



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-233

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

**Appearances:**

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

Gina DeCrescenzo, PC, attorneys for respondent, by Benjamin Brown, 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 respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Windward School (Windward) for the 2018-19 and 2019-20 school years. The parent cross-appeals from the IHO's failure to address all of the claims raised in her due process complaint notice. The appeal must be sustained. The cross-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 was referred for an initial special education eligibility determination during the 2012-13 school year (second grade) while residing in a different state (Parent Ex. X at pp. 1, 6). In January 2013, the student's then-current public school district conducted a psychoeducational assessment of the student that included a record review, parent interview, direct observation, administration of intelligence testing, and completion of a student strengths assessment and behavior rating scales (id. at p. 1). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded a full-scale IQ of 114 (id. at p. 3).

According to the evaluator, the student's performance on the WISC-IV indicated that he had a "personal and normative" strength in verbal comprehension (*id.*). Completion of an educational assessment by the student's second grade teacher revealed student strengths in math, oral expression, and listening comprehension skills (*id.* at p. 1). In contrast, the teacher assessment revealed student difficulties with literacy skills, specifically decoding, reading fluency, reading comprehension, and written language skills (*id.* at pp. 1-2). The evaluator noted that at the time of the assessment the parent reported that the student quickly lost focus during activities and that parenting had been a challenge (*id.* at p. 1). The evaluator also noted that the student's teacher raised a concern regarding the student's level of activity and movement in the classroom (*id.*). In addition, the evaluator reported that the results of behavior rating scales indicated the student exhibited difficulty with both hyperactivity and attention problems within a classroom setting and that concerns were raised regarding the student's ability to engage in planning and goal directed behavior (*id.* at p. 5). The evaluator stated that in the context of a learning environment the student's behaviors might be based on avoiding difficult tasks rather than indicative of primary attention deficit concerns (*id.*). She opined that the student likely required more movement and vestibular input than a typical student his age and indicated that the student did not meet the diagnostic criteria for an attention deficit hyperactivity disorder (ADHD) (*id.*). The evaluator noted that parent responses indicated very elevated levels of behaviors associated with oppositionality but that the student did not meet the diagnostic criteria for oppositional defiant disorder (*id.*). In an IEP developed February 28, 2013, a CSE found the student eligible for special education as a student with a specific learning disability in reading and written language and recommended that he receive direct services in the general education classroom in literacy and language arts (writing), direct instruction in literacy outside of the general education classroom, and consultant teacher services (Parent Ex. EE at pp. 1, 8, 24; *see id.* at pp. 14-19). The IEP indicated that in order to make effective progress the student required a research-based, scientifically-proven, structured program that provided explicit instruction in encoding and decoding and multi-sensory instruction (*id.* at p. 4).

In May 2014, the family moved to New York and the student began attending a district elementary school for third grade (Parent Ex. FF at p. 1; *see Tr.* pp. 1086-87). A CSE convened on September 17, 2014 and found the student eligible for special education and related services as a student with a learning disability (Parent Ex. FF at p. 1). The September 2014 CSE developed an IEP for the student for the 2014-15 school year (fourth grade), which recommended that he receive specialized reading instruction in a group of five, three times per week for one-hour sessions (*id.* at p. 7). The IEP and CSE meeting information summary reflected that the results of the student's previous intelligence testing, which indicated that his full-scale IQ was in the high average range, verbal comprehension abilities were in the very superior range, and perceptual reasoning, working memory, and processing speed scores were all in the average range (*id.* at pp. 1, 4). The IEP also reflected the results of the Wechsler Individual Achievement Test, Third Edition (WIAT-III), administered to the student in August 2014, which yielded scores in the average range for math, essay composition, reading comprehension, and spelling and at the low end of the average range for word reading and pseudoword decoding (*id.* at pp. 1, 3-4). The IEP noted that the student's grammar and mechanics were significantly below average (*id.* at pp. 1, 3). According to the meeting information summary, the CSE discussed the results of the Comprehensive Test of Phonological Processing-Second Edition (CTOPP-2) which indicated that the student's phonological awareness and phonological memory were in the average range but noted his difficulty with rapid naming and phoneme isolation that suggested a weakness in fluency

(id.). The CSE also discussed the student's performance on the Woodcock Reading Mastery Test-Third Edition (WRMT-III) which revealed listening comprehension skills in the superior range, average word comprehension and passage comprehension skills, and below average word attack and word comprehension skills, which suggested a weakness in phonics (id.). As reflected in the meeting information summary, the student's classroom teacher reported that, when writing, the student had some letter reversals, did not use capitalization rules, wrote lightly, and with small handwriting (id. at p. 2). According to the CSE meeting information summary, the student disclosed that he did not like using Orton-Gillingham strategies because they were slower and he knew other strategies, which he found much more efficient (id.). The CSE determined that the student needed to develop more grade level sight words and to continue to work on decoding and spelling skills (id.). The CSE developed goals related to applying phonic and word analysis skills to correctly decode words, recognizing and reading instructional level words without the need to apply word analysis skills, reading fluently with accuracy, and correctly spelling instructional level words (id. at pp. 6-7). The CSE also recommended program modifications and testing accommodations (id.).

A CSE convened on April 20, 2016 to develop the student's IEP the 2016-17 school year (sixth grade) (Parent Ex. GG at p. 1).<sup>1</sup> According to the CSE meeting information summary, the CSE chairperson shared the results of an updated psychological evaluation conducted in March 2016 (id. at pp. 1, 3). She indicated that based on the administration of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) the student's overall cognitive functioning was in the high average range with his performance on indices scales ranging from average to high average (id.; see Parent Ex. P at pp. 2-4, 6). The meeting information summary indicated that in response to concerns raised by the parent regarding the student's attention and executive functioning, the CSE chairperson shared the results of an attention rating scale (Parent Ex. GG at p. 1; see Parent Ex. P at pp. 4-5, 7). Parent's ratings yielded elevated scores in the areas of activity level, learning problems, and executive functioning (Parent Ex. GG at p. 1; see Parent Ex. P at p. 7). The teacher's ratings yielded very elevated scores in the areas of inattention, activity level, and defiance/aggression and elevated scores in the areas of learning problems and executive functioning (Parent Ex. GG at p. 1; see Parent Ex. P at p. 7). To further explain the teacher's ratings, the meeting information summary clarified that the student was not necessarily aggressive, rather he had a tendency to test limits and boundaries which likely explained elevations related to defiance (Parent Ex. GG at p. 1). The CSE chairperson reviewed her classroom observation of the student with CSE members and noted overall it appeared that the student was engaged in the learning process and also appeared to understand the concepts taught quite well (id. at p. 2). However, the chairperson reported that the student had difficulty staying focused on the task at hand and preferred to use a shortcut of finding answers without showing his work (id. at p. 2). She described the student's behavior as appropriate and respectful (id.).

The CSE meeting information summary also included a report from the student's "reading resource teacher" who described the student as cooperative, smart, funny, and generally engaged (Parent Ex. GG at p. 2). The reading resource teacher reported that the student was working on

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<sup>1</sup> The student's fifth grade IEP (2015-16 school year) was not offered into evidence during the impartial hearing. The parent's exhibit list incorrectly lists the April 20, 2016 IEP, which has an implementation date of September 7, 2016, as the fifth grade IEP (Parent Ex. GG). The April 20, 2016 IEP was also admitted into evidence by the district (see Dist. Ex. 3).

sight words, syllabication, and fluency (*id.*). She also noted that the student presented with weakness in his writing with respect to paragraph structure and elaboration (*id.*). The meeting information summary indicated that, according to results from the CTOPP-2, the student had shown "nice growth from last year's testing," with his phonological awareness and phonological memory "nicely developed" (*id.*; *see* Parent Ex. R at pp. 3-4). The student's score in rapid symbolic naming was noted to be relatively weaker, yet still fell within the average range (Parent Ex. GG at p. 2; *see* Parent Ex. R at pp. 3-4). The meeting information summary noted that the student's individual subtest scores on this measure ranged from the 25th percentile in the average range to the 91st percentile in the above average range (Parent Ex. GG at p. 2; *see* Parent Ex. R at pp. 3-4). The student's ability to segment and blend words, as well as to identify specific sounds, repeat a series of numbers, and repeat nonwords were solidly developed (Parent Ex. GG at p. 2; *see* Parent Ex. R at pp. 3-4). The meeting information summary also noted that, according to results of the WRMT-III, the student "showed beautiful growth compared to last year" (Parent Ex. GG at p. 2; *see* Parent Ex. R at pp. 1-2). The student's total reading score was reported at the 77th percentile, his basic skills cluster score fell within the average range at the 45th percentile, while his reading comprehension cluster score was at the 90th percentile (Parent Ex. GG at p. 2; *see* Parent Ex. R at pp. 1-2). Individual subtest scores ranged from the 30th percentile in reading nonsense words to the 98th percentile in word and passage comprehension subtests (Parent Ex. GG at p. 2; *see* Parent Ex. R at pp. 1-2). According to the meeting information summary, the parent stated that, in the past, the student had shown great concern about what books he was reading compared to others and about "what those children may think" (Parent Ex. GG at p. 2). The meeting information summary reflected the reading resource teacher's opinion that, at that time, the student did not yet believe that he was a good reader and "need[ed] to embrace that part of himself while building confidence" (*id.*).

Next, the student's special education teacher shared the results of updated testing on the WIAT-III with CSE members, indicating that the student's scores fell well within the average to above average range (Parent Ex. GG at p. 2; *see* Parent Ex. Q at pp. 1-3). According to the special education teacher, the student's subtest scores ranged from the 21st percentile in spelling to the 91st percentile in essay composition (Parent Ex. GG at p. 2; *see* Parent Ex. Q at pp. 1-3). The CSE meeting information summary noted that, although the student's spelling score fell within the average range, his performance fell near the lower limit of this range and presented as a relative weakness when compared to other strong skills (Parent Ex. GG at p. 2; *see* Parent Ex. Q at pp. 1-3). The special education teacher stated that the student was not performing reading and writing skills independently and fluently (Parent Ex. GG at p. 2). The student reportedly was able to make very close approximations when spelling but was still making errors (*id.*). When writing an essay about himself, the student was reportedly well able to demonstrate solid skills (*id.*). The special education teacher described the student as presenting with nice vocabulary and a nice written voice, but noted that classroom assignments in the day-to-day setting proved to be more challenging (*id.*). The CSE meeting information summary indicated that the special education teacher "questioned the role of attention" (*id.*).

The student's classroom teacher reported that the student responded well to solid, positive relationships with the adults around him but required frequent reminders of behavioral expectations, particularly when his regular team of adults was not present (Parent Ex. GG at p. 2). According to the meeting information summary, the classroom teacher noted that student needed frequent reminders to turn in homework and she further noted that writing was very difficult for

him (id.). The classroom teacher stated that the student had great ideas, but demonstrated difficulty putting them down onto paper and sometimes fell behind in his homework (id.). She further reported that paragraph writing was challenging as the student's spelling could be poor and punctuation was limited (id.). The student's test scores in the classroom presented as inconsistent and the student made several careless errors, particularly in math (id.). The CSE meeting information summary noted that "[a]s others commented," the classroom teacher "agreed that [the student] [wa]s resistant to showing his work, yet he might earn more credit if he did so" (id.). The classroom teacher concluded by noting again that the student required structure, limits, clear expectations, and solid relationships with the adults supporting him (id.).

