The University of the State of New York

The State Education Department
State Review Officer
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No. 21-216

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Rye Neck Union Free School District

Appearances:
Spencer Walsh Law, PLLC, attorneys for petitioners, by Christopher Barnett, Esq.

Bond, Schoeneck & King, PLLC, attorneys for respondent, by Emily E. Iannucci, Esq., and Howard M. Miller, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered the student appropriate special education programming and denied their request to be reimbursed for their daughter's tuition costs at the Windward School (Windward) for the 2019-20 and 2020-21 school years. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 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 presents with deficits in reading and math, working memory, attention and concentration, social/emotional, and expressive language skills (Parent Exs. E at pp. 1-3, 9-13; G at pp. 1-3; see Parent Ex. S; Dist. Ex. 22 at pp. 1-2, 5-8). The student has received diagnoses of an attention deficit hyperactivity disorder (ADHD) inattentive type, a specific learning disability with impairments in reading, written expression, and math, and "rule/out anxiety disorder" (Parent Exs. A at p. 3; B at p. 3; S at pp. 28-29, 32-33; Dist. Ex. 16 at pp. 28-29, 32-33). The student attended a district elementary school beginning in kindergarten and, in first grade (2017-18 school year), received academic intervention services (AIS) in both reading and math and one 30-minute session per week of AIS speech-language therapy (Parent Exs. S at p. 2; W at p. 1; Dist. Ex. 24 at p. 1). A member of the instructional support team referred the student to the CSE due to concerns regarding her learning and retention of academic concepts (Dist. Ex. 24 at p. 1).

A CSE convened on June 20, 2018 to determine the student's initial eligibility for special education services (see generally Dist. Ex. 24). The June 2018 CSE found the student eligible for special education as a student with a learning disability and developed an IEP to be implemented during the 10-month 2018-19 school year (second grade) (id. at pp. 1-2, 9-10).[1] To address the student's management needs, the CSE identified that she required the support of a small group with multisensory instruction, which included the use of models, visuals, and repetition of material to aid her retention and application of academic concepts (id. at p. 7). The June 2018 CSE recommended four 45-minute sessions per week of resource room services in a group (5:1), one 40-minute session per day of specialized reading instruction in a group (8:1), and two 30-minute sessions per week of speech-language therapy in a group (5:1) (id. at p. 9). Additionally, the June 2018 CSE recommended supplementary aids and services of preteach/reteaching of materials in a small group setting, multisensory techniques, visual aids/models, refocusing/redirection, preferential seating, modified homework assignments, and repetition/practice (direct instruction of skills) to aid the student's retention of academic concepts together with testing accommodations (id. at pp. 9-11).

Next, a CSE convened on May 21, 2019 to conduct the student's annual review and develop her IEP for the 2019-20 school year (third grade) (see generally Dist. Ex. 22). The resultant May 2019 IEP described the student's management needs as requiring "small group support both in the general education classroom and in a small group pull out setting using a multi-sensory approach to learning" (id. at p. 8). The May 2019 CSE recommended that the student attend a general education classroom placement and receive two 45-minute sessions per day of integrated co-teaching (ICT) services in English language arts (ELA) and two 45-minute sessions per day of ICT services in math (id. at p. 10). The May 2019 CSE also recommended two 30-minute sessions per week of group (5:1) speech-language therapy, and four 40-minute session per week of group (8:1) specialized reading instruction (id. at pp. 10-11). In addition to the supplementary aids and services recommended by the June 2018 CSE, the May 2019 CSE also recommended that the student receive encouragement and motivation to complete tasks the student perceived as difficult, as well as use of graph paper for math computations (compare Dist. Ex. 22 at p. 11, with Dist. Ex. 24 at pp. 9-10). The May 2019 CSE recommended 12-month services of three 30-minute sessions per week of group (5:1) specialized math instruction (Dist. Ex. 22 at p. 12).

