student continued to show evidence of a reading disability and that he was not on grade level with regard to reading (id. at pp. 9-10). The evaluator also reported that the student's total reading score fell in the 10th percentile, his basic reading composite score fell in the 9th percentile, that his reading comprehension and fluency composite score was in the 16th percentile, and that his ability to decode pseudowords fell in the 10th percentile (id. at 10).

The neuropsychological evaluation report also contained the evaluator's diagnostic impressions of the student, including that he demonstrated significant academic difficulties and met the criteria for diagnoses of a learning disability not otherwise specified and a reading disorder (Dist. Ex. 4 at p. 11). Among other recommendations, the evaluator concluded that a comprehensive reading evaluation of the student should be completed and that the student should be subsequently enrolled in the Orton-Gillingham program of remediation following that evaluation (id.). The evaluator further opined that the student could benefit from a multisensory approach to the acquisition of basic reading skills and comprehension (id.).

Consistent with the May 2013 neuropsychological evaluation report, the June 2013 IEP reflected that the student's reading comprehension skills were in the sixteenth percentile and his pseudoword decoding skills were in the tenth percentile of same-age peers (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 4 at p. 10). The academic performance and learning characteristics portion of the present levels of performance section in the June 2013 IEP indicated that the student was "reading on a level R in the Fountas and Pinnell leveling system," equating to approximately a fourth grade level (Dist. Ex. 3 at pp. 1, 10; see May 16, 2014 Tr. pp. 40-42, 80-81). According to the June 2013 IEP, the student was able to successfully retell stories sequentially and could answer literal comprehension questions about the plot, setting, and vocabulary (Dist. Ex. 3 at p. 1). The June 2013 IEP also indicated that the student struggled to answer more inferential comprehension questions and elaborate on his thinking, or to provide clear, multiple pieces of evidence to support his thinking (id.).

Further, the special education teacher who provided the student with ICT services during the 2012-13 school year testified that in reading and writing the student was "definitely below grade level expectations" and "less confident" in his skills (May 16, 2014 Tr. pp. 34, 40). The special education teacher testified that she provided information about the student's inferential reading comprehension difficulties at the June 2013 CSE meeting; while a review of the IEP shows that those needs were described in the present levels of performance, the student's decoding needs were not described in the IEP other than to indicate his performance in the 10th percentile on the May 2013 neuropsychological evaluation (May 16, 2014 Tr. pp. 46-47; see Dist. Ex. 3 at p. 1). A review of the testimony provided by the special education teacher does not indicate that she provided information about the student's decoding needs or abilities to the June 2013 CSE (see May 16, 2014 Tr. pp. 31-84).

In light of the above, I am inclined to agree with the IHO that decoding (especially in light of the student's general struggles with reading) was an identified area of difficulty for the student

which the June 2013 CSE should have addressed.<sup>5</sup> However, and despite the district's contentions that April 2013 IEP addresses the student's needs in reading in general (or that the IEP as a whole addresses the student's decoding needs), I am unable to determine on the record before me that such is the case. In this regard I note that, as the IHO found, there are no goals that specifically address the student's decoding needs. Rather, the June 2013 IEP includes eight annual goals in the areas of reading, writing, mathematics, and speech-language (Dist. Ex. 3 at pp. 4-5). One of the two annual goals on the IEP related to reading indicates the student would make statements about texts he was reading supported with textual evidence, while the second indicates the student would develop theories or ideas about characters and include textual information to support these theories and ideas; neither of these annual goals directly addressed decoding skills (*id.* at p. 4). Likewise, a review of the remainder of the student's annual goals shows that they also did not address his decoding needs (*id.* at pp. 4-5). In this regard, while the district asserts that the speech-language and reading goals adequately addressed the student's decoding needs, I can find no support in the hearing record for this assertion.

Further, I note that the June 2013 IEP includes various management needs, services and supports to assist the student.<sup>6</sup> However, while these supports and services may have assisted the student in making progress with regard to certain of his academic skills, upon careful review of the hearing record the district has not established that such supports in a general education classroom with ICT services were sufficient to address the student's decoding needs without any services directly aimed at addressing that deficit. Moreover, and with respect to the district's recommendation for ICT services in ELA, math, and social studies, it is unclear from the record how the provision of ICT services for just these portions of the school day would have adequately addressed the student's needs with regard to decoding, inasmuch as those needs are not addressed by the June 2013 IEP (other than noting that the student achieved a score within the 10th percentile on an assessment of his decoding skills). In this regard I note that the district offered no testimonial or documentary evidence linking any of the services provided in the IEP to the student's needs in this area. Accordingly, I cannot find on the record before me that the student's decoding needs are addressed by the June 2013 IEP as the district suggests.