The April 2016 meeting information summary also indicated that the student's classification was discussed (Parent Ex. GG at p. 2). The CSE determined that the student's classroom functioning on a day-to-day basis was markedly weaker in academic skills than in attentional skills and, on that basis, the student's classification of learning disability was continued (id.). The CSE meeting information reflected that all present, including the parent, were in agreement that the proposed plan was crafted to effectively meet the student's anticipated needs in the sixth grade and that the student's "need for a resource room [w]ould be monitored" (id.). For the 2016-17 school year, the CSE recommended that the student receive integrated co-teaching (ICT) services in language arts and math, each for one 40-minute session per day, and a study skills resource room (12:1) for one 40-minute session per day (id. at pp. 1, 8).

By email dated January 30, 2017, the parent wrote to the student's guidance counselor to request that the student enroll in a technology elective class in place of resource room (Dist. Ex. 4 at p. 1). The parent indicated that resource room had been helpful to the student and that the student would likely continue to benefit from special education teachers in the classroom working with him on IEP goals, but opined that "at this point in his development, it would be better for his overall school experience to allow him to try Technology" (id.).

A CSE convened on February 16, 2017 to develop an IEP for the student for the 2017-18 school year (seventh grade) (Dist. Ex. 5 at p. 1). The February 2017 IEP was to be implemented beginning on September 5, 2017, and the CSE recommended that the student continue to be found eligible for special education as a student with a learning disability (id.). The February 2017 CSE further recommended that the student receive ICT services in language arts and math, each for one 40-minute session per day, and a study skills resource room (5:1) for one 40-minute session per day (id. at pp. 1, 8). According to the CSE meeting information summary, the parent reported that she had declined resource room services for the past few weeks so that the student could participate in a technology elective class (id. at p. 1). The parent also shared that the student really liked technology and his introduction to law class (id.). The meeting information summary indicated that the student was not attending "X period" for academic support and the parent "note[d] that she must require him to go to X period especially if he [wa]s not going to be accessing resource room" (id.).<sup>2</sup> The parent further stated that the student had an overall high IQ and had been diagnosed

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<sup>2</sup> X period was described by the district school psychologist, who served as the chairperson of the February 2017 CSE meeting, as a voluntary, afterschool support available to all students to seek help from any teacher of the students' choosing (Tr. pp. 24, 39-40; Dist. Ex. 5 at p. 1).

with dyslexia, was socially gifted, and that writing was an area of challenge because he needed help putting his thoughts into his writing (id.).

The meeting information summary reflected that the student's special education teacher described the student as clever, insightful, a leader, and actively social (Dist. Ex. 5 at p. 1). She noted that the student could have difficulty with spelling, although his thoughts were very creative (id.). The special education teacher further noted that the student continued to have executive functioning needs, including with initiating tasks, writing, punctuation, and capitalization (id.). She stated that, although the student could write beautifully, he was not quite at the formal level (id.). The meeting information summary indicated that, based on the student's needs, resource room continued to be recommended for the next school year (id.). The summary stated that in math, the student needed to be able to produce written work and noted that he "d[id] things in his head and ha[d] difficulty putting anything on paper" (id.).

According to the February 2017 meeting information summary, the student's regular education teacher for social studies described the student as energetic and highly social and agreed that writing was a challenge for the student (Dist. Ex. 5 at p. 2). The social studies teacher reported that the student could advocate for his own needs and would move his own seat within the classroom if he felt distracted (id.). He further reported that the student had insight and self-awareness if he blurted out an answer and responded to a gentle prompt and could even self-correct at times (id.). The student's guidance counselor also noted that one of the student's many strengths was that he advocated for his needs (id.). He stated that, if the student experienced any issues, he would come in and articulate himself well (id.). The meeting information summary indicated that testing, program accommodations, and academic goals were reviewed and agreed upon and the parent would continue to monitor the student's progress regarding his need to access resource room (id.).

By email dated September 20, 2017, the parent wrote to the student's guidance counselor indicating that the student wanted to "do Band" and that she was very glad about this and supported it (Parent Ex. A). She further indicated that the student did "not want to do Resource Room and his reasons [we]re sound" (id.). The parent expressed that the needs of the resource room group were very diverse (id.). She stated that the student would benefit from someone to help him with his homework, perhaps in the literacy room, "or perhaps he should just opt out again" (id.). The parent further wrote that she had more time during the 2017-18 school year to help him with his homework during the evening (id.).

The student was evaluated in April and May 2018 by a private psychologist at the parent's request in order to inform his educational planning (Dist. Ex. 6 at p. 1). In her resultant neuropsychological evaluation report, dated June 6, 2018, the private psychologist opined that the student required placement in an educational program with a homogenous grouping of students with similar learning profiles and a small student to teacher ratio; that he would benefit from a structured writing program to refine skills for developing organized essays and complex sentences, outlining skills, writing data-based questions, and revising and editing; that he required one-to-one daily explicit instruction in executive functioning which included a program of cognitive remediation to teach him to recognize the attentional variability that affected his performance; that addressing the student's organization and language processing deficits would be necessary on an on-going basis throughout the school day; that the principle of instructional scaffolding should be

implemented; and that collaboration and consultation with and among his teachers would be "absolutely required" (*id.* at p. 17). In addition, the private psychologist recommended numerous program accommodations including preferential seating, refocusing and redirection, directions given one at a time and rephrased, spelling waived, and a copy of class notes provided (*id.*). She also recommended the following testing accommodations: extended time (1.5), breaks for long test time, flexible location, privacy during testing, directions read and explained and underlined for key words to further clarification, use of a calculator for math, scantron checked and allowance to write in test booklet, directions given one at a time and directions rephrased in the student's own words (*id.* at p. 18).

In a letter dated May 10, 2018, the student's guidance counselor informed the parent that the student was in danger of failing science class (Parent Ex. C).

A CSE convened on June 6, 2018 for the student's annual review and to develop an IEP for the 2018-19 school year (eighth grade) (Dist. Ex. 8 at p. 1). The June 2018 CSE recommended that the student receive ICT services for language arts and math, each for one 40-minute session per day, and also that he participate in a study skills resource room (5:1) for one 40-minute session per day (*id.* at pp. 1, 8). The June 2018 CSE also recommended classroom accommodations including the use a graphic organizer, ability to stand while working, brainstorming and verbalizing ideas before writing, preferential seating, copies of class notes provided, breaking down assignments into manageable tasks with teacher established deadlines, prompts to turn in his homework, refocusing and redirection, spelling waived when not assessing for spelling, and access to a computer for writing assignments (*id.* at p. 9). The June 2018 IEP also included testing accommodations of flexible seating, extended time, standing during tests, redirection, and spelling waived when allowed and when spelling was not being assessed (*id.* at p. 10).

The June 2018 CSE meeting information summary indicated that the school psychologist, who also served as the CSE chairperson, reviewed the May 2018 private neuropsychological evaluation report with the CSE members (Dist. Ex. 8 at p. 1; *see* Tr. p. 48). The school psychologist explained that the results revealed that the student displayed many areas of strength similar to his performance on previous evaluations (Dist. Ex. 8 at p. 1). Specifically, his fluid reasoning abilities and visual spatial reasoning were within the high average to very high average range, and at a level above what would be expected of his same age peers (*id.*). According to the meeting information summary, the school psychologist reported that the student's verbal comprehension was also in the high average range and his working memory and processing speed abilities were solidly average (*id.*). She noted, however, that the student's performance on academic tasks was variable (*id.*). The student performed within the average range in most areas, but he struggled with spelling, sentence composition, and math fluency tasks involving multiplication (*id.*). The school psychologist reported that according to the private psychologist the student met the criteria for a learning disability in reading and writing (*id.*).

Next, the meeting information summary indicated that the student's regular education teacher for social studies shared reports on behalf of all of his core teachers (Dist. Ex. 8 at p. 1). The social studies teacher indicated that the student participated in class although sometimes he was off topic and tried to "actively derail" the lesson (*id.* at pp. 1-2). However, recently the student's participation had improved, and he was more focused during class (*id.* at p. 2). According to the social studies teacher, the student struggled with deadlines, homework completion,



punctuation, and proofreading (id.). The student needed refocusing and redirection, did not always complete his assignments, and was working with a teacher assistant during gym period to get his work done (id.). The special education teacher echoed the social studies teacher in reporting that the student was at times off topic and needed to follow through with assignments (id.). She noted that, in class, the student was confident, enjoyed thinking outside the box, and his comments could be insightful (id.). Still, she indicated that the student was more interested in debating in the classroom and with teachers than staying on topic and was not always receptive to teacher feedback (id.). The meeting information summary indicated that the parent expressed concern regarding the student's writing skills and agreed that he needed to work harder (id.). The parent opined that the student needed more support, similar to what he received in elementary school (id.). The meeting notes reflected that the CSE reviewed academic and study skills goals, as well as testing and program accommodations, and that the CSE discussed the Wilson Reading Program (id.; see Tr. pp. 170-71). According to the school psychologist, the parent asked if the student required Wilson reading instruction instead of resource room, but that based on all of the information discussed, the CSE determined that resource room was the most appropriate program for the student (Dist. Ex. 8 at p. 2; see Tr. pp. 170-71).

The CSE meeting information also reflected that the student had not been accessing supports for his learning disability and the "Subcommittee [felt] that it [wa]s imperative" that he attend resource room to address his math, reading, writing, and study skills (Dist. Ex. 8 at p. 2). However, the parent had declined the resource room service for the past year and a half, in order for the student to attend an elective (id.). In addition, the parent expressed concerns that the resource room grouping was "heterogeneous," and that the student's time would be better spent in an elective class (id.). The CSE recommended that the student receive resource room services in a group of students with similar needs, but the parent questioned whether this would meet the student's needs (id.). The student's academic and study skills goals as well as testing and program accommodations were reviewed and agreed upon (id.).

The student's fourth quarter report card for the 2017-18 school year (seventh grade) indicated that the student passed all of his classes with a fourth quarter grade point average of 78.25 and a final grade point average of 81.50 (Dist. Ex. 7).

The student participated in an initial educational screening and writing assessment for Windward on June 19, 2018 (Parent Exs. Z; MM).<sup>3</sup> On June 28, 2018, the parent executed an enrollment contract with Windward for the student's attendance during the 2018-19 school year (Parent Ex. N at p. 2). By letter dated August 15, 2018, the parent advised the district of her intention to unilaterally enroll the student at Windward for the 2018-19 school year and reserved her right to seek tuition reimbursement from the district (Parent Exs. E, U). By letter dated August 24, 2018, the district responded to the parent's letter by declining the parent's request for tuition reimbursement, asserting that the student had been offered an appropriate educational program, and offering to reconvene the CSE to address the parent's concerns (Parent Ex. F).

The student attended Windward for the 2018-19 school year (see Parent Ex. L).

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<sup>3</sup> Windward has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On February 25, 2019, the parent executed an enrollment contract with Windward for the student's attendance during the 2019-20 school year (ninth grade) (Parent Ex. O at p. 2).