Because of the parents' concern that the student was "below grade level, ha[d] difficulty with reading and math, and struggle[d] to complete her homework independently," the parents obtained a private neuropsychological evaluation of the student, which was conducted over three days in June 2019 (see Dist. Ex. 16).[2] On June 26, 2019, the parents executed a contract with Windward for the student's attendance during the 2019-20 school year (Parent Ex. Z).[3] In a letter

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

[2] The hearing record contains multiple duplicative exhibits. For purposes of this decision, either the parent or district exhibit is cited (but not both) in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[3] 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).

dated August 15, 2019, the parents notified the district that they disagreed with the recommendations contained in the May 2019 IEP and that they intended to unilaterally place the student at Windward for the 2019-20 school year and seek reimbursement for the costs thereof from the district (see Parent Ex. C).

Thereafter, on September 3, 2019, a requested review CSE meeting was held to discuss the parents' concerns and to review the private neuropsychological evaluation results (see Dist. Ex. 11; see also Parent Exs. C; R; UU; VV). The September 2019 CSE continued to recommend two 45-minute sessions per day of ICT services in both ELA and math (Dist. Ex. 11 at p. 15). The September 2019 CSE recommended one 30-minute session per week of group (5:1) speech-language therapy outside the classroom and one 30-minute session per week of group (5:1) speech-language therapy inside the classroom (id.). Further, the September 2019 CSE increased the student's specialized reading instruction to five 40-minute sessions per week in a group (8:1) (compare Dist. Ex. 11 at p. 15, with Dist. Ex. 22 at p. 11). In connection with previously recommended supplementary aids and services, the September 2019 CSE also recommended access to computer/word processor, books on tape, prompting, wait time for the student to process information, directions repeated, extended time to complete assignments, and "[t]eaching [a]ssistant cluster (5:1) during social studies and science (compare Dist. Ex. 11 at pp. 16-17, with Dist. Exs. 22 at p. 11; 24 at pp. 9-10). The September 2019 CSE also continued to recommend 12-month services of three 30-minute sessions per week of specialized math instruction (compare Dist. Ex. 11 at p. 17, with Dist. Ex. 22 at p. 12).

The student attended Windward for the 2019-20 school year (see Dist. Ex. 31). On January 29, 2020, the parents executed a contracted with Windward for the student's attendance during the 2020-21 school year (Parent Ex. FF). The parents filed a due process complaint notice dated February 5, 2020, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Parent Ex. A).[4]

On May 20, 2020, a CSE convened to conduct the student's annual review and developed her IEP for the 2020-21 school year (fourth grade) (see generally Dist. Ex. 8). The May 2020 IEP reflected that the student needed positive behavioral interventions, supports and strategies to address behaviors impeding the student's learning (id. at p. 12). The May 2020 CSE recommended two 45-minute sessions per day of ICT services in ELA, two 40-minute sessions per day of ICT services in math, and one 120-minute weekly session of indirect consultant teacher services to the regular education teacher for science and social studies (id. at p. 14). Additionally, the May 2020 CSE recommended related services of one 30-minute session per week of group (5:1) speech-language therapy outside the classroom, one 30-minute session per week of group (5:1) speech-language therapy inside the classroom, and five 40-minute sessions per week of specialized reading instruction in a group (8:1) (id.). The supplementary aids and services remained the same as recommended by the September 2019 CSE (compare Dist. Ex. 8 at pp. 14-16, with Dist. Ex. 11 at pp. 16-17). 12-month services were recommended consisting of three 30-minute sessions per week of 5:1 specialized math instruction and three 60-minute sessions per week of specialized reading instruction for decoding and comprehension in a group (5:1) (Dist. Ex. 8 at pp. 16-17).

[4] The February 2020 due process complaint notice is summarized in more detail below.

In a letter dated August 14, 2020, the parents notified the district that they disagreed with the recommendations contained in the May 2020 IEP and that they intended to unilaterally place the student at Windward for the 2020-21 school year (see Parent Ex. D).

