



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 18-053

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

Appearances:

Frazer & Feldman, LLP, attorneys for respondent, by Jacob S. Feldman, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the cost of the student's tuition at the Mary McDowell School (Mary McDowell) for the 2015-16 school year. Respondent (the district) cross-appeals from the IHO's determination that Mary McDowell was an appropriate unilateral placement for the student for the 2015-16 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student in this case was initially found eligible to receive special education in April 2012 during the 2011-12 school year (first grade) (see Tr. pp. 1110-19; see also Parent Exs. A at pp. 2-3; MM at pp. 1, 3-4). At that time, the student received resource room ("seven days a week"), counseling services, and occupational therapy (OT) services (Tr. p. 1119).¹ For the 2012-13 school

¹ In a letter dated May 3, 2012, a pediatric neurologist described the student as having received "multiple overlapping diagnoses," including an attention deficit hyperactivity disorder (ADHD), a "[d]evelopmental reading disorder," a "simple Motor Tic disorder and some O[bssessive] C[ompulsive] D[isorder] tendencies," as well as "fine motor and visual motor" delays (Parent Ex. MM at pp. 3-4). The pediatric neurologist indicated that the student was "recently" provided with an IEP that included two sessions per week of OT, resource room, "reading

year (retained in first grade), the student received integrated co-teaching (ICT) services, speech-language therapy, OT, and counseling services (see Tr. pp. 1119-22). For the 2013-14 school year (second grade), the student—eligible for special education as a student with an other health-impairment—received ICT services, speech-language therapy, OT, and counseling, as well as a 12-month school year program in July and August 2013 (two 45-minute sessions per week of direct consultant teacher services) (see Parent Ex. A at pp. 1, 8-10). In addition, the student's April 2013 IEP included recommendations for supplementary aids and services, program modifications and accommodations, as well as testing accommodations (*id.* at pp. 8-9).

On May 23, 2014, a CSE convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (third grade) (see Parent Ex. B at p. 1).^{2, 3} Finding that the student remained eligible to receive special education as a student with an other health-impairment, the May 2014 CSE recommended that he receive: daily ICT services (2.5 hours per day); related services consisting of speech-language therapy, OT, and counseling; and supplementary aids and services, program modifications, and accommodations consisting of preferential seating, refocusing and redirection, checking for understanding, modified homework assignments, a copy of class notes, and instructional support (*id.* at pp. 8-9).⁴ In addition, the May 2014 CSE recommended testing accommodations and, as assistive technology devices and services, the use of a text reader and access to an iPad (*id.* at pp. 9-10). The May 2014 CSE created annual goals to address the student's needs in the areas of study skills, reading, writing, speech-language, social/emotional and behavioral, motor skills, daily living skills, and hearing (*id.* at pp. 7-8). As

support," and testing modifications (*id.* at p. 1). At that time, the pediatric neurologist recommended that the student "would benefit from repeating first grade in an inclusion class in light of his complex medical picture and his very late [birthday]," noting further that, "[n]eurodevelopmentally he should be with younger peers" (*id.* at p. 4). The pediatric neurologist also recommended that the student's related services and "reading support" should be provided as a "push in rather than pull out service if feasible" (*id.*).

² The student's mother attended the May 2014 CSE meeting with two individuals identified as advocates (see Parent Ex. B at p. 1).

³ Although designated as a CSE meeting, the May 2014 IEP also refers to the annual review as being conducted by a "[s]ubcommittee" (Parent Ex. B at pp. 1-2). For purposes of this decision, whether the May 2014 meeting was conducted by either a full CSE or a subcommittee on special education is not significant.

⁴ At the impartial hearing, the district executive director of special education (director) described the delivery of ICT services in the classroom (or "ICT class") (see Tr. pp. 58-59, 129-30). The director testified that, at the elementary level, the district had a "team with general ed[ucation] teachers, [a] special education teacher and a teaching assistant" (Tr. p. 129). She further explained that the regular education teacher "remain[ed] with the class for the whole day," and the special education teacher "push[ed] in and co-t[each] with the teacher for half of the day, and then the teacher assistant work[ed] with the class for the other part of the day" (Tr. pp. 129-30). The director clarified that the students were "always supported by two adults in the classroom, a special ed[ucation] teacher or a teaching assistant, and a general ed[ucation] teacher" (Tr. p. 130). The director also testified that the teaching assistants were certified special education teachers, and the teaching assistant support was referred to as "instructional support, parentheses, collaborative" in the student's IEP under the "supplementary aids and supports" (Tr. pp. 130-31; see Parent Ex. B at p. 9).

noted in the May 2014 IEP, the parent "expressed agreement with the recommendations" of the CSE (id. at p. 1).

