



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 18-095

**Application of the BOARD OF EDUCATION OF THE  
HARRISON CENTRAL 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:**

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, by Michael K. Lambert, Esq.

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondents, by Diana Gersten, Esq., and Linda Goldman, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Windward School (Windward) for the 2016-17 school year. The appeal must be sustained.

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

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

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

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

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

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

The student has been the subject of prior due process proceedings concerning the 2014-15 and 2015-16 school years (see Application of the Bd. of Educ., Appeal No. 17-017). The parties' familiarity with the underlying facts and procedural history is presumed and they will not be repeated at length herein. Briefly, the student attended a parochial nonpublic school from kindergarten through second grade; she attended Windward beginning in the 2014-15 school year (third grade) and continuing through the 2016-17 school year (fifth grade) at issue in this proceeding (see Parent Exs. B; D; Dist. Exs. 7 at pp. 1, 3; 13 at pp. 1-2; 14 at p. 5; 17).

In August 2014, the parents obtained an independent neuropsychological evaluation of the student (Dist. Ex. 13). The August 2014 neuropsychological evaluation, which was received by the district in June 2015, indicated the student presented with a "severe language based learning disorder," met the criteria for dyslexia, specific learning disorder in reading, and specific learning disorder in mathematics, and "require[d] a small full-time special education program . . . for children with good cognitive and academic potential" (id. at pp. 1, 7, 9). In June 2015, the district completed an educational evaluation, a speech-language evaluation, and a psychological assessment of the student (Dist. Exs. 14; 16; 18). Notably, the psychological assessment indicated that the student's overall intellectual abilities fell within the average range; however, the general intellectual ability score was not considered to be a statistically valid reflection of her abilities because of the significant variability among the student's skills, which included strengths in processing speed and visual-spatial thinking skills and relative weaknesses in inductive reasoning and working memory skills (Dist. Ex. 18 at pp. 4-7). The educational evaluation revealed that many of the student's academic skills were within the average range; however, the student demonstrated below average skills in reading comprehension, nonsense word decoding, and decoding fluency (Dist. Ex. 14 at p. 5). According to the speech-language evaluation, the student demonstrated average receptive and expressive language skills but exhibited relative weaknesses in inferential reasoning and language processing (Dist. Ex. 16 at p. 3). In May 2016, the district conducted an observation of the student in her language arts class at Windward, the report of which indicated the student's academic, behavioral, and language skills were at grade level to the extent observed (Dist. Ex. 37).

On June 8, 2016, a CSE<sup>1</sup> convened to develop the student's IEP for the 2016-17 school year (Dist. Ex. 5).<sup>2</sup> The June 2016 CSE considered, among other information, a Windward report, the results of the August 2014 neuropsychological evaluation, the June 2015 educational, speech-language, and psychological evaluations, and the May 2016 classroom observation (Dist. Exs. 5 at p. 3; 12; 13; 14; 16; 18; 37). For the 2016-17 school year, the June 2016 CSE recommended a program consisting of integrated co-teaching (ICT) services for four hours per day, a resource room program five times per six-day cycle for 45-minutes, and counseling once per six-day cycle for 30-minutes (Dist. Ex. 5 at pp. 1-2, 10). At the CSE meeting, the parent informed the district participants that she felt that the student benefited from a small classroom setting and was "not sure if she agree[d] with" the recommendation for ICT services and a resource room program (id. at p. 2).

By 10-day notice letter to the district dated August 22, 2016, the parents asserted that the June 2016 IEP denied the student a free appropriate public education (FAPE) on both procedural and substantive grounds, rejected the IEP, and notified the district of their intention to place the student at Windward for the 2016-17 school year and seek district funding for this placement (Dist. Ex. 38). In response to the parents' letter, the district's director of special education and support services (the director) wrote that the CSE believed that the June 2016 IEP was appropriate;

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<sup>1</sup> Both of the IEPs at issue in this proceeding were developed by Subcommittees on Special Education; however, as no claims are raised challenging the development of the IEPs by CSE subcommittees, they are referenced in this decision as CSEs.

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

however, she offered to reconvene the CSE to discuss the parents' concerns and, "to the extent appropriate, consider modifications to the IEP" (Parent Ex. O).

On September 30, 2016, a CSE convened for a program review (Dist. Ex. 5A). In addition to the evaluative information considered by the June 2016 CSE, the September 2016 CSE considered further input from the student's parent and the student's Windward providers (Dist. Ex. 5A at pp. 1-3, 5-8). The September 2016 IEP meeting information summary reflected that the student had transitioned well into the upper school at Windward, but could be sensitive and fragile at times (*id.* at p. 1). The student was reported to work hard and do well in the Windward program and was also described as social and chatty (*id.*). The Windward representative who participated in the September 2016 CSE meeting also indicated that the student was in the "middle level" math and English language arts (ELA) groups, was progressing with decoding and encoding, demonstrated strong factual and computation skills, but needed more guidance with the "language of math" (*id.*). The Windward representative discussed the student's "report card and testing grid" and reported that the student was making progress at Windward (*id.* at p. 2). According to the meeting information summary, the CSE addressed each of the concerns set forth in the parents' 10-day notice letter (*id.*). The meeting information summary reflected that the CSE reviewed the student's need for program modifications and the student's "[m]other and Windward agreed that the program modifications outlined in the IEP were appropriate and still were needed" (*id.*). Accordingly, the district added a notation to the management needs section of the IEP that the student required the program modifications and accommodations included in the IEP (*id.* at pp. 2, 8, 10-11). The meeting information summary also indicated that the CSE would obtain consent to update the student's social history despite the parent's report "that there were no significant changes" and to reassess the student's anxiety in November 2016 (*id.* at p. 2). Also noted was the student's mother's belief that the student needed a "full time special education program at Windward" (*id.*). The meeting information summary reflected that the director, serving as the CSE chairperson, explained that the CSE did "not have the authority to recommend" Windward, because it was not a State-approved nonpublic school (*id.*).<sup>3</sup> According to the written comments, the CSE then discussed the availability of an in-district 12:1+2 language-based special class; with each of the CSE members agreeing that this placement would be "overly restrictive" for the student (*id.*). The September 2016 CSE indicated that the student would receive specialized instruction using Orton-Gillingham techniques (*id.*). The September 2016 CSE also agreed to add an annual goal in the area of social skills to assist the student with interpreting social situations (*id.* at pp. 2, 10). According to the meeting information summary, the student's mother and "Windward" were in agreement with the IEP goals (*id.* at p. 2).

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

By due process complaint notice dated June 2, 2017, the parents alleged that the district failed to offer the student a FAPE for the 2016-17 school year (Dist. Ex. 1). The parents asserted that the June 2016 CSE discounted the recommendations made by private evaluators in evaluative information provided by the parents, disregarded information provided by the student's teachers, and ignored input from the parents, thereby denying them the opportunity to participate in the development of the student's IEP (*id.* at pp. 2, 5). The parents also claimed that the June 2016 CSE

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<sup>3</sup> The Commissioner of Education has not approved the Windward School as a school with which districts may contract for the instruction of students with disabilities (see NYCRR 200.1[d], 200.7).

considered "stale and inaccurate" evaluative information that did not reflect the student's present functional levels, specifically asserting that the CSE failed to update the student's social history and used an outdated assessment when considering the student's social development (id. at p. 4).

The parents claimed that the June 2016 IEP omitted the student's management needs and did not acknowledge the student's need for "substantial special attention for academic as well as social emotional challenges" (Dist. Ex. 1 at p. 3). The parents further contended that the June 2016 IEP did not reflect the student's variability in skills and deficits (id. at p. 2). The parents also alleged that the June 2016 IEP inaccurately reported the student's anxiety as average despite reports that the student was struggling, failed to adequately address the student's anxiety by recommending one 30-minute session of counseling per six-day cycle, and did not provide sufficient transitional support services (id. at p. 4).

With regard to goals and objectives, the parents claimed that the annual goals were insufficient, generic and vague, and did not accurately reflect the student's educational needs (id. at p. 5). The parents further argued that the June 2016 IEP failed to include social skills goals and contained insufficient goals and services to address the student's social development (id. at p. 6). The parents alleged that the June 2016 CSE had "no legitimate basis" for changing the student's placement from a small specialized school to a larger general education classroom, improperly relied on "isolated test scores" without acknowledging the student's deficits, and that the student required a "small, full-time special education program" to address her academic and social/emotional needs (id. at pp. 2-5). The parents further contended that the June 2016 CSE's recommendation for ICT services and a resource room program was inadequate because it did not provide full-time special education support, could not address the student's complex special education needs, and would not permit her to make progress academically or social/emotionally (id. at pp. 3-5). The parents further alleged that the June 2016 CSE predetermined its recommendation and refused to consider anything other than a general education placement (id. at p. 5).

The parents also argued that in response to their concerns regarding the inadequacy of the June 2016 IEP, the CSE reconvened on September 30, 2016, to attempt "to rectify the deficiencies" in the June 2016 IEP (Dist. Ex. 1 at p. 6). The parents asserted that the addition of management needs and social skills goals, updating the student's social history, and requiring additional assessments regarding the student's anxiety was "not a legitimate way of curing the deficiencies in the original 2016-17 IEP" (id.). The parents also claimed that the CSE indicated that the students in its "full-time language-based special education program" were "more cognitively compromised" than the student and "admitted that it lacked a suitable full-time special education program" for the student but "flatly refused to consider placing [the student] in any other appropriate full-time special education program," reflecting the CSE's "refusal to meaningfully consider alternative programs and services" (id.). The parents further alleged that the CSE stated it had no authority to recommend "any approved non-public school," even if necessary (id.). The parents asserted that the unilateral placement of the student at the Windward School was appropriate and requested reimbursement for the costs of the unilateral placement (id. at p. 7).