In response to the parents' August 2020 10-day notice letter, the CSE reconvened on August 28, 2020 to discuss the parents' concerns pertaining to the May 2020 IEP (see generally Dist. Ex. 6). The August 2020 CSE recommended that additional testing be conducted to obtain updated information about the student's needs before discussing any further recommendations (id. at p. 2). The recommended program, related services, and supplementary aids and services remained the same as the May 2020 IEP except that the CSE further recommended one 30-minute session per week of individual counseling (compare Dist. Ex. 6 at pp. 15-17; with Dist. Ex. 8 at pp. 14-16).

On October 2, 2020, the CSE reconvened to review the updated information pertaining to the student's current academic levels and functioning (see generally Dist. Ex. 2). Based upon the updated testing information, the CSE determined that the "student would benefit from a more intensive program to develop her reading and decoding skills" (id. at pp. 2-3). The October 2020 CSE recommended two 45-minute sessions daily of a 12:1+1 special class in ELA and one 40-minute session daily of a 12:1+1 special class in math, together with one 120-minute session per week of indirect consultant teacher services to the regular education teacher for science and social studies (id. at p. 19). The October 2020 CSE continued to recommend related services of one 30-minute session per week of group (5:1) speech-language therapy outside the classroom, one 30-minute session per week of group (5:1) speech-language therapy inside the classroom, and one 30-minute session per week of individual counseling (compare Dist. Ex. 2 at p. 19, with Dist. Ex. 6 at p. 16). In addition to the supplementary aids and services recommended in the August 2020 IEP, the October 2020 CSE recommended that spelling be waived on writing assignments (compare Dist. Ex. 2 at pp. 19-21, with Dist. Ex. 6 at pp. 16-17). The October 2020 CSE meeting information summary noted that 12-month services would be discussed at the student's annual review, although the IEP indicated that 12-month services were recommended consisting of three 30-minute sessions per week of specialized math instruction in a group (5:1) and three 60-minute sessions per week of specialized reading instruction for decoding and comprehension in a group (5:1) (Dist. Ex. 2 at pp. 3, 21). The student remained at Windward for the entire 2020-21 school year (see Parent Exs. FF-GG, II).

A. Due Process Complaint Notices

As noted above, in the February 2020 due process complaint notice, which consisted of 15 pages and 88 enumerated paragraphs together with approximately 13 lettered subparagraphs, the parents alleged that the district failed to appropriately evaluate the student, provide the student with an appropriate placement, or develop an appropriate IEP for the 2019-20 school year, thereby denying the student a FAPE (see Parent Ex. A). In another due process complaint notice dated December 1, 2020, which consisted of 28 pages and 220 enumerated paragraphs together with approximately 42 lettered subparagraphs, the parents asserted that the district failed to appropriately evaluate the student, provide the student with an appropriate placement, or develop an appropriate IEP for the 2020-21 school year, thereby denying the student FAPE (see Parent Ex. B). For both the 2019-20 and 2020-21 school years, the parents alleged that Windward was an appropriate unilateral placement and that equitable considerations weighed in favor of their requested relief (Parent Exs. A at p. 14; B at p. 27). The parents requested tuition reimbursement and transportation to Windward for both school years (Parent Exs. A at p. 14; B at p. 27).

B. Impartial Hearing Officer Decision

The parties agreed to the consolidation of both due process complaint notices, and on December 10, 2020, the IHO issued an interim order consolidating the matters (Interim IHO Decision at pp. 2-3).

An impartial hearing convened on April 28, 2021 and concluded on June 23, 2021, after six days of proceedings (see Tr. pp. 1-1008). In a decision dated September 17, 2021, the IHO determined that the district offered the student a FAPE for the 2019-20 and 2020-21 school years (IHO Decision at pp. 13-32).

The IHO held that the student's placement was not predetermined for administrative convenience and the parents had opportunities to meaningfully participate in CSE processes (IHO Decision at p. 16). In connection with the evaluations that the parents alleged the district should have conducted, the IHO held that, based on the June 2018 OT evaluation and teacher reports, the district correctly declined to conduct another OT evaluation (id. at p. 17). The IHO acknowledged that the district did not conduct a classroom observation but noted evidence that Windward would not permit observations in-person due to COVID or during remote instruction (id. at p. 18). While the IHO noted that at the May 2019 CSE meeting the student's need for an assistive technology evaluation should have been discussed and "perhaps" should have been conducted, she found that, overall, the CSEs had "a significant amount of information regarding [the] [s]tudent at each of the IEP meetings" and that, therefore, the parents' claims that the student was not adequately evaluated were without merit (id. at pp. 17-18).