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<sup>5</sup> While the student's June 2012 IEP included a decoding goal which the IEP indicates was met (Dist. Ex. 5 at p. 6), there is no indication in the record that decoding was not addressed by the June 2013 CSE because the student had met this goal. Moreover, the decoding goal in the June 2012 IEP is relatively vague and required only that the student "better" self-monitor his reading, noting that if the student "makes a decoding error and/or the text does not make sense to him, he will stop, go back, and reread for clarification" (*id.*). Thus, the fact that this goal may have been met, at best, suggests that at the end of the 2012-13 school year, the student was "better" at self-monitoring his reading needs. This alone, however, does not establish that the student does not still have decoding needs.

<sup>6</sup> The June 2013 IEP, for example includes the following management needs: preferential seating, repeated directions, visuals, direct instruction, and opportunities for repeated practice (Dist. Ex. 3 at p. 2). Additionally, the IEP indicated that the student benefitted from graphic organizers, clear and concise directions, and lesson previewing (*id.*). The June 2013 IEP included testing accommodations such as extended to double time, testing in a separate location with a group no larger than twelve, directions read and reread, questions read aloud, and the aid of masks and markers to maintain place (*id.* at p. 8). The June 2013 CSE recommended placement in a general education classroom with ICT services in ELA (fifteen times per week), mathematics (ten times per week), and social studies (five times per week) (*id.* at p. 6). The June 2013 CSE also recommended that the student receive two 30-minute sessions per week of group speech-language therapy in a separate location or classroom (*id.*).

Nor am I able to find, again as the district suggests, that the student would have received sufficient special education support throughout his educational program, including for science. In this regard I note that the district appears to suggest that the June 2013 CSE did not need to consider the student's needs in science because the June 2013 IEP was based on the student's then-current subjects which, at the time of the June 2013 CSE meeting, did not include science. However, this assertion is incorrect both factually and legally. Rather, the evidence in the hearing record indicates that the student attended a general education science class during the 2012-13 school year on a twice weekly basis (May 16, 2014 Tr. pp. 74-77). Moreover, to develop an IEP based only on the subjects the student is attending at the time the IEP is developed, with no consideration for the student's needs the following school year during which the majority of the implementation of the IEP was to take place, violates the district's obligation to consider the student's unique needs. Accordingly, I am unable to find that the June 2013 IEP, in fact, would have adequately supported the student.

Finally, the district asserts that the student made progress during the 2012-13 school year while receiving services under an IEP substantially similar to the June 2013 IEP, such that the recommended program was reasonably calculated to provide the student with educational benefits (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153 [10th Cir. 2008]; 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]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F.Supp.2d 606, 650 [S.D.N.Y. 2011]). However, while the district is correct that the district school psychologist and the student's special education teacher each testified that the student made progress during the 2012-13 school year (Tr. pp. 16, 26, 39-42, 48, 63-64), and further while the student's previous IEP suggests that he made progress during that year,<sup>7</sup> even if I were inclined to find that such evidence of progress was sufficient, I note that the student's prior (June 2012) IEP included a goal explicitly directed at addressing his ability to self-monitor his decoding skills which, as noted above, the June 2013 IEP does not address (Dist. Ex. 5 at p. 6). In addition, I note that the June 2012 IEP also included a goal directed at the student's auditory processing deficits, for which there is no clear parallel in the June 2013 IEP (id. at p. 11).<sup>8</sup> Accordingly, I am unable to find on the record before me that the student's two IEPs are substantially similar.

## **VII. Conclusion**

Based on the above, the evidence in the hearing record supports the IHO's determination that the district failed to demonstrate that it offered the student a FAPE for the 2013-14 school

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<sup>7</sup> Specifically, the IEP indicates "goal met" with respect to various goals without further description or explanation (Dist. Ex. 5 at pp. 4-11).

<sup>8</sup> The May 2013 neuropsychological evaluation determined that the student had difficulty processing information, that his processing deficits "underscore[d] the nature of his learning disability," and reflected that his ability to process information fell in the borderline range (Dist. Ex. 4 at pp. 2, 7, 9, 11).

year. As such, it is unnecessary for me to address the parties' remaining claims, including those related to the public school to which the student was assigned.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
October 24, 2014**

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**HOWARD BEYER  
STATE REVIEW OFFICER**