In March 2019 the student was reevaluated by the district as part of a triennial evaluation (Parent Ex. H; Dist. Exs. 9-12). A social history update was completed on June 5, 2019 (Parent Ex. I). A CSE convened on June 10, 2019 to review the evaluations and develop an IEP for the student for the 2019-20 school year (Dist. Ex. 13). The June 2019 CSE meeting information summary indicated that according to the social history, which was completed by the parent, the student was thriving in his program at Windward (Dist. Ex. 13 at p. 1; see Parent Ex. I at p. 1). The CSE reviewed the results of the student's educational reevaluation (Dist. Ex. 13 at p. 2). According to the meeting information summary, the student's overall reading scores were within the average range, with his word attack skills noted to be at the high end of the low average range (id.). Decoding real words was easier for the student than decoding nonsense words (id.). With regard to written language subtests, the student scored in the average range for writing samples and low average for spelling (id.). In terms of math, the student scored in the average range for calculation, superior range for problems solving, and low average range for fluency tasks (id.). The meeting information summary noted that all of the student's composite scores were within the average range (id.). Administration of the Woodcock Reading Mastery Test-Third Edition (WRMT-III) yielded scores in the average to above average range (id.). The meeting summary noted strengths in the student's listening comprehension, word identification, word attack, and oral reading fluency skills (id.). The student's phonological processing was also assessed, and the results showed that the student's phonological awareness was within the average range and his phonological memory was in the above average range, but that his rapid naming composite was in the poor range (id.). The meeting information summary indicated that this could impact the student's oral reading fluency but that it was not consistent with scores on other reading tests and the student was able to use compensatory strategies (id.).

According to the student's private school teacher, the student's reading comprehension was good with some gaps noted in his ability to analyze literature (id.). The student's decoding had improved, but he needed reminders to attend to punctuation and slow down when reading aloud (id.). The teacher reported that the student might misread sight words (id.). The student exhibited the ability to understand inferences and make predictions (id.). The private school teacher reported that initially the student's writing was at the sentence level and he exhibited difficulties with spelling, awkward syntax, and grammar (id.). The student was also unaware of how to use an outline but now used one to plan writing and add details (id.). The teacher reported that the student had a tendency to put his head down on his desk in his afternoon class and that his stamina was decreased throughout the school day (id.). The teacher also noted that homework completion had become an issue but when asked to complete his homework the student would comply (id.). With regard to the student's math skills, the meeting information summary indicated that the student was in an upper-level math group, that the student's math skills were strong but he might skip details with more complex problems, and that the student was not asked to write out an explanation of the solution (id.). According to the meeting information summary, the CSE reviewed the results of internal testing conducted by Windward that showed the student demonstrated improvement in his ability to decode multisyllabic words (id.). With respect to decoding, the student had worked on reading list, dividing syllables, dissecting words, vowel teams, silent e, CVC words, irregular words, and special endings (id.). The meeting information summary indicated that the that student had also shown improvement in skills worked on in his study skills class including writing a

research paper, locating evidence facts, writing note cards, creating draft versions of a paper, and time management skills and that the student required help breaking down long term assignments such as research papers (*id.*). The summary reflected that the need for related services, program modifications, assistive technology, supports for school personnel, test accommodations, and special transportation and eligibility for extended school year services were reviewed (*id.* at p. 3). The CSE determined that the student remained eligible for special education as a student with a learning disability (*id.* at pp. 3, 4). The June 2019 CSE recommended that the student receive ICT services in language arts, math, and social studies, each for one 40-minute session per day, and participate in an 8:1 "educational support class," daily, for goals and academic skill work (*id.* at pp. 3, 11-12). The parent and Windward staff disagreed and asserted that the student needed to remain at Windward for the 2019-20 school year (*id.* at p. 3).

By letter dated June 25, 2019, the parent provided notice to the district of her intention to unilaterally enroll the student at Windward for the 2019-20 school year and seek tuition reimbursement from the district (Parent Ex. J). The parent asserted that the student required dyslexia-specific remediation to be educated appropriately and that the district did "not offer dyslexia-specific remediation above elementary school" (*id.*). The parent also stated that the district had provided no reason for her to believe that the student would be offered an appropriate program "or take steps to end the culture that denie[d], humiliate[d], isolate[d] and aggressively retaliate[d] against students with disabilities and their families that so cruelly ruined middle school for [the student]" (*id.*).

By letter dated June 28, 2019, the district responded to the parent's notice letter asserting that the student had been offered an appropriate program and declining the parent's request for tuition reimbursement (Parent Ex. K at p. 1). The district further offered to reconvene the CSE to discuss the parent's concerns (*id.*).

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

In a due process complaint notice, dated May 28, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 and 2019-20 school years (*see generally* Dist. Ex. 1).

The parent asserted that specifically for both school years, or for unspecified years, the CSE: (1) failed to appropriately evaluate the student; (2) failed to appropriately consider evaluative data; (3) failed to offer methodologies or strategies that were based on peer-reviewed research; (4) failed to offer adequate instruction, supports and services; (5) failed to conduct an appropriate transition assessment or develop an appropriate post-secondary transition plan; and (6) failed to develop appropriate goals and objectives (Dist. Ex. 1 at pp. 7-8). The parent also alleged that the district's failure to provide research-based instruction to address the student's documented needs amounted to a denial of reasonable accommodation in violation of section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a), and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. (*id.* at pp. 1, 8-9). The parent further asserted generally that any procedural violations alleged impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, and caused a deprivation of educational benefits (*id.* at p. 8).

Next, the parent argued that Windward for the 2018-19 and 2019-20 school years was an appropriate unilateral placement, and that equitable considerations supported an award of full tuition reimbursement (Dist. Ex. 1 at pp. 9-11). As a proposed remedy, the parent sought declaratory relief, as well as tuition reimbursement for the cost of the student's attendance at Windward for the 2018-19 and 2019-20 school years (id. at p. 11).

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

An impartial hearing convened on October 19, 2020, and concluded on April 6, 2021, after seven days of proceedings (Tr. pp. 1-1236).<sup>4</sup> In a decision dated October 25, 2021, the IHO found that the June 2018 CSE's recommendations for the 2018-19 school year, consisting of ICT and resource room services, denied the student a FAPE "because it failed to follow recommendations in the then[-]current [n]europsychological [e]valuation the [d]istrict's CSE purportedly relied on for its recommendation" (IHO Decision at p. 16). The IHO also indicated that "[n]othing in the IEP note[d] the significant discrepancy between [the student]'s cognitive and academic skills and the diagnosis of [d]yslexia" (id.). The IHO further noted that none of the recommendations included in the parent's neuropsychological evaluation appeared in the IEP other than testing accommodations and that "nothing in the [n]europsychological [e]valuation support[ed] placement of [the student] in a large class without significant 1:1 instruction and without multi[ ]sensory strategies to address [d]yslexia" (id. at p. 17). The IHO also found that the student's 2017-18 report card should have informed the CSE that the student "was underperforming by scoring in the 70's or below in most marking periods in . . . areas requiring substantial reading, notwithstanding [the student]'s [h]igh [a]verage [c]ognitive [s]kills" (id.). The IHO further found that the student's performance in the ICT class with resource room for the "2017[-]18 school year . . . resulted in underperformance demonstrating a denial of FAPE" (id.). The IHO also found that "the student's circumstances include[d] a very high intellect, which the resource room and ICT class failed to ensure appropriate performance by [the student]" and that "[c]ontinuing this recommendation in the 2018[-]19 school year resulted in a denial of [a] FAPE" (id.). The IHO did not agree with the district's argument that the student's failure to attend resource room during the 2017-18 school year affected the student's grades, finding that the student's grades in subjects that required substantial reading "were consistently far below [the student]'s cognitive potential . . . and . . . the failure . . . to address [the student]'s very substantial learning disability, [d]yslexia, was the cause of the substantial disparity between [the student]'s cognitive ability and academic performance" (id. at p. 18). The IHO then noted that "[e]vidence to support this view of [the student]'s lack of progress in the [d]istrict[s] ICT and resource room program [wa]s found in the fact that when [the student] began attending the type of program recommended in the [n]europsychological [e]valuation at Windward his grades improved, including, in particular, problematic areas related to [the student]'s [d]yslexia in [r]eading and [w]riting" (id.).

Next the IHO found that "[f]or virtually identical reasons" the district failed to offer the student a FAPE for the 2019-20 school year by continuing to recommend "the same inadequacies" in the IEP (IHO Decision at p. 18). The IHO found that nothing in the record indicated that the IEP would address the student's dyslexia or "need for direct multi[ ]sensory instruction in small

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<sup>4</sup> In addition, the October 19, 2020 transcript of the proceedings reflects that a telephonic conference was held on July 10, 2020 (Tr. p. 6).

groups or 1:1 using a multisensory methodology such as Wilson" (*id.*). In reaching his decision, the IHO specifically rejected the conclusions of the district's evaluators who assessed the student in March 2019 and relied instead on the parent's neuropsychological evaluation conducted in June 2018 finding that it "was far more thorough and reliable" and credited the neuropsychologist's "very substantial credentials . . . for evaluating the complexities" of the student "which vastly outweigh[ed] those of a special education teacher from the [d]istrict" (*id.* at pp. 18-19). The IHO further noted that, "[s]ignificantly, the [d]istrict teachers are not qualified to render a diagnosis of [d]yslexia, which lies at the heart [of the student]'s disability and the need for special education as provided at Windward" (*id.* at p. 19). Lastly, the IHO indicated that he was troubled by the district's refusal to follow the recommendations of the parent's neuropsychological evaluation, which he stated the CSE otherwise had relied on when developing the student's IEP (*id.*). Specifically, the IHO noted that the parent's neuropsychological evaluation concluded that the student required multisensory instruction in reading and writing, such as the Wilson reading program, and that despite having "Wilson trained providers and . . . using the program in the [d]istrict," the CSE failed to incorporate multisensory instruction in reading and writing on the student's IEP (*id.*).

Turning to the appropriateness of the parent's unilateral placement, the IHO determined that Windward was appropriate for both the 2018-19 and 2019-20 school years (IHO Decision at pp. 19, 20). The IHO found that, in choosing Windward, the parent followed the recommendations in the neuropsychological evaluation for a program with "a homogenous group of students of average intelligence with similar learning profiles in a high school diploma program with a small student[-to-]teacher ratio," and "an evidence-based structured writing program, 1:1 daily explicit instruction in executive function, coordination by the 1:1, alternation of instruction to promote mental endurance," that also addressed organization and language processing delays throughout the day (*id.* at pp. 20-21). The IHO further found that Windward was designed for students "who are average or above cognitively and have significant learning disabilities including [d]yslexia and other language-based impairments," and are also capable of mastering a general education curriculum and attending college (*id.*). The IHO noted that Windward offered small class sizes ranging from a 4:1 student-teacher ratio to 9-13 students per teacher in a classroom (*id.* at p. 21). The IHO also noted that the application process at Windward was "likely to result in an appropriate placement" and found that the student had made significant progress at Windward during the 2018-19 and 2019-20 school years (*id.*). Next the IHO noted his disagreement with the district's argument that Windward was too restrictive because the student did not have access to nondisabled peers (*id.* at p. 22). The IHO determined that the student's need for a highly specialized small class and a multisensory learning environment outweighed any LRE concerns (*id.*).