For both school years, the IHO found the CSEs considered available evaluations and reports, determined the student's present levels of performance, and recommended annual goals to target the student's areas of need (IHO Decision at pp. 19-20). While the IHO indicated that the CSEs should have engaged in more discussions regarding the student's needs related to an ADHD diagnosis, she found that the CSEs developed annual goals and recommended modifications and accommodations to address the student's needs for refocusing and redirection (id. at pp. 23-25). Regarding related services, the IHO referred to the prior discussion related to the need for an OT evaluation and further indicated that the student was recommended to receive speech-language therapy and specialized instruction; the IHO noted that the student exhibited "anxiety and self-confidence issues" and, therefore, opined that it would "have been appropriate" for the CSEs to discuss whether the student would benefit from counseling services (id. at 21).

As for the CSEs' program recommendations, the IHO weighed the testimony of the parents' expert witness, a pediatric and literacy specialist, and found it to be "somewhat credible," but determined that the standard for a FAPE required that the district provide an IEP that was reasonably calculated to allow the student to make progress, which might not be the "best possible program" such as that recommended by the parents' expert (IHO Decision at pp. 21-23). Additionally, the IHO held that district witnesses testified credibly as to the appropriateness of the recommended program and provided specific information pertaining to how the program and annual goals would be implemented (id. at pp. 24-25). On this point, the IHO detailed testimony from district witnesses explaining the rationale for the CSEs' recommendations during the relevant school years, noting adjustments to the recommendations over time in response to the "variety of reports, evaluations and teacher and parent concerns" (id.). Further, the IHO held that the CSEs' recommendations for a district public school were supported by the record (id. at pp. 25-26).

Overall, the IHO determined that, based on the evidence in the hearing record, the CSEs' recommendations during the 2019-20 and 2020-21 school years offered the student a program that was reasonably calculated to enable the student to make progress (id. at pp. 26, 30, 32).

Although the IHO found that the district offered the student a FAPE for the 2019-20 and 2020-21 school years, she acknowledged the district's concession that Windward was appropriate unilateral placement for the student (IHO Decision at pp. 23, 27). As for equitable considerations, the IHO determined that the parents would not have accepted any program the district recommended and, therefore, held that if there had been a finding of a denial of a FAPE, an award of tuition reimbursement would have been reduced by half (id. at pp. 29-30). Ultimately, the IHO declined to award the parents any relief (id. at p. 32).

IV. Appeal for State-Level Review

On appeal, the parents argue that the IHO erred in finding that the district offered the student a FAPE for the 2019-20 and 2020-21 school years. In particular, the parents challenge the IHO's findings related to parent participation and predetermination, the sufficiency of evaluative information given the district's failure to conduct an assistive technology evaluation or OT evaluations, the appropriateness of the IEPs in light of the CSEs' failure to discuss the student's needs related to an ADHD diagnosis or include annual goals related thereto, the appropriateness of annual goals and CSEs' program recommendations, and the IHO's reliance on evidence, which the parents argue was retrospective. The parents also assert that, when finding that the district offered the student a FAPE, the IHO failed to consider or weigh evidence regarding the effect of a past traumatic incident on the student's social/emotional needs, her regression after breaks, and her need for direct instruction in all academics. In addition, the parents allege that the IHO erred in determining that tuition, if awarded, would be reduced by 50 percent based on equitable considerations.

In its answer the district generally denies the allegations contained in the parents' request for review and argues that the IHO's decision should be upheld in its entirety except that the district asserts that, if it was determined that the district had not provided the student with a FAPE for the 2019-20 or 2020-21 school years, the IHO should have found that equitable considerations would have warranted a full denial of tuition reimbursement.

