



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-098

### **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.

Law Offices of Neal H. Rosenberg, attorneys for respondents, by Michael Mastrangelo, Esq.

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Windward School (Windward) for the 2020-21 and 2021-22 school years. The appeal must be sustained in part.

#### **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**

Concerns regarding the student's language development at the age of four resulted in a Committee on Preschool Special Education (CPSE) evaluation in December 2014, at which time the student "was approved for services" and received two sessions per week of speech-language therapy in a small group and one session individually (Dist. Exs. 4 at pp. 1-2; 15 at p. 1). A September 2015 speech-language assessment of the student indicated that he was experiencing difficulties following lengthy commands within the classroom, planning and producing appropriate sentences, and using social language (Dist. Ex. 3 at p. 1). A neuropsychological evaluation conducted at that time determined that the student had "at least average intelligence" and that he "presented with phonological deficits and the early indicators of a language-based learning disability (dyslexia)" (Dist. Ex. 4 at pp. 1, 3). For the 2015-16 school year (kindergarten)

the CSE found the student eligible for special education as a student with a speech or language impairment and recommended that he receive resource room services and continue with speech-language therapy (*id.* at p. 2). The student attended a district elementary school for kindergarten and first grade (2016-17 school year) (*id.* at p. 3).

In March 2017 Windward conducted an initial educational screening and the parents obtained a neuropsychological re-evaluation of the student in August 2017 (Parent Ex. A; Dist. Ex. 4). The student was unilaterally placed by his parents at Windward for second grade (2017-18 school year) during which time the CSE continued to find the student eligible for special education as a student with a speech or language impairment (Dist. Exs. 5 at p. 1; 6 at pp. 1, 3; 7 at p. 1; 9 at p. 1; 15 at pp. 1, 25; 16 at p. 2).<sup>1</sup>

In spring 2018, as part of the student's "three year re-evaluation" the district conducted a speech-language evaluation, an occupational therapy (OT) evaluation, an educational evaluation, a classroom observation, and a psychological evaluation of the student as well as a social history update (*see* Dist. Exs. 5; 6; 7; 8; 9; 16).

Windward spring 2019 testing updates and a June 2019 Windward progress report reflected that during the 2018-19 school year the student was "Consistently" or "Frequently" performing skills involving decoding (*see* Dist. Ex. 10 at pp. 1, 3). The progress report's fourth quarter comments stated that the student's "decoding became more automatic as he applied the strategies taught in class to decode unfamiliar words" and noted that "[a]s the year progressed, [the student] benefitted from systematic and explicit instruction in reading comprehension strategies and demonstrated increased understanding of connected text" (*id.* at p. 5).

January 2020 speech-language testing data showed the student's relative weaknesses in paragraph construction, contextual fluency, vocabulary, spelling, contextual conventions, story compositions, and spontaneous writing (Dist. Ex. 13). The speech-language pathologist who conducted the testing recommended that the student continue to receive individual speech-language therapy for the 2020-21 school year, with a focus on "continued improvement of [the student's] expressive and receptive language skills, with additional goals to complement academic language based literacy skills" (Dist. Ex. 14).

In February 2020, the parents executed an enrollment contract with Windward for the 2020-21 school year (Parent Ex. M).

On June 10, 2020, a CSE convened to conduct the student's annual review and develop his IEP for the 2020-21 school year (Dist. Ex. 11 at p. 1). Finding the student eligible for special education and related services as a student with a speech or language impairment, the CSE recommended integrated co-teaching (ICT) services for language arts and math, a one-hour session daily of specialized reading instruction in a group of five, three 30-minute sessions per six-day cycle of individual speech-language therapy, one 15-minute session per six-day cycle of individual social skills instruction, one 30-minute session per six-day cycle of social skills instruction in a group of five, and 12-month services consisting of three one-hour sessions per week of specialized

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<sup>1</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).

reading instruction in a group of five (id. at pp. 1, 11, 14).<sup>2</sup> The CSE also recommended a number of supplementary aids and program modifications/accommodations, access to audio books, an occupational therapy (OT) consultation, and a psychological consultation (id. at pp. 11-14). The June 2020 CSE meeting comments indicated that the parents stated that they needed to review the IEP developed and would let the district know if they planned to access the program (id. at p. 2).

In an August 31, 2020 10-day letter the parents notified the district that based on the student's specific learning profile they did not believe that the district's recommended program was sufficient to meet his needs and that it failed to provide the student with the level of support he required to make appropriate progress (Parent Ex. J at pp. 1-2). The parents further advised the district that they planned to continue the student's enrollment at Windward for the 2020-21 school year, and intended to seek tuition reimbursement for that placement (id. at p. 2).

The student attended Windward for the 2020-21 school year (fifth grade) (see Parent Exs. B; D; E; Dist. Ex. 17 at p. 1).

In December 2020, the parents privately obtained a psychological evaluation of the student (Dist. Ex. 15; IHO Ex. I).<sup>3</sup> Following administration of a variety of cognitive, language, visual motor, academic, and social/emotional assessments, the evaluator concluded that the student met criteria for diagnoses of a language disorder, specific learning disorder with impairment in mathematics, reading, and written expression, and disruptive mood dysregulation disorder (see Dist. Ex. 15; IHO Ex. I). In February 2021, the parents executed an enrollment contract with Windward for the 2021-22 school year (Parent Ex. N).

In spring 2021, as part of the student's triennial re-evaluation, the district conducted a speech-language evaluation, an educational evaluation, a social history update, and a psychological evaluation (Dist. Exs. 17-20).

A CSE convened on April 15, 2021, to conduct a reevaluation and annual review and to develop the student's IEP for the 2021-22 school year (Dist. Ex. 21 at p. 1). Finding the student eligible for special education and related services as a student with a learning disability, the CSE recommended one 40-minute session per day of ICT services in each of the following subjects: language arts, math, social studies, and science; one 40-minute session per day of an educational support class in a group of 15; two 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of speech-language therapy in a group of five; and one 30-minute session per week of both individual and small group (5:1) counseling (id. at pp. 1, 3,

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<sup>2</sup> The student's eligibility for special education as a student with a speech or language impairment as of June 2020 is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

<sup>3</sup> IHO Exhibit I and District Exhibit 15 are both copies of a December 2020 psychological evaluation report; however, IHO Exhibit I specifically included a recommendation that the student attend Windward while District Exhibit 15 did not include that recommendation (compare IHO Ex. I at p. 33, with Dist. Ex. 15 at p. 33). The evaluator testified at the impartial hearing about a draft of the evaluation report which contained the specific Windward recommendation; in testimony, the parent explained that she requested that the reference to Windward be removed because she wanted the CSE to consider a recommendation that described a specific educational program and not a specific school location (Tr. pp. 505-14, 800-06, 834, 897-900, 928-29; Dist. Ex. 15 at p. 35).

14).<sup>4</sup> In addition, the April 2021 IEP included annual goals addressing the student's needs in the areas of reading, writing, mathematics, speaking and listening, speech-language, and social/emotional/behavioral and provided supports and accommodations including checks for understanding, breaking down assignments into manageable tasks with teacher determined deadlines, preferential seating, visual schedule and supports, wait time for oral and written responses, positive reinforcement, pre-teaching and re-teaching, movement breaks, use of a calculator and graphic organizers, assignments and homework modified for quantity, copy of class notes, spelling waived, refocusing and redirection, access to audio books, one 30-minute OT consultation per month, and one 15 minute psychological consultation per month (*id.* at pp. 11-17). On April 23, 2021 a testing accommodation decision checklist was completed (Dist. Ex. 22).

In an August 13, 2021 letter, the parents notified the district that based on the student's specific learning profile they did not believe that the district's recommended program was sufficient to meet his needs and that it failed to provide the student with the level of support he required to make appropriate progress (Parent Ex. K at p. 1). The parents referenced the results of the December 2020 private psychological evaluation, and stated that they planned to continue the student's enrollment at Windward for the 2021-22 school year and seek tuition reimbursement and transportation (*id.* at pp. 1-2).

The student attended Windward for the 2021-22 school year (sixth grade) (Parent Exs. C; F; G; L; O).

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

By due process complaint notice dated August 20, 2021, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2020-21 and 2021-22 school years (*see* Dist. Ex. 1).

With respect to the 2020-21 school year, the parents argued that the June 2020 CSE meeting and recommendations of ICT services for language arts and math, speech-language therapy, social skills, and specialized reading instruction were substantively and procedurally inappropriate, inadequate and not reasonably calculated to offer the student an opportunity to make progress, and impeded the parents' opportunity to participate in the decision-making process (Dist. Ex. 1 at pp. 3-4). Next, the parents argued that the IEP failed to address the student's need for small instructional classes, individualized attention, specialized teaching strategies, and multisensory techniques; the program failed to offer the student appropriate peer functional grouping; class sizes were too large and would be distracting; pull-out services would be dysregulating and anxiety-inducing; and the program failed to address the student's executive functioning skills (*id.* at p. 4). Additionally, the parents asserted that the June 2020 IEP did not accurately reflect the results of available evaluations and as a result the CSE failed to identify the student's needs and establish annual goals related to those needs, and that the CSE failed to discuss any appropriate methodologies (*id.* at p. 5). Further, the parents argued that the extensive programming modifications the student required to access the curriculum could not be implemented (*id.*). Next, the parents argued that the IEP was developed without meaningful parental participation and the

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<sup>4</sup> The student's eligibility for special education as a student with a learning disability as of April 2021 is not in dispute (*see* 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

program was predetermined based on availability rather than the student's needs (*id.*). Finally, the parents alleged the CSE failed to address the student's behaviors that interfered with his learning and was unable to provide the parents with information related to the implementation of the IEP in the event that the circumstances surrounding the COVID-19 pandemic necessitated continued distance learning or an alternate instruction format (*id.* at p. 5-6).