With regard to equitable considerations, the IHO found that the parent cooperated with the CSE process and provided timely notice of her intention to unilaterally enroll the student at Windward (IHO Decision at p. 22). The IHO agreed with the district that the parent's refusal of resource room services during the 2017-18 school year was detrimental to the student's performance because resource room assisted the student with organizational skills and completing assignments (*id.* at p. 23). The IHO did not agree that ICT services and resource room would have offered the student a FAPE for the 2018-19 school year but nevertheless reduced the award of tuition reimbursement for the 2018-19 school year by ten percent (*id.*). The IHO further awarded

full tuition reimbursement for the 2019-20 school year and directed the district to fund both school years upon proof of payment and attendance by the student (*id.* at p. 24).<sup>5</sup>

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

The district appeals, arguing that the IHO erred by finding that it failed to offer the student a FAPE for the 2018-19 and 2019-20 school years and by awarding the parent tuition reimbursement for the student's attendance at Windward. First, the district argues that the IHO erred by finding that the student required direct multisensory reading instruction in a small group or 1:1 instruction using a multisensory methodology such as Wilson. The district asserts that the IHO failed to consider most of the evidence at the hearing, specifically that the student was provided with reading instruction using Wilson during elementary school, which was discontinued during middle school because the student no longer needed it. Further the district contends that all of the district's witnesses who were knowledgeable about the student's needs testified that the student did not require a Wilson reading program. The district alleges that the evidence demonstrated that the student exhibited average reading skills with a weakness in decoding but that he had developed compensatory skills and did not require a specialized reading program.

The district also argues that the IHO erred by finding that "the [s]tudent had a very substantial learning disability" that must be addressed with "significant 1:1 instruction" (Req. for Rev. p. 3).<sup>6</sup> The district alleges that the IHO did not cite to any evidentiary support for this finding other than the opinion of the parent's private evaluator. The district further argues that the IHO improperly found that the report of the parent's private evaluator was more reliable than the assessments conducted by the district and by Windward and was deserving of greater weight based on the credentials of the private evaluator. The district asserts that its assessments and those conducted by Windward demonstrated that the student had average reading skills. The district contends that the parent's private evaluator did not speak with any of the district staff at the parent's request, did not obtain any information regarding the student's performance at school, and had no experience teaching in public school or with providing reading instruction. The district further asserts that the parent's private evaluator relied on outdated testing to assess the student's reading skills and relied on subjective measures such as projective testing to evaluate the student's behavior.

Next the district alleges that the IHO's decision is contrary to the IDEA in that the IHO found that the CSE was required to defer to the parent's private evaluator based on the evaluator's qualifications regardless of the evaluator's failure to consider the least restrictive environment for the student. In addition, the district asserts that the IHO erred by finding the student's IEP was inappropriate because the CSE failed to incorporate the recommendations of the parent's private evaluator into the IEP. The district contends that its recommendations for the 2018-19 and 2019-

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<sup>5</sup> The IHO also found that tuition reimbursement was an appropriate compensatory remedy for a denial of a FAPE for both the 2018-19 and 2019-20 school years (IHO Decision at p. 23).

<sup>6</sup> Contrary to the form requirements governing appeals to the Office of State Review, the district's request for review is not paginated (*see* 8 NYCRR 279.8[a][3]); for the purposes of this decision, the pages will be cited by reference to their consecutive pagination (*see* Req. for Rev. at pp. 1-10).

20 school years consisting of ICT and resource room services were appropriate and offered the student a FAPE.

The district also argues that the IHO erred by finding that the parent's unilateral placement at Windward was appropriate. Specifically, the district alleges that there was insufficient evidence to demonstrate that Windward provided any necessary services to the student, and that the student already possessed compensatory strategies in reading prior to enrolling at Windward. Further, the district contends that the parent did not present competent evidence of the student's performance at Windward or evidence of what instruction the student received. The district alleges that the student was too high functioning for the Windward reading program and did not require specialized reading instruction. The district asserts that the student's reading skills based on several assessments indicated that the student's skills declined after enrolling at Windward. The district also contends that the IHO improperly relied on the affidavit of the Windward CSE liaison and failed to consider that she never attended any CSE meetings and never taught, evaluated, or observed the student.

The district further asserts that the IHO improperly relied on retrospective evidence of the student's alleged progress at Windward in finding the district's IEP was inappropriate. Next the district argues that the IHO erred by only reducing the award of tuition reimbursement by ten percent, given that the parent had refused resource room services recommended for the student. The district alleges that the IHO correctly determined that the student's failure to attend resource room was detrimental to the student's performance but erred by not finding the refusal to attend was a complete bar to tuition reimbursement. As relief, the district requests that the IHO's decision be reversed, and seeks determinations that the student was offered a FAPE for the 2018-19 and 2019-20 school years, that the evidence did not demonstrate that the student received specially designed instruction at Windward, and that equitable considerations precluded reimbursement because the parent failed to access the services recommended on the student's IEP.

In an answer and cross-appeal, the parent responds to the district's allegations with admissions and denials. As and for a cross-appeal, the parent asserts that the IHO failed to rule on her claim that the district's recommendation of resource room services was discriminatory and that the IHO erred by reducing one year of tuition reimbursement by ten percent. As relief, the parent requests dismissal of the district's request for review and an award of full tuition reimbursement for the 2018-19 and 2019-20 school years.

In an answer to the parent's cross-appeal, the district denies that the IHO failed to rule on the parent's discrimination claim asserting that the IHO considered all of the parent's remaining claims and found them to be without merit. Further, the district asserts that the parent's discrimination claim under the IDEA was not raised in the due process complaint notice, that there is no viable discrimination claim brought under the IDEA, and that an SRO has no authority to review such a claim.

In a reply, the parent responds to the district's answer to the cross-appeal.

## 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 Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>7</sup>

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

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

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<sup>7</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

## VI. Discussion

### A. Scope of the Impartial Hearing and Review

It is first necessary to identify what issues are properly before me on appeal.

Initially, the parent raised a number of claims in her due process complaint notice that were not addressed by the IHO (see Dist. Ex. 1 at pp. 7-8). The parent has not cross-appealed from the IHO's failure to address those claims and has not otherwise asserted them on appeal as additional bases for upholding the IHO's determination that the district failed to offer the student a FAPE. In particular, the IHO did not address the parent's claims that the district CSE failed to appropriately evaluate the student, failed to conduct an appropriate transition assessment or develop an appropriate post-secondary transition plan, and failed to develop appropriate goals and objectives (compare Dist. Ex. 1 at pp. 7-9, with IHO Decision at pp. 16-19).

The regulations governing practice before the Office of State Review require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served within the time permitted by section 279.5 of this Part. A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f] [emphasis added]). Furthermore, the practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at \*23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at \*4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]). Accordingly, as the parent has only cross-appealed the IHO's failure to address her discrimination claim and the IHO's reduction of one-year of tuition reimbursement by ten percent, the remaining claims raised in the due process complaint notice that were not addressed by the IHO are deemed abandoned.

Next, the district asserts that the parent's discrimination claim must fail for several reasons. The district first argues that the parent's claim that the scheduling of resource room interfered with the student's access "to the full breadth of educational opportunity that was offered to his peers" in violation of the IDEA was not raised in the due process complaint notice (Answer & Cross-Appeal at p. 10). Further, the district contends that "the IDEA does not provide for a claim of discrimination" and that an SRO has no authority to review such a claim (Answer to Cross-Appeal at p. 6). Lastly, the district alleges that even if such a claim was viable, no evidence exists in the record to support it. In her reply to the district's answer to her cross-appeal, the parent argues that her claim that resource room "impeded, rather than facilitated, [the student's] access to educational

programming" was alleged in the due process complaint notice, that the district waived "this procedural argument," that the district opened the door to this issue at the hearing, and that the parent's claim of discrimination under the IDEA was properly raised (Reply at pp. 2-3). The parent also asserts that an SRO has the authority to review claims of discrimination under the IDEA, section 504, and the ADA because 8 NYCRR 200.5(i) "encompasses discrimination or denial of access, because such discrimination or denial of access relates to the educational placement and conflicts or interferes with the provision of a [FAPE]" (*id.* at p. 3). Lastly, the parent argues that the district opened the door by alleging that the parent's declination of resource room services "was inequitable" (*id.*).

A review of the parent's due process complaint notice reveals that the district is correct that the parent did not allege any claims related to the scheduling of resource room. The paragraphs cited by the parent in her cross-appeal assert that the "heterogeneous peer group" in the resource room was not appropriate and impeded the student's access to educational programming and that the district was required to provide "disability-specific services" as a reasonable accommodation (Dist. Ex. 1 at pp. 3, 8). The parent further alleged that, by failing to provide disability-specific services as a reasonable accommodation, the district violated section 504 and the ADA (*id.* at p. 8). In her closing brief, the parent alleged that the exclusion of the student from offered elective programming constituted unlawful discrimination and denial of equal opportunity under section 504, the ADA, and the IDEA (Parent Post-Hr'g Br. at p. 30). This claim also is not alleged in the due process complaint notice.

Moreover, despite the parent's protestations to the contrary, an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504 or ADA claims, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], *aff'd*, 513 Fed. App'x 95 [2d Cir. May 12, 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at \*11 [S.D.N.Y. Aug. 5, 2016]). Therefore, even if they were sufficiently raised, I have no jurisdiction to review any portion of the parent's claims regarding violations of section 504 or the ADA, and such claims will not be further addressed.

## **B. FAPE**

At the outset, I will address the district's allegation that the IHO improperly considered the student's progress at Windward during the 2018-19 and 2019-20 school years in finding the June 2018 and June 2019 IEPs denied the student a FAPE (IHO Decision at pp. 16-19). With regard to the 2018-19 school year, the IHO expressly compared the student's performance at Windward with the recommendations set forth in the June 2018 IEP and appeared to follow suit when considering the 2019-20 school year by stating that he found a denial of a FAPE "[f]or virtually identical reasons" (*id.* at p. 18). The IHO erred in finding a denial of a FAPE on this ground.

Comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE; rather, an IHO must determine whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint notice, and whether the IEP developed by its CSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (Rowley, 458 U.S. at 189, 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at \*15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at \*11 [S.D.N.Y. Feb. 16, 2011] [finding that "the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at \*9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy of comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at \*8 [S.D. Cal. Feb. 14, 2013] [noting that "[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at \*5 [S.D. Cal. Mar. 14, 2011]).

Further, as evidence of the student's progress at Windward during the 2018-19 school year post-dated the June 2018 IEP, it was impermissibly retrospective (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]).<sup>8</sup>

Accordingly, to the extent the IHO relied on the student's progress at Windward to support his finding that the district failed to offer the student FAPE for the 2018-19 and 2019-20 school years, such reliance was in error.

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<sup>8</sup> However, where, as in this case, the student is attending a unilateral placement, some reference to a student's performance at a nonpublic school may be necessary if preparing a new or revised IEP while the student is attending the nonpublic school. Thus, the student's progress at Windward during the 2018-19 school year was relevant to evaluating the June 2019 IEP (to the extent such progress was communicated to the CSE); however, this is not the context in which the IHO relied on progress evidence (see IHO Decision at p. 18).