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]).[5]

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

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE for the 2019-20 and 2020-21 school years (IHO Decision at pp. 10-26). The IHO accurately recounted the facts of the case, addressed all of the specific issues identified in the due process complaint notices, set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2019-20 and 2020-21 school years, and applied that standard to the facts at hand (id.). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that she weighed the evidence and properly supported her conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while I will briefly discuss the parents' allegations on appeal, the conclusions of the IHO are hereby adopted.

[5] 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).

In connection with the 2019-20 school year, two separate IEPs were developed: May 21, 2019 and September 3, 2019 (see Dist. Exs. 11; 22). The parents objected to the May 2019 IEP in an August 2019 10-day notice letter and the CSE reconvened in September 2019 in response to the parents' letter and to review the private neuropsychological evaluation report (see Parent Exs. C; S; Dist. Ex. 11). In connection with the 2020-21 school year, three separate IEPs were developed: May 20, 2020, August 28, 2020, and October 2, 2020 (see Dist. Exs. 2; 6; 8). Again, the parents objected to the May 2020 IEP in an August 2020 10-day notice letter and the CSE reconvened in late August 2020 in response to the letter (see Parent Ex. D; Dist. Ex. 6). After agreeing to conduct additional testing at the August 2020 CSE meeting, the CSE again met in October 2020 and recommended program changes (compare Dist. Ex. 2, with Dist. Ex. 6). Based upon the multiple meetings held over the two school years, including meetings where the CSE reconvened at the request of the parents, the evidence in the hearing record supports the IHO's determination that the parents had a full opportunity to participate in the development of the student's IEPs and that the district had the requisite open mind, thereby defeating any notion that the recommended programs were predetermined (see IHO Decision at p. 16; see also T.P., 554 F.3d at 253).[6] While the parents did not agree with the CSE's ultimate recommendations, disagreement with a proposed IEP does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]).

As to the parents' contention that the district's failure to perform an assistive technology evaluation and an OT evaluation resulted in a denial of FAPE for the 2019-20 and 2020-21 school years, this argument is not supported by the evidence in the hearing record.[7] Even if the district's

[6] As for the parents' allegation that the district's purported predetermination was demonstrated by the lack of a recommendation in the student's IEPs for full-time ICT services or a special class (including for science and social studies), the meeting information summary from the September 2019 CSE shows that the CSE considered ICT services for science and social studies and memorialized the reasons for the CSE's decision not to recommend such services, which were related to the student's needs and not the availability of such classes in the district (Dist. Ex. 11 at pp. 2-3). The IHO considered and weighed this and other evidence on this point and the parents have not identified a convincing reason to depart from the IHO's sound reasoning (see IHO Decision at pp. 13-16).

[7] The parents argue that the IHO "shifted the burden" (Req. for Rev. at p. 9), using language that is ordinarily employed in administrative proceedings under the IDEA and Article 89 of the State Education Law when referring to the parties' burden of production and persuasion at the impartial hearing (see Educ. Law § 4404[1][c]); however, further review of the parents' argument reveals that it is not related to the IHO's allocation of the burden of proof but instead is a legal argument regarding who was responsible for seeking a particular assessments of a student. While the parents are correct that the district carried the responsibility to ensure that the student was evaluated in all areas of disability (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][3], [6][vii]), the IHO was examining whether, based on the information available to the CSEs, the district committed a procedural violation of the IDEA by failing to conduct an assistive technology evaluation of the student (see IHO Decision at p. 17). It was relevant and appropriate for the IHO to consider whether a specific request for such assessments had been made by the parents or any of the student's teachers at either the district or at Windward (see id.). Further, had the parent made a specific request for either an assistive technology or an OT evaluation, such request would have further defined the district's responsibility in that, in response to the request, the district would have been required to either conduct the assessments or provide the parents with prior written notice stating the reasons why the district felt that the evaluations were not necessary (34 CFR 300.303[a][2]; 300.503;