Regarding the 2021-22 school year, with respect to the April 2021 CSE meeting and recommendations of ICT services for language arts, math, social studies and science, a 15:1 special class, speech-language therapy, and counseling, the parents again argued that the program recommendations were substantively and procedurally inappropriate, inadequate and not reasonably calculated to offer the student an opportunity to make progress, and impeded the parents' opportunity to participate in the decision-making process (Dist. Ex. 1 at pp. 7-8). Otherwise, the parents argued the same claims for 2021-22 as they did for the 2020-21 school year, additionally referencing the December 2020 psychological evaluation (*id.* at pp. 7-12).

The parents further asserted that Windward was an appropriate unilateral placement and that equitable considerations weighed in favor of the parents' claims for the 2020-21 and 2021-22 school years (Dist. Ex. 1 at p. 12). As relief, the parents requested an order for "direct payment/reimbursement" for tuition at Windward, continued transportation for the 2020-21 and 2021-22 school years, and reimbursement for all associated costs including independent assessments conducted (*id.* at p. 13).

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

An impartial hearing convened on December 6, 2021, and concluded on February 28, 2022, after six days of proceedings (Tr. pp. 1-932). In a final decision dated July 1, 2022, the IHO determined that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years, that Windward was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 32-43).

Initially, the IHO found that the district failed to meet "its burden in showing that the ICT classes for language arts and math combined with general education classes for all [the student's] other subjects, a specialized reading class, and related services were sufficient to meet the [s]tudent's needs and provide him with academic benefit for the 2020-2021 school year" (IHO Decision at p. 36). The IHO noted, among other things, that the reading instruction on the student's IEP was not provided throughout the day and was not the Orton-Gillingham approach as recommended in the August 1, 2017 neuropsychological re-evaluation, finding that, given the student's significant reading and writing deficits at the time of the June 2020 CSE meeting, the district's recommended program could not sufficiently remediate these deficits in an ICT class and enable the student to make progress (*id.* at p. 35). The IHO also noted testimony that the student needed to learn in "homogeneous ability group classes" with small student to teacher ratios and indicated that, despite testimony that the parents were in agreement with the June 2020 IEP, the parents had stated they needed to review the IEP and would let the district know if they planned to access the program (*id.* at pp. 34, 35). With respect to annual goals, the IHO referenced testimony in which the district witness stated that "she did not know whether Windward's input related to goals contextualized or within the context of the Windward program," which the IHO

stated would make a "tremendous difference" as to the program's development and appropriateness, and that "although there was a discussion of goals, specific goals were not drafted until after the meeting" (*id.* at p. 35). With respect to the ICT services, the IHO referenced district witness testimony generally, and stated that the witness "did not address this [s]tudent's specific diagnoses and deficits and how they could be addressed in such a setting," noting that despite witness testimony that "the ICT program can meet the needs of all learners," "[t]his is not the case and that is why there is a continuum" (*id.* at p. 36).

For the 2021-22 school year, the IHO again found that the district failed to meet its burden, this time in showing that the ICT classes for language arts, math, social studies and science, with an educational support class and related services, were sufficient to meet the student's needs and provide him with academic benefit (IHO Decision at pp. 37, 39). Among other things, the IHO stated that "[c]learly, [the private December 2020 psychological evaluation] report was not appropriately reviewed at the [April 2021 CSE] meeting" also noting that the private evaluator's "recommendations for the [s]tudent going forward were not discussed at the meeting" (*id.* at p. 37). With respect to annual goals, the IHO noted that there was a discussion of the proposed goals and whether they could be met in an ICT class with the Windward representative stating that she had concerns about whether the student could meet the goals (*id.* at p. 38). Next, noting that the CSE removed the student's 5:1 specialized reading class and replaced it with an educational support class of 15 students, the IHO found that, although the special education teacher in this classroom would have an opportunity for reteaching, planning for long-term assignments, and teaching the student study skills and strategies, there was "no indication that reading would be taught in any manner" and that based on his testing, the student "clearly need[ed] a specialized reading program and w[ould] be lost without it" (*id.* at p. 39). The IHO further found testimony credible that the student needed continued decoding intervention (*id.*). With respect to the recommended ICT placement for the student's academic classes, the IHO referenced testimony that the student would not be a candidate for ICT services based on his specific needs because it would be difficult for the student to learn in a class of 20-25 students and he required an "integrated specialized reading program that the [d]istrict d[id] not have," noting that the student has attention issues that would be exacerbated by a class of that size, and finding that "a larger class would be detrimental and would not provide the student with educational benefit" (*id.*).

The IHO determined that the parents met their burden in proving the appropriateness of Windward for both the 2020-21 and 2021-22 school years, finding that the multisensory instruction program met the student's language-based learning disabilities and the student made progress (IHO Decision at pp. 39-42). The IHO also found that the parents participated and cooperated with the district for the years at issue, and an analysis of equitable considerations offered no basis to rule against them (*id.* at p. 43). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Windward for the 2020-21 and 2021-22 school years (*id.* at p. 44).

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

The district appeals and asserts that the IHO erred in determining the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years. With respect to 2020-21, the district argues that the IHO erred in relying on the August 2017 neuropsychological re-evaluation which recommended "an Orton Gillingham reading program which is delivered 'throughout the day,'" in determining that the June 2020 CSE's recommendations were not appropriate. The district also

argues that the IHO improperly determined that the CSE did not consider "the three year old private evaluation" as the due process complaint "d[id] not even mention the 2017 . . . evaluation, much less assert a claim based up on the failure to review it." Further, the district asserted that the IHO erred in determining the CSE "somehow acted improperly" for not reviewing the August 2017 private neuropsychological evaluation or the March 2018 educational evaluation.<sup>5</sup> Next, the district argues that the IHO's decision misconstrued testimony of a district witness concerning the district's reading program and improperly required a specific reading program as an element of FAPE, stating that the district is not required to provide the most appropriate intervention but merely an appropriate one, and also that it was proper for the CSE to recommend specialized reading without referencing a specific reading program. In addition, the district asserts that the IHO's statement that the recommended ICT program would not enable the student to make progress in reading ignored the recommendation for specialized reading and speech-language therapy in the IEP, and further, that the IHO ignored the evidence the student has "poor language scores and average decoding skills" and that, therefore, recommendations to address his deficits through "a combination of language therapy and specialized reading" rather than through a "proprietary phonics program" was proper.

With respect to the 2021-22 school year, the district argues that the IHO erred in determining that the district failed to offer a FAPE for the 2021-22 school year. Specifically, the district asserts that the IHO erred in finding the student required a specialized reading program "integrated throughout the day," again arguing that testimony showed the student "had a language deficit, so he needed speech-language therapy and he was decoding in the average range, so he did not need a specific reading program to learn phonics," and that the IHO ignored the weight of the evidence. The district also argues that the IHO erred in determining the district did not review the December 2020 private psychological evaluation, noting that it was listed on the IEP, the diagnoses and test results were discussed in the IEP, and the CSE chairperson testified that she compared her results to the test results in the December 2020 evaluation report.

Next, the district argues that the IHO erred in determining that Windward was appropriate for the student for the 2020-21 and 2021-22 school years based on the 2017 reevaluation. The district also argues that the IHO erred in finding the annual goals were improper for the 2020-21 and 2021-22 school years. Finally, the district argues that the IHO erred in determining that the CSE failed to have an explicit discussion about how the student's learning needs would be met with the ICT class recommendation. As relief, the district requests that the IHO decision be annulled, and the parents request for relief be denied in its entirety.

In an answer, regarding the 2020-21 school year, the parents argue that the IHO properly determined the CSE did not consider the 2017 "three-year old private evaluation" and used the 2017 neuropsychological reevaluation to identify the student's learning challenges and diagnoses "alongside" other relevant information about the student's present levels of performance, as it "was the most recent set of standardized testing that was conducted prior to the 2020-21 school year" and it "contributed to understanding a full picture" of the student "alongside more up-to-date information." Additionally, the parents assert that the IHO's findings were less concerned with the

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<sup>5</sup> Although the IHO and the district refer to a March 2018 evaluation as private (see IHO Decision at p. 34; Req. for Rev. at p. 2), a review of the hearing record indicates that the referenced evaluation was the March 2018 educational evaluation conducted by the district (Dist. Ex. 7; see Tr. p. 111).



CSE's failure to consider the 2017 evaluation and more concerned with the "CSE's recommendations in light of the [s]tudent's diagnoses" as outlined in the evaluation. Next, the parents argue that the IHO correctly found that the reading instruction provided to the student on his IEP was not provided "throughout the day" and was not the "Orton-Gillingham approach specifically designated." The parents contend that the IHO's decision was "primarily rooted" in the fact that the district's reading instruction would have occurred "solely" during the specialized reading instruction period as opposed to throughout the school day or in the recommended ICT class, whereas the record supported a finding that the student required instruction throughout the school day and "embedded" into each of his content area classes. In addition, with respect to the ICT program, the parents argue that the district mischaracterized the IHO's findings and that the IHO based her decision on the evaluative information available to the CSE at the time of the meeting to determine the student required a language-based, structured, evidence-based reading curriculum and methodology throughout the day, which the record shows that ICT services would not have provided.