## 1. June 2018 IEP

### a. The Student's Needs

For the 2018-19 school year, the IHO found that the student was denied a FAPE based on the district's failure to follow the recommendations in the private neuropsychological evaluation, which included:

attendance in an education program with a homogenous group of students of average intelligence with similar learning profiles in a high school diploma program with a small student teacher ratio, an evidence-based structured writing program, 1:1 daily explicit instruction in executive function, coordination by the 1:1, alternation of instruction to promote mental endurance, addressing organization and language processing delays throughout the day, instructional scaffolding to result in mastery, teacher collaboration with program accommodations and test modifications

(IHO Decision at pp. 16-17).

As noted above, the parent has not cross-appealed from the IHO's failure to address her claim that the district did not appropriately evaluate the student and as a result that claim has been abandoned. The IHO based a number of his findings on the recommendations set forth in the private neuropsychological evaluation and the parties' dispute in this matter essentially distills to their disagreement over the conclusions that the CSE should have drawn from the available evaluative information. Thus, the evaluative information relied on in developing the June 2018 will be discussed below along with the student's needs as described in the IEP.

The June 2018 IEP reflects that the CSE considered a January 20, 2016 classroom observation, a February 1, 2016 reading evaluation report, a February 23, 2016 educational evaluation report, a February 26, 2016 social history update, a March 9, 2016 district psychological evaluation report, an April 15, 2016 WIAT-III testing report, a June 5, 2018 private neuropsychological evaluation report, and a progress summary that the student's teacher shared with the CSE (Parent Exs. R; Q; P; Dist. Exs. 6; 8 at p. 3).<sup>9, 10</sup>

The June 2018 private neuropsychological evaluation report indicated that the student was evaluated on April 2, 4, and May 4, 2018 at the parent's request in order to inform his educational planning (Dist. Ex. 6 at p. 1). The private psychologist who evaluated the student administered the following formal assessments: WISC-V; Kaufman Adolescent Intelligence Test, Delis-Kaplan Executive Function System (D-KEFS); Test of Adolescent Word Finding (TAWF); CTOPP-2; WIAT-III; Test of Word Reading Efficiency (TOWRE); Bender-Gestalt II; Conners 3-P; and the

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<sup>9</sup> The hearing record includes an IEP goals progress report that was sent to the parent on June 13, 2018, after the June 6, 2018 CSE meeting (Parent Ex. T at pp. 1-4).

<sup>10</sup> The evaluations from 2016 were also considered by the April 2016 CSE, as summarized above (see Parent Ex. GG at pp. 1-2).

Behavior Rating Inventory of Executive Function (BRIEF) (*id.* at pp. 2-3).<sup>11</sup> In addition, the following measures were also used: clinical interview, FAS Test; Wiig-Semel Test of Linguistic Concepts; Rorschach; Thematic Apperception Test; 'Three Wishes' Projective Technique; Witkins KidsStress Inventory; Human Figure Drawings; Kinetic Family Drawing; German & German Word Finding Checklist; Informal Writing Inventory; Jester Learning Style Survey; Integrated Visual and Auditory Continuous Performance Test (IVA-2 CPT) with Quantitative Electroencephalogram (QEEG) read-out; and "[n]on-standardized measures" (*id.*). According to the private psychologist, the parent did not want the student's previous educational records available for review by the private psychologist because she wanted a "totally independent" evaluation of the student (Tr. pp. 627-28; Dist. Ex. 6 at p. 2).

With regard to testing, the private psychologist reported that the student was cooperative, had no difficulty beginning the structured tasks, and attempted all tasks presented (Dist. Ex. 6 at p. 3). She indicated that the student's intellectual functioning fell within the above average range as assessed by the WISC-V (*id.* at p. 10). More specifically the private psychologist reported that the student's scores on the verbal comprehension and visual spatial indices were within the above average range, and that his vocabulary had been acquired at a very superior rate, his fund of knowledge was within the average range, and his performance on a visual puzzle activity was in the above average range (*id.* at pp. 3, 10). In contrast, the student needed more time than average to process information and scored in the low average range on the similarities subtest (*id.* at p. 10). According to the private psychologist, on the fluid intelligence index, which measured analytic ability, an understanding of figural relations, and perceptual organization, the student scored in the superior range (*id.*). The student attained an above average score on the matrix reasoning subtest and very superior score on the figure weights subtest, which was a "measure of quantitative and analogical reasoning" (*id.*). On the Kaufman Adolescent Intelligence Scale, the student scored in the superior range on the mystery codes and logical steps subtests, which assessed "complex, problem-solving behavior," deductive reasoning, and visual thinking (*id.* at pp. 5, 11).

In addition to evaluating the student's intellectual ability, the private psychologist also assessed the student's "attentional capacity" (Dist. Ex. 6 at p. 11). She reported that the Conners 3-P was completed by the student's mother but was not significant for attention/concentration issues (*id.*). On the BRIEF, the parent indicated that the student "often" exhibited difficulty with getting his ideas on paper and with poor handwriting (*id.*). The private psychologist included the results of performance testing as measured by the IVA-2 CPT and a QEEG (*id.* at pp. 11-13, 22-28). On the IVA-2 CPT the student scored in the mild to moderately weak range on the full scale response control scale, moderately weak range on the full scale attention scale, and severely weak range on the combined sustained attention scale (*id.* at p. 12). The private psychologist opined that the student's executive functioning skill difficulties, which included maintenance of attention, organization, planning, shifting frames of reference, maintaining set, self-monitoring, self-regulation, and time sense, could take a substantial toll on his mental stamina (*id.* at p. 13).

With regard to academic skills, including reading, math fluency and written language, the private psychologist reported that the student's performance was "clearly not at the level of his

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<sup>11</sup> The June 2018 private neuropsychological evaluation report did not consistently list the edition utilized for each assessment conducted (Dist. Ex. 6 at pp. 2-3).

high intelligence" (Dist. Ex. 6 at p. 13). According to the private psychologist, the discrepancy between the student's intelligence and academic ability indicated that he had a learning disability (id.). Specifically, she explained that the student's basic reading, reading comprehension and fluency abilities as measured by the WIAT-III were "significantly below his IQ" (id.). The private psychologist noted that the student's oral reading fluency was within the average range, but his pseudoword decoding skills were at the 9th percentile (id.). She described the student's handwriting as "effortful" (id. at p. 14). She noted that, while he understood grammatical conventions, there were numerous spelling errors and the student scored at the 3rd percentile on the spelling subtest of the WIAT-III (id.). The student also exhibited difficulty in sentence building with errors in spelling, syntax, and grammar (id.). He scored at the 30th percentile in essay writing, but due to a high number of spelling errors, he scored at the 5th percentile on the mechanics of essay composition (id.). In contrast, the student scored within the average range on numerical operations and math problem solving, while his math fluency was at the 7th percentile (id.).

On the CTOPP-2, the student could blend individually presented segments into whole words and he scored at the 25th percentile in segmenting words into the component parts (Dist. Ex. 6 at p. 14). Overall, the student's phonological awareness was at the 42nd percentile and his phonological memory fell at the 55th percentile (id.). The student's speed of processing sounds and his reading comprehension were both at the 27th percentile (id.).

According to the private psychologist, the student met the criteria for a diagnosis of specific learning disorder in reading and writing (Dist. Ex. 6 at p. 16). The private psychologist recommended placement of the student in an educational setting for students with similar needs and abilities; that he be provided with a small student-to-teacher ratio, a structured writing program, and 1:1 daily explicit instruction in executive functioning; that the 1:1 teacher work in liaison with the student's family and therapists; that core instruction be alternated with sessions of enrichment or physical exercise; that the student's organization and language processing deficits be addressed throughout the school day; and that the student be provided with scaffolding, preferential seating, refocusing and redirection, directions simplified and repeated, spelling waived, and copies of class notes (id. at p. 17). In addition, the private psychologist recommended testing modifications including extended time, flexible location away from distraction, breaks, directions read and explained, and use of a calculator, among others (id.). Further, the private psychologist identified numerous strategies that might benefit the student including shorter study sessions; explicit instruction in organizational skills; positive feedback; highlighting and color coding; use of pictures, charts, diagrams, question-answer with a study partner or dramatizations to help him process information; experiential learning; and verbal rehearsal techniques (id. at pp. 18-19). Finally, the performance testing report included as part of the private psychologist's evaluation report indicated the IVA-2 CPT and QEEG findings suggested a diagnosis of ADHD, combined presentation and the student's weaknesses would likely impact his functioning at home and school (id. at p. 28).

The resultant June 2018 IEP indicated that the student was confident and enjoyed class discussions about all topics (Dist. Ex. 8 at p. 5). The IEP noted that according to the student's ICT language arts teacher's the student liked "thinking out of the box" and posed "what if" questions to dialogue with students (id.). The June 2018 IEP also noted that the student's comments in the ICT language arts class could be insightful and showed depth of understanding, and although the student had a creative thought process, he could get off topic and, at times, misunderstand

important facts and details pertaining to the topic at hand (id.). The IEP indicated that, at these moments, it appeared as though the student was more interested in debating with classmates rather than making a salient point and backing up his claim with factual evidence (id.). The IEP reflected that this distinction was not yet clear to the student and he continued to be inconsistent in producing solid statements that were on point (id.).

In mathematics, the June 2018 IEP indicated that the student had strong math skills in computation and problem solving (Dist. Ex. 8 at p. 5). It was reported that the student used mental math to solve equations, but he did not accurately show work or did not show work at all (id.). The IEP further reflected that the student was informed that showing math work was required and that points were taken off of quizzes and tests when work was not shown (id.).

In writing, the June 2018 IEP indicated that the student was a creative writer with a strong voice (Dist. Ex. 8 at p. 5). The IEP noted that the student composed his best writing on the computer when using automatic spell check, as spelling was an area of weakness for him (id.). The IEP described the student as able to approach a writing assignment with multiple points of view and indicated that the student relished making his writing pieces interesting and humorous (id.). The June 2018 IEP reflected that an area of weakness for the student was quoting details from text to prove a claim (id.). It noted that this skill would be necessary to develop as the student moved into eighth grade (id.). In study skills, the student's teachers reported that the student participated in class discussions, but at times the student would try and lead the conversation off track (id.). The IEP described the student as inconsistently completing homework and projects and meeting deadlines (id.). The June 2018 IEP reflected that, at the beginning of the school year, the student used an assignment pad to write down assignments but discontinued its use during the school year (id.). The IEP further noted that recently the student had settled down and focused on schoolwork and had exhibited some maturity (id.). The IEP described the student as a creative thinker who enjoyed engaging in conversation with peers and teachers (id.). It noted that the student was confident and wanted to pursue a career in comedy (id.).

According to the June 2018 IEP, the student continued to struggle with writing and editing paragraphs that included text details, spelling and punctuation skills in writing responses, even when using spell check when writing on a laptop (Dist. Ex. 8 at p. 5). The parent expressed concern regarding the student's weak spelling skills and paragraph writing (id.). The June 2018 IEP reflected that, in the area of social development, the student's social/emotional skills were within age-appropriate expectations and no needs were identified by the CSE (id.). The parent reported that the student was "really happy and ha[d] a nice friend group" and did not have any concerns about the student's social/emotional functioning that should be addressed by special education (id.). Likewise, in the area of physical development, the student's "levels and abilities" were within age-appropriate expectations and no areas of concern were identified on the IEP or attributed to the parent (id. at p. 6). With regard to management needs, the June 2018 IEP indicated that the student required resource room and ICT services for language arts and math in order to access the general education curriculum (id.). Further, the student required program modifications of use of graphic organizers, use of a standing desk, "brainstorm[ing] writing ideas," preferential seating near the teacher, a copy of class notes, long term assignments broken down, prompts to turn in homework, refocusing and redirection, spelling waived, and use of a computer (id.). The June 2018 IEP also reflected that with respect to the effect of the student's needs on involvement and progress in the general education curriculum and participation in appropriate activities, the student



had a learning disability specific to the areas of reading and writing which inhibited his ability to showcase his true abilities and that the student required special education services to access the general education curriculum (*id.*). The June 2018 IEP did not identify any student needs related to special factors and reflected that the student did not require any strategies to address behavioral needs (*id.*). The June 2018 IEP indicated that the student needed an assistive technology device (*id.*).