failure to conduct an assistive technology evaluation constituted a procedural violation, the parent fails to point to any facts or evidence to establish that this violation impeded the student's right to a FAPE, hindered the parent's opportunity to participate in the decision-making process, or otherwise deprived the student of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Assistive technology was first mentioned by the private neuropsychologist, who stated that the district should pursue "the use of assistive technology" (Parent Ex. S at p. 32). Upon receiving and reviewing the private neuropsychological evaluation report, the September 2019 CSE recommended access to computer/word processor for classwork and homework, books on tape when needed, and access to a computer/word processor for all tests (Dist. Ex. 11 at pp. 16, 18). Those recommendations continued on the May, August and September 2020 IEPs (compare Dist. Exs. 2 at pp. 20, 22, with Dist. Exs 6 at pp. 17-18; 8 at pp. 15, 17). At the October 2020 CSE meeting there was a discussion that the student was "demonstrating similarities to children who show a dyslexic profile" and the CSE discussed that the student would benefit from audiobooks (Dist. Ex. 2 at p. 2). Given the recommendations in the IEPs that the student have access to assistive technology, the lack of an evaluation is this area does not rise to the level of a denial of a FAPE (see D.B. v Ithaca City Sch. Dist., 690 Fed. App'x 778, 782 [2d Cir May 23, 2017] [finding that although the district did not first pursue an evaluation to consider the benefits of assistive technology, the IEP addressed the student's needs by recommending access to a computer and word processor]).

As for OT, at the September 2019 CSE meeting, the recommendation for an OT evaluation was considered based upon the neuropsychologist's report that the district "may" want to conduct an OT evaluation (Parent Ex. S at p. 30; Dist. Ex. 11 at p. 2). However, the CSE pointed out from the neuropsychologist's testing that, although the student was "disorganized" when copying designs, she "performed in the [a]verage range on both the copying and recall task" (Dist. Ex. 11 at p. 2). The student's teacher shared with the September 2019 CSE that the student's handwriting was neat, and she had "excellent drawing skills" (id.). Based upon this information, the CSE did not recommend another OT evaluation (id.). Therefore, the evidence in the hearing record supports the IHO's determination that the district "correctly declined to conduct another" OT evaluation based upon the results of the June 2018 OT evaluation, which revealed average and above average scores with no graphomotor concerns and teacher reports that the student's fine motor skills were a strength (IHO Decision at p. 17).

With respect to annual goals, the parents contend that the IHO erred in finding that the IEPs annual goals for the 2019-20 and 2020-21 school years met applicable standards and were specifically designed to meet the student's needs. The parents rely upon the testimony of their expert witness as to why it was important for the September 2019 IEP annual goals to "have a sequenced and hierarchical breakdown" (see Tr. pp. 816, 819-21; Dist. Ex. 11 at pp. 14-15). Essentially, the testimony reflects the expert's view that the student's annual goals should have been broken down into short-term objectives. Short-term instructional objectives or benchmarks—defined in State regulation as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (8 NYCRR 200.4[d][2][iv]; see 20 U.S.C.

300.505[d]; 8 NYCRR 200.4[b][4]; 200.5[a]). Accordingly, the IHO did not err in noting that neither the parents nor the student's teachers had requested that the district conduct an assistive technology evaluation (see IHO Decision at p. 17).

§1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]). However, here, this student had not been identified as requiring alternate assessments, and therefore, the CSEs were not required to develop short term objectives to be included in her annual goals (see Dist. Exs. 2 at p. 22; 6 at p. 19; 8 at p. 17; 11 at p. 22 at p. 18). Additionally, citing testimony from their expert witness, the parents argue that the annual goals failed to promote independence and would lead to "the accumulation of a deficit" by recommending 70 percent or 75 percent accuracy, which the expert witness considered to be "a very low supported standard" for "a child who could be taught to . . . acquire a specific skill set with 100 percent accuracy" (see Tr. pp. 819, 824, 942-43; Dist. Ex. 11 at pp. 14-15). Even if the expert's view about the low threshold for mastery of the annual goals was valid, the evidence in the hearing record does not support a finding that defects in the form or measurability criteria for the goals, as opposed to the content of the goals, resulted in a denial of FAPE (see P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). Indeed, the IHO recognized the testimony of the parents' expert witness that the annual goals "could" have been "more" appropriate but held that it was "clear" that the various CSEs "went through the evaluations and reports, determined [the student's] present levels of performance and recommended numerous goals to address those concerns" (IHO Decision at p. 20). Accordingly, the IHO properly weighed the testimony of the parents' expert witness together with the district's testimony and evidence pertaining to annual goals, and properly determined that the goals in each of the IEPs enabled the student to "make meaningful progress" (id. at p. 26).