With respect to the 2021-22 school year, the parents dispute the district's argument that because the student's decoding skills were "intact" he did not require specialized reading instruction, instead asserting that the student's primary reading deficit was in the area of comprehension and that the district's position contradicted the IEP which indicated the student continued to need to decode multi-syllabic words, was working on decoding at the time of the CSE meeting, and benefitted from multi-syllabic instruction for decoding. The parents also argue that the IHO properly determined the district did not meet its burden to show that the recommended ICT classes, educational support class, and related services were sufficient to meet the student's needs and provide academic benefit. The parents assert next that the IHO properly determined that the December 2020 evaluation was not appropriately reviewed at the CSE meeting as testimony failed to establish that the testing contained in the evaluation report was sufficiently discussed and considered.

In addition, as to whether Windward was an appropriate program and placement for the student for the 2020-21 and 2021-22 school years, the parents dispute the district's argument, alleging that the district "misconstrues" the basis upon which the IHO made her determination. The parents argue that the IHO's decision was based on the "totality of the documentary and testimonial evidence presented by the parent," including the August 2017 neuropsychological re-evaluation which was within three years of the 2020 CSE meeting thus entitling it to some weight, and the December 2020 evaluation which was very recent and entitled to substantial weight. The parents also dispute the district's allegations with respect to annual goals, arguing that the IHO did not explicitly find the annual IEP goals for 2020-21 and 2021-22 inappropriate but properly determined that whether the goals could be achieved within the recommended program was an important issue that made a difference. Finally, the parents argue that the IHO correctly found that the CSE did not present specific information about how the student's learning needs would be met in the recommended program for the 2020-21 school year.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and

independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations

omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see 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>6</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).

## **VI. Discussion**

### **A. Scope of Impartial Hearing**

Initially, with respect to the 2020-2021 school year, it is necessary to address the district's argument that the parents did not assert a claim in their due process complaint notice based upon the CSE's failure to review the August 2017 parent-obtained neuropsychological re-evaluation.

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<sup>6</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).

Specifically, the district argues the due process complaint notice "does not even mention the 2017 . . . evaluation, much less assert a claim based on the failure to review it" and the IHO may not base her decision on claims not asserted in the due process complaint notice. The parents respond that the IHO properly considered the 2017 evaluation alongside other relevant information to obtain a full picture of the student and was less concerned with the CSE's failure to consider the 2017 evaluation and more concerned with its recommendations in light of the student's diagnoses.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59[2d Cir. June 18, 2014]).

Here, a review of the due process complaint notice demonstrates that, while the parents did not specifically mention the August 2017 neuropsychological re-evaluation by name, the parents did raise the issue of consideration of evaluative information for the 2020-21 school year, stating that "[t]he program discussed by the CSE in June 2020 fails to accurately reflect the results of the evaluations available to the CSE" and further that "as a result, it neither adequately identifies the [s]tudent's needs, nor establishes annual goals related to those needs" (see Dist. Ex. 1 ¶ 17). Therefore, I find that there is no basis to find that the IHO based her decision on claims not asserted in the due process complaint notice and the merits of the IHO's analysis in this regard are discussed further below.<sup>7</sup>

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<sup>7</sup> With respect to issues that have not been raised by the parties on appeal, I note that the parents have not cross-appealed the IHO's finding that the parents participated in the decision-making process during the development of the student's IEP for the 2020-21 and 2021-22 school years (see IHO Decision at p. 43). As such, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]). Additionally, the due process complaint notice raised issues that were not addressed by the IHO and have not been argued on appeal. State regulations governing practice before the Office of State Review require that a "request for review 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 indicate the relief sought by the petitioner (8 NYCRR 279.4[a] [emphasis added]). Tethered closely to this requirement is the State regulation which mandates 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" (8 NYCRR 279.8[c][2]). "[A]ny 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][4]). Accordingly, as per the above-stated regulations, my review is limited to issues specifically raised in the parties' pleadings.

## **B. 2020-21 School Year**

The district argues that the IHO erred in determining that the district failed to offer the student a FAPE for the 2020-21 school year.

### **1. June 2020 CSE Process: Consideration of Evaluative Information**

#### **a. August 2017 Neuropsychological Re-Evaluation**

The district alleges that the IHO erred in relying upon the recommendations of the August 2017 neuropsychological re-evaluation in determining that the June 2020 CSE's recommendations were not appropriate and improperly determined that the CSE did not consider the three-year old private evaluation. The district further argues that the law requires the CSE to consider the private evaluation but does not require the CSE to review the private evaluation at every CSE meeting thereafter. Accordingly, the district asserts the IHO erred in determining that the CSE acted improperly in June 2020 for not reviewing evaluations conducted in March 2018 and August 2017.

The parents dispute the district's allegations in their answer and contend that the August 2017 neuropsychological re-evaluation report contained the most recent set of standardized testing conducted prior to the 2020-21 school year and that, while the district argues that the student's needs were not the same in 2020 as they were in 2017, standardized assessments alongside more up-to-date information contributed to understanding a full picture of the student, including relevant learning disability diagnoses. The parents further argue that the IHO used the evaluation to identify the student's learning challenges and diagnoses alongside other relevant information about the student's present levels of performance to provide rationale as to why the district's program was inappropriate. As such, the parents contend that the IHO's findings were less concerned with the fact that the CSE failed to consider the 2017 evaluation and more concerned with the CSE's recommendations in light of the student's diagnoses as outlined in the 2017 evaluation report.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). A CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight or adopt their recommendations (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James

D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

Here the evidence in the hearing record supports the district's position that the CSE acted properly in its review and consideration of the available evaluative information. The district supervisor of secondary special education (supervisor), who served as chairperson of the June 2020 CSE meeting, stated that she prepared the June 2020 IEP in collaboration with the Windward liaison, the private speech-language pathologist, the parents, and the district special education teacher but noted that the CSE "heavily relied" on Windward staff feedback, parent feedback, and the private speech-language pathologist's feedback since they were working directly with the student (Tr. pp. 34, 40-41, 87; see Dist. Ex. 23 at pp. 2-21).

In addition, the supervisor stated that the June 2020 CSE had information from the March 2018 evaluations, a teacher progress summary on behalf of Windward staff, the Windward report card, parent report and observation, and feedback and testing results from the private speech-language pathologist (Tr. pp. 87-88; see Dist. Ex. 11 at pp. 3-5). At the hearing, the supervisor stated that the August 2017 neuropsychological re-evaluation was not discussed at the June 2020 CSE meeting because it was previously discussed and that an IEP was developed based on "that information at the time of that reevaluation" (Tr. p. 88). She testified that the district's "practice" was that after parents submit an evaluation to the district, the CSE either held "a requested review" or a "reevaluation meeting" at which time the evaluation was reviewed and the CSE made "any necessary implementations to the IEP" at the time the evaluation was reviewed (Tr. pp. 88-89; see Dist. Ex. 4). Further, and contrary to testimony at the hearing, the June 2020 IEP did include the August 2017 neuropsychological re-evaluation's testing results. Specifically, the evidence in the hearing record demonstrates that the June 2020 IEP listed the August 2017 neuropsychological evaluation in the present levels of performance under "Evaluations / Reports" and, under "Test Results," listed the results for the tests administered to the student in August 2017 including the Comprehensive Test of Phonological Processing (CTOPP), the Kaufman Test of Educational Achievement, Second Edition (K-TEA-II), the Wechsler Individual Achievement Test, Third Edition (WIAT-III), and the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) (Dist. Ex. 11 at pp. 3, 5-6). The June 2020 IEP also references the August 2017 neuropsychological evaluation in the "Academic Achievement, Functional Performance and Learning Characteristics" section under "Basic Cognitive/Daily Living Skills," indicating that administration of the WISC-V yielded a full scale intelligence quotient (FSIQ) of 101 and that the student demonstrated a relative strength in visual spatial abilities and a relative weakness in working memory (id. at p. 6). Further, the IEP present levels of performance indicated that both the August 2017 and March 2018 evaluations noted the impact of the student's inconsistent attention on his overall performance (Tr. pp. 87-89; Dist. Ex. 11 at pp. 5-6).

As to the parents' argument that the present levels of performance in the June 2020 IEP were inadequate because they failed to include specific language and diagnoses from the August 2017 neuropsychological re-evaluation report, a review of the IEP reveals that it adequately identified the student's needs including those contained within the August 2017 evaluation report and that any such omission did not result in a denial of FAPE.

Cognitive testing conducted as part of the August 2017 neuropsychological re-evaluation found the student generally functioning in the average range (Dist. Ex. 4 at pp. 5-6, 10-11). The

evaluator identified the student's reading decoding skills as "weak" in comparison to both his age and his grade and noted that the low score was "concerning especially in light of the intervention (school based and privately) that he ha[d] received," and that the scores were "consistent with dyslexia" (id. at p. 14). However, the WIAT-III results indicated that the student achieved a standard score of 88 in the area of pseudoword decoding, which was the highest score the student achieved on any of the WIAT-III reading subtests administered (id. at p. 8). The student's WIAT-III total reading and basic reading composite scores were found to be in the below average and average range, respectively (id.).

The evaluator observed that the student was easily engaged in the testing materials, was often distracted by noises and needed active facilitation and intervention more than other children his age, yet "always gave it his best shot" and was motivated to do well (Dist. Ex. 4 at p. 4). The evaluator found the student met the criteria for diagnoses of a specific learning disorder with impairment in reading, a specific learning disorder with impairment in mathematics, a specific learning disorder with impairment in written expression, and an attention deficit disorder (inattentive type) (id. at p. 19).

The evaluator offered recommendations including that the student "need[ed] to learn in a homogeneous ability group classes with a small student:teacher ratios" in "a school which specialize[d] in the education of children of at least average intelligence with a language-based learning disability"; "an integrated, specialized educational environment" with "a carefully structured, sequential curriculum to teach basic skills"; "a program such as Orton-Gillingham" and "[a] multi-sensory based curriculum" which utilizes visual, auditory and kinesthetic learning modalities; and "a structured writing program" (Dist. Ex. 4 at pp. 19-20). Additionally, the evaluator identified specific recommendations which "may prove useful" for the student that included a consistent routine, breaking down tasks and multi-step processes into small units, periodic self-pacing, visual references and aids to accompany verbal instruction, instructions repeated and clarified, teaching of active listening skills, and the use of encouragement, praise and support (id. at pp. 20-22).

The supervisor stated that at the June 2020 CSE meeting the parent reported that the student had severe or significant dyslexia, but the supervisor also noted that she was not aware that the student had received that diagnosis (Tr. pp. 93-94; see Dist. Ex. 11 at p. 1). The supervisor further explained that she was aware that the student had weaknesses in reading, writing, mathematics, and study skills and that he required speech-language therapy to meet his speech-language needs but was "not necessarily" aware of a specific diagnosis (Tr. p. 92).

While the June 2020 IEP did not specifically include the diagnoses of a specific learning disorder with impairment in reading, a specific learning disorder with impairment in mathematics, a specific learning disorder with impairment in written expression, and attention deficit disorder (inattentive type) that were identified within the August 2017 neuropsychological re-evaluation report, the CSE identified the student's needs and developed the present levels of performance consistent with the descriptions of the diagnoses from the 2017 evaluation report (compare Dist. Ex. 11 at pp. 1-16, with Dist. Ex. 4 at p. 19). Specifically, with respect to reading, the June 2020 IEP noted the student's needs in self-correcting, reading with expression, attending to punctuation, recalling story components, and answering higher level thinking questions (compare Dist. Ex. 11 at p. 6, with Dist. Ex. 4 at p. 19). The student's needs in math were identified as understanding the

"language of math within word problems," solving multi-step word problems, solving multi-digit multiplication and division problems, solving problems with money, and automaticity with his math facts (compare Dist. Ex. 11 at pp. 6-7, with Dist. Ex. 4 at p. 19). In the area of writing the June 2020 IEP present levels of performance identified the student's need for a high level of modeling, support in the use of conjunctions, support with his phrasing and initiating when writing a paragraph, and his need in the area of spelling noting that he needed "a lot of supports" in the form of visuals and key word cards as well as proofreading (compare Dist. Ex. 11 at pp. 6-7, with Dist. Ex. 4 at p. 19). Additionally, consistent with the private evaluator's conclusion that the student exhibited a language-based learning disability, the June 2020 IEP present levels of performance identified that the student continued to have significant language needs and needed to continue to work on increasing word relationships, following multi-step directions, sequencing an oral narrative, understanding and using basic linguistic concepts, and working on temporal concepts, directionality, and social language in private speech-language sessions (compare Dist. Ex. 11 at p. 6, with Dist. Ex. 4 at pp. 3, 14, 19).

Further, with respect to the effect of the student's needs on his involvement and progress in the general education curriculum, the June 2020 IEP indicated that the student's speech-language impairment and weaknesses in the areas of reading, writing, and mathematics inhibited his progress with the general education curriculum without the support of special education (Dist. Ex. 11 at p. 8).

With regard to the student's diagnosis of an attention deficit disorder, the June 2020 IEP reflected evaluation results that "noted the impact of his inconsistent attention on his overall performance" and identified strategies such as preferential seating, checks for understanding, directions repeated, and refocusing and redirection (compare Dist. Ex. 11 at pp. 6, 11, with Dist. Ex. 4 at p. 19).

Based on the foregoing, review of the June 2020 IEP shows that the CSE identified the student's needs consistent with those described in the August 2017 neuropsychological re-evaluation report, and the lack of specific diagnoses in the IEP did not rise to the level of a denial of a FAPE. In addition, to the extent that the IHO's decision could be read to require the CSE to "adopt wholesale" the ultimate recommendations made by the private evaluator in 2017, it was not obligated to do so.

#### **b. Other Evaluative Information**

In addition to the August 2017 neuropsychological re-evaluation, there were a number of evaluations and reports that the June 2020 CSE had available which identified the student's needs including information from evaluations conducted in March 2018, reporting from the student's parents, private speech-language pathologist, and Windward teachers and staff (Dist. Ex. 11 at p. 3). While the CSE's consideration of these sources of information is not directly challenged, a review of the student's needs as known to the CSE frames the remaining issues to be discussed.

Formal and informal assessments of the student conducted as part of the district's March 2018 speech-language evaluation yielded variable scores ranging from average to below average and revealed that the student's expressive abilities were higher than his receptive skills (Dist. Ex. 5 at pp. 1, 7). The speech-language pathologist found that the student demonstrated strengths in



his vocabulary knowledge, word structure, and ability to formulate sentences with appropriate grammar and syntax and had more difficulty with receptive tasks including following multi-step directions and recalling information presented verbally (id. at p. 7).

A March 2018 OT evaluation found the student demonstrated various strengths in his visual perceptual and visual motor skills and that he showed difficulties with spatial relations, visual sequential memory, visual discrimination, and visual figure-ground (Dist. Ex. 6 at p. 3). The evaluator noted that these difficulties impacted how much visual information the student could process and how efficiently he could interpret visual information, and that the assessment of the student's motor skills suggested that the student utilized functional grasping skills but could not execute fine motor tasks quickly (id. at pp. 3-4).

Testing of the student's reading abilities included in the district's March 2018 educational evaluation revealed mixed results (Dist. Ex. 7 at pp. 1-2, 4-5). Results of administration of the Woodcock-Johnson IV-Tests of Achievement (WJ-IV ACH) showed the student performing in the low average range on all subtests in the area of reading, except for word attack (decoding) which fell in the average range, while administration of the Woodcock Reading Mastery Test-Third Edition (WRMT-III) yielded scores in the above average range (rapid automatic naming) to the well below average range (word comprehension), with the student's word attack score falling in the below average range (id.). The evaluator concluded that the student's inconsistencies in being able to decode single and multi-syllabic words affected his ability to read passages fluently and to comprehend passages (id. at p. 5). The evaluator found that the student demonstrated average phonological awareness and listening comprehension abilities and noted that word comprehension was an area of significant weakness for the student (id.). Additionally, the student's scores were in the average (calculation, writing samples) to low ranges (applied problems) in the areas of mathematics and written language (id. at p. 3).

Within an April 2018 social history update, the parent reported that the student was "responding very well to Windward's multisensory approach both in language arts and math," demonstrated persistence with challenging material, enjoyed going to school and had made friends, had become more confident and outgoing, and was "happier" (Dist. Exs. 11 at p. 3; 16 at pp. 1-2).

In an April 2018 classroom observation of the student at Windward, the district special education teacher reported that she observed the student decoding words correctly, waiting his turn, answering several comprehension questions independently, and needing "refocus and direction," scaffolding, and verbal and non-verbal prompts to understand the subject matter (Dist. Ex. 8).

The district conducted a psychological evaluation in April 2018 to assess the student's cognitive and social/emotional functioning (Dist. Ex. 9 at p. 1). The school psychologist reported that the evaluation was conducted to obtain additional information regarding the student's cognitive functions, specifically as they related to memory and attention, which were his relative weakness according to previous testing (Dist. Ex. 9 at p. 4; see Dist. Exs. 3 at pp. 3-4; 4 at pp. 3, 11, 13, 19; 5 at pp. 6, 7). Within the evaluation report, the school psychologist explained that he used supplemental testing in the area of memory and learning, specifically the Symbol Translation subtests of the WISC-V, "which taps into skills required for reading," for the purpose of gaining greater insight into the student's cognitive development as well as to better understand his

intellectual strengths and weaknesses (Dist. Ex. 9 at p. 2). The school psychologist stated that the student's performance on the supplemental subtests—which was in the average to high average range—demonstrated that he was able to retain and retrieve previously learned information (*id.* at pp. 2-3). In addition, the evaluator stated that the student presented with average long-term storage and retrieval, was able to encode and retrieve learned visual-auditory associations at the same level of his peers, and that while his auditory memory was measured to be average, he demonstrated difficulty synthesizing and storing information in an organized way that would enable him to communicate his knowledge of the information cohesively (*id.* at p. 4).