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

The parties proceeded to an impartial hearing on October 4, 2017, which concluded on April 27, 2018, after six days of proceedings (Tr. pp. 1-1139).<sup>4</sup> By decision dated June 30, 2018, the IHO determined that the hearing record supported a finding that the student's academic delays, dyslexia, ADHD and social/emotional needs showed that the student required a full-time special education program for her to make progress that was appropriate in light of her circumstances and that ICT services did not meet the State definition for a special education class (IHO Decision at p. 32). The IHO also found that the district recommended an ICT class "because it was the best choice available" in the district, as the special classes available in the district did not include students with similar academic, social/emotional, or management needs (*id.* at pp. 32-33). The IHO noted that the student "continued to struggle academically" at Windward notwithstanding the level of support provided, and it "defie[d] reason to think" the student would make progress in a larger class with typically developing peers, which would cause her anxiety and challenge her self-esteem (*id.* at p. 33). The IHO further found the student "would have difficulty keeping up with the pace of a general education class" (*id.*).

The IHO then found that the CSE should have considered a nonpublic school placement given that the district acknowledged that the student required a full-time special education placement and that it could not "offer an appropriate full time special education class placement" (IHO Decision at p. 33).<sup>5</sup> The IHO determined that the district's failure to consider a nonpublic school placement "violated the student's rights, resulting in a denial of a FAPE and amount[ed] to an impermissible predetermination that denied the parents' opportunity to meaningfully participate in the decision making process" (*id.*).

Considering the appropriateness of the parents' unilateral placement at Windward, the IHO found that the student had made slow and steady progress and that Windward tailored curriculum to the student's needs, provided reading instruction using the Orton-Gillingham methodology, multi-sensory instruction, and a small student-to-teacher ratio (IHO Decision at pp. 33-34). With regard to equitable considerations, the IHO found that the parents cooperated with the CSE process and there were no factors that would preclude or limit reimbursement (*id.* at p. 34). Therefore, the IHO ordered the district to reimburse the parents for the student's tuition at Windward for the 2016-17 school year (*id.*).

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

The district appeals, arguing that the IHO made no findings relative to the June 2016 IEP. The district contends that regarding the September 2016 IEP, which was "the operative IEP in this case," the parents only challenged the CSE's statement that it did not have the authority to

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<sup>4</sup> The hearing record does not include, as required by State regulation, any documentation indicating that extension requests were granted after consideration by the IHO of the relevant factors (8 NYCRR 200.5[j][5][i], [ii], [iv]).

<sup>5</sup> The IHO determined it was "incumbent upon the CSE to refer the matter to the CBST team" for placement in a nonpublic school (IHO Decision at p. 33); however, as the district points out, the IHO appears to be referring to the "central based support team" placement process in different public school system (see e.g., Application of Student with a Disability, Appeal No. 16-070).

recommend a nonpublic school, even if necessary to offer the student a FAPE. The district alleges that notwithstanding the lack of claims raised regarding the September 2016 IEP, the IHO exceeded her jurisdiction by finding a denial of a FAPE based on "several purported defects" in the September 2016 IEP. The district further generally asserts that the claims raised in the parents' due process complaint notice were without merit.<sup>6</sup>

The district appeals the IHO's finding that the CSE did not recommend a full-time special education program, arguing that "the CSE recommended appropriate supports for the entirety of [the student's] academic day" and that the student did not need special education support during lunch, recess, and specials. The district contends that the CSE recommended an appropriate program of special education, related services, program modifications, and accommodations that were reasonably calculated to enable the student to receive educational benefit. The district further alleges that the IHO erred by relying on information that was not available to the CSE, including a privately-obtained 2017 neuropsychological evaluation, and that the student would not be able to stay on task and would have difficulty keeping up with the pace of a general education class. The district also contends that the IHO erred in finding that placement within a classroom with typically-developing peers would elevate the student's anxiety and failed to consider that the September 2016 IEP included extensive supports to address the student's anxiety, including counseling and annual goals.

The district also alleges that the IHO erred by concluding that the CSE improperly failed to consider a nonpublic school placement and that such failure constituted an impermissible predetermination of the recommended program.

With regard to the appropriateness of the parents' unilateral placement, the district alleges that the parents failed to establish that Windward was appropriate because the progress reports from Windward did not demonstrate that the student's needs were addressed or that progress was achieved. The district further alleges that there was no evidence of academic supports or individualized instruction provided to the student at Windward. Additionally, the district argues that the student did not have any opportunities to interact with nondisabled peers at Windward and that there was no evidence she was appropriately grouped with students having similar needs.

In an answer, the parents respond with admissions and denials and argue that the IHO's decision should be upheld in its entirety. The parents do not cross-appeal or otherwise identify for review those issues raised in the due process complaint notice that were not addressed by the IHO. The parents argue that the September 2016 IEP was not the operative IEP because it was not in place at the beginning of the 2016-17 school year and that they were justified in basing their decision to unilaterally place the student at Windward on the June 2016 IEP. The parents further assert that the IHO properly addressed the issues raised in their due process complaint notice. The parents argue that the IHO correctly found that the district recommended an ICT placement

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<sup>6</sup> State regulations provide that a request for review "shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]; see 8 NYCRR 279.8[c]). Much of the district's request for review, as well as its memorandum of law, focuses on addressing the complaints raised in the parents' due process complaint notice, rather than engaging with the IHO's specific findings challenged on appeal.

because it was the best choice available in-district and that the district lacked the ability to provide the full-time special education program it conceded the student required. The parents also argue that the evidence supported the IHO's finding that the student would have difficulty keeping up with the pace of a general education class with "part-time" ICT services because the student struggled to stay on task in the small special class setting at Windward containing between 10 and 12 students as well as in 1:1 settings. The parents allege that neither the CSE nor the district's witnesses had any first hand knowledge of the student's functional performance and the district should have adopted the recommendation of the student's neuropsychologist. The parents further argue that the evidence in the hearing record demonstrated that the student had significant academic deficits, anxiety related to her academic performance, and social/emotional deficits including anxiety and low self-esteem, such that she would not have been successful in the recommended mainstream setting with ICT services and a resource room program. The parents next contend that the IHO properly determined that the district's failure to consider nonpublic school placement options constituted impermissible predetermination. The parents also assert that the IHO correctly determined that Windward was an appropriate unilateral placement for the student and awarded reimbursement for the costs of the student's tuition at Windward for the 2016-17 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. \_\_\_, 137 S. Ct. 988, 999 [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., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [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>7</sup>

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<sup>7</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., 137 S. Ct. at 1000).

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

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Scope of Review**

Initially, the parents raised a number of claims in their due process complaint notice that were not addressed by the IHO and the parents have not cross-appealed from the IHO's failure to address their claims or otherwise asserted them on appeal as additional bases for upholding the IHO's determination that the district failed to offer the student a FAPE. In particular, the IHO did not address the parents' claims relating to the adequacy of the evaluative information available to the CSE; the adequacy of the statement of the student's present levels of functional performance; the adequacy of the annual goals; the failure of the June 2016 IEP to include social skills goals or adequately address the student's social development; whether the recommended counseling was sufficient to address the student's anxiety; the failure to provide transitional support services; and that the modification of the June 2016 IEP at the September 2016 CSE meeting was impermissible (compare Dist. Ex. 1 at pp. 2-6, with IHO Decision at pp. 31-34).

The regulations governing practice before the Office of State Review require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served within the time permitted by section 279.5 of this Part. A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f] [emphasis added]). Furthermore, the practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Accordingly, the claims set forth above have been abandoned and will not be further discussed below. The remaining issues for review include whether the IHO properly determined that the

CSE's recommendation for ICT services and a resource room program was not appropriate and that the CSE predetermined its recommendation by failing to consider a nonpublic school placement.

## 2. Operative IEP

As indicated above, the district alleges that the IHO made no findings relative to the June 2016 IEP. The district also argues that the parents only challenged one aspect of the September 2016 IEP, which was the CSE's statement that it did not have the authority to recommend an unapproved nonpublic school, even if such a recommendation was necessary to offer the student a FAPE. The district asserts that the September 2016 IEP was the operative IEP and that, because the parents did not challenge any aspects of that IEP, the IHO erred in finding a denial of a FAPE based on purported defects in it. The parents argue that the June 2016 IEP was the operative IEP and that they were justified in unilaterally placing the student at Windward based on the June 2016 IEP.