With respect to the CSEs' program and service recommendations, review of the parents' allegations on appeal reveal no convincing basis to disturb the IHO's decision. Although the parents cite to evidence that they characterize as retrospective, reviewing the IHO's decision as a whole shows that the IHO's determinations were supported by sufficient permissible evidence such that, even if she referred to evidence that could be deemed retrospective, it would not warrant a reversal of her determinations (see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 85-86 [2d Cir. July 24, 2013] [noting that the inquiry should focus not on whether the IHO or SRO "relied on impermissible retrospective evidence, but whether sufficient permissible evidence, relied on . . . , supports the . . . conclusion that the IEP offered [the student] a reasonable prospect of educational benefits"]). Moreover, the Second Circuit rejected a rigid "four-corners rule" that would prevent consideration of evidence—including testimony that explains the written terms of the IEP (R.E., 694 F.3d at 186-87; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 411 (S.D.N.Y. 2017). The testimony referred to by the parents was that the district witnesses testified that the district would provide an Orton-Gillingham based program or multisensory instruction. However, a close review of the hearing record demonstrates that multisensory instruction was recommended in each IEP and the CSEs' discussions of the use of the Orton-Gillingham methodology was memorialized in meeting information summaries attached to the IEPs (Dist. Exs. 2 at pp. 2-3, 16, 19; 6 at pp. 12, 16; 8 at pp. 11, 15; 11 at pp. 2-3, 13, 16; 22 at pp. 8, 11; 24 at pp. 7, 9). Therefore, this is not an instance where the district was trying to rehabilitate deficient IEPs by relying on information not available to the CSEs (see R.E., 694 F.3d at 186-88). Further, while the parents characterize testimony that the district would have developed a "full-time" ICT program for the student if she required such program, this testimony was not offered to rehabilitate the IEPs but instead was offered and to show that the CSEs had an open mind and did not predetermine the student's programming based on what was available in the district, and it is for this purpose that the IHO cited it (IHO Decision at p. 14).

Further, the IHO properly weighed evidence regarding the student's anxiety and needs related to ADHD and the degree to which the IEPs addressed these needs and, other than generally arguing that the IHO should have found otherwise, the parents have not pointed to any basis for disturbing the IHO's well-supported finding that these deficiencies in the educational planning process did not result in a denial of a FAPE. To the extent the parents argue the CSEs failed to consider the student's past traumatic event or the student's regression, they do not challenge the sufficiency of the IEPs' present levels of social development or otherwise identify supports or services the IEPs lacked to address needs arising from that event and therefore do not provide a basis upon which to overturn the IHO's findings.