### **b. ICT Services and Resource Room**

The June 2018 CSE recommended that the student receive ICT services for language arts and math and attend a study skills resource room (5:1), each once per day for 40 minutes (Dist. Ex. 8 at p. 8). The June 2018 CSE also recommended classroom accommodations including using a graphic organizer, standing while working, brainstorming and verbalizing ideas before writing, preferential seating, copies of class notes, breaking down assignments, prompts to turn in his homework, refocusing and redirection, spelling waived, and access to a computer for writing assignments (*id.* at p. 9). Finally, the June 2018 IEP included testing accommodations of flexible seating, extended time, standing during tests, redirection when off-task, and spelling waived when allowed and when spelling was not being assessed (*id.* at p. 10).

State regulation defines resource room as a "special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]). Resource room programs "shall be for the purpose of supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]). State regulation describes ICT services within the continuum of 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]). According to State regulation, ICT services minimally require the assignment of a special education teacher and a regular education teacher (8 NYCRR 200.6[g]2)).

In finding that the June 2018 CSE's recommendation for ICT and resource room services were inappropriate, the IHO relied on evidence of the student's progress (or lack thereof) in a similar program during the 2017-18 school year (*see* IHO Decision at p. 16).<sup>12</sup> A student's progress

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<sup>12</sup> The IHO's reference to the student's underperformance during the 2017-18 school year despite his cognitive skills (IHO Decision at p. 17) is dangerously close to stating an expectation of maximization, which is not required under the IDEA. To be sure, the Supreme Court in *Endrew F.* indicated that "every child should have the chance to meet challenging objectives" and that an educational program "must be appropriately ambitious in light of [the student's] circumstances" (137 S. Ct. at 1000). In the case of a student who is higher functioning, a strict reading of such language in isolation could be interpreted to require districts to offer something more challenging than the programming that it offers to nondisabled students. However, the Court utilized this language to clarify the standard for "closer cases" such as *Endrew F.* and specifically considered the standard as applied to students that were not meeting grade level standards and who were attending special classes; i.e., despite that such a student might be making limited progress, a program would meet the FAPE standard so long as the student was offered the opportunity to meet challenging objectives (*id.*). In contrast to the close case scenario addressed by the Supreme Court in *Endrew F.*, the Court in *Rowley* considered whether a student who was succeeding academically was receiving a FAPE notwithstanding that her IEP did not include the services of a sign-language interpreter (*Rowley*, 458 U.S. at 184-87). The Court explicitly rejected the idea that a FAPE required a district to ensure that a student's full potential be realized (*id.* at 198-99). The Court in *Endrew F.* reaffirmed some of the

under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]).

Relevant to assessing the student's progress under a purportedly similar program is evidence regarding whether the student accessed the services set forth in his IEPs in the years leading up to the June 2018 CSE. The school psychologist who chaired the February 2017 CSE and the student's middle school guidance counselor testified that, in January of his sixth-grade school year, the parent decided to decline resource room services for the student in order for him to attend an elective class (Tr. pp. 32-34, 206-10). In a January 30, 2017 email to the student's guidance counselor, the parent informed the district that she wanted the student to attend a technology class instead of resource room (Tr. pp. 34, 36, 210; Dist. Ex. 4). The psychologist stated that, although the parent had a right to decline the service for the student, the resource room recommendation would remain on his IEP because the CSE felt he still needed it (Tr. p. 35).

The school psychologist confirmed that the parent had never conveyed to her that the resource room was not effective for the student or asked for additional supports because he would not be attending resource room (Tr. pp. 36-37). However, the parent did want him to attend X

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points articulated in Rowley, such as the fact that, for a student fully integrated in the general education classroom, an IEP would be appropriately ambitious if it was "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade" (137 S. Ct. at 992, quoting Rowley, 458 U.S. at 204). Based on this precedent, an interpretation that would require the district to ensure better educational outcomes (i.e., more than advancement from grade to grade) than those promised to nondisabled peers would not be in line with the underlying goals of the IDEA—i.e., to offer a basic floor of opportunity for students with disabilities (Rowley, 458 U.S. at 201). The Supreme Court in Endrew F. did not go so far as to create a new requirement that mandated school districts to develop enhanced programming for students with high average intellect because they also happen to be disabled under the IDEA when it held every child should have the chance to meet challenging objectives.

period, which occurred at the end of the school day for the purpose of allowing students to visit any of their teachers to seek academic support (Tr. pp. 36-37, 39-40).

The school psychologist recalled that the student had attended resource room in the beginning of September 2017 when he was in seventh grade (Tr. p. 44). However, by the end of September, the parent again decided to decline the resource room service in favor of the student taking an elective (Tr. p. 44). In a September 20, 2017 email the parent again informed the district that she wanted the student to attend band instead of resource room (Tr. p. 215; Parent Ex. A). In addition, the guidance counselor stated that the student was beginning to feel uncomfortable and did not want to be in resource room because he perceived the needs of the other students in the class as being different from his (Tr. pp. 215-16). The student's grades declined, and he was in danger of failing a class by the end of seventh grade (Tr. p. 44). The district offered the student an alternative to resource room, consisting of a teaching assistant to work with the student on alternating days instead of his gym class (Tr. pp. 45-46). The school psychologist recalled that the student had attended resource room in the beginning of September 2017 when he was in seventh grade (Tr. p. 44). However, by the end of September, the parent again decided to decline the resource room service in favor of the student taking an elective (Tr. p. 44). In a September 20, 2017 email the parent again informed the district that she wanted the student to attend band instead of resource room (Tr. p. 215; Parent Ex. A). In addition, the guidance counselor stated that the student was beginning to feel uncomfortable and did not want to be in resource room because he perceived the needs of the other students in the class were as being different from his own (Tr. p. 215-16). The student's grades declined, and he was in danger of failing a class by the end of seventh grade (Tr. p. 44). The district offered the student an alternative to resource room, consisting of a teaching assistant to work with the student during his gym class (Tr. p. 45).

The special education teacher for who provided the student's ICT services in his seventh-grade language arts class testified that she was trained and certified in providing instruction using the Wilson Reading Program (Tr. p. 246-47, 249-50, 255). She stated that the student knew what he wanted to write and wrote most of his own written work but had difficulty with spelling and was encouraged to use spell check (Tr. p. 259-60). The special education teacher stated that although the student was allowed to use a program which read books to him, he preferred to read them himself (Tr. p. 260). She also offered him individual reading time with her in the hallway, but he usually declined because he preferred to stay with his class (Tr. p. 260). The student's reading abilities were reportedly average compared to his peers within the ICT class (Tr. p. 261, 287-88). The student understood the material, and while he could misread words, he was still able to understand and discuss the information (Tr. p. 261). To support the student the teacher reported that she used graphic organizers and made sure he was using spell check (Tr. p. 261). In addition, she encouraged the student to attend X period, but he never did (Tr. p. 262). The teacher opined that the student would have benefitted from attending X period to clarify anything he misunderstood or help him develop his ability to find text evidence to support his written work, but the student was sure he understood everything (Tr. p. 263).

The special education teacher stated that the resource room program provided students re-teaching and pre-teaching, as well as help with reading difficulties, organization, and executive functioning (Tr. p. 264). The special education teacher indicated that a resource room program would provide the student time to finish assignments, extra support for study skills, help with organizational skills for his executive functioning, pre-teaching, and re-teaching (Tr. p. 298). The

student's participation in his ICT services was described as "always excellent," but his inconsistent grades were dependent upon whether he prepared and studied, and whether his homework was on time, which it usually was not (Tr. p. 268). The special education teacher testified that the resource room program would have addressed any deficits related to these issues (Tr. pp. 268-69). She opined that the student was making progress in school but that he "wasn't stepping up to do the studying and the homework nor the X period" and in addition resource room was taken away, so the student did not have the ability to get questions answered or to participate in pre-teaching or reteaching (Tr. p. 297).

The IHO dismissed, in conclusory fashion, the district's argument that the student's failure to attend resource room impeded his ability to achieve grades consistent with his academic ability despite the special education teacher's testimony that, while the student's day-to-day academic functioning in the classroom with the support of ICT services was uniformly excellent, his inconsistent grades reflected deficits in his preparation and studying skills and failure to complete his homework assignments in a timely fashion, all of which would have been addressed by the resource room services recommended by the IEP (Tr. pp. 268-69). While the parent remained free to decline the special education services recommended by the district in whole or in part (see, e.g., 34 C.F.R. 300.300[b]), the evidence here shows that the parent's decision to decline resource room services for the student prevented the district from providing the student with the full range of appropriate services that had been recommended for him. Thus, the evidence tends to support a finding that the student's struggles could have been addressed if he had attended the recommended resource room services, and that the June 2018 CSE's determination to continue the recommendation for ICT and resource room services leading into the 2018-19 school year was not rendered inappropriate based on evidence of the student's performance during the 2017-18 school year.

The June 2018 CSE recommended a program similar to seventh grade: ICT and resource room services (Tr. p. 281). The parent "very strongly" advocated for a program for dyslexia, but the district determined it was unnecessary (id.). The IHO seemed to agree, finding that the student's struggles during the 2017-18 school year were attributable, not to his failure to access resource room services, but to the district's failure to address the student's needs related to dyslexia (see IHO Decision at pp. 17-18). With regard to the position that the district was obligated to provide the student with "dyslexia-specific instruction needed to access the general education curriculum" (Parent Post-Hr'g Br. at p. 30), State guidance specific to students with disabilities resulting from dyslexia, dysgraphia, and dyscalculia emphasizes that "[t]he specially designed instruction that is appropriate to the unique needs of each student with a disability resulting from dyslexia, dysgraphia, and/or dyscalculia may vary across individual students with each of these specific learning disabilities" and that "[b]ecause of this, there is no single approach, product, or method of delivering specially designed instruction to such students that is required in federal or State law and regulations" ("Students with Disabilities Resulting from Dyslexia, Dysgraphia, and Dyscalculia: Questions and Answers, at p. 6, Office of Special Educ. [Aug. 2018], available at <http://www.p12.nysed.gov/specialed/publications/documents/q-and-a-students-with-dyslexia-dysgraphia-dyscalculia.pdf>; see generally Educ. Law § 305[56]; Dear Colleague Letter, 66 IDELR 188 [OSERS 2015]). Further, in general a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct.

29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g 2011 WL 12882793, at \*16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [indicating the district's "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]).

Thus, there is no support for the parent's position that the diagnosis of dyslexia should have dictated the student's programming, and instead, the IDEA requires a more individualized determination. The special education teacher testified that the student did not require explicit instruction in decoding to make progress because he was too bright and energetic to engage in Wilson instruction; she explained that, at his age, it would seem like "drudgery" and a waste of time (Tr. pp. 296, 321). The special education teacher stated that as of seventh grade the student's scores were all in the average range, despite having some weaknesses (Tr. p. 317). The recommended program focused on the student's ability to apply the strategies he had learned (id.). She indicated that the student was a fluent reader at the seventh-grade level and she would not have recommended Wilson instruction at that time (Tr. pp. 320-21). She reiterated that when a student was able to read at grade level the next step was for them to use their strategies to use syllable types to help decode words (Tr. p. 322). She noted that all seventh-grade students were introduced to new multisyllabic vocabulary and without patterning no seventh grade student could read fluently without learning new words (id.).<sup>13, 14</sup>

The special education teacher who provided the student's ICT services in his seventh-grade language arts class testified that she was trained and certified in providing instruction using the Wilson Reading Program (Tr. pp. 246-47, 249-50, 255). She stated that the student knew what he wanted to write and wrote most of it but had difficulty with spelling and was encouraged to use spell check (Tr. pp. 259-60). The special education teacher stated that, although the student was allowed to use a program which read books to him, he preferred to read them himself (Tr. p. 260). She also offered him individual reading time with her in the hallway, but he usually declined because he preferred to stay with his class (Tr. p. 260). The student's reading abilities were reportedly average compared to his peers within the ICT class (Tr. pp. 261, 287-88). The student understood the material, and, while he could misread words, he was still able to understand and discuss the information (Tr. p. 261). To support the student, the teacher reportedly used graphic organizers and made sure he was using spell check (Tr. p. 261). In addition, she encouraged the student to attend X period, but he never did (Tr. p. 262). The teacher opined that the student would

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<sup>13</sup> As summarized in detail above, before the student moved to the State, a CSE had recommended that he receive multisensory instruction in decoding and encoding (Parent Ex. EE at pp. 4). After the student moved to the district, a CSE recommended that the student receive specialized reading instruction (Parent Ex. FF at p. 1, 7). As early as the September 2014 IEP, it was documented that the student did not like Orton-Gillingham strategies and found other strategies that he knew to be more efficient (id. at p. 2). By the April 2016 CSE meeting, the student's growth and progress in reading was noted (see Parent Ex. G at p. 2). This progression lends further support to the special education teacher's belief as to how the student would be likely to respond to Wilson instruction.

<sup>14</sup> The private psychologist acknowledged that the student was able to compensate for his decoding weakness and was "able to glean information from the text even though the underlying mechanics of reading might not be that strong" (Tr. p. 667).

have benefitted from attending X period to clarify anything he misunderstood or help him develop his ability to find text evidence to support his written work, but the student was sure he understood everything (Tr. p. 263).

The private psychologist who conducted the June 2018 neuropsychological evaluation testified that she came to the conclusion that the student needed Wilson instruction based on testing and his history, which indicated he still had issues with his ability to read (Tr. p. 562). However, the private psychologist had no experience teaching in public schools or providing reading instruction and was not Wilson trained (Tr. pp. 623-25). In addition, the private psychologist did not consider the student's performance in school because the parent did not want his school to provide input into the evaluation (Tr. pp. 627-29, 643). Moreover, the private psychologist did not recommend Wilson reading instruction for the student in her written evaluation report (see Dist. Ex. 6), and accordingly her opinions with respect to the student's need for Wilson reading instruction were not available to the CSE and, therefore, may not be relied upon to undermine the appropriateness of the CSE's recommendations (see C.L.K., 2013 WL 6818376, at \*13).

Based on the foregoing, the evidence in the hearing record does not support a finding that the June 2018 IEP was inappropriate due to a lack of specially designed instruction specific to dyslexia or for specialized reading instruction using Wilson in particular. Rather, the student demonstrated average reading skills and an ability to use strategies to compensate for his deficits in this area.

As a final matter, the IHO relied heavily on the recommendations set forth in the private neuropsychological evaluation to conclude that the June 2018 IEP did not offer the student a FAPE. In his decision, the IHO determined that the district failed to follow the recommendations in the parent's private neuropsychological evaluation after the district "purportedly relied on [it] for its recommendation" (IHO Decision at p. 16, citing Tr. pp. 49-50). The district school psychologist who served as chairperson at the June 2018 CSE meeting testified that "we reviewed a private evaluation that was conducted that the parent submitted" (Tr. p. 49). As discussed above, the objective assessments conducted by the private psychologist and reviewed by the district school psychologist in her testimony were consistent with district evaluations; accordingly, to the extent the IHO viewed the private neuropsychological evaluation as a unique source of information available to the CSE, such a characterization is not supported by the evidence in the hearing record.

The district school psychologist who served as the chairperson for the student's June 2018 CSE meeting summarized the June 2018 neuropsychological evaluation report at the meeting (Tr. p. 49). She noted that the report described scores with no narrative, which made it difficult to draw conclusions based solely on test scores (Tr. p. 56). Conversely, the report offered narrative but no scores for the Connors 3 and the BRIEF; however, based on the narrative the parent endorsed no areas of concern regarding attention, learning issues, or executive functioning on those measures (Tr. pp. 57-58). The parent did report concerns regarding the student's inability to get his ideas on paper, as well as poor handwriting (Tr. p. 59). The school psychologist testified that, when evaluating the student's cognitive ability, executive functioning, or behavior, determinations should be based on multiple sources, thereby making the results more reliable and valid (Tr. p. 63). In this case, the evaluator based her findings from the Connors 3 and the BRIEF on only the parent's response (Tr. p. 62). The school psychologist confirmed that to determine how the student functioned in school and to develop an IEP with supports for the student in the school setting, it

was important to obtain the input of his teachers regarding how he was performing in school (Tr. p. 64). In addition, the school psychologist asserted that to diagnose ADHD, the student must present with symptoms in two or more settings (Tr. pp. 64-65). In this case, the student's functioning was assessed in only one setting (Tr. p. 64).

Although the IHO faulted the CSE for not adopting the recommendations of the private psychologist, which included placement in "an education program with a homogenous group of students of average intelligence with similar learning profiles in a high school diploma program with a small student teacher ratio" (IHO Decision at p. 16), the CSE was not obligated to do so (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson, 325 F. Supp. 2d at 145 [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]). This is particularly so given the limitations of the evaluation, the additional information available to the CSE regarding the student's functioning in the school setting, and that, in addition to considering what supports and services the student needed in order to receive educational benefits, the district was mandated to consider placing the student with his nondisabled peers in light of the IDEA's LRE requirements. Where, as here, the student could be educated satisfactorily in a general education classroom with supplemental aids and services, the placement recommended in the June 2018 IEP represented the student's LRE (see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 119-20).

Based on the foregoing, the IHO erred in finding that the district failed to offer the student a FAPE for the 2018-19 school year. The hearing record demonstrates that the student was succeeding academically within the district's programming and consistent with the legal standard set forth in Rowley, the student had received educational benefit, achieved passing marks and advanced from grade to grade despite declining the resource room services recommended by the district beginning during the 2016-17 school year. The district's recommendation that the student continue to receive ICT and resource room services for the 2018-19 school year was reasonably calculated to enable the student to make progress appropriate in light of his circumstances in the LRE.

## **2. June 2019 IEP**

### **a. The Student's Needs**

A CSE convened on June 10, 2019 for the student's annual review (Dist. Ex. 13 at p. 1). The June 2019 CSE had before it a March 5, 2019 classroom observation, a March 25, 2019 district educational testing report, a March 25, 2019 career assessment report, a March 26, 2019 district reading evaluation report, and a June 5, 2019 social history update (Dist. Ex. 13 at p. 4; see Parent Exs. H-I; Dist. Exs. 9-12). The June 2019 CSE determined that the student continued to be eligible for special education services as a student with a learning disability and recommended that the student attend an 8:1 "educational support class" for one 40-minute session per day, and receive ICT services in ELA, math, and social studies, each, for one 40-minute session per day (Dist. Ex. 13 at pp. 11-12).

On March 26, 2019, the district administered a reading evaluation to the student (Dist. Ex. 11 at p. 1). The results of the CTOPP-2 were considered by the June 2019 CSE (Dist. Ex. 13 at pp. 2, 4-5). On the elision subtest, which required the student to segment spoken words into smaller parts, he received a scaled score of 9, placing him in the 37th percentile and in the average range for his age (id.). On the blending words subtest, which required the student to blend individually presented segments into whole words, he received a scaled score of 12, placing him at the 75th percentile and in the average range for his age (id.). On the phoneme isolation subtest, which measured the student's ability to identify specific sounds in words, he received a scaled score of 12, placing him at the 75th percentile, and in the average range for his age (id.). Together, the three subtests yielded a phonological awareness composite score at the 68th percentile and in the average range for his age (id. at p. 2).

On the memory for digits subtest, which measured the extent to which the student could repeat a series of numbers, he received a scaled score of 12, placing him in the 75th percentile, and in the average range for his age (Dist. Ex. 11 at p. 2). On the nonword repetition subtest, which measured the student's ability to repeat nonwords, he received a scaled score of 13, placing him in the 84th percentile, and in the above average range for his age (id. at p. 2). Together, the two subtests yield a phonological memory composite score, which assessed the functioning of the part of memory that briefly stores auditory information verbatim (id.). The student scored at the 86th percentile, in the above average range for his age (id.).

On the rapid digit naming subtest, which measured the speed at which the student could name numbers, he received a scaled score of 4, placing him at the 2nd percentile, and in the poor range for his age (Dist. Ex. 11 at p. 2). On the rapid letter naming subtest, which measures the speed with which the student could name letters, he received a scaled score of 3, placing him in the 1st percentile, and in the very poor range for his age (id.). Together, the two subtests yielded the rapid symbolic naming composite score, which measured his ability to efficiently retrieve phonological information from long-term memory and the ability to execute a sequence of operations quickly and repeatedly (id. at p. 3). The student's low scores reflected difficulties with reading fluency due to the timed nature of the subtests (id.). The student's composite score placed him at the < 1st percentile, and in the very poor range for his age (id.). The evaluator commented that significant weaknesses in rapid symbolic naming may manifest in difficulties with oral reading fluency (id.).

In addition to the CTOPP-2, the district administered the WRMT-III, Form A, as part of its reading evaluation of the student (Dist. Ex. 12 at p. 1). The special education teacher who evaluated the student reported that he was cooperative and attempted all items presented to him (id.). On the word identification subtest, which required the student to read words of increasing difficulty, he received a standard score of 90, placing him at the 25th percentile, and at the average range for his age (id.). On the word attack subtest, which required the student to read nonsense words of increasing difficulty, he received a standard score of 90, placing him at the 25th percentile, and in the average range for his age (id.). Together, these two subtests comprised the basic skills cluster for which the student received a standard score of 89, placing him at the 23rd percentile and in the average range (id.).

On the word comprehension subtest, which measured the student's reading vocabulary, he received a standard score of 118, placing him at the 88th percentile, and in the above average range



(Dist. Ex. 12 at pp. 2-3). On the passage comprehension subtest, which measured the student's ability to read a sentence or short passage and identify a missing word, he received a standard score of 116 placing him at the 86th percentile, and in the above average range for his age (*id.* at p. 3). Together, the two subtests provided a broad measure of reading comprehension skills and comprised the reading comprehension cluster for which the student received a standard score of 118, placing him at the 88th percentile, and in the above average range for his age (*id.*).