As discussed above, the June 2016 and September 2016 IEPs were substantively similar, with the only significant differences being the addition of a statement of the student's management needs and a social skills goal (compare Dist. Ex. 5, with Dist. Ex. 5A). As noted above, the IHO did not address the adequacy of the management needs or annual goals in her decision and the parents have not alleged on appeal that the failure of the recommended program to contain a statement of the student's management needs or a social skills goal for the first month of the school year constituted a denial of a FAPE.<sup>8</sup>

The district's assertion that the September 2016 IEP was the operative IEP is not supported by any citation to authority. In any event, the district's contention that the September 2016 IEP was not challenged by the parents paints with too broad a brush, ignoring that the IHO did not clearly indicate which IEP she was addressing in her decision, likely because the program recommended by both IEPs was largely the same, and the majority of the claims asserted by the parents applied equally to both IEPs. To the extent the IHO determined that the CSE's recommendation for ICT services and a resource room program was not appropriate and that the CSE predetermined its recommendation by failing to consider a nonpublic school placement, the recommendation was the same in both IEPs, and I decline to reverse the IHO's decision on this basis. Accordingly, for purposes of this decision the IEPs are largely identical and although

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<sup>8</sup> To the extent that the June 2016 IEP did not explicitly indicate that the student had management needs (see Dist. Ex. 5 at p. 8), management needs are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). The June 2016 IEP provided a number of supplementary aids and services, program modifications, and accommodations designed to address these needs (Dist. Ex. 5 at pp. 10-11), which the parent agreed were appropriate (Tr. pp. 924-25). However, the director indicated her misapprehension that management needs indicated behavioral needs as opposed to the program modifications required by the student (Tr. pp. 120-21). Accordingly, the September 2016 IEP reflected that the student's management needs consisted of "the program modifications and accommodations outlined under Supplementary Aids and Program Modifications" (Dist. Ex. 5A at p. 8), which were unchanged from the June 2016 IEP (compare Dist. Ex. 5 at pp. 10-11, with Dist. Ex. 5A at pp. 10-11), and which both the parent and Windward staff agreed were appropriate (id. at p. 2; see Tr. p. 938).

citations are provided to the September 2016 IEP, the conclusions apply equally to the program recommended by the June 2016 CSE.

## **B. Appropriateness of the IEP**

Turning to the merits of the district's appeal, the district asserts that the IHO erred in finding that the CSE did not recommend a full-time special education program, arguing that the CSE recommended supports for the entirety of the academic day and that the student did not need special education supports during lunch, recess, and specials. The district contends that the CSE recommended an appropriate program of special education, related services, modifications and accommodations that were reasonably calculated to confer educational benefit to the student.

In her decision, the IHO stated that the district failed to recommend a "full-time special education program" and appears to use this phrase interchangeably with "special class" (IHO Decision at pp. 32-33). Special education is defined by federal and State law as "specially designed instruction" (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]) and specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]). ICT services are defined as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Resource room program is defined as "a special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]). Special class is defined as "a class consisting of students with disabilities who have been grouped together because of similar individual needs for the purpose of being provided specially designed instruction" (8 NYCRR 200.1[uu]). Accordingly, each of ICT services, resource room programs, and special classes are defined in part by their provision of specially designed instruction to students with disabilities, and to the extent the IHO implied that the recommended program did not constitute a special education program, her determination does not comport with the definitions contained in State regulation. For the sake of clarity, the CSE's recommendation was for a special education program consisting of ICT services, a resource room program, and counseling services, the adequacy of which is the central issue in this appeal. To the extent the IHO found that the student required a full-time special class placement, the parties' arguments related to that point are discussed below.

### **1. Student's Needs**

Although the student's needs are not in dispute, much of the impartial hearing revolved around the parties' attempt to characterize the student's needs based in order to provide justification for their viewpoints of the appropriate placement for the student. As noted below, the student's mother was largely in agreement with the recommendations of the IEP, with the notable exception of the proposed ICT services. Consequently, I will first review the information describing the student's needs as a backdrop to the parties dispute over an appropriate setting in which to educate the student.

For the academic skills domain of the September 2016 IEP, information regarding the student's reading abilities was primarily drawn from the June 2015 educational evaluation, during which the Kaufman Test of Educational Achievement-Second Edition (K-TEA-II) was administered (Dist. Exs. 5A at pp. 4-5; 14). According to the IEP, the student's performance on several K-TEA-II subtests fell within the average range (Tr. pp. 79, 86, 99, 194-195; Dist. Exs. 5A at pp. 5-6; 14 at pp. 1-5, 7).<sup>9</sup> Specifically, her performance yielded the following standard scores and associated percentile ranks on administered subtests: letter-word recognition (91; 27th percentile), phonological awareness (99; 47th percentile), word recognition fluency (89; 23rd percentile), and naming facility (111; 77th percentile) (Dist. Exs. 5A at pp. 4-5; 14 at pp. 1-5, 7). The student's performance on a time-limited K-TEA-II task earned an above average standard score of 116 (86th percentile) (Dist. Exs. 5A at pp. 4-5; 14 at pp. 4, 7). In contrast, the student earned below average standard scores on subtests assessing reading comprehension (82; 12th percentile), nonsense word decoding (83; 13th percentile), and decoding fluency (80; 9th percentile) (Dist. Exs. 5A at p. 5; 14 at pp. 2, 4, 7). Consistent with the educational evaluation report, the September 2016 IEP stated that the student experienced difficulty responding to questions assessing inferential comprehension (Dist. Exs. 5A at p. 5; 14 at p. 2). In addition, the IEP reflected the report's description of the student's specific challenges related to decoding words with a wide range of elements, including words with "single/double consonant, consonant blends, consonant digraphs, short vowels, long vowels, vowel teams/diphthongs, silent letters, prefixes, suffixes, and unpredictable patterns" (Dist. Exs. 5A at p. 5; 14 at p. 1). According to the September 2016 IEP, the student was similarly challenged when attempting to decode nonsense words on a speeded subtest (Dist. Exs. 5A at p. 5; 14 at p. 4). The IEP noted, as did the educational evaluation, that when confronted with a challenging word, the student would attempt to employ a chunking strategy of breaking the word into parts (Dist. Exs. 5A at p. 5; 14 at p. 1). The IEP stated that according to the Windward team, the student continued to need support in applying decoding rules to her reading especially with multi-syllabic words, was reading on a third to fourth grade level, needed scaffolding to answer complex comprehension questions, did better when she listened to text, and could summarize and identify a main idea (Dist. Ex. 5A at p. 5).

The September 2016 IEP indicated that the student's performance on K-TEA-II measures of written language fell within the average range, with standard scores of 108 (70th percentile) on the written expression subtest and 92 (30th percentile) on the spelling subtest (Dist. Exs. 5A at pp. 5; 14 at pp. 3, 7). As stated in both the June 2015 educational evaluation report and the IEP, the student showed "strong skills in her ability to apply the rules for punctuation" and average skills with regard to capitalization, word form, and structure (Dist. Exs. 5A at p. 6; 14 at p. 3). As indicated on the IEP and according to the Windward team, the student's handwriting was "beautiful," she still struggled with spelling, was able to learn and apply rules, and was able to

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<sup>9</sup> The director of special education and support services confirmed that the June 2016 IEP did not include scores from the August 2014 neuropsychological evaluation report (Tr. p. 138-39). She explained that it was district practice to use school-based scores (Tr. p. 140). The director testified that although the August 2014 neuropsychological evaluation report was part of the June 2016 CSE discussion, it took place "a year before" (Tr. p. 150). She opined that the August 2014 neuropsychological evaluation report "was who [the student was], this wasn't current information with who she was academically when we had Windward testing and we had our own educational testing and we had classroom performance in the academic area (Tr. p. 153).

expand her sentences using conjunctions (Dist. Exs. 5A at p. 6). The student also needed assistance with multi-paragraph writing (id.).

The description of the student's math skills on the September 2016 IEP reflected the results of her performance on the K-TEA-II and were described as falling within the average range; specifically, the student earned a standard score of 92 (30th percentile) on the math concepts and applications subtest, and a standard score of 90 (25th percentile) on the math computation subtest (Dist. Exs. 5A at p. 5; 14 at pp. 2-3, 7). The IEP further explained that while the student showed average ability solving multiplication problems, her ability to solve addition, subtraction, and measurement problems was less well developed (Dist. Exs. 5A at p. 6; 14 at p. 2). When the student had difficulty understanding problems that were read to her, she reportedly voiced her confusion (Dist. Ex. 5A at p. 6). The IEP also remarked on the student's use of strategies to solve problems, such as using drawings to assist her when "working through division problems" (Dist. Exs. 5A at p. 6; 14 at p. 3). According to the Windward team, math was "much more difficult for the student than language arts," she had "worked on 4th grade concepts," and she needed the "language of math" "broken down and explained" to her (Dist. Exs. 5A at p. 6). As indicated by the Windward team, the IEP emphasized that the student benefited from direct instruction and re-teaching of concepts (id.).

The June 2015 speech-language evaluation results were also described in the September 2016 IEP, indicating that while the student's listening comprehension skills were within the average range, she exhibited a "relative weakness in the area of language processing of lengthy, complex information when not provided with picture cues, print or answer choices" (Dist. Exs. 5A at p. 6; 16 at p. 3). The IEP included comments from the speech-language evaluation report that described the student's strong executive functioning skills, use of metacognition, and strong attending skills, "even under conditions of background noise" (Dist. Exs. 5A at p. 6; 16 at pp. 2-3).<sup>10</sup> Notably, the speech-language therapist who conducted the June 2015 speech-language evaluation testified that the scores achieved by the student did "not support a severe language-based learning disorder," but did not opine with regard to whether the student had a learning disorder in reading (Tr. pp. 409-10).

The June 2015 psychological evaluation report reviewed by the CSE indicated that the student "evidenced significant variability among her skills," with scores ranging from low average to superior on the Woodcock-Johnson III Test of Cognitive Abilities (WJ-III) (Dist. Ex. 18 at pp. 4, 7). Specifically, the student's general intellectual ability and verbal ability fell in the average range at the 37th and 33rd percentiles, respectively (id.). The student's thinking ability, which was comprised of long-term retrieval, visual spatial thinking, auditory processing, and fluid reasoning, fell in the low to high average range at the 48th percentile overall (id.). Cognitive efficiency, which is comprised of processing speed and short-term memory, fell in the average to superior range, with processing speed being "one of her greatest cognitive strengths" (id. at pp. 5, 7). According to selected scales on the Beck Youth Inventory-Second Edition (BYI-II), the student scored in the average range in the areas of anxiety and self-concept (id. at p. 6). The student was

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<sup>10</sup>The speech-language evaluator's assessment of the student's attending behaviors during testing conflicts with the observations reported in the psychological evaluation report (Dist. Ex. 18 at p. 3).

reportedly generally engaged during the session, but her ability to concentrate and attend, especially during more demanding tasks, was variable (id. at pp. 3, 6).

The CSE also reviewed the May 2016 classroom observation took place at the private school during a language arts lesson (Dist. Ex. 37 at p. 1). The observation report indicated that when the student was called upon to read aloud, she did so "at a fast pace," decoded words accurately, and initially "exhibited generally good fluency" (id.). In a subsequent oral reading the observer noted that the student "exhibited occasional pauses/hesitations in fluency, and tended to repeat a word before resuming her original pace of oral reading" (id.). The student was able to accurately respond to comprehension questions which required her to infer and predict (id.). The student was observed to raise her hand several times to ask questions and offer answers (id.). Overall, the student reportedly performed as expected for her grade level (id. at pp. 1-2). The director explained how the June 2016 CSE reviewed the classroom observation conducted by the district and endorsed by the student's Windward teacher as being accurate (Tr. pp. 83-84). The observation showed that the student read at a fast pace with some pauses in fluency and according to the director indicated that the student was working at grade level expectation (Tr. p. 84; see Dist. Ex. 37). The director characterized the classroom observation as one piece of important information used to determine appropriate modifications, appropriate areas for remediation and how much the student could be integrated (Tr. p. 85). The director testified that based on the classroom observation, the district "felt [the student] absolutely could be and had a right to be with her general ed[ucation] peers" (id.).

While the September 2016 IEP portrayed the student as "polite and respectful in her interactions with teachers" and stated that she "consistently interact[ed] positively with peers," it also noted "a few incidents in which student ha[d] been involved in conflicts with peers" (Dist. Exs. 5A at p. 7; 18 at p. 6). According to the September 2016 IEP, the findings of the BYI-II indicated the student exhibited "average levels of anxiety for her age" (Dist. Ex. 5A at p. 7; 18 at p. 6). The Beck Self-Concept Inventory was administered as well, and the resultant score fell within the average range, with "typical levels of positive and negative views about herself" (Dist. Ex. 5A at p. 7). According to the September 2016 IEP, "the student needs to be able to verbally identify her own emotions and the event that triggered the emotion" to "identify coping skills for managing anxiety and frustration" and to "improve in her ability to interpret social situations" (id. at pp. 7-8).

#### **a. Integrated Co-teaching Services**

Turning to the merits of the district's appeal, the district asserts that the IHO erred in finding that the CSE did not recommend a "full-time special education program," arguing that the CSE recommended supports for the entirety of the academic day and that the student did not need special education supports during lunch, recess, and specials. The district contends that the CSE recommended an appropriate program of special education, related services, modifications and accommodations that were reasonably calculated to confer educational benefit to the student. The parent testified that she disagreed with the recommended ICT services and resource room program because the student "needed a small classroom setting" and a full-time special education program (Tr. pp. 826-28). A review of the evidence in the hearing record supports the district's position.

In her decision, the IHO stated that the district failed to recommend a "full-time special education program" and appears to use this phrase interchangeably with "special class" (IHO Decision at pp. 32-33). Special education is defined by federal and State law as "specially designed instruction" (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]) and specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]). ICT services are defined as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Resource room program is defined as "a special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]). Special class is defined as "a class consisting of students with disabilities who have been grouped together because of similar individual needs for the purpose of being provided specially designed instruction" (8 NYCRR 200.1[uu]). Accordingly, each of ICT services, resource room programs, and special classes are defined in part by their provision of specially designed instruction to students with disabilities, and to the extent the IHO implied that the recommended program did not constitute a special education program, her determination does not comport with the definitions contained in State regulation. For the sake of clarity, the CSE's recommendation was for a special education program consisting of ICT services, a resource room program, and counseling services, the adequacy of which is the central issue in this appeal. To the extent the IHO found that the student required a full-time special class placement, the parties' arguments related to that point are discussed below.

The August 2014 neuropsychological evaluation indicated the student's "cognitive and academic profile [was] consistent with a severe language based learning disorder" and that the student "require[d] a small full-time special education program . . . for children with good cognitive and academic potential" that was "part of a small, language-based, special education school" (Dist. Ex. 13 at p. 9). However, district witnesses testified that the recommended ICT services, resource room program, counseling services and program modifications and accommodations would provide the student with sufficient support to succeed in the mainstream setting (Tr. pp. 97, 98, 99, 101-08, 109, 122-23, 125-26, 169, 171, 201, 271, 285-86, 287, 290-91, 300-01, 303-04, 338-39, 363-64, 366-67, 412-13, 415-16, 417, 418, 484-500, 525-26, 530-31, 547).

At the time of the impartial hearing, student's mother characterized the June 2016 CSE meeting as "overwhelming" (Tr. p. 824). She testified that she had "a very hard time" when the committee reviewed what would be appropriate for the student, because she knew the student "better than anyone" and was afraid that putting her into a general education classroom with support and having her pulled out for resource room and counseling would be very hard for the student (Tr. pp. 824-25). The student's mother explained that, at the time of the June 2016 CSE meeting, the student was getting "24/7 special education" including recess, lunch and art (Tr. p. 825). She testified that, for the student, the change from her current program would have been "extremely hard and anxiety driven" (*id.*). According to the student's mother, as schoolwork became more difficult the student's anxiety became more palpable and overwhelming (Tr. pp. 825, 960).

The student's mother testified at the impartial hearing that she felt the student needed a small classroom setting and that her anxiety was so bad that she (the student's mother) was scared that as the work became more difficult the student would "drown academically, socially, and emotionally" (Tr. pp. 826-27, 872). The student's mother testified that she did not feel that the district was recommending a full-time special education program for the student because the student required special education across the board including during recess and specials (Tr. p. 827). She explained that at Windward students have set seats "so there is no anxiety when you walk into a lunchroom where to sit, who to sit next to" (Tr. p. 828). The student's mother reported that recess at Windward was facilitated by a teacher and designed to help students socially (*id.*). She explained that the student missed social cues and had a hard time socially, so the facilitation was something that she needed (*id.*). According to the student's mother, in the Windward art class the steps that a student needed to do a project were written down on the board and the teacher read them as well (*id.*).

The student's mother testified that she understood co-teaching to be a general education classroom with a mainstream teacher and a special education teacher, but that she did not understand how the teachers worked together to deliver instruction (Tr. p. 922). She testified that she did not ask the CSE for additional information or suggest to the CSE that she did not have a full understanding of how the teachers worked together in a co-taught class (Tr. pp. 921-22). She also reported that the district team did not share any additional information about the program with her (Tr. p. 958).

In contrast to the lack of support that may have been perceived by the student's mother, the director testified that based on the recommended services in the IEP, the student would receive special education support for everything except lunch, recess, and specials (Tr. p. 101). The director opined that the program was appropriate because it was a "full-day special education presence in [the student's] life that would do what a special education teacher needs to do, which is, remediate skill deficits in her area of weakness, provide access, address her social-emotional issues" (Tr. p. 109, 125-26). She stated that there was no data to suggest that the student needed a special educator with her in lunch, recess and specials and to provide one would have been overly restrictive (Tr. pp. 169, 201). The director confirmed that there would be an hour and 15 minutes per day when the student was not in special education (Tr. pp. 169-70). She indicated that during those times the student would have a program modification, but not an adult (Tr. p. 171). The director testified that the student did not need specialized instruction during specials, lunch or PE (Tr. p. 201). She opined that the student needed the program modifications that were recommended but noted that the student was active in sports and did not require adapted PE and that she did not require specialized instruction in art, rather needed the program modifications of directions repeated and broken down and visuals (*id.*).

The IEP recommended ICT services every day for four hours per day, in all academic classes (Dist. Ex. 5A at p. 10). The special education teacher (for resource room) who attended the September 2016 CSE meeting testified that ICT services would provide the student with a "great level of support and would address the needs that she had" (Tr. p. 525; *see* Dist. Ex. 5A at p. 1). She further testified that ICT services were appropriate for the student because the special education teacher would be responsible for modifying the work, pre-teaching vocabulary, providing additional practice, providing instruction to students in a small group, and ensuring that the student had access to the curriculum (Tr. pp. 525-26). Specifically, in the ICT program the

student would have access to two teachers and the "second" teacher would be "always available to support" the student throughout the day and "in the moment" (Tr. pp. 530-31).

When asked if the CSE recommended the student for a "full-time" special education program, the special education teacher testified that the student would have a special education teacher with her four hours per day, and also have resource room services for 45 minutes (Tr. p. 547). Although "the rest of the day" including lunch and "specials" the student was not in a special education program, the student would have "access to a special ed[ucation] teacher throughout the day" (*id.*).

The district speech-language pathologist who evaluated the student testified that she had no reason to doubt that the student could be successful in an integrated co-teaching setting (Tr. pp. 412-13). The speech-language pathologist opined that a co-teach setting would be appropriate for the student because there would be two teachers at all times, which would address the student's attending issues and the student would get pull out for specific skills, along with small group and large group [instruction] (Tr. p. 413). According to the speech-language pathologist, the IEP addressed the "whole child and all her needs" (Tr. p. 418). She reported that the number of students in an ICT class varied, but was around 19-20, with no more than six students with IEPs (Tr. pp. 434-35). She indicated that one of the things discussed at the CSE meeting was that the student had not had the experience of being in a large class (Tr. p. 436-37).

The school psychologist who attended the September 2016 CSE meeting testified that she believed that the CSE's program recommendations were appropriate because they provided the student with "a full-time program with special education support throughout her day," including "four hours of instruction with a special education teacher in the classroom," resource room services, and counseling (Tr. pp. 300-01; Dist. Ex. 5A at p. 1).

According to the school psychologist, the special education teacher in the ICT class would be able to provide repetition, review of material, and a number of the student's accommodations and modifications (Tr. p. 285). Based on her review of the student's assessment results, anxiety, and cognitive and academic profile, the school psychologist opined that ICT services were "perfect" for the student because she had available a special education teacher to provide her with "extensive additional support" and reassurance to lessen her anxiety in the classroom (Tr. pp. 285-86). The school psychologist testified that ICT services would also address the student's working memory difficulties by nature of the special education teacher implementing the accommodations and modifications the CSE recommended (Tr. pp. 363-64). Additionally, the school psychologist testified that it would be "great" for the student to be in a classroom with general education peers (Tr. p. 286).

The director opined that the level of support the CSE was recommending would be a "good match" for the student and stated that the CSE erred on the side of giving the student more support (Tr. p. 97). Specifically, she testified that the integrated co-teaching program simultaneously provided access to rich, grade level standards, as well as specialized instruction and modifications to ensure that the student could access it (Tr. p. 98). In addition, the director noted that the student would be getting direct skill remediation in both the integrated co-teaching classroom and the resource room, as well as direct "remediation" to through counseling to develop her social and coping skills (*id.*). The director reported that the student was cognitively appropriate for this type

of program because her cognitive skills were intact and the "richness and background knowledge ... that she could be exposed to would be important for her development" and "typical peers could add to the richness of her educational experience" (*id.*). The director opined that access to typical peers was an important component of the program for the student because, aside from the legal requirement of LRE, research literature indicated that "inclusion is essential" (Tr. p. 99). She stated that based on what she had observed in her career that access to the general education curriculum led students to have better outcomes in high school with Regents diplomas (*id.*). According to the director, the student had specific deficits in reading that would be typical of the district's [resource] room population, although the typical co-taught student might have additional deficits (*id.*).

Although the student's mother felt the student needed a full-time special education program at Windward, the director testified that she believed the district offered the student a full-time special education program through its recommendation of ICT and resource room services and counseling (Tr. pp. 122-23; Dist. Ex. 5A at p. 2). The school psychologist also testified that the September 2016 CSE discussed the parents' request for a "full-time special education" program for the student during the CSE meeting (Tr. p. 303). She stated that the recommendation was for "essentially a full-time educational program because [the student would be] receiving special education supports throughout her day"; during the four hours of "instruction time," during resource room, and counseling (Tr. pp. 303-04, 338-39). During the other portions of the school day, including activities such as lunch, art class and music class, the school psychologist believed that the student did not require "special education" (Tr. pp. 303-04, 339).

The IHO appeared to find the August 2014 neuropsychological evaluation, the neuropsychologist's testimony, and the testimony of the parent to be outcome determinative. The August 2014 private neuropsychological evaluation indicated the student's "cognitive and academic profile [was] consistent with a severe language based learning disorder" and that the student "require[d] a small full-time special education program ... for children with good cognitive and academic potential" that was "part of a small, language-based, special education school" (Dist. Ex. 13 at p. 9).<sup>11</sup> However, the August 2014 neuropsychological evaluation was only one among several evaluations and reports considered by the June and September 2016 CSEs. As noted above, the June and September 2016 CSEs also reviewed and discussed a June 2016 report from Windward, a May 2016 classroom observation, a June 2015 psychological evaluation, a June 2015 speech-language evaluation, a June 2015 educational evaluation, an August 2014 social history, and an August 2014 physical examination (Dist. Exs. 5 at p. 3; 5A at p. 3).

The private neuropsychologist who evaluated the student in August 2014 also testified during the impartial hearing in this case. She opined that the student required a "full time" special education program (Tr. pp. 603-04). She explained that there were three things that warranted this recommendation: first, the parent was "very distraught" over pulling the student from the environment "where her sibling was and in a community where they were very closely knit with other families"; second, the student was struggling and not keeping up with her peers, even with interventions, and being around typically developing students would exacerbate her anxiety; and

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<sup>11</sup> This was not the first time the district members of the CSE considered and ultimately disagreed with the neuropsychological evaluation. The same evaluation report was also among the issues considered by August 2015 CSE as described in Application of the Bd. of Educ., Appeal No. 17-017.

third, given her ADHD, the student struggled, even in a 1:1 setting (Tr. pp. 604-05). The neuropsychologist stated that "those three things working against each other were really the perfect storm" (Tr. p. 605). She further explained, "I felt that it was critical for her to be in an environment where she not only had direct remediation of her deficits in reading, but had the supports in terms of her emotional functioning, as well as the attention price, which in a classroom of even 18 children would be simply too much for her because she was constantly missing information" (Tr. p. 605). The neuropsychologist reported that the student was making progress in the private school because of the intervention she received in the "full time special education" program (Tr. p. 643-44). The neuropsychologist further averred that the student had anxiety even in the "full time special education program" and that she had an "increased awareness" of her disability (Tr. p. 645). Finally, the neuropsychologist asserted that the student needed "full-time special education meaning throughout the day in every subject and within a special education school"(Tr. p. 738-39).

The neuropsychologist opined in testimony at the time of the impartial hearing that the student was not ready "in any way, shape or form to be in a mainstream setting," even in an ICT classroom (Tr. p. 670). She further opined that the pace of the instruction would be too fast which would exacerbate the student's anxiety and that even in "non-threatening situations" the student was very self-conscious (Tr. p. 670). The neuropsychologist asserted that she was concerned "about the peers [the student] would be around," the pace of the class, her distractibility in a class of that size because she needed one on one prompting "even in" her current smaller classroom, and that her "availability for learning would be impeded" in the ICT classroom (Tr. p. 671). Additionally, the neuropsychologist stated that due to the student's "pretty severe" deficits, she did not have any data to suggest that a less restrictive environment was appropriate for the student at the time (Tr. p. 671). Finally, the neuropsychologist stated that the program modifications and accommodations on the student's IEP were not sufficient for the student to succeed in an ICT classroom because after three years of intensive services in her private school, she still exhibited reading comprehension skills at the fifth percentile (Tr. p. 780).

The private neuropsychologist questioned the district's use of the K-TEA-II and WJ-III to assess the student, noting that there were more current versions of the tests available at the time (Tr. pp 606-07, 612). She opined that it would have made more sense for the district to assess the student using tests where the IQ and academic scores can be compared, rather than the tests they chose (Tr. pp. 612-13).

It appears that the IHO, in reaching her conclusions, placed very heavy weight on the private neuropsychologist's opinion testimony regarding the student's anxiety and inability to attend a setting with nondisabled peers. The problem with that approach is, as further described below is that much of the basis for the neuropsychologist's expert opinion does not appear in the August 2014 evaluation report that was before the CSE, especially the severity of student's social emotional functioning that she later opined on at the time of the impartial hearing. The IHO also too quickly dismissed the fact that the CSE had considerably more evaluative information than just the private neuropsychologist's testing in 2014 at the time of the CSE meetings in 2016. The district presented a school district psychologist as a rebuttal witness to explained why the private neuropsychologist's evaluation portrayed the student with a much more severe presentation and why it was reasonable that the district's evaluations presented the student's skill levels and academic functioning in a different light and, consequently, the district was able to cast doubt on

how closely the CSE was required adhere to and/or adopt the opinions viewpoints of the neuropsychologist.<sup>12</sup>

For example, the district psychologist testified to generally accepted levels of significance in the field of psychology and how deviating from accepted levels can allow for a false conclusion (Tr. pp. 1007-09). Specifically considering the private neuropsychological evaluation, the district psychologist testified that in order to "make sense" of the score interpretations, he had to employ a level of significance outside of the accepted norm which "allow[ed] for more error" (Tr. p. 1029). According to the district psychologist, allowing for more error tended to "overstat[e] the severity of the disability that she was identifying" (Tr. p. 1017).

To demonstrate one way the student's results on the WISC-IV were overstated by the private neuropsychologist, the district psychologist used the Administration and Scoring Manual provided with the WISC-IV testing kit to show that there was only one statistically significant discrepancy in the student's performance, which was between the working memory and the processing speed indices (Tr. p. 1028; Dist. Ex. 46 at p. 2). The district psychologist further testified that the private neuropsychologist's assertion that the student had a "split in her IQ, meaning that her verbal skills were not as strong as her non-verbal skills in many areas assessed on the IQ test" was not based on fact (Tr. p. 1030). Again employing the scoring manual, he reported that there was not a significant difference between the student's verbal comprehension and perceptual reasoning index scores (Tr. pp. 1030-31). With respect to the private neuropsychologist's characterization of the student's decoding skills as "below the first grade level," the district psychologist opined that it was not "standard practice to report grade equivalences in a testing grid because it is an unreliable statistic" (Tr. 1031).

The district psychologist challenged the private neuropsychologist's assertion that the student was not a fluent reader, noting that test scores in her evaluation did not support that conclusion (Tr. p. 1037). The district psychologist pointed out that on the reading fluency subtest of the WJ-III, the student attained a standard score of 96 (39th percentile rank) (Tr. pp. 1037-38). He further explained that although the private neuropsychologist reported that the student had a hard time generating an essay, many of the student's scores on assessed writing tasks were in the average range (Tr. pp. 1038-39). Additionally, although the private neuropsychologist asserted "if you have a hard time decoding, you have a hard time spelling," the district psychologist noted that the student performed in the average range on the spelling subtest (Tr. p. 1040). He took further issue with the fact that the private neuropsychologist's conclusion was based on "one of the scoring components where all the other scoring components were average or above" (Tr. p. 1042). He referenced the speed naming subtest on the "compendium" to the NEPSY and suggested that

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<sup>12</sup> The IHO appeared to believe that the district's psychologist's ability to explain objective data collection and the content of scoring manuals correlated to whether or not the psychologist had ever personally evaluated the student, but there is no such correlation. The district psychologist acknowledged that he had never spoken to the student, her parents, or the private psychologist (Tr. pp. 1064-1065). He testified that he had done classroom observations of the student but never a 1:1 clinical observation of the student or a home observation (Tr. pp. 1066-67, 1083-84, 1118). The district psychologist testified that he was a licensed psychologist and confirmed that he did not have "the additional certification in neuropsychology" (Tr. pp. 1068-69). However, he reported that he had administered all of the tests that were part of the private neuropsychological evaluation (Tr. pp. 1069-70).

according to the scoring manual the student's performance on the subtest was indicative of impulsive behavior (Tr. pp. 1043-45).

With respect to the private neuropsychologist's conclusion that the student had a 'severe language-based learning disability, the district psychologist testified that the data did not support the characterization of severe (Tr. p. 1046). Using the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), the district psychologist asserted that the student did not meet the criteria for a "severe language-based learning disability" because as coded by the private neuropsychologist, the student only had deficits in reading and math and not writing (Tr. pp. 1048-1052, 1103-11). The district psychologist testified that based on the private neuropsychologist's data and his reading of the DSM-5 he would characterize the severity of the student's disability as "mild" (Tr. pp. 1052-53).

The district psychologist agreed that the private neuropsychologist did not state that she relied solely on test scores to determine that the student has a severe language-based learning disability and further agreed that in addition to age and grade equivalents the private neuropsychologist reported percentile ranks and standard scores, which were robust measures of performance (Tr. pp. 1071-72). The district psychologist confirmed that the student's scores on the Gray Oral Reading Test were significantly below average with respect to accuracy, fluency and comprehension, and that her comprehension score on the Wechsler Individual Achievement Test, Third Edition (WIAT-III) was in the low average range (Tr. p. 1072-74, 1100-01). He confirmed that the student had lower than average ability with respect to reading comprehension, word reading, essay development, and numerical operations (Tr. pp. 1074-76, 1101-03). The district psychologist also agreed that according to the W-J III the student had a marked deficit in math fluency (Tr. p. 1077). With respect to comparison between the student's IQ score and reading comprehension score on the WIAT-III, the school psychologist reported that there were ways to statistically compare ability and achievement, but that this analysis was not provided (Tr. pp. 1078-80).

The evidence shows that the district considered the variety of viewpoints expressed regarding whether the student could be appropriately placed in an ICT setting. The testimony of the experts at the impartial hearing continued show disagreement about the precise severity of the student's deficits and the interpretative conclusions that should have been drawn from aspects of the testing that was before the CSE. The IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*11 [S.D.N.Y. Aug. 5, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]). Contrary to the conclusion of the IHO, the evidence shows that August 2014 neuropsychological report was not so convincing that the CSE was precluded from recommending an ICT setting for the student in favor of a special class setting only. Furthermore, the ICT services were but one aspect of the IEP's overall design. The other elements of the plan are discussed further below.

## **b. Resource Room**

The next element in the IEP was the 5:1 resource room recommendation. The student's mother described her understanding of resource room as a "refresher" of what was being taught in the regular classroom (Tr. p. 923). She noted that the student was recommended for resource room for five days out of a six-day cycle and that there would be days when she would not get resource room services (Tr. p. 959). She testified that she did not understand how the student would maintain learning without having resource room everyday (Tr. pp. 959-60).

In contrast to the understanding of the student's mother, the school psychologist testified that resource room services were appropriate for the student because of the small group 5:1 ratio (Tr. p. 287). She further indicated that in resource room the student would receive "explicit direct instruction from a special education teacher" who would work on the student's goals, provide her with modifications and accommodations, review and preview material, and provide repetition, refocusing and redirection (*id.*). The school psychologist testified that the student could "work on executive functioning skills or strategies to help her attend" during resource room (*id.*). The district speech-language pathologist further opined that resource room in addition to ICT services was appropriate because it would provide the student additional support in terms of reading and special skills (Tr. p. 413). In addition, the special education teacher testified that resource room services were appropriate for the student because she continued to exhibit difficulties in decoding and math problem solving, and resource room would provide additional support and work on those "specific skills on a daily basis in a small group" (Tr. p. 526).

## **c. Modifications**

As mentioned numerous times above, the IEP also contained modifications and accommodations that could be used both within and outside the ICT setting, and these aspects of the IEP were also integral to the design of the programming proposed by the district. The district regular education teacher who attended the September 2016 CSE meeting testified and described in detail the manner in which the modifications and accommodations recommended by the IEP could be provided in a general education classroom, asserting that they are routinely implemented within her ICT classroom (Tr. pp. 484-500). The teacher indicated that during lessons she provides students time to process their thinking before they "share out," editing checklists to guide and prompt their written work, pacing, refocusing and redirection, scaffolding, breaking down directions, repetition, thinking aloud, visuals (such as graphic organizers and Venn diagrams), and manipulatives (Tr. pp. 484-93). The teacher further explained that asking students to paraphrase in order to check for understanding, and special seating to reduce distractibility are also used within the ICT classroom (Tr. pp. 495-97). Finally, the teacher described how breaking the class into small groups addressed anxiety issues for some students (Tr. pp. 497-98).

The director testified regarding the recommended program modifications and accommodations, how they would address the student's specific areas of need, and how those modifications would be implemented within a general education environment (Tr. pp. 101-08).<sup>13</sup>

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<sup>13</sup> The director testified that the parent and Windward staff were in agreement with the recommended program modifications and that there were no modifications or accommodations recommended by the parent or Windward that did not make it into the June 2016 IEP (Tr. pp. 102-03; see Dist. Ex. 5A at p. 2).

Specifically, the director explained that in order to accommodate the student's need for time to process and "wait time to respond," directions would be broken down for her and she would be allowed extra time to process and formulate responses (Tr. pp. 102, 104-05; Dist. Ex. 5A at p. 11). Further, to monitor whether the student had the component parts of a paragraph, and in accordance with input from the private school, the student would be allowed the use of an editing checklist (Tr. p. 103; Dist. Ex. 5A at p. 11).<sup>14</sup> The director recalled that during the classroom observation the student had difficulties with fluency and therefore her IEP provided for assistance with pacing, refocusing and redirection when reading aloud (Tr. p. 104; Dist. Ex. 5A at p. 11). In addition, the CSE recommended providing the student with additional examples during new lessons and assignments; visual cues and manipulatives, particularly for math; special seating near the source of instruction, use of a graphic organizer for writing assignments and checks for understanding including a discreet cueing system (Dist. Ex. A at p. 11). With respect to "provide additional examples," the director explained that for new lessons it was important for the student to have exemplars on the page that she could refer back to (Tr. p. 105). The director testified that using multisensory approaches like manipulatives during math and post-it notes as a visual cue were deemed beneficial for the student (*id.*). The director explained that the use of graphic organizers was recommended because it would provide the student with a scaffold for writing (Tr. pp. 105-06). To ensure that the student comprehended information presented and to address her relative weaknesses in processing and understanding the director noted that the IEP included checks for understanding and a modification where teachers would ask the student to paraphrase what was said to her in order to demonstrate comprehension (Tr. pp. 106-08; Dist. Ex. 5A at p. 11). Similarly, the director indicated that the student would be provided testing accommodations consisting of checking for understanding, directions repeated, minimal distractions and extended time (Tr. p. 108; Dist. Ex. 5A at p. 12).

The district school psychologist also detailed the modifications and accommodations that would be provided to the student. According to the district psychologist, the student would be provided modifications and accommodations to reduce distractions, provide repetition, refocusing, redirection, strategies to help her attend, and "visuals" to support her working memory (Tr. pp. 271, 285, 287). In order to alleviate her anxiety, the student would be allowed extra time to process and formulate responses (Tr. p. 290). The district psychologist testified that to address the student's relative weakness related to essay composition, organization, and spelling, she would be provided with an editing checklist which she could use to edit her work independently (Tr. pp. 290-91). The student benefitted from help with pacing her work, redirection, refocusing, special seating and breaking down tasks due to anxiety and distractibility (Tr. pp. 291-93, 295). Further, the student benefitted from being provided with additional examples, visual cues, and use of manipulatives (Tr. p. 293). The district psychologist asserted that the student's difficulty with working memory would be addressed through many of the above accommodations (Tr. pp. 363-64). Finally, the district psychologist averred that the student did not need special education support during lunch and art class, but that the student's accommodations could be provided throughout the school day, if necessary (Tr. pp. 338-39, 366-67).