According to the June 2020 meeting information summary, the Windward CSE liaison provided feedback on behalf of Windward staff during the CSE meeting (Dist. Ex. 11 at p. 2). Specifically, the student was "in the mid-level group" for language arts instruction, benefitted from a multisensory approach for reading, spelling, and handwriting, required repeated practice and frequent review of phonetic skills, and was working on reading with some automaticity (*id.*). The student was reportedly reading at a third grade reading level and was beginning to become more fluent but not pausing or reading with expression, with weaknesses noted in failing self-correct when reading and omitting small words (*id.*). The student's literal comprehension skills were good, and he benefitted from visual supports to recall story components and teacher scaffolding (*id.*). The summary reflected reports that the student's handwriting was neat, he responded well to handwriting support, he required supports to recall vocabulary and remember spelling rules, and did better with spelling in isolation, as he did not always carry over skills to independent writing (*id.*). The student composed sentences independently but needed support to make it more complex, and he required a high level of teacher modeling although his capitalization and punctuation skills were improving (*id.*). Additionally, the student was able to use a quick outline to create a basic paragraph (*id.*). In math, the student was "in a slower-paced math group" and he received one session of math tutoring per week (*id.*). Further, the summary reflected reports that the student had "nice addition calculation skills but need[ed] support with multiplication and division" (*id.*).

The June 2020 meeting information summary also reflected parent reports that the student was "severely dyslexic," but benefitted from the Windward curriculum and was "slowly acquiring his skills" (Dist. Ex. 11 at p. 1). The private speech-language pathologist who worked with the student for the past five years "shared her testing results and discussed scores," most of which "fell in the average range" (*id.* at p. 2; *see* Tr. pp. 696-97).

With the foregoing information about the student's needs in mind, I now turn to address the parties' arguments about the appropriateness of the June 2020 IEP.

## **2. June 2020 IEP**

### **a. Annual Goals**

The district alleges that the IHO erred in finding that the annual goals were improper for the 2020-21 school year. The parents dispute the district's allegations yet note that the IHO did not explicitly find that the annual goals contained in the 2020-21 IEP were inappropriate but rather questioned whether those goals could be appropriately addressed in the CSE's recommended program.

As noted by the parents, the IHO does not appear to make a finding with respect to the annual goals or the implementation of such, however in an abundance of caution (or insofar as the parents continue to argue that the annual goals included in the June 2020 IEP were inappropriate), I will address their claim here.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum, and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

At the June 2020 CSE meeting, the CSE, which included a Windward CSE liaison, the student's private speech-language pathologist, and the parents, discussed the student's abilities, needs, and progress toward his current annual goals and developed the student's annual goals for the upcoming school year (Dist. Ex. 23 at pp. 9-17; see Dist. Ex. 11 at pp. 1, 9-10).

The June 2020 IEP included reading annual goals addressing the student's identified needs in recognizing and reading high-frequency words; reading fluency with attention to expression, punctuation, and self-correcting; answering inferential comprehension questions; and decoding words of up to two syllables with vowel teams and long vowels by applying phonetic and word analysis skills (Dist. Ex. 11 at p. 9). The IEP included four annual goals in the area of writing addressing the student's needs in writing complex and compound sentences; spelling words with vowel teams, VCe and long vowels up to two syllables; spelling high-frequency words; and using a graphic organizer to write a paragraph with a topic sentence and supporting details (id.). In addition, the IEP contained three math annual goals targeting the student's needs in identifying the appropriate operation and steps needed to solve multi-step word problems, identifying the value of mixed dollars and coins, and answering multiplication facts up to "10 times" (id. at p. 10). Regarding the student's speech-language needs, the IEP included five annual goals addressing needs in predicting events in short stories, sequencing events in oral narratives, using categorization/classification/association of selected vocabulary to increase understanding of word relationships, understanding the language of math by identifying "what the question is asking," and following two-step directions presented orally incorporating basic linguistic language (before/after, first/then) (id.). Lastly the IEP included two social/emotional/behavioral annual goals targeting needs in initiating conversations and utilizing a learned coping skill during a challenging academic or social situation (id.).

The annual goals included evaluative criteria (e.g. 8 out of 10 trials over 4 weeks, 2 out of 3 trials on two occasions), evaluation procedures (e.g. work samples, recorded observations), and schedules to measure progress (e.g. monthly, by end of each marking period) (Dist. Ex. 11 at pp. 9-10).

Additionally, to the extent that the IHO suggested, and the parents argue, that the annual goals discussed at the June 2020 CSE meeting were within the context of the Windward program

(see IHO Decision at p. 35), a determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). To hold otherwise would suggest that CSEs or CPSEs should preselect an educational setting on the continuum of alternative placements and/or related services and then draft annual goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf> [stating, among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the [LRE]" [emphasis added]).

Given the foregoing, a review of the evidence in the hearing record regarding the development of the June 2020 IEP annual goals reveals that the goals contained therein address the student's main areas of need and to the extent any minor deficiencies in particular goals as written are present, they do not substantially detract from the overall appropriateness of the goals in the context of the program recommended for the student which is further discussed below.

#### **b. ICT Services**

Next, I turn to the district's argument that the IHO erred in determining that the CSE failed to have an explicit discussion about how the student's learning needs would be met in the ICT classroom and when he was not receiving ICT services, and what an ICT class entailed. The parents dispute the district's allegations and argue that the IHO correctly found that the CSE did not present specific information about how the student's learning needs would be met in the recommended program for the 2020-21 school year.

For the 2020-21 school year, the June 2020 CSE recommended that the student receive one 90-minute session per day of ICT services in ELA and one 60-minute session per day of ICT services in math (Dist. Ex. 11 at pp. 1, 2, 11). State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students and that the school personnel assigned to each class shall minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]).

The supervisor testified that she believed that ICT services were appropriate for the student and would have enabled him to meet his annual goals (Tr. pp. 62-63). The supervisor stated that ICT services were provided in classrooms that ranged in size from 23 to 26 students and that the district "really commit[ted]" to keeping the number of students in the classroom with an IEP to about six to eight (Tr. p. 63). She explained that this allowed the special education teacher to focus

on those students with IEPs while also supporting the needs of all students in the classroom (Tr. p. 65). She also stated that ICT services allowed for small group instruction and individual instruction, was based on student needs, and could be differentiated so that students could "thrive in that setting" (Tr. p. 63).

The supervisor testified that in a classroom where ICT services are delivered, the special education teacher co-planned and co-facilitated lessons and instructions, was "kind of the master of the IEP and implementing the students[] needs," and was "progress monitoring" student goals and ensuring they were making progress toward identified areas of need (Tr. p. 66). The supervisor explained that within the ICT setting there were opportunities for parallel teaching where the class was split in half allowing for small group instruction, alternative teaching or differentiated teaching, and work in stations, which were very small, targeted groups (Tr. pp. 68-69). She also stated there were "lots" of opportunities for small group instruction or even individualized instruction if necessary (Tr. p. 69). The supervisor stated that the special education teachers were also collaborating with the speech-language therapist, the occupational therapist, the physical therapist, and specialized reading intervention teachers so that they were "constantly talking, reaching out and communicating" throughout the day and the year (Tr. p. 67).

At the June 2020 CSE meeting the supervisor stated that based on everything she heard, she felt the student would be "most appropriate for" the ICT class setting for language arts and math and that through this program the district would be able to provide small group instruction and individual skills that the student needed to be successful (Dist. Ex. 23 at p. 17). The district special education teacher and the parent both agreed (id.; see Tr. pp. 105-06).

Here, the June 2020 CSE meeting transcript details discussions regarding the delivery of the student's program (Dist. Ex. 23 at pp. 1-33).<sup>8</sup> At the CSE meeting, the supervisor initiated a discussion regarding the student's needs for positive behavior intervention supports and it was determined that the student was then-currently receiving positive reinforcement and a structured setting and it was agreed that the student would need that support to continue (id. at p. 9; see Dist. Ex. 11 at p. 8). The CSE team discussed the student's recommend annual goals including social/emotional annual goals, which would benefit the student throughout his school day and specifically targeted initiating conversations and utilizing coping strategies to persevere through challenging academic and social situations (Dist. Ex. 23 at pp. 9-17).

In discussing related services at the CSE meeting, the supervisor stated that the social skills service would occur during lunch and recess "just to make sure that he is making progress with those social interactions" (Dist. Ex. 23 at p. 17). The June 2020 CSE discussed psychological consultation and how there would be a check-in with the teacher about the student's self-esteem and social functioning and that the psychologist could provide the teacher with supports in the classroom to "carry over" when the psychologist was not working directly with the student (id. at p. 19).

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<sup>8</sup> While District Exhibit 23 is dated June 10, 2021 throughout the exhibit, at the impartial hearing, counsel for the district stated that there was a "typo" and that the exhibit was the June 10, 2020 CSE meeting transcript, and he stated that there was no meeting on June 10, 2021 (Tr. pp. 860-61).

Lastly, while review of the June 2020 CSE meeting transcript shows that the parents were given the opportunity to share their input and ask questions during the meeting, there was not a time during the June 2020 CSE meeting in which the parents asked for additional discussion about how the student's learning needs would be met in the ICT classroom and when he was not in an ICT program and what an ICT class entailed (see Dist. Ex. 23 at pp. 1-21). In this case, the record does not support the claim that the district failed to offer the student a FAPE for the June 2020 CSE's lack of an "explicit discussion" regarding how the student's specific learning needs would be met.

### **c. Specialized Reading Program Methodology**

The appropriateness of the program the district offered with respect to reading instruction appears to be the crux of the parties' dispute on appeal. The district argues that the IHO's decision misconstrues the testimony of the supervisor concerning the reading instruction at the district and improperly "requires" a specific reading program as an element of FAPE. The district contends that it was proper for the CSE to recommend specialized reading without citing a specific proprietary reading program and that the IHO's decision ignored the recommendations for specialized reading and speech-language therapy.

The parents argue that the IHO determined that the student required a language-based, structured, evidence-based reading curriculum and methodology throughout the school day and that the record makes clear that the "ICT class" would not have provided such a program. The parents contend that the record is clear that the student required instruction "throughout the school day" and "embedded" into each of his content area classes and that the IHO appropriately found that "the reading instruction provided to the [s]tudent on his IEP was not provided throughout the day and was not the Orton-Gillingham approach specifically designated."

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a resource room program, as a consultant teacher service, in a special class, or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>).<sup>9</sup>

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<sup>9</sup> 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-dysgrahia-dyscalculia.pdf>; see generally Educ. Law § 305[56]; Dear Colleague

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"]). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.B., 589 Fed. App'x at 576; R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]; R.B., 589 Fed. App'x at 576; A.S., 573 Fed. App'x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"])).

The IHO pointed to the August 2017 evaluator's recommendation that the student receive "a program such as Orton-Gillingham, an evidence-based curriculum which has been demonstrated to be more effective with the child struggling with sound-symbol correspondence than traditional curricula" and the evaluator's view that "[d]ue to the degree of delay, particularly in light of his intelligence, [the student] need[ed] this type of instruction throughout the school day" (IHO Decision at p. 35).

The student had been attending Windward since second grade and the most recent Windward progress reporting from February 2020 did not indicate that the student required a specific teaching methodology in order to make progress in reading or for such instruction to occur throughout the school day (see Dist. Ex. 24 at pp. 1-7).<sup>10</sup> The February 2020 progress report noted that the student's decoding was becoming more automatic as he continued to apply the strategies taught in class to decode multi-syllabic words and that his reading comprehension was steadily improving (id. at p. 3).

At the June 2020 CSE meeting, the Windward liaison stated that all their classes used direct instruction and multisensory support and that they provided language arts instruction during three different (reading, writing and skills) 40-minute periods per day (Dist. Ex. 23 at p. 3). The

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Letter, 66 IDELR 188 [OSERS 2015]).

<sup>10</sup> An earlier progress report from June 2019 (2018-19 school year), stated that an Orton-Gillingham approach was used to teach reading, spelling and handwriting, yet the report did not state that the student could only be successful with this approach (Dist. Ex. 10 at p. 4; see Dist. Ex. 10 at pp. 1-11). Additionally, the June 2019 progress report also referenced the use of "[a] read-aloud literature program" that was "incorporated into the curriculum to introduce more complex language and concepts" (id. at p. 4).

Windward liaison also reported that Windward followed "the Presenting [sic] Academic Failure Program," which the Windward liaison described as a "multisensory, comprehensive Orton-Gillingham-based program for reading, spelling and handwriting" (*id.* at p. 4).<sup>11</sup> Additionally, she stated that in each reading lesson students were "supported with explicit phonics instruction using a very sequenced, skilled-based program," with "repeated practice reading words in isolation," and "frequent review of phonics skills," opining that this program "definitely seems essential" given the student's decoding challenges (*id.*). The Windward liaison reported at the June 2020 CSE meeting that the student's "group" was in the lower half of the grade in terms of decoding and that he could be slow to self-start but was easily redirected (*id.* at p. 3). The Windward liaison noted the student's needs in reading with expression, proofreading, and recognizing spelling errors, and that he benefitted from teacher scaffolding for any higher-level comprehension questions, visual supports, teacher modeling, a multisensory approach and direct instruction (*id.* p. 4). The parent shared at the June 2020 CSE meeting that the student had benefitted from Windward's multisensory and language intensive curriculum (*id.* at p. 3).

In addition to the ICT services for ELA and math discussed above, the June 2020 IEP provided one 60-minute session per day of specialized reading instruction in a group of five, three 30-minute sessions per six-day cycle of individual speech-language therapy, one 15-minute session per six-day cycle of individual social skills, and one 30-minute session per six-day cycle of social skills instruction in a group of five (Dist. Ex. 11 at pp. 1, 2, 11). The June 2020 IEP also provided one 30-minute session per month of OT consultation and one 15-minute session per month of psychological consultation to "[c]heck in" with the student's teacher regarding his self-esteem and social functioning (*id.* at pp. 13-14).

At the June 2020 CSE meeting, the supervisor stated that specialized reading instruction in a small group was "definitely recommended to continue" based on the student's reading, decoding and fluency skills (Dist. Ex. 23 at p. 17).

At the impartial hearing, the supervisor explained that the district's reading instruction used a multisensory approach and that while they had providers that were Wilson-certified providing that instruction, the providers were "trained in multisensory approaches" so that it was "not necessarily only Wilson or only one type of reading program" (Tr. p. 61). The supervisor further testified that the teachers in the ICT setting followed the Teachers College Reading and Writing Workshop, which "align[ed] nicely" to the ICT model and allowed for targeted learning in small groups (Tr. pp. 69-70). She stated that the workshop model allowed for more participation and engagement, and the teachers had a better understanding of student needs and where to target instruction (*id.*). The district second grade special education teacher in the ICT setting (special education teacher) testified that for the 2020-21 school year the student was recommended to have 60-minutes of specialized reading daily where he could have worked on his decoding, encoding and fluency needs and that within the classroom the school had a separate program for phonics called Words Their Way, which she explained was a "general education" program (Tr. pp. 150, 155; *see* Tr. pp. 160-61).

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<sup>11</sup> The Windward program description document entered into the hearing record indicates that the school used the "Preventing Academic Failure" program (Parent Ex. H at p. 1).



In order to prevent "substantial regression" in the area of reading, the June 2020 CSE recommended a 12-month program of three 60-minute sessions per week of specialized reading instruction in a group of five during summer 2020 (Dist. Ex. 11 at pp. 1, 2, 14; see Dist. Ex. 23 at pp. 19-20). At the June 2020 CSE meeting, the parent stated that he was not aware that 12-month specialized reading instruction for the student was available, but noted that having in-person services was "a positive," he had no concerns, and that the parents would "definitely review it" (Dist. Ex. 23 at pp. 20-21).

In addressing the student's need for multisensory instruction, the June 2020 IEP included accommodations and supports such as visual schedules and supports to help the student adjust to unanticipated events and routines and provide advance notice of transitions, use of manipulatives and a multiplication chart for math, use of graphic organizers to generate/organize ideas and plan out the writing task, and access to audio books for all texts above the student's independent reading level (Dist. Ex. 11 at pp. 12-13). At the June 2020 CSE meeting the supervisor noted that "[d]ue to the multisensory approach he requires," it was appropriate to continue with the use of manipulatives for math (Dist. Ex. 23 at p. 18). The supervisor testified that having audiobooks was beneficial to the student "for that multisensory piece" as he could hear and read along when he was at home and during independent reading times (Tr. pp. 126-27).

To further address the student's needs, the June 2020 IEP included additional supports and accommodations such as checks to ensure understanding of the directions at the onset of independent class work and check-ins throughout the assignment to ensure continued understanding, breaking assignments down into manageable tasks, preferential seating, wait time for oral and written responses to allow the student to process information, positive reinforcement, pre-teaching and re-teaching material for reinforcement of new concepts and for multiple exposure/repetition, movement breaks, and refocusing and redirection in the form of non-verbal cues and/or subtle reminders (Dist. Ex. 11 at pp. 11-13).<sup>12</sup>

The June 2020 IEP also included testing accommodations of tests read, breaks, check for understanding, flexible setting, access to graphic organizers, and waive spelling requirements (Dist. Ex. 11 at pp. 14-15).

While the parents are correct that the June 2020 IEP did not include the recommendation of a specific reading program as recommended in the August 2017 neuropsychological re-evaluation report or the specific program used by Windward staff, the evidence in the record shows that the totality of the program offered through the June 2020 IEP appropriately addressed the student's learning needs, specifically his needs in receptive language, decoding, and comprehension and the recommendation of a specific methodology for reading instruction was not required in order to provide the student with a FAPE.

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<sup>12</sup> The June 2020 IEP management needs and program accommodations/supports were consistent with those recommended within the 2017 neuropsychological re-evaluation report (compare Dist. Ex. 11 at pp. 8, 11-13, with Dist. Ex. 4 at pp. 20-22).

### **C. 2021-22 School Year**

The district argues that the IHO erred in determining that the district failed to offer the student a FAPE for the 2021-22 school year.

#### **1. April 2021 CSE Process: Consideration of Evaluative Information**

##### **a. December 2020 Psychological Evaluation**

With respect to the 2021-22 school year, the district asserts that the IHO erred in determining that the CSE did not appropriately review the December 2020 private psychological evaluation report. The district contends that the IHO's decision ignores the fact that the report is specifically listed in the evaluation section of the April 2021 IEP, that the diagnoses and test results from the private evaluation report are discussed in detail in the comment section of the IEP, and that the school psychologist, who also served as the April 2021 CSE chairperson, testified that during the CSE meeting when she reviewed her evaluation, she compared her results to the results found in the December 2020 evaluation report.