Next, the parents contend that the IHO ignored critical evidence that the student required significant direct instruction in all academic areas for the 2020-21 school year It is not entirely clear what the parents mean when they use the phrase "direct instruction."[8] Review of the parents' due process complaint notice indicates that they alleged that the CSEs' "failed to offer a sufficient level of direct reading intervention" (Parent Ex. B at pp. 9, 20). During the impartial hearing, the CSE liaison from Windward testified that, when Windward first screened the student, it was determined that the student "required direct instruction" and "specific tools" to address gaps in her decoding skills (see Tr. pp. 740-741). Thus, viewing the parents' claim as relating to the student's need for specialized reading instruction, perhaps in a small group, review of the IEPs in effect for the 2020-21 school year demonstrates that the CSE recommended such instruction. For example, the May 2020, CSE subcommittee recommended that the student receive five 40-minute sessions per week of specialized reading instruction in a group (8:1) along with use of a multisensory approach for reading and other supports and accommodations (Dist. Ex. 8 at pp. 1, 11, 14-16). When the CSE subcommittee reconvened for a program review on October 2, 2020, it reviewed the results of the assessments conducted in September 2020 and recommended the student attend a 12:1+1 special class for ELA and math (see Dist. Exs. 2-4). The meeting information summary attached to the October 2020 IEP noted that the 12:1+1 special class for math was recommended to best meet the student's needs based on current information (Dist. Ex. 2 at pp. 2-3). With regard to ELA, the CSE recommended the student attend a 12:1+1 special class in ELA which would "provide two periods daily of intensive direct instruction using Preventing Academic Failure (PAF) program" (id.). According to the meeting information, PAF is a multisensory program that focuses on decoding and uses daily dictation, charts around the room for reminders, and direct reinforcement of sounds and spelling patterns (id.). The district's administrator of special services (administrator) explained that the PAF class was to be divided "into two specific groups to better meet her needs" (Tr. pp. 651, 659). The meeting information summary indicated that one class would be an "intensive PAF class and the other would be an intensive comprehension and language development class" (Dist. Ex. 2 at p. 3). The administrator opined that the October 2020 IEP was a "very creative solution," and "a very responsive solution" to the test results which showed the student's "certain profile" in that she "really required the decoding and the encoding, the spelling

[8] The terms "direct" and "indirect" are used in State regulation to define consultant teacher services with direct being delivered to a student with a disability and indirect being delivered to a regular education teacher (8 NYCRR 200.6[d]). In addition, State guidance describing the continuum of special education services draws a distinction between primary instruction (which can be delivered in a general education class with or without ICT services or in a special class) and supplementary instruction (such as resource room services) ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 8, 9-11, 14-15, Office of Special Educ. [Nov. 2013], available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf).

approach, the multisensory approach verses comprehension" (Tr. p. 659). The special education and reading teacher who conducted the September 2020 assessments testified that the PAF program was an Orton-Gillingham program taught through direct instruction using a multisensory, systemic approach to teach spelling and reading (Tr. pp. 521, 525). The special education teacher explained that the students in the ELA 12:1+1 special class "always separated for spelling and reading," and that she provided direct reading instruction based on their level (Tr. p. 598). Additionally, the CSE determined that the indirect consultant teacher and teaching assistant cluster for science and social studies within the mainstream classroom continued to be appropriate (Dist. Ex. 2 at pp. 1, 3, 19, 21). Based on the foregoing, the parents' allegation that the IEPs did not include direct instruction is without merit.

Finally, the parents argue that the IHO erred in finding that the district's class and program recommendations for the 2019-20 and 2020-21 school years were appropriate. In support of this argument, the parents generally assert that the district's "insufficient and incomplete recommendations" in the IEPs together with the CSEs' failure to address the student's ADHD, past traumatic experience, anxiety, need for direct instruction, lack of appropriate annual goals, and predetermination denied the student a FAPE (Req. for Rev. at p. 10). As described above, the grounds cited by the parent do not support a finding that the IHO erred in finding that the district offered the student a FAPE for the 2019-20 and 2020-21 school year. Additionally, the IHO weighed the testimony from the parent's expert opining that the student needed a small structured program like that at Winward but accorded greater weight to the testimony of the district witnesses including rationales they articulated for the CSEs' recommendations; thus, the IHO determined based on all of the evidence in the hearing record that, despite the expert's view, the CSEs recommended appropriate programs and services reasonably calculated to enable the student to make progress (see IHO Decision at pp. 21-23, 24-26). The IHO's decision was well reasoned and is supported by the evidence in the hearing record and, therefore, will not be disturbed.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's decision that the district offered the student a FAPE for the 2019-20 and 2020-21 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at *10 [S.D.N.Y. Aug. 21, 2014]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 15, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER