



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-007

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

Appearances:

Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Nathaniel R. Luken, Esq.

Regina Skyer and Associates, LLP, attorneys for respondents, by Jesse C. Cutler, 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 the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at The Windward School (Windward) for the 2019-20 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

Due to global developmental delays, the student received special instruction, speech-language therapy, and physical therapy through the Early Intervention Program (EIP) (Parent Exs. Q at p. 1; S at pp. 1-2). At two and three years of age, the student attended private nursery/preschool programs, followed by a public-school pre-kindergarten program; he received EI and then CPSE services (Parent Exs. Q at pp. 1-2; S at pp. 1-2). The student attended the public school for kindergarten (2018-19 school year) where he received speech-language and

occupational therapies as a student with a speech or language impairment (Dist. Ex. 3 at p. 1; Parent Ex. S at p.). He also received speech services privately (Parent Ex. Q at p. 2).

On or around December 7, 2018, the parent requested a reevaluation of the student due to concerns regarding his reading ability (Tr. p. 30; see Parent Ex. S at p. 2; Dist. Ex. 1). The district obtained parental consent and conducted a psychoeducational evaluation of the student in January 2019 (Tr. pp. 30-31; Dist. Exs. 2; 3).¹ The resultant January 17, 2019 psychoeducational evaluation report indicated the student's performance on the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) yielded a full-scale IQ of 87 (percentile rank 19) which fell in the low average range (id. at p. 3). The evaluator indicated that the student's language skills, although diverse, were one of his strongest areas and noted that the student attained a standard score of 108 on the verbal comprehension index and a standard score of 88 on the fluid reasoning index, suggesting a comparative weakness in his visual spatial ability (id. at p. 7). With respect to academic achievement, the evaluator reported that the student's reading and writing skills were below age expectancy and he had difficulty writing letters, identifying letters or letter sounds, and rhyming words (id. at pp. 4-6). In math the student had difficulty with basic math skills (id. at pp. 5-6).

A CSE convened on February 12, 2019, to review the results of the January 2019 psychoeducational evaluation report (Dist. Exs. 7; 8 at p. 1). Finding that the student remained eligible for special education and related services as a student with a speech or language impairment, the February 2019 CSE recommended that he receive integrated co-teaching (ICT) services for English language arts (ELA), mathematics, and social studies to commence on September 5, 2019 (Dist. Ex. 7 at pp. 1, 14). The CSE also recommended the continuation of related services including individual occupational therapy (OT) twice a week for 30-minutes per session and individual speech-language therapy twice a week for 30-minutes per session (id. at p. 14). According to a February 15, 2019 prior written notice, the CSE decided that changing the student's classroom mid-year would not be beneficial for the student; therefore, the student would not begin attending the ICT program until September 2019 for the 2019-20 school year (Dist. Ex. 8 at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated November 18, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year on procedural and substantive grounds (Parent Ex. B at p. 1). The parents sought tuition reimbursement from the district for costs they incurred in enrolling the student at Windward for the 2019-20 school year (id. at pp. 1, 3).²

The parents contended that the actions and inactions of the February 12, 2019 CSE impeded the student's right to a FAPE, significantly impeded the parents' opportunity to meaningfully

¹ The psychoeducational evaluation indicated that the student was referred for reevaluation by his parent and teachers due to ongoing academic delays (Dist. Ex. 3 at p. 1).

² The Commissioner of Education has not approved Windward as a school with which districts may contract for the instruction of students with disabilities (see NYCRR 200.1[d], 200.7).

participate in the decision-making process, and thereby caused the student a deprivation of educational benefit (Parent Ex. B at p. 2). The parents argued that the February 2019 CSE denied the student a FAPE by failing to provide the student with a program and placement that was reasonably calculated to provide the student with a meaningful educational benefit (id.). The parents maintained that during the 2018-19 school year, the student failed to demonstrate progress, and after reaching out to the district, which agreed that the student was not progressing during the fall semester, it recommended at-risk reading support (id.). The parents alleged that the district did not consistently provide the at-risk reading support and the student continued to fall behind his peers prompting the parents to request that the district evaluate the student for special education services (id.).³

The parents noted that the CSE convened in February 2019 and classified the student as speech or language impaired and recommended an ICT class with related services of OT and speech-language therapy (Parent Ex. B at p. 2). The parents and district agreed that the student was in academic jeopardy and required specialized supports and interventions throughout the day (id. at p. 2). The parents contend that despite this agreement, the district recommended delaying the start of the student's academic supports (ICT services until September 2019, without providing a rationale, leaving the student without the necessary support for the remainder of the 2018-19 school year (id.). The parents further argued that although the student received some reading support, OT, and speech-language therapy it was inadequate to meet the student's needs (id.). The parents maintained that the student did not make sufficient progress during the latter half of the 2018-19 school year and cited to the student's report card and a July 2019 independent evaluation to support their claim (id.). Further, the parents alleged that the February 2019 IEP, program, and placement were inappropriate and inconsistent with the student's needs and therefore they rejected the IEP and placement proposed by the district for the 2019-20 school year (id.). Maintaining that there was no appropriate IEP in place, the parents contended that they were denied their right to meaningfully participate in the development of an appropriate program for the student (id.).⁴ The parents sought from the district the costs they incurred in enrolling the student at Windward for the 2019-20 school year (id. at p. 3).

³ The hearing record suggests that the student entered the 2018-19 school with an IEP in place and that the student was receiving related services in OT and speech-language therapy (Tr. pp. 38, 41). However, this IEP is not contained in the hearing record.

⁴ Although not expounded on, the parents indicated that their objections included but were not limited to: the district's failure to adhere to its federal child find obligations; the district's impermissible delay in providing and implementing the student's recommended services; the district's failure to recommend immediate academic support; the district's failure to convene a legally valid IEP team; the district's failure to conduct necessary evaluations and assessments in all the student's areas of need; the district's failure to appropriately identify the student's present levels of performance; the district's failure to recommend and provide for transitional supports especially in light of the delay in starting the recommended services; the district's failure to recommend social/emotional supports; the district's failure to recommend a full-time specialized program; the district's failure to create appropriate goals and management needs; the district's failure to recommend appropriate individualized services, accommodations and supports throughout the day; the district's failure to recommend an appropriate placement; and the district's failure to consider the continuum of services (Parent Ex. B at pp. 3-4). The parents do not provide specific factual details regarding this set of claims nor do the parents specify the school year at issue regarding these claims (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on May 26, 2020 and concluded on September 8, 2020 following five days of proceedings (Tr. pp. 1-200). In a decision dated November 27, 2020, the IHO determined that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years (IHO Decision at pp. 4-6, 9). The IHO also found that that parent's unilateral placement of the student at Windward was appropriate and that equitable factors supported the parents' claim for reimbursement (*id.* at pp. 8-9). The IHO directed the district to fund the cost of the student's 2019-20 10-month school year placement at Windward (*id.* at p. 9).

For the 2018-19 school year, the IHO found that the district failed to provide the student with a FAPE as the program and services provided to the student were inadequate, and as a result the student failed to make "any level of meaningful progress. In fact, he may well have regressed" (IHO Decision at p. 4). However, the IHO noted that the relief requested in these proceedings pertained only to the 2019-20 school year, therefore, "that is the school year that must be examined in determining whether or not the [p]arents are entitled to tuition reimbursement for that year" (*id.*).

The IHO noted that the February 2019 CSE recommended ICT services for ELA, mathematics, and social studies along with related services of individual OT and speech-language therapy, each for two 30-minute sessions per week (IHO Decision at p. 4). The IHO also recognized the district's position that ICT services were appropriate because they would provide a variety of different supports for the student and although the student struggled with reading, he was capable of accessing the general education program (*id.* at pp. 4-5).⁵ However, she found that the district's argument failed to address how the student could access the general education curriculum if he could not recognize letters, "let alone read" noting, as asserted by the parent, that an "ICT class is 'not able to educate a student that is unable to identify the letters'" (*id.* at p. 5). After reviewing an excerpt from the student's February 2019 IEP that reflected the student's performance on formal measures of reading and writing, the IHO determined that the "IEP did not provide for the level of instruction that the [s]tudent required in order to address his substantial delay in reading skills. If the IEP had included the services and instruction that the [s]tudent needed in order to address his significant reading deficits, I may well have found that the IEP was reasonably calculated to enable the [s]tudent to make meaningful educational progress. However, in the absence of such services, the IEP was insufficient. It would not have enabled the [s]tudent to make progress" (*id.* at pp. 5-6). Rather, the IHO opined that the student would likely experience regression, as the curriculum advanced, leaving him further behind in reading skills as compared to his classmates (*id.* at p. 6). The IHO further opined that without remediation of his reading deficits the student would not be able to access the curriculum (*id.*). Additionally, the IHO found that the hearing record included conflicting testimony regarding the student's IEP goals (*id.*). She

⁵ The IHO indicated that, as identified by the district, the "variety of supports" included in the ICT were: frequent check ins; positive reinforcement; praise and encouragement; modeling/scaffolding/spiraling of instruction; reminder to utilize learned strategies when speaking, tasks/questions/directions broken down and repeated; clear and consistent rules; expectations and routines; verbal/visual prompts; graphic organizers; outlines; checklists and rubrics; opportunities for repeated practice of skills; opportunities to pause after reading small portions of text to respond to questions, small group instruction, direct instruction, and tactile activities (IHO Decision at pp. 4-5).

stated that the February 2019 IEP goals were not discussed at the CSE meeting and it was unclear who developed the goals or when they were developed (*id.*). She found that the failure to discuss and develop the IEP goals at the CSE meeting constituted a procedural due process violation that significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE (*id.*). Based on this analysis, the IHO found that the district failed to offer the student a FAPE for 2019-20 school year (*id.*).

With regard to the parents' unilateral placement, the IHO noted the district's position that Windward was inappropriate because it did not provide the student with OT or speech-language therapy, and was overly restrictive; however, she determined that neither factor warranted a finding that the unilateral placement was inappropriate (IHO Decision at p. 7). The IHO concluded that, while the student "may have benefitted from related services, there [wa]s nothing in the [h]earing [r]ecord to support a finding that the [s]tudent could not make meaningful progress without related services" (*id.*). Further, the IHO indicated that the district did not present testimonial or documentary evidence that the related services were necessary noting that including the services in the IEP and submitting the IEP as evidence at the impartial hearing was not a substitute for testimony or evaluations/progress reports establishing the student's need for OT and speech-language therapy (*id.*). By contrast, the IHO found that the parents' witnesses and documentary evidence established that the 2019-20 unilateral placement was appropriate and provided the student with educational instruction that was specifically designed to meet his unique special education needs, supported by the services that were necessary to permit him to benefit from instruction (*id.*). Additionally, the IHO found that the student made meaningful progress at Windward (*id.*).

The IHO noted that her findings applied to the entire 2019-20 school year including the period of school closure and subsequent remote learning that occurred due to the COVID-19 pandemic (IHO Decision at pp. 7-8). The IHO found that even during the time of remote learning, Windward "continued to provide the student with a comprehensive instructional program, with appropriate supportive services, during the entire period" (*id.* at p. 8). The IHO found that the testimony and evidence presented during the hearing established that Windward provided the student with "appropriate educational instruction that was specifically designed to meet the [his] unique special education needs, supported by such services that were necessary to permit him to benefit from instruction, both before and during the period of remote learning" (*id.* p. 8).

Finding that equitable considerations favored the parents, the IHO determined that they were entitled to tuition funding for the full amount of the Windward 2019-20 school year contractual enrollment cost, regardless of whether the instruction and services were provided in person or remotely (IHO Decision at pp. 8-9).

IV. Appeal for State-Level Review

On appeal, the district argues that the IHO erred in finding that the district deprived the student of a FAPE for the 2018-19 school year, and asserts that the parents' due process complaint did not contain an allegation that the district failed to provide the student a FAPE for the 2018-19 school year. Furthermore, the district contends that the parents did not request any type of relief for a purported FAPE deprivation for the 2018-19 school year which provides additional evidence that the 2018-19 school year was not part of the dispute in these proceedings.

The district also alleges that the IHO erred by finding that the district failed to provide the student with a FAPE for the 2019-20 school year because the student's IEP did not include the services and instruction necessary to address the student's significant reading deficits, arguing that finding is not supported by the hearing record. The district asserts that the February 2019 IEP included several goals designed to assist the student in developing his reading skills and the management needs section of the IEP included supportive strategies which, when combined, provided the remediation necessary to address the student's reading deficits. The district asserts that it is unclear which part of the record served as the basis for the IHO's decision that the February 2019 CSE's failure to discuss or develop goals at the CSE meeting was a procedural due process violation that significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE. The district asserts that this determination is not supported by the hearing record. Moreover, the district argues that the IHO did not conclude that the goals were inappropriate.

Turning to the parents' unilateral placement, the district claims that the IHO erred in finding that Windward was an appropriate placement for the 2019-20 school, as the evidence does not demonstrate how it addressed the student's reading deficits and Windward did not provide the necessary related services of OT and speech-language therapy. Lastly, the district argues that Windward was overly restrictive and the parents failed to establish that the program at Windward was specifically designed to meet the unique needs of the student.

In an answer, the parents respond to the district's allegations with admissions and denials and request that the State Review Officer uphold the findings of the IHO and deny the request for review in its entirety. The parents also state that the CSE improperly modified the IEP's management needs section to remove the description that the section is to identify the "environmental and human or material resources" necessary to address the student's needs identified within the IEP, and that the CSE failed to identify specific educational services to address the student's management needs within the IEP's recommended educational program and services section, thereby failing to identify any specific recommendations to address the student's learning and management needs.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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]).⁶

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. Scope of Impartial Hearing

As noted above, the district argues that the IHO exceeded the scope of the impartial hearing when she determined that the district denied the student a FAPE for the 2018-19 school year. In response, the parents contend that their due process complaint explicitly states that they objected to the district's failure to adhere to its child find obligations, the district's impermissible delay in providing services and implementing the student's recommended services, and the district's failure to recommend immediate academic support. The parents also assert that the district opened the door to the appropriateness of delaying the implementation of services for seven months.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b]; 300.508[a]; 8 NYCRR 200.5[j][1]). Under the IDEA and its implementing regulations, the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B];

⁶ 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).

34 CFR 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Additionally, the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013])

Here, although the parents refer to the 2018-19 school year in the due process complaint notice they do not seek any specific relief with respect to that school year and the inclusion of any information from that school year appears to be for background purposes only and not as the underpinning for a FAPE claim related to 2018-19. Specifically, the parents aver in pertinent part that that "[d]uring the second semester of the 2018-2019 school year, [the district] provided [the student] with some reading support, occupational therapy, and speech therapy; but did not provide [him] with enough specialized supports to make appropriate progress" and "[a]n independent evaluation of [the student] . . . conducted in July 2019 . . . confirm[ed] that [the student] did not mak[] sufficient progress during the 2018-2019 school year, despite being provided with at-risk services" (Parent Ex. B at p. 2). However, the due process complaint notice also makes clear that the parents rejected the district's February 2019 IEP for the 2019-20 year and seek tuition reimbursement for their son's attendance at Windward for the 2019-20 school year as relief. Although the parents assert that general claims in the due process complaint notice related to child find, implementation and the lack of appropriate supportive services implicate the 2018-19 school year, such claims lack the requisite factual specificity to link them definitively to that school year especially given that the parents do not seek any relief for an alleged denial of FAPE for that time period.

Similarly, although the parents claim that, in any event, the district opened the door during the impartial hearing to claims regarding the appropriateness of the district's program and placement for the student during the 2018-19 school year, the hearing record reveals that any

testimony solicited at the impartial hearing from district witnesses related to that school year largely served to provide background information and context for the alleged deprivation of FAPE by the district during for the 2019-20 school year for which the parents sought an award of tuition reimbursement as relief and was not proffered to defeat any FAPE claims raised by the parents in the due process complaint notice concerning the 2018-19 school year. Accordingly, the district could not be deemed to have "opened the door" under the holding of M.H. (see A.M., 964 F. Supp. 2d at 283; J.C.S., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *6). As a result, the IHO erred in reaching the issue of a denial of FAPE for the 2018-19 school year sua sponte and finding that the district "failed to provide the student with a FAPE for the 2018-19 school year" (IHO Decision at p. 4).

Although I find that the IHO erred in making a FAPE determination regarding the 2018-19 school year, I concur with the IHO that the parents' requested relief pertains to the 2019-20 school year exclusively and therefore, that is the year that must be examined in determining whether the parents are entitled to tuition reimbursement.

B. 2019-2020 School Year

On appeal, the district asserts that the IHO erred by finding that it failed to offer the student a FAPE for the 2019-20 school year because the "IEP did not provide for the level of instruction that the [s]tudent required in order to address his substantial delay in reading skills" (Req. for Rev. at p. 5; IHO Decision at p. 5). Additionally, the IHO found that the hearing record included conflicting testimony regarding the development of the student's IEP goals, specifically who developed the goals and when they were developed (id. at p. 6). In so finding, the IHO determined that the "failure to discuss and develop the goals at the meeting constitute[d] a procedural due process violation that significantly impeded the [p]arents' opportunity to participate in the decision-making process regarding the provision of a FAPE" (id.). The district argues that the goals and management needs portion of the February 2019 IEP provide the remediation necessary to address the student's reading deficits and that the ICT program would provide the necessary small group and direct instruction to remediate the student's reading deficits while allowing the student to interact with typically developing peers.

For the reasons set forth below, I find that the hearing record supports a finding that the district offered the student a FAPE for the 2019-20 school year. While the student's current level of functioning and identified needs are not in dispute in this matter, a review of the student's needs as reflected in the evaluative information before the February 2019 CSE and the present levels of performance included in the resultant February 2019 IEP provides important context for discussion of the appropriateness of the district's recommended program and placement for the student's 2019-20 school year.

As noted above, on or about December 7, 2018, the parent requested that the district evaluate the student to "get everything up to date" (Dist. Ex. 1). In response to the parents' request, and to address concerns of the student's parents and teacher, the school psychologist conducted a psychoeducational re-evaluation of the student on January 17, 2019 (Dist. Ex. 3).

According to the resultant January 2019 psychoeducational evaluation report, the psychologist used the following evaluation measures: administration of the WPPSI-IV and

Wechsler Individual Achievement Test, Third Edition (WIAT-III), clinical observation, student interview, and review of records (Dist. Ex. 3 at p. 1). The evaluator testified that for the record review portion of the evaluation she reviewed "[t]he student's previous IEPs and previous records in SESIS, current teacher reports, current progress reports from his related service providers and report cards" (Tr. pp. 31-32). She indicated that the SESIS file contained the student's preschool file including his preschool eligibility evaluations (Tr. pp. 44-45). With regard to teacher reports, the evaluator indicated that the student's teacher completed a self-made form that provided information regarding the student's reading, writing, mathematics, social skills, and behavior (Tr. p. 45; Dist. Ex. 3 at p. 1). The evaluator reported that her clinical observation consisted of an observation of the student in his class during a reading lesson and noted that she conducted an interview with the student prior to testing in order to establish rapport (Tr. pp. 32-33). The January 2019 psychoeducational evaluation report described the student as a friendly, playful, "hyper" boy who presented with an outgoing and talkative manner, displayed sporadic eye contact, and required multiple breaks during the evaluation session (Dist. Ex. 3 at p. 1). The evaluator noted that the student seemed to struggle with overall receptive language skills and appeared to have "immature verbal skills" for his age (*id.*). The evaluator indicated that at times the student responded slowly and needed frequent prompting, was "moderately fidgety," and constantly needed to touch testing materials, play with something, or try to get out of his seat (*id.*). The psychoeducational report noted that the student "would often lose focus on the task at hand and needed redirection to continue working" but with frequent breaks and prompting the student was able to complete all the tasks presented to him (*id.*).

The psychoeducational evaluation report indicated that on formal testing using the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) the student's full-scale IQ measured in the low average range with a standard score of 87 and percentile rank of 19 (Dist. Ex. 3 at p. 3). With respect to verbal comprehension, the evaluator noted that the student's performance was uneven suggesting that the student's verbal concept formation and abstract reasoning skills were stronger than his ability to acquire, remember, and retrieve general knowledge (*id.*). According to the evaluation report, the student demonstrated weakness in block design that suggested that he may have difficulty with analyzing and synthesizing abstract visual information (*id.*). With respect to fluid reasoning, the evaluator indicated that the student's performance was diverse and low average for his age with a standard score of 88 and a percentile rank of 21 (*id.* at p. 4). The evaluator interpreted the student's fluid reasoning performance to suggest that he may "experience relative difficulty applying logical reasoning skills to visual information, but he may have a relatively strong ability to verbalize meaningful concepts" (*id.*). The evaluator also suggested the student may have difficulty solving problems in novel situations and may demonstrate better fluid reasoning skills when working with verbally based, rather than visually based, concepts (*id.*). With respect to working memory, the student reportedly performed similarly to peers his age and his processing speed was within an average range (*id.*).

According to the January 2019 psychoeducational evaluation report, the student's academic achievement was assessed using the Wechsler Individual Achievement Test, Third Edition (WIAT-III) (Dist. Ex. 3 at pp. 4-6). The student performed in the below average range on the early reading skills assessment (standard score 78, 7th percentile), spelling (standard score 79, 8th percentile), and alphabet writing fluency (standard score 84, 12th percentile) indicating that his reading and writing abilities were below age expectancy (*id.* at p. 6). The evaluator reported that the student presented with challenges in writing letters, identifying letters or letter sounds, and

rhyming words (id.). With respect to mathematics, the student's performance on a measure of basic mathematic skills (numerical operations, standard score 79, 8th percentile) was weaker than his performance on a measure of problem-solving skills (math problem solving, standard score 101, 53rd percentile) (id.).

The psychoeducational evaluation report indicated that, based on the student's performance, the student may learn new information at a rate that was somewhat slower than his peers and may present with a particular challenge with respect to abstract thinking (Dist. Ex. 3 at p. 7). To address the student's challenges, the evaluator recommended supporting his academic progress through "multiple interventions" and suggested that pre-teaching and re-teaching lessons learned in school would provide the student with additional exposure to new concepts and may facilitate his comprehension and recall of information (id.). The evaluator also suggested that the student may benefit from having new content material presented in multiple modalities, using relatively simple vocabulary and sentence structure (id.). According to the psychoeducational report, focusing on literacy goals was strongly recommended because strong reading skills could build a foundation for academic success (id.).

A CSE convened on February 12, 2019, to review the January 2019 psychoeducational evaluation report and determine the student's ongoing need for special education and related services (Dist. Exs. 7; 8). The CSE was composed of the school psychologist as the district representative; the student's speech-language pathologist, kindergarten teacher and occupational therapist; the district IEP/special education teacher; and the parent (Tr. pp. 35-36, 55-56, 105; Dist. Ex. 6). The school psychologist testified that the February CSE reviewed the January 2019 psychoeducational report, a teacher's report, and progress reports from the student's related service providers (Tr. p. 37).^{7,8} Finding the student remained eligible for special education and related services as a student with a speech or language impairment, the February 2019 CSE recommended that the student receive integrated co-teaching services for English language arts (ELA), mathematics, and social studies to commence on September 5, 2019 (Dist. Ex. 7 at p. 14).⁹ The CSE also recommended the continuation of related services including individual occupational therapy (OT) twice a week for 30-minutes per session and individual speech-language therapy twice a week for 30-minutes per session (id. at p. 14). The prior written

⁷ The school psychologist testified that the teacher report, which was not included in the hearing record, was a self-made document given to the teacher to obtain extra information on how the student was performing in the classroom (Tr. p. 45). It included information regarding the student's reading, writing, mathematics, social and behavioral presentation (id.). The school psychologist testified that the student's teacher shared that the student was "falling behind from the other students with phonemic awareness" (id. pp. 45-46).

⁸ The related services progress reports reviewed by the February 2019 CSE were not submitted as part of the hearing record. The February 2019 IEP included OT results from the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI) which indicated the student's performance was within one standard of the mean (92) which was considered to be average as compared to same aged peers (Dist. Ex. 7 at p. 1). Additionally, the Goodenough Draw-a-Person Test results indicated the student was functioning at the five year nine-month-old level an improvement of one year two months from December 2018 (id.). The IEP does not specify when these assessments were administered.

⁹ The school psychologist testified that the February 2019 CSE was not convened in response to an initial evaluation as the student entered kindergarten with an IEP as a student with a speech or language impairment (Tr. pp. 37-38).

notice dated February 15, 2019 indicated that the CSE "decided that changing [the student's] classroom mid-year would not be beneficial" for the student, therefore, the student would not begin attending an ICT program until September 2019 for the 2019-20 school year (Dist. Ex. 8 at p. 2).

The February 2019 IEP reflected the results of the January 2019 psychoeducational report, detailed above, with regard to the student's cognitive ability and academic achievement (compare Dist. Ex. 3 at pp. 2-6, with Dist. Ex. 7 at p. 2). With respect to speech and language therapy, the February 2019 IEP indicated that the student's goals primarily addressed pre-reading skills and articulation noting the student's challenges with phonological awareness (Dist. Ex. 7 at p. 2). The IEP indicated the student had made some progress with regard to rhyming CVC combinations but was not yet able to identify the initial sound or letter in a CVC word and tended to stretch out the medial vowel in an attempt to identify the letter (id.). The IEP indicated the student made gains in his receptive ability to identify the letters of the alphabet but noted this skill was inconsistent from day to day (id.). The student's speech intelligibility was judged to be poor to fair due to sound substitutions, distortions, and omissions secondary to poor jaw and tongue differentiation (id.). He also presented with poor jaw grading and the use of restricted jaw movement to produce vowels (id.). With respect to social development, the February 2019 IEP indicated that, by teacher report, the student displayed great behavior in the classroom, was compliant and got along well with his classmates in school (id. at p. 3). In terms of the student's physical development, the IEP noted that concerns were primarily related to fine-motor control and writing/drawing skills and although the student found these tasks difficult, he had shown a greater willingness to try new things and persevere with difficult tasks (id.).

The February 2019 IEP indicated that the parent expressed concerns regarding the student's academic progress and reported that he struggled with reading, writing and speech (Dist. Ex. 7 at p. 2). In terms of social development, the parent indicated she was concerned with the student's playdates because he did not play well with other children and making friends was "really hard for him" (id. at p. 3). However, the student's teacher indicated that the student did not have difficulties socializing within the classroom environment (id.). The IEP stated that the parent also expressed concerns regarding the student's fine motor skills (id.).

To address the student's challenges particularly in the areas of reading, writing, mathematics and fine motor skills, the February 2019 CSE developed 10 annual goals (Dist. Ex. 7 at pp. 6-12). With respect to reading, the IEP included a decoding goal related to improving the student's decoding abilities to grade level by demonstrating an ability to blend sounds into CVC, CVCC, and CCVC words accurately and a sight word recognition goal related to recognizing and reading all sight words from the Teacher's College word lists A through E (id. at p. 9). The special education teacher testified that the goal targeting decoding skills was appropriate for the student (Tr. p. 79). The teacher explained that in kindergarten students are taught the sound-symbol relationship and although many may be familiar with the letters of the alphabet, they are not necessarily familiar with the sounds the letters make or how to put those sounds together to form a word (Tr. pp. 78-79). She further explained that the CVC, CVCC and CCVC words targeted in the student's goals formed the basic words in the English lexicon and would therefore help the student be successful in his reading skills (Tr. p. 79). With respect to the goal addressing the student's ability to recognize sight words, the special education teacher testified that the Teacher's College word lists were made up of high frequency words that appeared most often in

kindergarten-leveled text, thus it would make reading an easier task for the student if he knew them by sight (Tr. pp. 77, 79-80).

The IEP also contained a reading goal that targeted the student's ability to retell a familiar story read aloud to him or read independently, including three details, beginning, middle and end with faded teacher prompts (Dist. Ex. 7 at p. 10). The special education teacher testified that this goal was appropriate for the student because it began to work on the student's comprehension of text, which was important for reading (Tr. p. 80). She elaborated on this by stating that in kindergarten the expectation was that the student would be able to talk about the beginning, middle, and end of a story, showing the teacher that the student was able to retain the information in the story (Tr. pp. 80-81). Further, the teacher stated that this skill showed that the student could manipulate the information and use it in conversation and had "not used all of his cognitive energy on decoding the words but was also able to understand what those words meant" (Tr. pp. 80-81).

Turning to mathematics, the IEP included a goal that targeted the student's ability to accurately read, write, and form numbers up to 100 with correct formation (Dist. Ex. 7 at p. 11). In addition, the IEP contained a goal that targeted the student's ability to demonstrate mathematic computations skills on an early first grade level by counting to 100 and adding and subtracting numbers 1-25 with concrete manipulatives (*id.*). The special education teacher testified that these goals were appropriate for the student because by the end of kindergarten students were expected to be able to count to 100 and add and subtract within 25 (Tr. p. 81). Although kindergarteners were not necessarily expected to master the skill of adding and subtracting within 25, if the student was able to do it three out of five times using manipulatives it would be reported as him having met the goal (Tr. p. 81). The special education teacher testified that recognizing and labeling numbers up to 100 was also a kindergarten expectation and the student was having difficulty reading, writing, and forming numbers so to do so was an appropriate goal for him (Tr. pp. 81-82).

With respect to writing, the February 2019 IEP included a goal targeting the student's ability to write on an early first grade level by demonstrating an ability to encode initial consonant sounds, final consonant sounds and vowel sounds when writing short words and to use appropriate conventions of print (directionality, top to bottom) (*id.* at p. 12). The special education teacher testified that, when students first enter kindergarten, they generally do not have this sound-symbol relationship as mentioned with respect to decoding (Tr. p. 82). She testified that with encoding a student needs to hear the sound and produce the symbol which was challenging for the student (Tr. pp. 82-83). She indicated that by mid-kindergarten students were expected to at least be able to hear and write the beginning sound of a word and by the end of kindergarten be able to write the beginning and ending sound (*id.*). Because this was challenging for the student, the special education teacher testified that including a goal targeting this skill made it an appropriate goal for the student (*id.*).

The hearing record presents some discrepancy regarding who wrote the academic goals for the student's 2019-20 IEP (Tr. pp. 38, 106). The school psychologist testified that the special education teacher authored the special education/academic goals and the special education teacher testified that the school psychologist composed the goals (Tr. pp. 38, 106). Both the school psychologist and special education teacher attended the February 2019 CSE meeting (Dist. Ex. 6).

In addition to the above, the February 2019 IEP also included three speech-language goals, one targeting articulation (the student will produce one syllable words with appropriate jaw grading to improve speech intelligibility), one for sound/letter correspondence (when presented with a single letter the student will expressively identify the corresponding sound)—and the third for sound discrimination and identification (the student will identify the first sound in single words when orally presented with the word) (Dist. Ex. 3 at pp. 6-8). To address the student's motor needs, the IEP included an OT goal that targeted the student's ability to write upper case letters of the alphabet and his name using a tripod grasp, when given visual, fine, and graphomotor activities (id. at p. 6).¹⁰

To address the student's academic, motor, and speech-language needs, the February 2019 IEP also identified 14 management strategies including: encouraging the use of tiny crayons and pencils to promote a mature grasp; frequent check-ins to ensure understanding of material being taught; positive reinforcement; praise and encouragement; modeling/scaffolding/spiraling of instruction; reminders to utilize learned strategies when speaking; tasks/questions/directions broken down and repeated; clear and consistent rule, expectations, and routines; verbal/visual prompts, cues and aids to ensure focus on tasks; the use of graphic organizers, outlines, checklists, and rubrics; opportunities for repeated practice of skills using a variety of strategies; opportunities to pause after reading small portions of a text to respond to questions; small group instruction; direct instruction; and tactile activities (hands on activities and manipulatives) (Dist. Ex. 7 at p. 4).

To address the student's identified educational needs, the February 2019 CSE recommended that he receive integrated co-teaching (ICT) services for English language arts (ELA), mathematics, and social studies to commence on September 5, 2019 (Tr. pp. 38-39; Dist. Ex. 7 at p. 14).¹¹ The CSE also recommended the continuation of related services including individual occupational therapy (OT) twice a week for 30-minutes per session and individual speech-language therapy twice a week for 30-minutes per session (Dist. Ex. 7 at p. 14). The school psychologist and special education teacher testified to the appropriateness of the CSE's recommendations (Tr. pp. 39-40, 42, 63-64, 83-86). The school psychologist indicated that in the ICT classroom 40 percent of the students had IEPs while 60 percent of the students did not and the two groups were jointly instructed by a general education teacher and a special education teacher (Tr. p. 39). She stated that the teachers co-planned and prepared lessons and activities with a multisensory approach (id.). Together they delivered instruction to all of the students, with specially designed instruction for the students who had IEPs (id.). The school psychologist testified that ICT services would meet the student's needs in that the student would get small group instruction, an enriching learning environment, and modified instruction to meet his goals (id.). In addition,

¹⁰ According to the school psychologist's testimony, the OT goals were written by the occupational therapist and the speech-language goals were written by the speech-language pathologist neither of which is in dispute (Tr. p. 38).

¹¹ State regulations define integrated coteaching (ICT) services 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]). The number of students with disabilities receiving ICT services within a class may not exceed 12 (8 NYCRR 200.6[g][1]). In addition, State regulations require that the class in which students receive ICT services must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]).

the student would have access to the general education population (Tr. p. 39). The psychologist opined that the ICT class would allow the student to make progress and noted that the CSE had an LRE mandate and ICT services would be less restrictive than a special class placement for the student (Tr. pp. 40-41).

The school psychologist testified that her recommendations in the January 2019 psychoeducational report for pre-teaching, reteaching and presentation of information through multiple interventions, could be met by way of the ICT classroom recommendation (Tr. p. 64). She explained that in terms of multiple interventions she was referring to collaboration between the student's classroom teacher, related service providers and his "at-risk SETSS teacher" to all work on the same goal, to pre-teach the student things prior to a lesson being taught to all the students, and to reteach it in the speech lesson or pull-out services (Tr. p. 64).^{12 13}

The district special education teacher testified that based on her knowledge of the student and his performance at the time, she agreed that the ICT class recommendation with related services would be the most appropriate placement for him (Tr. pp. 83-84). She stated that, due to her knowledge of the student's ability to transition, it was "better for him to get his services inside of the classroom as opposed to being pulled out and come back into the class" (Tr. p. 84). She also indicated that she felt the student required "more small group time with teachers and more immediate feedback," which could be provided in a classroom with two full-time teachers as opposed to pull-out academic support (id.). Further, the special education teacher stated that pull-out services for academics would have been limiting for the student, as he would miss lessons in the classroom and he would be expected to generalize information learned in an outside academic situation and transfer that information back to the classroom (id.). She indicated that the CSE "felt that would have been too hard" for the student at that point (id.).

With respect to the student's reading challenges, the special education teacher testified that because the student-to-teacher ratio was much less in the ICT classroom than in a typical general education classroom, there would be more opportunities for the student's goals to be targeted (Tr. p. 85). She also indicated the ICT classroom would allow for more opportunities for smaller, shorter tasks, as well as time to modify or accommodate assignments, and the student would "just generally have more attention" (id.). The special education teacher also stated that in the ICT classroom, the teachers would have a greater ability to target their instruction toward the student's needs (id.). For these same reasons, the special education teacher testified that the ICT classroom was also appropriate to support the student's needs with respect to writing and mathematics (id.).

Regarding the February 2019 CSE's recommendations to maintain related services at the same level—two individual sessions each per week of OT and speech-language therapy—the

¹² Although pre-teaching and reteaching are recommended in the January 2019 psychoeducational report, they are not specifically identified in the management needs portion of the IEP despite being considered moderately important as described in the psychologist's testimony (compare Tr. p. 65, with Dist. Ex. 3 at p.4).

¹³ The school psychologist testified that the district provided the student with "at-risk SETSS services" until he started in the ICT classroom (Tr. p. 42). The services were not on the student's IEP but were provided by the special education teacher as a pull-out service (Tr. pp. 42). The hearing record suggests that the district also provided the student with "at-risk" reading services beginning in fall 2018 (Tr. pp. 46-47).

school psychologist testified that the student's providers felt that the pull-out recommendations were sufficient because the student was making progress with the level of services he was receiving at the time of the February 2019 CSE meeting (Tr. pp. 41-42).

The special education teacher testified that the CSE considered recommending special education teacher support services (SETSS) for the student, which were generally pull-out services that occurred one time a day for a short period of approximately 45 minutes, but felt he would require more support so they were rejected (Tr. pp. 85-86). She indicated that a self-contained classroom was not considered because "[a]ccording to the special education laws, we have to follow a continuum where we have to try out certain programs and services first. We are not allowed to jump to the most restrictive environment right off the bat" (Tr. p. 86).^{14,15} The special education teacher testified that in following the continuum they started with related services and then moved to the ICT recommendation, which if not successful, they would then discuss a self-contained option, however, at that point in time the self-contained option was considered too restrictive (Tr. p. 86; *see* Tr. p. 55).¹⁶ The school psychologist also testified to the CSE's responsibility to educate students in the least restrictive environment (Tr. p. 40). She explained that the ICT classroom was less restrictive than a self-contained class because it employed a general education curriculum and included typically developing peers alongside students with disabilities, whereas in a self-contained class all of the student's had disabilities and IEPs (Tr. pp. 40-41). She also indicated that the CSE considered recommending SETSS for the student, but felt

¹⁴ The school psychologist testified that the February 2019 CSE considered a 12:1+1 self-contained classroom but felt it was too restrictive for the student (Tr. p. 40).

¹⁵ The IDEA requires that a student's recommended program must be provided in the 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 111; Gagliardo, 489 F.3d at 108; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; *see* 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; M.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131, 144 [2d Cir. 2013]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; *see* 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6).

¹⁶ The special education teacher testified that there were 11 IEP students enrolled the first grade ICT classroom for the 2019-20 school year and there was a spot for the student in that classroom (Tr. pp. 88-89, 106). She also testified that the program had the ability to implement the recommended related services (Tr. 89).

he would "highly benefit" from having a special education teacher with him throughout the school day (Tr. p. 41).¹⁷

The February 2019 IEP highlighted the student's needs with respect to reading including his challenges with understanding letter sounds, rhyming, discriminating beginning and ending sounds, and blending sounds (Dist. Ex. 7 at p. 2). The IEP also identifies the student's challenges with writing letters, spelling, and identifying letters (id). The February 2019 IEP describes the student's needs with respect to mathematics noting his poorer performance relative to basic mathematics skills versus problem solving abilities and identified his challenges performing basic math skills (id).

The February 2019 IEP describes the student's struggles with phonological awareness skills, his poor-to-fair speech intelligibility due to articulation substitutions and distortions, and fine motor challenges related to writing and drawing (Dist. Ex. 7 at pp. 2-3). As noted above, the hearing record supports a finding that the February 2019 CSE developed appropriate goals to address the student's needs and also recommended instructional strategies and supportive interventions reasonably calculated to provide the student with educational benefit the in the least restrictive environment.

In finding that the district denied the student a FAPE for the 2019-20 school year, the IHO opined, in somewhat conclusory terms, that "[t]he IEP did not provide for the level of instruction that the [s]tudent required in order to address his substantial delay in reading skills" and "[i]f the IEP had included the services and instruction that the [s]tudent needed in order to address his significant reading deficits" she "may well have found that the IEP was reasonably calculated to enable the Student to make meaningful educational progress" (IHO Decision at p. 5). However, the IHO failed to articulate what specific services, supports or instructional modalities the IEP should have recommended instead of the ICT services, related services, supports and goals that were included in the IEP and which addressed the student's educational needs, including reading needs. Similarly, although the IHO identified what she deemed to be flaws in the CSE's development of the student's goals, she did not identify any deficiencies with the goals themselves, whether specific goals were missing or incomplete or what goals should have been developed in place of those actually created by the CSE (*id.* at p. 6). Rather, the hearing record supports a finding that the goals, in tandem with the program and service recommendations in the February 2019 IEP, addressed the student's educational needs, including his reading needs and the IEP, in its totality, was reasonably calculated to provide the student with educational benefits.¹⁸

¹⁷ According to the February 2019 IEP and the February 15, 2019 prior written notice the CSE considered related services only, special education teacher support services and an ICT classroom (Dist. Exs. 7 at p. 19; 8 at p. 1).

¹⁸ I note that, in the answer, the parents urge affirmance of the IHO's decision by arguing, at some length, that the district did not follow State guidance or procedure with respect to the CSE's use of the Management Needs section of the IEP (see <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/answers-present.htm>). Specifically, the parents contend that the CSE improperly modified the IEP's management needs section to remove the description that that section is to identify the "environmental and human or material resources" necessary to address the student's needs identified within the IEP, and that the CSE failed to identify specific educational services to address the student's management needs within the IEP's recommended educational program and services section, thereby failing to identify any specific recommendations to address the student's

Accordingly, given the student's undisputed needs as described in the February 2019 IEP, the hearing record supports a finding that the recommended ICT classroom, in conjunction with the related services of occupational and speech-language therapy, as well as instructional supports, strategies and goals, offered the student an educational program in the least restrictive environment that was reasonably calculated to enable the student to make meaningful progress in light of his circumstances.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record supports the finding that the district offered the student a FAPE for the 2019-20 school year, therefore the IHO's finding to the contrary must be reversed.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED

IT IS ORDERED that the IHO's decision dated November 27, 2020 in this matter be modified to reverse that portion of the decision that awarded for tuition reimbursement for the student's attendance at Windward for the 2019-20 school year.

**Dated: Albany, New York
February 5, 2021**

**CAROL H. HAUGE
STATE REVIEW OFFICER**

learning and management needs. The parents' interpretation of the relevant guidance, however, goes far beyond what the IHO found with respect to the district's alleged denial of a FAPE to the student and, likewise, any claims based upon the district's adherence to State guidance with respect to IEP development were not raised by the parents in the due process complaint as a basis for finding a FAPE denial for the 2019-20 school year. Accordingly, I decline to address such arguments here. However, as determined herein, upon my independent review of the record, I find that the totality of the CSE's IEP recommendations for the student's program, related services and placement provided him with a FAPE for the 2019-20 school year.