The parents argue that the IHO properly determined that the December 2020 psychological evaluation report was not appropriately reviewed at the April 2021 CSE meeting, and that while the resultant IEP did contain reference to the evaluation, the testimony from the district's witnesses failed to establish that the private evaluator's testing was sufficiently discussed and considered.

Results of cognitive assessments conducted as part of the December 2020 private psychological evaluation indicated that the student was "functioning overall in the borderline to low average range of intellectual ability" (Dist. Ex. 15 at p. 5). In sum, the evaluator stated that the student's "profile suggest[ed] continued language impairment and an underlying language-based learning disability" and that academically, the student's "language impairment affect[ed] his learning in all areas" (*id.* at pp. 31-32). The student received diagnoses of a language disorder, specific learning disorder with impairment in mathematics, specific learning disorder with impairment in reading, specific learning disorder with impairment in written expression, and disruptive mood dysregulation disorder (*id.* at p. 32). Recommendations included "placement in a small, structured, supportive full-time special education classroom within a small, full-time special education school" among a group of age-appropriate peers; a multisensory instructional program; private math tutor; continued work with the private speech-language pathologist; and accommodations including providing extended time for assignments and exams, flexible seating for testing, directions read/repeated/clarified, and permission to provide test answers on the exam paper; pairing of oral instructions with demonstrations; breaking complex tasks into component parts; repeating and rephrasing key information; using colored strips to help following along while reading and wide-line/modified paper; and allowing access to a computer (Dist. Ex. 15 at pp. 33-35).

Again, I note that while a CSE must consider independent education evaluations, consideration does not require substantive discussion, or that every member of the CSE read the documents, or that the CSE accord the private evaluation any particular weight (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]); (*Mr. P.*, 885 F.3d at 753).

Here, the evidence in the hearing record supports the district's position that they appropriately considered the December 2020 private psychological to the extent required by regulation. A review of the April 2021 IEP shows that it included the testing results and diagnoses found in the December 2020 psychological evaluation report (compare Dist. Ex. 21 at pp. 2, 5, 7-9, with Dist. Ex. 15 at pp. 5, 14-15, 32). Also, as noted by the school psychologist, during the April 2021 CSE meeting she compared her results to the results found in the December 2020 psychological evaluation report (Tr. pp. 284-85; see Dist. Ex. 21 at p. 2). As such, review of the hearing record does not support the IHO's finding that the April 2021 CSE failed to appropriately review the December 2020 private psychological evaluation report.

### **b. Other Evaluative Information**

In addition to the December 2020 private psychological evaluation report, review of the April 2021 IEP indicates that the April 2021 CSE also had available information about the student including a November 2020 physical exam, a March 2021 speech-language evaluation report, a March 2021 social history update, a March 2021 psychological evaluation report, an April 2021 teacher progress summary submitted by the Windward CSE liaison, an April 2021 speech-language progress summary provided by the private speech-language pathologist, and parent report and observations outlining the student's needs (Dist. Ex. 21 at p. 4; see Dist. Exs. 15; 17-20).

A March 2021 district speech-language evaluation report stated that formal assessment revealed below average core language skills, language content skills, and language memory skills; moderately below average receptive language skills; and average expressive language skills (Dist. Ex. 17 at p. 6). In addition, the speech-language pathologist found that the student's narrative comprehension and production skills were in the average range, that informal assessments revealed no concerns with articulation, and that a hearing screening by the school nurse was recommended to rule out hearing concerns (id.).

As part of the March 2021 district educational evaluation, administration of the WIAT-III to the student yielded a basic reading composite standard score of 98 (45th percentile), with the following reading subtest standard scores: comprehension 84 (14th percentile), word reading 96 (39th percentile), and pseudoword decoding 102 (55th percentile) (Dist. Ex. 18 at p. 2). On an administration of the WRMT-III, the student achieved total reading (90, 25th percentile) and basic skills (103, 58th percentile) cluster standard scores within the average range, a reading comprehension cluster standard score of 77 (7th percentile) in the below average range, and the following subtest standard scores: word identification 104 (61st percentile), word attack 103 (58th percentile), word comprehension 77 (6th percentile), passage comprehension 79 (8th percentile), listening comprehension 101 (53rd percentile), and oral reading fluency 95th (37th percentile) (id. at p. 5). The special education teacher concluded that the student's pseudoword decoding skills were a strength and comprehension skills were below average (id. at pp. 6-7). Assessment of the student's math skills indicated that mathematics was an area of weakness with scores falling in the below average, low, and very low ranges, and with respect to written expression the student's scores were in the average range for spelling and sentence composition and below average for essay composition (id. at pp. 2-7).

A March 2021 social history update stated that the student was performing well in the fifth grade at Windward, his social development was age appropriate, and noted that he "suffer[ed] from underlying anxiety relating to his learning disability which [wa]s managed with medication" (Dist. Ex. 19 at pp. 1-2).

In April 2021 the district sent the parents a March 2021 district psychological evaluation report (Dist. Ex. 20). The school psychologist stated that administration of the WISC-V to the student indicated that his cognitive functioning was in the very low range; however, he "presented with a large scatter of cognitive skills" (*id.* at p. 7). Specifically, the student's verbal comprehension and visual spatial reasoning skills were areas of significant strength, while he exhibited significant weaknesses in fluid reasoning and working memory skills (*id.*). Results of behavior assessments found the student in the at-risk range for aggression, anxiety, depression, atypicality, adaptability, leadership, and functional communication (*id.* at p. 8).

I now turn to address the parties' arguments about the appropriateness of the April 2021 IEP.

## **2. April 2021 IEP**

### **a. Annual Goals**

For the 2021-22 school year the district alleges that the IHO erred in finding that the annual goals were improper, based on an unsupported assumption that the goals "were only valid in the context of the Windward program." The parents dispute the district's allegations.

Here, the evidence in the hearing record supports the district's position. According to the meeting information summary, the April 2021 CSE reviewed all of the annual goals from the 2020-21 IEP and the CSE developed the April 2021 IEP annual goals "based on progress" (Dist. Ex. 21 at p. 3). The summary indicated that the student was not presenting with a significant level of anxiety or frustration, as such, the CSE removed a goal addressing frustration and added a goal for the student's self-advocacy skills (*id.*). The CSE then developed annual goals for academic skills, social/emotional functioning, and speech-language skills (*id.*). Specifically, the April 2021 IEP included four annual goals targeting the student's need to improve reading fluency with attention to expression, punctuation, and self-correcting; answer inferential comprehension questions while citing text evidence; decode multi-syllabic words that include common endings by applying phonetic and word analysis skills; and summarize text using sequential language and listing at least three major parts or events (*id.* at p. 12). The IEP included four writing annual goals addressing the student's needs in writing connected complex and compound sentences, spelling multi-syllabic words with common endings, spelling high-frequency words, and using a graphic organizer to write two connected paragraphs with a topic sentence, supporting details and a closing sentence (*id.*). The April 2021 IEP included three math annual goals targeting the student's needs in identifying the appropriate operation needed and then solving two-step word problems, identifying the value of mixed dollars and coins, and solving single- and/or double-digit equations of one of the four operations (*id.* at pp. 12-13). The IEP included an annual goal in the area of speaking and listening that involved verbally summarizing a written text read aloud (*id.* at p. 13). The student's speech-language needs were addressed through six annual goals which targeted the student's needs in adhering to conversational rules such as listener/speaker responsibilities, topic maintenance and

transitions, and fixing communication breakdowns; predicting events from verbally presented short stories; sequencing events in oral narratives; using categorization/classification/association of selected vocabulary to increase understanding of word relationships; providing synonyms/antonyms or similarities/differences to improve understanding of word relationships; and following multi-step directions with two to three critical elements (id.). Lastly, the IEP included two social/emotional/behavioral annual goals targeting needs in initiating conversations and identifying the need for and soliciting assistance when necessary to cope with an event (id.).

Additionally, the annual goals included evaluative criteria (8 out of 10 trials over 4 weeks, 2 out of 3 trials on 2 occasions), evaluation procedures (recorded observations, writing samples, structured observations of targeted behavior), and schedules to measure progress (monthly) (Dist. Ex. 21 at pp. 12-13).

To the extent that the Windward CSE liaison expressed her concern during the April 2021 CSE meeting that the student would not make progress toward his annual goals, the meeting information summary also reflected that she opined that "all of [the student's] [annual] goals were appropriate" (Dist. Ex. 21 at p. 3), and as stated above, the appropriateness of annual goals turns, not on their suitability within a particular classroom setting or student-to-teacher ratio, but on whether the annual goals relate to the identified needs and abilities of the student and a CSE's adoption of annual goals developed by a nonpublic school has been found appropriate (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 284 [S.D.N.Y. 2013] [noting that the parent cited "no authority for the proposition that drawing goals from a teacher's progress report [was] a violation of the statute or regulations"]).

Further, the school psychologist testified that the April 2021 IEP annual goals were appropriate as they were based on standardized testing, input from the parent, the Windward CSE liaison, and the private speech-language pathologist (Tr. pp. 291-95). Therefore, review of evidence does not support a finding that the April 2021 IEP annual goals were improper or otherwise contributed to a denial of a FAPE.

#### **b. ICT Services**

The district argues that the IHO erred and ignored the weight of the evidence and incorrectly determined that the district's evidence did not satisfy its burden of proof that the recommended program offered the student a FAPE for the 2021-22 school year. The district asserts that based on the testing, for the 2021-22 school year the CSE appropriately recommended ICT services for ELA, math, science, and social studies and an educational support class (see Dist. Mem. of Law at pp. 14-16).

The parents argue that the IHO properly determined that the district did not meet its burden to show that the recommended "ICT classes" and educational support class combined with general education classes and related services was sufficient to meet the student's needs and provide him with academic benefit for the 2021-22 school year.

The CSE convened on April 15, 2021, to review the results of the re-evaluations, conduct an annual review, and develop the student's IEP for the 2021-22 school year (Dist. Ex. 21). The

school psychologist testified that anytime they have a fifth to sixth grade meeting and transition, they "invite personnel from the middle school to really explain what the programs look like in action" and how the services the CSE recommends impacts the student's schedule (Tr. p. 283). The school psychologist also testified that, because it was a re-evaluation year, the CSE discussed the student's classification, and the CSE members all agreed that learning disability was the most appropriate classification for the student (Tr. p. 290).

The April 2021 CSE recommended that the student receive daily ICT services for language arts, math, social studies, and science; one 40-minute session per day of an educational support class in a group of 15; two 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of speech-language therapy in a group of five; and one 30-minute session per week of both individual and small group (5:1) counseling (Dist. Ex. 21 at pp. 1, 3, 14).

Within the April 2021 CSE meeting information summary, it was stated that the CSE recommended the student for ICT services in ELA, math, science, and social studies and noted that this was a change from the student's previous IEP "to include ICT content area subjects and to address reading skills in the ICT class" (Dist. Ex. 21 at p. 3). The school psychologist explained that the recommended daily educational support class would be an opportunity for reteaching, planning for long-term assignments, teaching study skills, teaching strategies, and ensuring that the student's academic IEP annual goals were met (Tr. p. 301). The school psychologist noted that the special education teacher who was with the student in the ICT setting for his core subjects would also be the teacher for the educational support class and therefore, she explained, the special education teacher "would have seen what was happening and be part of the learning" in small groups right in the classroom and also when the student attended the special class (Tr. pp. 298, 301).

The April 2021 IEP meeting information summary stated that the ICT program was discussed and that the parents reported that they felt they had found what worked for the student at Windward in a small environment with the needed modifications (Dist. Ex. 21 at p. 3). The student's father stated that the student required individualized support and the CSE meeting summary indicated that "[a] [s]pecial [c]lass setting was considered," for the student but was determined to be too restrictive at that time (*id.*). Reportedly, the Windward CSE liaison in attendance expressed concern that the student "would not make progress in his goals but felt that the ICT and [educational support class] placement was the best option" at that time (*id.*; *see* Tr. pp. 296-97).

The IHO pointed to testimony from the psychologist who conducted the December 2020 private psychological evaluation, who stated that it would be difficult for the student to learn in a class of 20 to 25 students as his attention issues would be exacerbated (IHO Decision at p. 39; *see* Tr. p. 469). With respect to attention and concentration the private psychologist found that the student's "performance fell in the impaired range of functioning overall" (Dist. Ex. 15 at p. 9). Presumably to address this need, the private psychologist recommended for the student a small, structured, supportive full-time special education classroom placement within a small, full-time special education school as well as supports including extended time, flexible setting for testing, directions reread and clarified as needed, and breaking down complex tasks (*id.* at p. 33).

At the impartial hearing, the school psychologist testified that the April 2021 CSE discussed the ICT program in language arts, math social studies and science, as well as the educational support class model (Tr. p. 296). She stated that in the ICT setting the student would be with non-disabled students as well as students with disabilities and would have exposure to the general education curriculum in a setting while still being provided with specialized instruction towards his annual goals (Tr. pp. 297-99). The school psychologist stated that the student would have access to peers who had similar cognitive profiles and would be able to work with a special education teacher in small groups and receive his modifications (Tr. pp. 297-98). The school psychologist stated that within the ICT model, along with the educational support class, the student would have opportunities for instruction in a small group and in an individual setting and noted that the student would have access to the special education teacher, for all core subjects, who could provide reteaching opportunities in a small group right in the classroom and that during the educational support class special class she could reteach and answer any questions from the student (Tr. p. 298). The April 2021 IEP included supports of checks for understanding, breaking assignments into manageable tasks, wait time for responses, and testing accommodations including tests read, breaks, checks for understanding and flexibility in setting (Dist. Ex. 21 at pp. 15-16, 18).

Based on the information available to the April 2021 CSE, the evidence in the hearing record supports the CSE's decision to recommend the ICT services with the educational support class to address the student's needs. Moreover, these recommendations were sufficient to address the student's reading needs, which is the key disputed issue in this matter to which I now turn.

### **c. Specialized Reading Program**

The district argues that the IHO erred in finding the student required a specialized reading program integrated throughout the day for the 2021-22 school year. The parents dispute the district's allegations and argue that the IHO properly relied on the recommendations of December 2020 evaluation report in finding that the student "clearly" needed a specialized reading program and would "be lost without it."

The IHO stated that the private psychologist felt "that the school need[ed] to continue with the decoding interventions and take it to the next level" so that the student would be able to understand what he read (IHO Decision at p. 39; see Tr. p. 496). The private psychologist testified that, although the student was able to read single words, he needed to be able to read and understand sentences, paragraphs and stories and she noted "that breaks down" when a student has language impairments (Tr. pp. 496-97). The IHO stated that she found the private psychologist's testimony credible in this regard.

The IHO acknowledged that the school psychologist who also evaluated the student was not in agreement with this as she stated that, if the student's scores were in the average range for decoding, he would not need a systematic program to learn phonics (IHO Decision at p. 39; see Tr. p. 271). The school psychologist elaborated and stated that the student's test scores indicated that skills such as decoding were already obtained and therefore, he "wouldn't need something like Wilson or Orton- or some other systematic programs to learn decoding" (Tr. p. 271). According to the private psychologist's testing results, both the student's decoding skills and sentence reading fluency fell in the average range (Dist. Ex. 15 at pp. 14-17; see Tr. p. 269).

The IHO found that, based on testing, the student clearly needed a specialized reading program (IHO Decision at p. 39). The IHO pointed to additional testimony from the private psychologist stating that the student required an integrated specialized reading program that the district did not have (id. at p. 38; see Tr. p. 469). However, the private psychologist did not include the recommendation for an integrated specialized reading program in her December 2020 evaluation report (see Dist. Ex. 15 at pp. 33-35). Indeed, a review of the December 2020 evaluation report reveals that the private psychologist's testing results found the student performing in the average range in reading achievement, which included oral sight-word reading skill, silent reading comprehension speed, and the ability to comprehend passages while reading silently, and in basic reading skills, which included oral sight word reading skill and the ability to apply phonic skills to pronounce unfamiliar printed words (id. at p. 15). In addition, the private psychologist found that assessments of the student's basic reading skills, reading fluency skills, and sentence reading fluency yielded test scores in the average range and were all "an area of personal strength for him" (id. at pp. 15-17). Therefore, the IHO erred in weighing so heavily the opinion of the private psychologist, articulated only after the CSE meeting at issue, to find the IEP was not appropriate (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"]).

Further reporting from Windward indicated the student had been improving his decoding skills, was progressing in his ability to read fluently, but did not read with expression and continued to improve his encoding abilities (Dist. Ex. 21 at p. 9). A Windward winter 2020-21 report card noted the student received "G+" grades (where G represents Good) in the areas of "Reads with Fluency" and "Applies Word Attack Skills" and showed that the student did not receive a grade below "Satisfactory" in any area (Dist. Ex. 12 at p. 9).

Based on the information before the April 2021 CSE, the hearing record demonstrates that the April 2021 IEP addressed the student's identified needs specifically in the areas reading and language by recommending ICT services and the daily educational support class (Dist. Ex. 21 at p. 14). The April 2021 CSE also recommended individual speech-language therapy as well as speech-language therapy in a group and included accompanying annual goals (id. at pp. 13-14). In addition, the April 2021 IEP provided supports and accommodations including checks for understanding, breaking down assignments into manageable tasks with teacher determined deadlines, preferential seating, visual schedule and supports, wait time, pre-teaching and re-teaching, movement breaks, use of a calculator and graphic organizers, assignments and homework modified for quantity, copy of class notes, access to audio books, occupational therapy consultation, and psychological consultation (Dist. Ex. 21 at pp. 14-17).

Based on the foregoing, the evidence in the hearing record does not support the IHO's findings that the student required specialized reading instruction throughout the school day to receive educational benefit.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the conclusion that the district offered the student a FAPE for the 2020-21 and 2021-22 school years, the IHO's



determination must be reversed, and the appeal sustained to the extent indicated herein. Therefore, the necessary inquiry is at an end and there is no need to reach the issues of whether Windward was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

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

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated July 1, 2022, is modified by reversing those portions which found that the district failed to offer a FAPE to the student for the 2020-21 and 2021-22 school years.

**Dated: Albany, New York  
November 10, 2022**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**