On the listening comprehension subtest, which measured the student's ability to comprehend spoken language, and tested both literal and inferential comprehension skills, he received a standard score of 133, placing him at the 99th percentile, and in the well above average range for his age (Dist. Ex. 12 at p. 3). On the oral reading fluency subtest, which measured the student's ability to fluently integrate decoding skills with expression and phrasing, he received a standard score of 93, placing him at the 32nd percentile, and in the average range for his age (*id.*). The evaluator noted that the student read quickly without expression but monitored his own accuracy by frequently self-correcting miscues (*id.*). Overall, on the total reading cluster, which provided a broad measure of global reading ability, the student received a standard score of 101, placing him at the 53rd percentile, and in the average range for his age (*id.*).

According to the March 29, 2019 district educational evaluation report, the student was attentive to all tasks, took his time with responses, and stayed engaged during the evaluation (Dist. Ex. 10 at p. 1). The student was administered the Woodcock-Johnson IV-Tests of Achievement (WJ-IV ACH) (Dist. Ex. 10 at p. 1). On the reading cluster, which measured reading achievement including decoding and the ability to comprehend connected text, the student's standard score of 101 fell in the average range (Tr. p. 376, 460, 469-70, Dist. Ex. 10 at p. 2).

On the basic reading skills cluster, which measured the student's sight word vocabulary, the application of phonics and structural analysis skills, the student's standard score of 91 fell in the average range (Dist. Ex. 10 at pp. 2-3). On the broad mathematics cluster, which measured math achievement, including problem solving, number facility, automaticity, and quantitative reasoning, the student's standard score of 109 fell in the average range (*id.* at pp. 3-4). On the written language cluster, which measured the student's written language achievement including spelling of single words (spelling) and quality of expression (writing samples), the student's standard score of 92 fell in the average range (*id.* at p. 4).

Overall, the student's composite scores all fell within the average range (Dist. Ex. 10 at p. 4). His word attack, spelling, and math fluency subtest scores fell in the low average range, while applied problems fell in the superior range (*id.* at pp. 2-4). All other subtest scores were in the average range (*id.*).

The student's Windward teacher participated in the meeting by phone and shared that the student's decoding had improved, but he needed reminders to pay attention to punctuation and slow down when reading aloud for improved fluency (Dist. Ex. 13 at pp. 1-2, 7). In addition, the student needed to work on including text-based evidence to support his "reading responses" (*id.* at p. 7). The student was able to make inferences and predictions, enjoyed participation in class discussions, and contributed insightful comments demonstrating his strong comprehension skills (*id.*). The private school teacher reported that the student was in the upper-level math class and that math was a strength but that he needed to slow down and show his work (*id.*). With respect

to writing, the private school teacher reported that the student benefitted from instruction in planning, outlining, drafting, and revising his written work (*id.*). The teacher also reported that spelling was a "major challenge" for the student and his syntax was awkward (*id.*). The student benefitted from using spell check, grammar tools, and having instructions presented orally and repeated (*id.*). The student's Windward teacher reported that during the last marking period, the student's homework had become "an issue", but when reminded he completed the missing assignments (*id.* at p. 8).

The June 2019 CSE reviewed the June 2018 private neuropsychological evaluation report and noted on the IEP that the results of the evaluation showed that the student exhibited many areas of strength, as well as average or above average abilities in most academic areas (Dist. Ex. 13 at p. 7).

### **b. ICT and Educational Support Class**

The June 2019 CSE recommended that the student receive ICT services in language arts, math and social studies, and attend an 8:1 "educational support class," which the district asserted would address the student's needs in the LRE (Dist. Ex. 13 at pp. 3, 11-12).<sup>15</sup> The parent and Windward staff disagreed with the CSE recommendation and asserted that the student needed to remain at Windward (*id.* at p. 3).

The district school psychologist who attended the June 2019 CSE meeting described the educational support class as "basically a class with special education students," which provided "support to help students accomplish their goals" (Tr. p. 390). The psychologist further testified that the educational support class could feature "preteaching or reteaching," executive functioning support such as "prioritizing, outlining," and teaching students "how to learn" (Tr. p. 391). He stated that the class was taught by a special education teacher with a "focus on goals" (*id.*). The psychologist testified that the ICT services and educational support class would offer the student access to education alongside peers with similar academic profiles and would offer opportunities for small group instruction (Tr. pp. 403-04). The psychologist stated that prior to participating in the student's June 2019 CSE meeting he reviewed the student's evaluations, grades, report cards, and previous IEP and spoke with the student's previous special education teacher and guidance counselor (Tr. pp. 410-11). The psychologist reported that prior to the meeting his understanding was that the student did not like and therefore did not access the educational support class but rather he wanted to take band and engineering instead (Tr. pp. 411-12).<sup>16</sup> In addition, the psychologist explained that there was a belief that, if the student had attended his resource room class, he would have made more progress (Tr. p. 412). The psychologist acknowledged that the educational support class was similar to a resource room because it was a small class where students focused on goals (Tr. pp. 430-31). Finally, the psychologist stated that his overall

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<sup>15</sup> The hearing record indicates that this class was not an 8:1 special class within the meaning of the continuum of services and functioned like a resource room (Tr. pp. 390-91, 430-31, 476, compare 8 NYCRR 200.6[f], with 8 NYCRR 200.6[h][4]).

<sup>16</sup> The psychologist appears to be referring to the resource room services recommended for the student in sixth and seventh grade as the educational support class was not recommended for the student until ninth grade (see Parent Exs. A; GG at p. 8; Dist. Exs. 4 at p. 1; 5 at p. 8; 13 at p. 11).

interpretation of the information before the June 2019 CSE was that the student had a mild reading issue that was exacerbated by ADHD (Tr. pp. 430-432).

The special education teacher who conducted the March 2019 reading evaluation and participated in the June 2019 CSE meeting, testified that she administered the CTOPP-2 and the WRMT-III to the student for his annual review (Tr. p. 451-52, 457; see Dist. Exs. 11, 12). She stated that the student scored in the average range or above in phonological awareness and phonological memory (Tr. pp. 452-54). He fell below average in rapid symbol naming, because although his answers were accurate, he took his time which affected his score (Tr. p. 454). She noted that it was the last subtest in the session, and his stamina affected his score as he was tired at that point (Tr. pp. 454-55). The teacher noted that the student had previously scored in the average range on the same test; that the test was a "snapshot" of the student and did not reflect his true ability (Tr. p. 455-56). She stated that the foundation for reading ability was phonological processing, and the student's skills in this area were intact (Tr. p. 456). The teacher opined that while the student exhibited weakness in decoding nonsense words in particular because he could not rely on context for clues, his reading comprehension was strong, which indicated that he was able to compensate for his difficulty with decoding (Tr. pp. 469-70). The teacher asserted that the student did not need one-to-one reading instruction and although he needed to work on patterns and syllable division, analyzing text, and reading fluency they could all be addressed with ICT services and the educational support class (Tr. p. 470).

As with the June 2018 IEP, the June 2019 CSE considered several sources of information including the private neuropsychological evaluation. In addition, similar to the reasons detailed above, the IHO erred in according the private evaluation greater weight than judgments of district staff, which generally may be afforded some amount of deference (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at \*16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at \*6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]).

This is particularly the case where, as here, the student attended district schools from the end of the 2013-14 school year through the end of the 2017-18 school year and was well known to the district providers. The private psychologist indicated in the neuropsychological evaluation report that its purpose was to inform educational planning, however she obtained no information about the student in an educational setting (compare Dist. Ex. 6 at p. 1; with Tr. pp. 627-30, 643). Accordingly, the IHO erred by faulting the district for not adopting the recommendations of the June 2018 private neuropsychological evaluation and by failing to give due deference to the views of the district educators and staff who knew and worked with the student.

With regard to the IHO's determination that the district's failure to recommend multisensory instruction such as Wilson into the student's IEP was inexplicable considering that the district had the availability of Wilson trained providers and was using the program in the district

at the time of the recommendations, it is noteworthy that the private neuropsychological evaluation did not include any reading recommendations for the student (compare IHO Decision at p. 19; with Dist. Ex. 6 at pp. 16-19).

Moreover, for reasons similar to those set forth above, the evidence in the hearing record does not support the IHO's determination that the student required "direct multi-sensory instruction in small groups or 1:1 using a multisensory methodology such as Wilson" (IHO Decision at p. 18). The hearing record supports the district's contention that the student did not require a Wilson reading program (Tr. pp. 171, 295-96, 316-17, 321, 469-72). The special education teacher who conducted the March 2019 reading evaluation and attended the June 2019 CSE meeting testified that the student's need to apply patterns and syllable divisions, analyze text, and improve reading fluency were all issues that could be addressed with ICT services and in the educational support class (Tr. p. 470). She explained that at higher grade levels, teachers look at error patterns and use the content they are teaching in the classroom to teach syllabication and learning strategies to make it more meaningful for the student (Tr. p. 471). The private psychologist testified that the fact that a student was doing well with comprehension even though they had difficulty with decoding indicated that the student was compensating because of their intelligence and were able to glean information from text even though the underlying mechanics of reading might not be that strong (Tr. p. 667). Her testimony was consistent with that of the student's seventh-grade special education teacher and the district's school psychologist who testified that the student's performance on the evaluations suggested that he had learned strategies such as using context clues to allow him to comprehend the text, even if he was unable to decode the words in isolation, such that a specialized reading program was no longer necessary (Tr. pp. 295-96, 376-77, 470-71). The psychologist opined that based on the data, the student's decoding weaknesses did not impact his comprehension of materials (Tr. p. 378). The school psychologist also explained that he did not agree with the private psychologist's diagnosis of dyslexia based upon the student's performance on the CTOPP-2 and TAWF and the district's reading evaluation (Tr. pp. 419-21). The May 2019 Windward assessments indicated that the student was reading in the average range when he transitioned there and was a strong decoder (Tr. pp. 381-83, 1040).

A review of the hearing record demonstrates that contrary to the IHO's findings, the district offered the student a FAPE for the 2019-20 school year. The hearing record indicates that the description of the student by Windward staff during the June 2019 CSE meeting was very similar to the descriptions provided by district staff during prior school years. The student demonstrated weaknesses in grammar, punctuation, spelling, writing and homework completion (Dist. Ex. 13 at pp. 2-3). Based on the evaluative information reviewed and additional information regarding the student's present levels of performance provided by Windward staff, the CSE recommended additional ICT class services in social studies and an 8:1 educational support class. The June 2019 CSE also recommended an additional reading goal in the area of decoding following the student's attendance at Windward. The hearing record supports the district's position that the recommendation of ICT services and an educational support class for the 2019-20 school year was reasonably calculated to enable the student to make progress appropriate in light of his circumstances in the LRE.

## **VII. Conclusion**

Having found that the district offered the student a FAPE for the 2018-19 and 2019-20 school years, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find them to be without merit.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the that the IHO's decision dated October 25, 2021 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years and ordered the district to reimburse the parents for the costs of the student's attendance at the Windward School for the 2018-19 and 2019-20 school years.

**Dated:**            **Albany, New York**  
                         **January 24, 2022**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**