The district speech-language pathologist stated that the accommodations and modifications included in the September 2016 IEP, particularly extra time for processing, pacing, redirecting,

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<sup>14</sup> According to the director, the Windward team reported that the student needed something to refer back to, to make sure she had all of the parts of a paragraph in place (Tr. pp. 103-04).

breaking down directions, providing additional examples, visual cues, manipulatives, checking for understanding and graphic organizers, addressed the student's attention issues and anxiety (Tr. pp. 415-16). The speech-language pathologist stated that during her evaluation of the student, the student "came up" with the answer if she was given enough time but became anxious if she was not (Tr. p. 416; see Dist. Ex. 16). The speech-language pathologist specifically indicated that the recommended modifications and accommodations could be implemented in an ICT classroom (Tr. p. 417).

The district special education resource room teacher, who participated in the September 2016 CSE meeting, indicated that the recommended services and modifications for the student would provide her with a "great level of support" and would address the student's needs (Tr. p. 525). She further explained that the student would receive instruction in the general education curriculum, while getting support from the special education teacher (id.). In addition, the special education teacher would modify the work, pre-teach vocabulary, provide additional practice, and work with the student in small groups within the ICT classroom (id.). In addition, the student would receive resource room in a 5:1 ratio in 45-minute sessions five days out of six, where she would be provided additional support of an Orton-Gillingham program and working on specific skills in a small group (Tr. p. 526; Dist. Ex. 5A at p. 10). Finally, the teacher opined that the program and services recommended in the September 2016 IEP were "very appropriate" for the student, adding that the special education teacher in the ICT classroom would always be available to give the student extra support and would ensure that the student's modifications were being "implemented on a regular basis" (Tr. p. 531).

The September 2016 IEP recommended ICT services for four hours per day, in all academic classes (Dist. Ex. 5A at p. 10). The IEP also recommended a resource room program in a 5:1 ratio in 45-minute sessions on five days out of a six-day cycle (id.). The student was also recommended to receive a number of supplementary aids and services/program modifications/accommodations, including extra time to process and formulate responses; breaking down of instructions and directions; provision of additional examples during new lessons, visual cues, manipulatives for math, and graphic organizers for writing assignments; being asked to paraphrase during instruction; special seating near the source of instruction; and checks for understanding to include "a discreet cueing system with student should attention wane or if the student needs a way to communicate that she needs help" (id. at pp. 10-11). To the extent the parents asserted, and the IHO found, that the CSE did not have adequate reason to believe that the student could be successful in a mainstream setting with the foregoing supports, the hearing record does not support this determination.

Although the hearing record shows that the student experienced anxiety with regard to academics, it does not show that at the time of the June and September 2016 CSEs meetings that her anxiety was such that she required placement in a special class. While the private neuropsychologist who evaluated the student reported that the student was "noticeably anxious on academic tasks, particularly those involving reading and writing," the district special education teacher who evaluated the student reported that she kept her hands in front of her mouth during oral reading and was anxious during a fluency test, and the student's parents reported that the student's anxiety had increased, there was no information before the CSEs that the student's anxiety was at a clinically significant level (Dist. Exs. 5 at p. 213 at p. 8; 14 at pp. 1-4). As noted above, the private neuropsychologist reported that the parent's responses to a behavior and adaptive rating

scale that included a subtest for anxiety "did not reveal any clinically significant concerns at this time" (Dist. Ex. 13 at p. 8). In addition, the student's responses on the anxiety and self-concept inventories of the BYI-II indicated that the student was functioning in the average range for her age (Dist. Ex. 18 at p. 6). The private neuropsychologist testified at the impartial hearing that she did not diagnose the student with an anxiety disorder, but she felt she had a lot of anxiety (Tr. p. 601). As described above, the ICT classroom is designed to provide specialized instruction during academics. The September 2016 IEP also recommended counseling and included goals to assist the student with interactions with non-disabled peers (Dist. Ex. 5A at p. 10). The parents' desire that the student be completely excluded from non-disabled peers would do little to promote progress in the area of her social/emotional development and undermine the principal goals of the IDEA, which are to provide the opportunity for students with disabilities to access the general education curriculum and to be educated with their non-disabled peers.

In J.R. v. New York City Department of Education (2017 WL 3446783 [E.D.N.Y. Aug. 10, 2017]), the district court found that the parents failed to raise specific claims regarding the district's recommended program; "[r]ather, in attacking the IEP, [the parents] make vague arguments that make clear that the only recommendation satisfactory to [them] is placement in the [nonpublic school]" (2017 WL 3446783, at \*21). Similar to the argument in J.R., "[t]he crux of [the parents'] argument is simply that the IEP is substantively inadequate because it did not recommend placement [at Windward] or another private school" (id.).

"To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (Endrew F., 137 S. Ct. at 1000). Under the IDEA, the district does not have to provide the student with precisely the services that Windward provides, the district's obligation under the IDEA is to develop a program that is reasonably calculated to enable the student to make progress that is appropriately ambitious in light of her circumstances (J.R., 2017 WL 3446783, at \*22 citing Endrew F., 137 S. Ct. at 1000).

The IHO was persuaded by the parents' claim that the September 2016 IEP violated the IDEA because it did not recommend placement at Windward (see IHO Decision at pp. 32-33). In a similar manner that the court found impermissible in J.R., the IHO overemphasized the student's struggles at Windward "[d]espite all the support, class size, accommodations and modifications provided" as a basis for finding that the district's recommendation of an ICT classroom with resource room and counseling denied the student a FAPE (IHO Decision at p. 33). "[I]n conducting her analysis under Prong I of the Burlington/Carter test, the [IHO] need not have considered . . . 'subsequent progress at . . . [a private school], but rather consider the propriety of the IEP with respect to the likelihood that it would benefit . . . [the child] at the time it was devised'" (J.R., 2017 WL 3446783, at \*22, quoting J.R. v. Bd. of Educ. of City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395-96 [S.D.N.Y. 2004]). Thus, that the student "benefited from [the nonpublic school] does not mean that she would not have benefited from the District's proposed . . . IEP, and the ex post information about her subsequent progress in private school is therefore irrelevant to the inquiry about whether the District's IEP was reasonably calculated to enable her to receive educational benefits in [that] academic year" (J.R. v. Bd. of Educ. of City of Rye Sch. Dist., 345 F. Supp. 2d at 396 n.13).

The hearing record also demonstrates that the student's mother was in agreement with the recommendations set forth in the September 2016 IEP, except that she did not want the student educated with non-disabled peers in the ICT setting (Tr. pp. 102-03, 111-12, 119-20, 123, 124-25, 169, 298, 522, 919, 920, 925, 938, 956). However, the hearing record also reveals that it is likely that the student's mother did not fully understand the level of support that would be provided by the recommended program (Tr. pp. 956-60).

In view of the forgoing evidence regarding reasonable (albeit differing) viewpoints regarding the severity of the student's needs, the objective evidence from multiple sources relied upon by the June and September CSEs, the district demonstrated that the September 2016 IEP was appropriate to address the student's needs and reasonably calculated to enable the student to make progress in light of her circumstances. The IHO's reasoning insufficiently addressed the evidence that was before the CSE at the time it made its decision and the IHO may also have improperly based her determination that the September 2016 IEP denied the student a FAPE on the student's subsequent performance at Windward. Therefore, the IHO's determination that the district failed to establish the appropriateness of the recommended programming must be reversed.

## 2. Predetermination

Finally, the district asserts that the IHO erred by finding that the September 2016 CSE predetermined the student's recommended program based on what was available in the district and that the district should have considered a nonpublic school placement.<sup>15</sup>

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P., 2015 WL 4597545, at \*8-\*9; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*10-\*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at \*18 [S.D.N.Y. Jan. 2, 2013] [alteration in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The IHO's ruling that the district's recommended program was predetermined because it was available more squarely confronts the issue of selecting a placement based on available resources, addressed above in the appropriateness of the recommendation analysis. Labeling the recommended program decision as predetermination would require a finding that the CSE was

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<sup>15</sup> The district correctly asserts that the IHO incorrectly used terminology specific to a different school district; nonetheless, the IHO's determination was based upon her finding that the district should have considered a nonpublic school placement because in-district placements were not appropriate to meet the student's needs.

unwilling to engage with the parents' concerns during the CSE meeting, which is contradicted by the record. To the contrary the evidence shows, as further described below, that the student's mother had concerns and misgivings, but the CSE continued to listen to and address those concerns, albeit not to the point of simply acquiescing to the parents' demands.

According to the student's mother, the June 2016 CSE discussed a different program option for the student but she was told that it was too restrictive and that the students in the class were more academically challenged and perhaps more socially challenged too (Tr. pp. 829-830). She testified that the CSE discussed the district's 12:1+2 language-based class as a possible full-time special education placement for the student, but committee members felt the program would be "overall restrictive" for the student and that most of the other students had significant deficits (Tr. pp. 832-32). The parent testified that she placed the student at Windward for the 2016-17 school year because she felt that she had no other option and the student required a school for students with severe language disabilities (Tr. p. 833).

The student's mother reported that no one at the June 2016 CSE meeting voiced disagreement with the way the student was described with respect to academic skills, social development, physical development and management needs (Tr. p. 918). However, she stated that when she received the June 2016 IEP in the mail she did not believe that it accurately characterized the June 2016 CSE meeting as she felt that "[the student] was misunderstood at the meeting, the way she presented" (Tr. pp. 918-19).

However, during the impartial hearing, the student's mother stated that she could not answer if the student was a stronger or weaker student at the beginning of the 2016-17 school year than she was at the beginning of the 2015-16 school year (Tr. p. 907). She explained that as the student's work became more challenging her anxiety became more apparent (*id.*). She reported that the student was growing at a slow, but steady pace (Tr. p. 908). The student's mother confirmed that the student's decoding skills were "slow building," but stated that the student "still couldn't decode" (*id.*). She reported that the student's writing skills were stronger and agreed that her math skills were stronger in a "slow incremental way" (*id.*). The student's mother was unable to describe a part of the IEP that she felt was inaccurate (Tr. p. 919).

The director of special education and support services testified that prior to the June 2016 CSE meeting the district received progress reports, report cards and a testing grid from Windward and also conducted a classroom observation of the student (Tr. p. 74). According to the director, based on an educational evaluation completed by the district and information from the Winward team, her understanding was that the student had many strengths and many average skills, with discrete areas that needed remediation (Tr. p. 79).

The director testified that the CSE also reviewed the testing grid from Windward that included information from Windward's that included the results of Windward curriculum-based measures and some standardized testing scores (Tr. p. 86). She noted that the grid showed that the student had "many and more average skills in all areas of testing" than skills deficits that needed remediation (*id.*). According to the director, when the district looked at the results of the most recent standardized testing given to the student and compared her to her general education peers or peers throughout the nation ("tens of thousands of kids her age") the student had solid academic skills (Tr. p. 86; *see* Tr. pp 86-87).

The director testified that the Windward team provided extensive feedback in all areas of academic functioning, indicating that the student was reading better (Tr. p. 87). She noted, however, that the student's "particular weaknesses" as reported by Windward staff were "a little inconsistent with their standardized testing data" (Tr. p. 87-88).

Notably, the director testified that based on the information conveyed to the CSE by Windward staff, she and the district team felt that resource room services would be appropriate for the student (Tr. p. 88). However, since the parent and the Windward team felt the student needed more support the CSE continued to recommend integrated co-teaching services in addition to resource room (id.).

The director explained then when developing the student's IEP for the 2016-17 school year, under each section of the "Academic Achievement, Functional Performance and Learning Characteristics" the CSE included information provided by Windward, which the parent agreed accurately portrayed the student (Tr. p. 90). The director recalled that at the June 2016 CSE meeting the student's mother emphasized the student's level of anxiety and perfectionist tendencies, which the Windward team echoed (Tr. pp. 91, 175). In response, the CSE added school-based counseling and social/emotional/behavioral goals to the student's IEP (Tr. p. 91; see Dist. Ex. 5 at p. 10). The director reported that social/emotional goals were developed "collaboratively based on the feedback that we received from Windward" and [the student's] mother (Tr. p. 94). The director stated that the student's anxiety was sometimes caused by academic frustration (Tr. p. 95). She explained that the IEP developed by the CSE provided the student with support as it related to academic frustration by recommending full-time special education support: a special education teacher throughout the day in addition to the resource room program (id.). The director reported that, in addition, the school-based counseling would discreetly teach the student coping skills and ways to manage her anxiety (id.).

The director testified that based on the information provided to the CSE, the recommendation from the district team and Windward was for "co-teaching, resource room and counseling"; however, she noted that the parent was unsure of this recommendation (Tr. pp. 96-97). The evidence consistently shows that the June 2016, while not reaching a consensus with the parents, was willing to listen to their concerns and receive and act on input from the parents and special education providers from Windward. It in no way suggests that the district lacked the requisite open mind by predetermining the student's special education programming.

Even after the parent rejected the public school placement, the district continued to attempt to work with the parents and receive new input. The CSE reconvened on September 30, 2016 for a program review (Tr. pp. 110-12; Dist. Ex. 5a). The director reported that the student had transitioned from the lower to the upper school [at Windward] and the committee discussed how the transition had gone, including the student's anxiety and sensitivity (Tr. p. 115). The CSE also reviewed new progress reports from Windward (Tr. pp. 116, 118). The director testified that a review of Windward progress reports and report cards confirmed for her that the student would be successful in an ICT program along with resource room services (Tr. p. 117). She noted that according to Windward's measures the student had foundational skills and opined that the areas that the student was struggling with could be addressed by ICT and resource room services (Tr. p. 117-18).

The director reported that she engaged the September 2016 CSE in a conversation about whether the student required a special class program all day long and committee members said "absolutely not" (Tr. pp. 123-24). She reported that the committee members discussed that a special class program all day long would be overly restrictive for the student and that her skills and profile were more advanced than the district's special class programs and that she had a right to be with her neurotypical peers (Tr. p. 124; Dist. Ex. 5A at p. 2).

The director testified that, in addition to the 12:1+2 "language class" there were other small classes in the district that could have been offered to the student (Tr. p. 184). She indicated that the CSE could have reviewed the district's 12:1+2 social emotional support program for students with "average academic skills and intact cognitive skills and social-emotional difficulties" (*id.*). She further indicated that the CSE could have reviewed 8:1+2 classes that were typically for "alternately assessed students with severe cognitive and developmental disability or autism" (*id.*). When asked if there were any 12:1+2 special classes for students like this student, the director responded "a student like [the student] should be included" Tr. pp. 184-85).<sup>16</sup>

The school psychologist also testified that the September 2016 CSE discussed a 12:1+2 special class placement option (Tr. pp. 305-06). She testified that the 12:1+2 special class would not be the LRE for the student, and the students in a 12:1+2 special class were more significantly impaired with respect to language disorders and cognitive difficulties; a profile that did not fit the student (Tr. p. 306).<sup>17</sup> The school psychologist testified that the student's performance on "most" assessments was not "in the single-digit percentile ranges," which was typical of students in the special class (*id.*). The school psychologist opined that the student did not need a special class level of support, but rather "could function and grow in the co-teach setting" (Tr. pp. 306-07).

In addition to the 12:1+2 special class, according to the school psychologist, the district also offered a special reading class, which the CSE did not recommend because the student was already recommended to receive resource room services (Tr. p. 343). When asked if the district had a "small class for students with dyslexia and ADHD," the school psychologist responded that "resource room would be a support for [the student]" (Tr. pp. 344-45).<sup>18</sup> The special reading class is not a full-time program, rather its "just one class" (Tr. p. 344).

The special education teacher testified that the CSE discussed a "more restrictive setting," including a 12:1+2 special class, but that the committee members felt that would not be appropriate because the student's needs did not rise to the level of needing "that type of restrictive program" (Tr. pp. 548-49). According to the special education teacher, the CSE did not conclude that the student required placement in a "small special class" (Tr. p. 551).

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<sup>16</sup> The essence of the witness's response on cross-examination was that students such as the student in this case would not be placed in a special class setting, but in an inclusive setting (i.e. with non-disabled peers).

<sup>17</sup> The school psychologist stated that the 12:1+2 special class would be the full-time "small classroom" option for students with dyslexia and ADHD (Tr. p. 345).

<sup>18</sup> The district also offers an 8:1+2 special class for students with significant developmental disabilities, and autism spectrum disorders (Tr. p. 344).

Contrary to the IHO's finding that the district should have considered nonpublic, out-of-district placements, once a CSE determines that a particular placement is the least restrictive environment in which a student can be educated, it is generally not required to thereafter consider other more restrictive placements along the continuum (see E.P. v. New York City Dep't of Educ., 2015 WL 4882523, at \*8 [E.D.N.Y. Aug. 14, 2015]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*15 [E.D.N.Y. Aug. 19, 2013]; but see E.H. v. New York City Dep't of Educ., 164 F. Supp. 3d 539, 552 [S.D.N.Y. 2016] [finding that the CSE was required to consider the parent's point of view that the student needed to be educated in the setting he was currently attending]). As described above, the September 2016 CSE based its recommendation on the needs of the student and as such, was not required to further discuss even more restrictive settings once it determined the student could be educated in an ICT classroom with the additional supports of resource room and counseling. The hearing record reflects that the parties' disagreement regarding the services the student required to address her needs did not rise to the level of the CSE refusing to consider or discuss the parents' concerns such that it impeded their ability to participate in the development of the student's IEP (see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 2018 WL 4049074, at \*2 [2d Cir. Aug. 24, 2018]).

## **VII. Conclusion**

In summary, the evidence in the hearing record does not support the IHO's finding that the student's placement was predetermined by the district and that student should have been removed to a special class setting because she could not be educated with nondisabled peers in the less restrictive setting of an ICT classroom with the supports of resource room, counseling and modifications/accommodations to be used both within and outside of the ICT setting. Having determined that the district did not fail to offer a FAPE in the LRE for the 2016-17 school year, it is not necessary to determine whether the Windward School was an appropriate unilateral placement or whether equitable considerations support the parents' claim, and the necessary inquiry is at an end (see T.P., 554 F.3d at 254; MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated June 30, 2018, is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2016-17 school year and directed the district to pay for the costs of the student's tuition at Windward.

**Dated:**            **Albany, New York**  
                         **September 24, 2018**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**