On September 4, 2014, a CSE convened for a "Requested Review" to address the student's "transition" to third grade and to develop an IEP for the "remainder of the 2014/2015 school year" (Parent Ex. C at p. 1).^{5, 6} At that time, the September 2014 CSE reviewed and modified the following sections of the student's IEP: the student's present levels of academic achievement, functional performance, and learning characteristics in the areas of reading, writing, speech-language, and "other"; the parents' concerns related to the student's academic, developmental, and functional needs in the area of reading, the "class make-up," and whether the student's needs were being met with ICT services; the student's social development with regard to feelings of anxiety; the parents' concerns related to the student's social development, including how his anxiety affected his "academic performance"; the student's physical development (noting the student's "dyspraxia"); the parents' concerns related to the student's physical development; and the annual goals (compare Parent Ex. C at pp. 1, 5-10, with Parent Ex. B at pp. 4-8).

In addition, the September 2014 CSE modified the student's IEP to include recommendations for: daily reading instruction (40 minutes per day) in a small group (2:1 ratio); use of audio books; use of an iPad with applications to assist with instructional needs (i.e., "Read2Go, Co-Writer, Firefly, and Dragon" together with assistive technology training for the parents, student, and staff); access to a word processor, speech-to-text software, and technology with word prediction software; and OT consultation services (compare Parent Ex. C at pp. 10-12, with Parent Ex. B at pp. 8-9). The September 2014 CSE also modified the student's testing accommodations to include the use of a scribe for classroom tests and assignments and noted that voice-to-text software could also be used (compare Parent Ex. C at p. 13, with Parent Ex. B at p.

⁵ The September 2014 IEP reflected a letter from the parents, dated August 12, 2014, within the "Evaluation Results" section of the IEP (Parent Ex. C at p. 3). The hearing record did not include a letter from the parents dated August 12, 2014 (see generally Tr. pp. 1-1703; Parent Exs. A-D; V-Y; HH; JJ; LL-OO; QQ; UU-YY; AAA-BBB; FFF-KKK; Dist. Exs. 1—6; 9-12; 15-16; 18; 20-28; 31-32; 35-39; 43-44; IHO Exs. I-IX). Instead, the hearing record included a copy of the parents' first State complaint, dated August 18, 2014, which the parents believed was the reason, in part, for the September 2014 CSE meeting (see Parent Ex. V at p. 1; see also Tr. pp. 1487).

⁶ The student's mother attended the September 2014 CSE meeting with one of the advocates who had also attended the May 2014 CSE meeting, and who would later assist the parents at the impartial hearing and on appeal (compare Parent Ex. C at p. 1, with Parent Ex. B at p. 1 and Req. for Rev.). This same advocate attended all of the CSE meetings held for the student during the 2014-15 school year (including the May 2014 CSE meeting), as well as the February 2015 and June 2015 CSE meetings held for the 2015-16 school year (see Parent Exs. B at p. 1; C at p. 1; D at p. 1; Dist. Exs. 12 at p. 1; 20 at p. 1). At times, the student's mother was accompanied to CSE meetings by both advocates who attended the May 2014 CSE meeting (see Parent Exs. B at p. 1; D at p. 1; Dist. Ex. 12 at p. 1).

10). As noted in the September 2014 IEP, the parent "expressed agreement with the recommendations" of the CSE (Parent Ex. C at p. 1; contra Parent Ex. X at pp. 1-2; KKK).^{7, 8}

Consistent with the notation in the September 2014 IEP, the district began the student's reevaluation process on December 15, 2014, by conducting a psychological evaluation and an educational evaluation (see Parent Ex. C at p. 1; see generally Dist. Exs. 24; 28).

On December 17, 2014, a CSE convened for a "Requested Review" (Parent Ex. D at p. 1).⁹ In reviewing the student's program, the December 2014 CSE modified: the student's present levels of academic achievement, functional performance and learning characteristics in the areas of reading, mathematics, and speech-language; the parents' concerns related to the student's academic, developmental, and functional needs with respect to mathematics and homework completion; the student's social and physical development concerning his ability to "identify coping strategies to effectively deal with his feelings of anxiety"; the parents' concerns related to the student's social and physical development, namely with regard to his feelings of anxiety and "how it affects completion of academically related tasks in the home environment" and the student's inability to "button or zipper jeans" and "tie his shoe laces"; the student's management needs; and the annual goals (compare Parent Ex. D at pp. 6-11, with Parent Ex. B at pp. 6-10).

In January 2015, the district continued with the student's reevaluation, and completed a classroom observation as well as a speech-language evaluation and an OT evaluation (see generally Dist. Exs. 21, 26-27). On January 20, 2015, the district (through an outside provider) conducted an assistive technology evaluation of the student (see generally Dist. Ex. 25).

On February 10, 2015, a CSE convened for a "Reevaluation/Annual Review" and to develop an IEP for the 2015-16 school year (fourth grade) (Dist. Ex. 20 at p. 1). Finding that the student remained eligible to receive special education as a student with an other health-impairment, the February 2015 CSE recommended a 12-month school year program, which, for July and August 2015, consisted of a special class placement ("small group") for instruction in reading (three 40-minute sessions per week) (id. at pp. 1, 13).¹⁰ For the remainder of the 2015-16 school

⁷ The September 2014 IEP also noted that the student would undergo a "thorough reevaluation during this school year" (Parent Ex. C at p. 1).

⁸ On or about October 8, 2014, the parents filed a third State complaint generally alleging that the student had not yet been provided with the assistive technology devices, services, or training recommended in his IEP (see Parent Ex. W at pp. 1-2). While the hearing record indicated that the student did not receive an iPad until October 9, 2014, the hearing record also revealed that the student used his teacher's iPad from the beginning of the 2014-15 school year until the time he received his own iPad (id. at p. 12; see Tr. p. 777). In addition, billing statements entered into the hearing record by the district reflected several assistive technology training sessions that the district provided to the student and/or to his parents (see generally Dist. Ex. 43).

⁹ Upon review, it appears that the December 2014 IEP—entered into evidence in the hearing record as parent exhibit D—was incorrectly paginated (see generally Parent Ex. D). As such, the citations to parent exhibit D will reflect the pages as counted and not the assigned page numbers reflected in the exhibit.

¹⁰ The student's eligibility for special education programs and related services as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

year from September 2015 through June 2016, the February 2015 CSE recommended daily ICT services (2.5 hours per day), daily reading instruction (40 minutes per session) in a small group (2:1 ratio), and speech-language therapy (id. at p. 11). In addition, the February 2015 CSE recommended the following supplementary aids and services, program modifications, and accommodations: special seating arrangements, checking for understanding, a copy of class notes, instructional support, use of audio books, and the provision of additional examples (for directions and homework) (id. at pp. 11-12). As assistive technology devices and services, the February 2015 CSE recommended: use of a text reader; use of an iPad with applications to assist with instructional needs (i.e., "Read2Go, Co-Writer, Firefly, and Dragon" together with assistive technology training for the parents, student, and staff); access to a word processor, speech-to-text software, and technology with word prediction software; and OT consultation services (id. at pp. 12-13). The February 2015 CSE created annual goals to address the student's needs in the areas of study skills, reading, writing, mathematics, and speech-language, and recommended testing accommodations (id. at pp. 10-11, 13-14). As noted in the February 2015 IEP, the parent "expressed agreement with these recommendations" (id. at p. 2).

On June 4, 2015, a CSE convened for a "Requested Review" to "review th[e] student's progress" and make recommendations for the 2015-16 school year (Dist. Ex. 12 at p. 1).¹¹ At that time, the June 2015 CSE reviewed and modified the following sections of the student's IEP: the student's present levels of academic achievement, functional performance, and learning characteristics in the areas of reading, writing, and mathematics (adding "small group math instruction with his special educator in a location with minimal distractions" and notations regarding a "pack-up schedule"); the parents' concerns related to the student's academic, developmental, and functional needs in the area of mathematics (the student's "math notebook [was] not coming home to support math homework"; concerns that the small group mathematics instruction was provided in a "pull out model"; and noting that the parents did not want parent counseling and training "at home to support the homework"); the student's physical development; and the annual goals (compare Dist. Ex. 12 at pp. 7-11, with Dist. Ex. 20 at pp. 7-11). The June 2015 CSE also modified the supplementary aids and services, program modifications, and accommodations to include the use of a graphic organizer and further clarified the additional examples provided to the student for mathematics (compare Dist. Ex. 12 at p. 12, with Dist. Ex. 20 at pp. 11-12).

By letter dated September 3, 2015, the parents—through an attorney—informed the district that they rejected the "special education program and placement the CSE recommended for [the student] at the latest annual review CSE meeting and subsequent meetings, if any" (Dist. Ex. 9). The parents also notified the district of their intentions to unilaterally place the student at Mary McDowell for the 2015-16 school year and to seek reimbursement for the costs of the student's tuition at Mary McDowell, as well as any transportation costs (id.). Additionally, the parents requested that the district provide the student, pursuant to State law, with round-trip transportation to Mary McDowell for the 2015-16 school year (id.).

¹¹ Both parents attended the June 2015 CSE meeting with the same two advocates who attended many of the student's previous CSE meetings (see Dist. Ex. 12 at p. 1).

Evidence in the hearing record revealed that the student began the 2015-16 school year attending the district public school because Mary McDowell had not accepted the student to attend until the "beginning of September" (Tr. pp. 1323-24; see Tr. p. 191 [noting that the student attended the district public school for approximately eight days in September 2015]).

On September 21, 2015, a CSE convened for a "Requested Review" to "review this student's progress" and to review an independent educational (assistive technology) evaluation of the student conducted in August 2015 (Dist. Ex. 6 at pp. 1, 3; see generally Dist. Ex. 11). The September 2015 CSE reviewed and modified the following sections of the student's IEP: the parents' concerns related to the student's academic, developmental, and functional needs (noting, per parent report, that the student "engaged in behavioral outbursts during homework completion and present[ed] with somatic complaints when homework [was] frustrating to him" and that when presented with homework "on his level he c[ould] complete the homework without a problem"); the parents' concerns about the student's needs in the area of mathematics (the student's "math notebook [was] not coming home to support math homework"; the parents' concerns related to the student's social development (reporting none); and the annual goals (compare Dist. Ex. 6 at pp. 8-11, with Dist. Ex. 12 at pp. 8-11). The September 2015 CSE also modified the supplementary aids and services, program modifications, and accommodations to expand the use of additional examples provided to the student for mathematics and added reteaching of materials and modified homework assignments (compare Dist. Ex. 6 at pp. 12-13, with Dist. Ex. 12 at p. 12).

The student began attending Mary McDowell on September 24, 2015 (see Tr. p. 1326).

A. Due Process Complaint Notice

By due process complaint notice dated May 19, 2016, the parents—through an attorney—alleged that the district failed to offer the student a free appropriate public education (FAPE) (see Dist. Ex. 1 at p. 1). Thereafter, in approximately 144 enumerated paragraphs, the parents described the student's educational history from kindergarten through third grade (2014-15 school year), generally asserting that the student failed to make progress (id. at pp. 2-26). More specific to the 2014-15 school year, the parents asserted that the present levels of performance in the May 2014 IEP were "full of inaccurate statements" and "failed to adequately describe the difficulties" the student had in "completing academic assignments independently" (id. at pp. 17-18). The parents also asserted that the May 2014 IEP failed to include a recommendation for a "reading program," despite the student's "severe reading deficits" (id. at p. 18). In addition, the parents alleged that the district failed to properly implement the reading program (Wilson Reading) used with the student beginning in April 2014 during the 2013-14 school year, noting further that the district did not convene a CSE meeting to include the reading program on the student's IEP, and the district failed to properly assess the student at the start of the reading program to determine baselines upon which to initiate instruction and ultimately measure the student's progress (id.). Finally, the parents contended that the district failed to timely convene a CSE meeting per their request in June 2014 (id. at pp. 19-20).¹²

¹² The parents also noted in the due process complaint notice that, in August 2014, they filed a State complaint with regard to the following: the district's failure to timely convene a CSE meeting, the district's failure to include

Next, the parents alleged that, while a CSE convened in September 2014 to address the allegations in the August 2014 State complaint, the September 2014 IEP failed to offer the student a FAPE (see Dist. Ex. 1 at pp. 20-21).¹³ In support of this assertion, the parents alleged that the September 2014 CSE based the "present levels of academic and social emotional functioning" on evaluations of the student conducted in 2012, and the IEP did not include a specific "reading methodology to be used" with the student (*id.* at p. 21). The parents further alleged that the district failed to provide the student with an iPad at the beginning of the 2014-15 school year in September and failed to provide the student and the parents with training to use the iPad (*id.* at pp. 21-22).¹⁴ The parents also noted that the iPad was not "wifi" accessible, the district public school did not have "wifi" available, and all of the applications ("apps") on the student's iPad required "wifi" accessibility (*id.* at p. 22).

Turning to the 2015-16 school year, the parents alleged that, although the February 2015 CSE recommended parent training and counseling related to the student's use of assistive technology (iPad), the district failed to provide such training to the parents (see Dist. Ex. 1 at p. 22). Next, the parents asserted that the "district placed Autism specific applications" onto the student's iPad—demonstrating the district's "deliberate indifference" to the student's rights—because the student was not "Autistic" (*id.* at pp. 22-23). With respect to the February 2015 IEP, the parents contended that the district did not provide them with a copy of it until late April 2015 (*id.* at p. 23). The parents also contended that district staff did not cooperate with a request for information about the student to allow an evaluator to move forward with an assistive technology evaluation of the student (*id.* at p. 24). According to the parents, the student's physical education teacher did not provide him with testing accommodations for an exam administered to the student in May 2015, which "exacerbated his already serious anxiety" (*id.*). In addition, the parents indicated that they voiced their disagreement with the ICT services recommended at a June 2015 CSE meeting, and further voiced their belief at the meeting that the student needed a "more specialized, smaller class size with a special educator all day long" (*id.*). With respect to summer 2015 services, the parents alleged that the CSE did not recommend the services they requested and that, "without any warning or notification to the parents," the district changed the student's reading teacher with approximately two weeks remaining in the summer program, which caused the student "extreme anxiety" (*id.* at pp. 24-25).

parental concerns about the student's "lack of progress in reading" in the May 2014 IEP, the absence of measurable annual goals for reading in the May 2014 IEP, and the failure of the May 2014 IEP to include information about the student's auditory processing evaluation and use of assistive technology at home (Dist. Ex. 1 at pp. 19-20).

¹³ The parents also noted in the due process complaint notice that, on or about September 8, 2014, they filed a second State complaint with regard to the following: the "continuing disagreement with the CSE on its recommendations" from the September 2014 CSE meeting; the "ICT class was not an appropriate grouping" for the student; and the student's inability to access a "Bookshare account" because the district failed to provide him with an iPad (Dist. Ex. 1 at pp. 21-22).

¹⁴ The parents also noted in the due process complaint notice that, on or about October 10, 2014, they filed a third State complaint with regard to the district's failure "to provide [the student] with assistive technology devices and services as agreed upon" at the September 2014 CSE meeting (Dist. Ex. 1 at p. 22).

Based upon the alleged violations, the parents—as relief—requested "full restitution" for costs of the student's tuition and "associated costs" at Mary McDowell for the 2015-16 school year, reimbursement for the costs of round-trip transportation for the student's attendance at Mary McDowell for the 2015-16 school year, and reimbursement for the costs of "all their expenses relating to evaluations" conducted by a specific individual during the 2015-16 school year (see Dist. Ex. 1 at p. 26).

B. Impartial Hearing Officer Decision

On June 28 and July 12, 2016, the IHO held prehearing conferences (see IHO Exs. I at p. 1; II at p. 1). On July 22, 2016, the parties proceeded to an impartial hearing, which concluded on December 15, 2017, after 11 days of proceedings (see Tr. pp. 1-1703).¹⁵ In a decision dated March 26, 2018, the IHO initially described the procedural history of the matter (see IHO Decision at pp. 1-4). After that, the IHO—in a lengthy recitation—recounted the findings of fact, beginning with the student's 2012-13 school year (second grade) in the district (id. at pp. 4-36). Thereafter, the IHO turned to the conclusions of law, which included a description of the issues to be resolved, the scope of the inquiry as defined by the two-year statute of limitations applicable to the case, the issues properly before the IHO for resolution, and the legal standard to apply (id. at pp. 36-39).¹⁶ In particular, the IHO indicated that the parents challenged the "program recommended for the 2015-2016 school year" (id. at p. 36). The IHO also noted, however, that the parties "disagreed on the IEP at issue for the 2015-2016" school year (id. at p. 37). While the IHO agreed with the district that the September 2015 IEP constituted the "operative IEP," the IHO explained that the facts of the case warranted consideration of the June 2015 IEP as well, noting that this was the case even though the "two IEPs ha[d] identical program recommendations" (id.).

Based upon these considerations, the IHO found the following as issues properly considered at the impartial hearing: the student's "placement in an ICT class, and the adequacy of supports in reading, writing and math"; as well as "several complaints about [the student] and assistive technology" (IHO Decision at p. 39). According to the IHO, the parents' "basic claim [was] that [the student's] placement in an ICT class was inappropriate [and] that the child needed a specialized smaller class size with a special education teacher all day long" (id.).

¹⁵ According to the IHO's decision, the parents filed a "new" due process complaint notice on April 13, 2017 regarding the 2016-17 school year (IHO Decision at p. 2). Pursuant to the parties' requests, the IHO consolidated the matters; however, due to subsequent events, the parents withdrew the April 2017 due process complaint notice (id. at pp. 2-3). It is unclear if the parties are currently involved in any other proceedings involving this student.

¹⁶ With regard to the statute of limitations, the IHO explained that, based upon the date of the due process complaint notice—May 19, 2016—"claims may therefore refer back only to May 19, 2014, which would allow examination [to] the tail end of the 2013-2014 school year and 2014-2015 school year but not to the extensive history recited" in the due process complaint notice (IHO Decision at p. 38). As such, the IHO concluded that, for purposes of the impartial hearing, the "relevant period began on Paragraph #94" of the due process complaint notice (id.). In addition, the IHO explained that, although the parents closing brief included "several claims neither in the [due process complaint notice] nor mentioned at the hearing," such claims were "not properly the subject of this hearing" (id. at pp. 38-39).

With the aforementioned as the backdrop, the IHO concluded, as relevant to the issues on appeal, that the "evidence was overwhelmingly clear that the program recommended for [the student], both in the 2014-2015 and as [a] recommendation for the 2015-2016 school year, was appropriate" (IHO Decision at p. 40).¹⁷ Initially, the IHO noted that the "size and structure of the ICT class reflected the benefits for [the student] described by district witnesses" (*id.*). The IHO also noted that the evidence in the hearing record consistently described the student's "eager participation and functioning in the larger classroom, interacting with typical peers both academically and socially" (*id.*). Overall, the IHO found the district director's testimony persuasive when describing the benefit the student received from "exposure to the general education curriculum and teaching strategies utilized within the classroom, as well as the support of the specialized instruction and the opportunity to socialize with typical peers and integrate with both small group instruction and large group instruction" (*id.*). The IHO further noted the testimony offered by the district coordinator of elementary special education (coordinator), which described a "placement that allowed [the student] the fluency to move between whole group and small group lessons" (*id.*).

Next, the IHO addressed the parents' allegation that the "ICT class was not an appropriate grouping" for the student (IHO Decision at pp. 40-41). First, the IHO clarified that the parents' "grouping issue addressed by the [S]tate complaint was not about [the student's] placement in an ICT class," but rather, it concerned the "students in the small IEP group within the class, a grouping that was corrected by the district upon decision" (*id.* at p. 40). To the extent that the parents continued to press grouping as an issue related to the 2015-16 school year, the IHO rejected the parents' contention as unsupported by the evidence in the hearing record (*id.* at p. 41). Based upon testimonial evidence, the IHO described the student—when compared to his special education classmates—as a "motivated learner in the small group," as "one of the stronger readers in his reading group," and as performing within the "middle" in other subjects (*id.*). According to the IHO, the district witnesses "unanimously" testified about the "appropriateness of the IEP group [the student] had been in and the one he would be in," noting specifically that the group was "homogenous" and comprised of "children who were similar, with similar needs" (*id.*). Relying on testimony from a district special education teacher, the IHO indicated that the student had "achieved more than the other children in the group" and he possessed a "reading level higher than the other students"; with respect to mathematics and writing, however, the IHO found that the student's skills were a "'level playing field' for students in the group with similar needs in math and writing" (*id.*).¹⁸ Referring to documentary evidence, the IHO found that the "[class] profile argued

¹⁷ It is unclear whether the IHO's language should be interpreted as a finding that the district offered the student a FAPE for the 2014-15 school year, especially given the IHO's clear language that the 2015-16 school year—encompassing only the June 2015 IEP and September 2015 IEP—was the school year at issue, or whether the IHO's language merely points out that the ICT services (ICT class)—as the program recommended for both the 2014-15 and 2015-16 school years—was appropriate and offered the student a FAPE for the 2015-16 school year at issue (*see* IHO Decision at pp. 36-39).

¹⁸ The district special education teacher who testified at the impartial hearing also attended all of the student's CSE meetings held during the 2014-15 school year (including the May 2014 CSE meeting), as well as the February 2015 and June 2015 CSE meetings held for the 2015-16 school year (*compare* Tr. pp. 715-1020, *with* Parent Exs. B at p. 1; C at p. 1; D at p. 1; Dist. Exs. 12 at p. 1; 20 at p. 1). The same district special education teacher provided ICT services to the student for the 2012-13, 2013-14, and 2014-15 school years (*see* Tr. pp. 717,

against the parent's demand for a more restrictive specialized class setting" (*id.*). In light of the progress the student achieved, the IHO found that the student was "appropriately grouped in the ICT class, in the smaller IEP group within the class, and in his specialized pull-out instruction" (*id.*). With regard to the parents' "demand for a 'specialized' class," the IHO indicated that they failed to consider the "general education curriculum [the student] was receiving, as well as services he received in the class" (*id.*). Additionally, the IHO noted that, while the parents' claimed the student required a "special education teacher 'all day long,'" the evidence in the hearing record demonstrated that the recommended ICT services met that requirement (*id.*).

Next, the IHO noted that while attending the ICT class, the student received "small group instruction in reading, writing, and math, as well as the daily special 2:1 reading class" (IHO Decision at p. 41). Finding "no credible claim that the reading instruction [the student] was receiving was anything other than appropriate," the IHO noted that, in the classroom, the student was instructed at "his [second] grade reading level, which reflected his ability to read" and the student could "decode, comprehend, and talk about what he read at that level" (*id.* at pp. 41-42). According to the IHO, the student participated in the "full class reading lesson," small group reading instruction within the ICT classroom delivered to the student by the special education teacher who possessed a master's degree in reading, and daily "specialized Orton Gillingham instruction" in a small group (2:1) setting (*id.* at p. 42). During the 2014-15 school year, the IHO found that the student made a "year's worth of progress" in reading—beginning the school year at a mid-first grade level and ending the school year at a mid-second grade level—and his progress in reading was "noted at each IEP meeting during the 2014-2015 school year" (*id.*). In addition, the student was scoring "100 percent on weekly spelling tests" (*id.*). The IHO also noted that the student's "sight word vocabulary improved," the parents "admitted" that his decoding skills had "improved," and they "agreed with the reading goals in the September 2015 IEP" (*id.*). Moreover, the IHO indicated that, since the parents were "pleased" with the daily, small group (2:1) reading instruction provided to the student, the parents wanted a "similar program for math and writing" (*id.*). According to the IHO, it was within the parents' demand for "more intensive instruction in math and writing" for the student that they "cited the success he achieved in reading, in what was acknowledged to be a strong program" (*id.*). With respect to writing, the IHO noted the student's progress in his ability to write sentences with more words, as well as with an "improvement in capitalization and punctuation," even though the student's writing was at a first-grade level (*id.*). The student worked on writing and reading, "utilizing dictation in the Orton Gillingham program" within his daily, small group (2:1) reading instruction (*id.*).¹⁹

724). The district special education teacher also held a master's degree in reading (see Tr. p. 718).

¹⁹ The IHO noted that the student first received reading instruction beginning in April 2014, and the recommendation for the same reading instruction was included on each of the student's IEPs beginning with the September 2014 IEP (see IHO Decision at pp. 42-43). The IHO also noted that it was "undisputed" that the recommended reading program was "implemented throughout the year, receiving praise from the district and nothing by accolades from the parent[s], who testified that [the student] 'loved' [the reading teacher]" (*id.* at p. 43). Relatedly, the IHO found that although the district was not required to identify a specific reading methodology in the student's IEPs, at least one prior written notice issued to the parents by the district reflected that the student would receive Orton-Gillingham reading instruction, and it was further undisputed that the student, throughout his attendance in the district public school, continuously received Orton-Gillingham reading instruction beginning

Turning to the area of mathematics, the IHO indicated that, at the start of the 2014-15 school year, the student could "add and subtract, but not regroup" numbers (IHO Decision at p. 43). However, by the end of the school year, in June 2015, the IHO found that the student could "add and subtract with regrouping, and multiply and divide single numbers" (*id.*). Based upon the district special education teacher's testimony, the IHO indicated that the student could "do the work in class and showcased his talents and ability to perform for his parent in the help session conducted in June 2015" (*id.*). The IHO criticized the parents' failure to "encourage" the student to attend "extra help" for mathematics, noting that the "parent's excuse that he couldn't get up early for school to start at 7:45 . . . failed a credibility test when compared to the 5:15 AM time she was willing to get him up to travel to Mary McDowell" (*id.* at pp. 43-44). In addition, the IHO noted that while the parents "demanded the elimination of modified homework for [the student] despite [a] purported concern about math homework and repeated problems, [the parents] then objected to work [they] thought was too difficult for him" (*id.* at p. 44). Similarly, the IHO noted that the parents "discounted district efforts to provide additional home support (Touch Math, strategy book)," and they "rejected parent counseling and training to address problems at home, primarily with math homework," indicating that they "didn't need it" (*id.*). Relying upon testimonial evidence, the IHO found that the "extra help would have helped had [the student] attended," noting further that "it did help on those few occasions" when the student used the extra help sessions during the 2014-15 school year (*id.*). Finally, the IHO found that the small group instruction the student received in mathematics "showed progress in classroom performance" (*id.*).

Next, the IHO found that, contrary to the parents' contentions, "several claims concerning anxiety expressed by [the student] at school w[ere] unsupported in the [hearing] record" (IHO Decision at p. 44). The IHO noted that although the parents "complained at CSE meetings about anxiety displayed by [the student] at home" and a doctor diagnosed the student as having a "mild anxiety disorder," the evidence in the hearing record revealed that the student's anxiety was confined to his home environment and did not present in the school environment (*id.*). Moreover, the IHO indicated that in the "middle" of the 2014-15 school year, counseling services were removed from the student's IEP because it was undisputed that he no longer needed the services (*id.*). In furtherance of the point that the student did not display any anxiety at school, the IHO noted the "total absence of its appearance at school and the uniform description of him as hardworking and eager, without any negative feelings about being with typical peers" (*id.*). And while the IHO did not "doubt the anxiety displayed at home"—especially given that the student acknowledged giving "his mother a hard time over homework"—the IHO also pointed out that the parents "refused the parent training offered [them] to help with homework efforts" (*id.*). Therefore, notwithstanding the parents' contentions about the student's anxiety at home, the IHO concluded that "it was undisputed that he was content at school, a model student, hardworking and eager to participate, [and] showing none of the anxiety reported at home" (*id.*). Finally, the IHO found that, while the parents contended that the student experienced increased anxiety during the administration of a State English Language Arts (ELA) examination, as a result of not receiving testing accommodations during a physical education examination, and due to an unanticipated change in teachers during summer 2015, the hearing record included no evidence to support "these claims" and specifically noted that the student's mother "failed to mention any of these events" in

in April 2014 (*id.*).

her testimony at the impartial hearing, which occurred over the course of three days (*id.* at pp. 44-45).

After addressing the parents' allegations concerning the student's anxiety, the IHO addressed, at length, the issues raised by the parents concerning the "subject of assistive technology," including "hardware," "software," "various" applications available to the student on his iPad, whether the applications required "Wi-Fi" access, and training for the student and parents to use the assistive technology devices (IHO Decision at pp. 45-48). Succinctly stated, the IHO found no support in the hearing record for any of the issues raised by the parents (*id.*).²⁰

Next, the IHO summarized the "appropriateness of the district's instructional program and services" for the student given the "language of the Supreme Court supporting ambitious programs for children with disabilities appropriate in light of their circumstances" (IHO Decision at p. 49). Here, the IHO relied on testimonial evidence from three district witnesses—who described the "benefit of the program, from the advantage to [the student] of exposure to the general education curriculum and teaching strategies utilized with the classroom and the opportunity to socialize with typical peers while still getting small group support in reading, writing, and math, and additional special class for reading"—as support for the conclusion that the district offered the student a FAPE (*id.* at pp. 40, 49). In further support of this conclusion, the IHO "credit[ed]" the district special education teacher's testimony about the student's "success" in third grade (2014-15 school year) as predictive of his continued success in fourth grade (2015-16 school year) (*id.* at p. 49).

With respect to the appropriateness of the 2015-16 program recommendations for the student, the IHO addressed one final point: least restrictive environment (LRE) (*see* IHO Decision at pp. 49-50). The IHO noted that "although the parents may have desired a more specialized instruction in a special education classroom, special classes or separate schooling [were] appropriate only if the nature or severity of the disability [was] such that education in regular classes with the use of supplementary aids and services [could not] be achieved satisfactorily" (*id.* at p. 49). Further noting that districts "must be guided by the requirement" imposed by the LRE, the IHO concluded that "[i]t was clear that the ICT was that for [the student]" (*id.* at pp. 49-50). The IHO further noted that placing the student in a "self-contained placement"—consistent with the parents' demand—"would have amounted to a denial of [a] FAPE" especially when the student "got along" with his peers in the "larger class and was making progress," when he received "small group instruction in which he was advancing," when he also received "daily specialized reading class showing progress," and when the student used the "recommended assistive technology" (*id.* at p. 50).

Having concluded that the district offered the student a FAPE, the IHO nonetheless analyzed the appropriateness of the parents' unilateral placement of the student at Mary McDowell for the 2015-16 school year and, as discussed below, equitable considerations (*see* IHO Decision at pp. 50-54). According to the IHO, the parents explained that they selected Mary McDowell to

²⁰ In addition to addressing the parents' IDEA claims, the IHO also addressed the issues raised by the parents pursuant to section 504 of the Rehabilitation Act of 1972 (section 504), 29 U.S.C. § 794(a) (*see* IHO Decision at pp. 48-49). The IHO concluded that the parents' due process complaint notice "failed to allege sufficient facts to support a claim" under section 504 (*id.* at p. 49).

meet the student's needs for a "small classroom setting all day long, instruction in a non-Common Core environment, immersion in education and with intensive one-on-one help"—with an added emphasis on the need for "something different and something very small" for the student (*id.* at p. 51).

Ultimately, the IHO concluded that the parents' sustained their burden to establish the appropriateness of the unilateral placement (*see* IHO Decision at pp. 51-54). In support of this finding, the IHO noted that the student attended a mixed fourth/fifth grade classroom (11 students, 2 teachers) during the 2015-16 school year (*id.* at p. 51). At the impartial hearing, the parents presented one witness from Mary McDowell, who the IHO noted had "never observed the child and was not very knowledgeable about him," and who could not "explain testing [of the student] that had been conducted" (*id.* at pp. 51-52). According to the IHO, the Mary McDowell witness's testimony primarily reflected "conversations with the child's teachers," which the IHO found "mirrored the year-end report submitted into evidence" and which the IHO described as adding "little more than a rehash of those reports" (*id.* at p. 52). Relying, therefore, more heavily on the documentary evidence, the IHO noted that, at Mary McDowell, the student received one 30-minute session per week of speech-language therapy to address "increasing his executive functioning skills" and that the student made "gradual progress in processing, verbal organization, and comprehension" (*id.* at pp. 52-53). The IHO also noted concerns about the student's peer relations and socialization at Mary McDowell, as reported by a school psychologist, as well as a description of the student as "more withdrawn and isolated" at Mary McDowell reflected in a district classroom observation of the student in June 2016 at Mary McDowell (*id.* at p. 52). While acknowledging that parents were not held to the same standard "regarding placement" in the LRE, the IHO indicated that the student's "apparent isolation present[ed] a stark contrast with his participation when he was with typically developing peers in [the district public school], suggesting that a school with only disabled peers and no opportunity for mainstream interaction may in fact be too restrictive a placement to benefit [the student]" (*id.*).

In reviewing the student's progress at Mary McDowell, the IHO found that the "school reports present[ed] a mixed picture" (IHO Decision at pp. 53-54). According to the "year-end report" from the student's reading teacher at Mary McDowell, the student "improved on spelling, and was better at realizing and working to correct an error, as well as demonstrating growth in decoding and encoding" (*id.* at p. 53). A classroom teacher's report noted the student's "increasing writing skills" and, as an example, reported "his ability to finish journal assignments" that he could not initially complete at the start of the school year (*id.*). In addition, the teachers' report "noted [the student's] independent mastery of homework," and, at the impartial hearing, the parents testified that the student "did not use technology to read for his homework from Mary McDowell, as it was on a 'level that he was able to do'" (*id.*). The IHO also noted, however, that the student's "independent comprehension grade level did not change, ending the year at a mid-[second] grade level"—which was the "same level as when he left the . . . district at the start of the school year" (*id.*). In addition to the concerns about the student's progress in reading, the IHO identified similar concerns related to the student's progress in mathematics at Mary McDowell (*id.* at pp. 53-54). Here, while noting evidence that the student improved in "solving word problems, and work on fractions," the IHO observed that an assessment administered to the student at the beginning and at the end of the 2015-16 school year showed "only a three-month improvement in addition and subtraction" (*id.*). Overall, however, the IHO found that "[d]espite doubts about the wisdom of

the parents' choice and mixed reports from the school," the "work being done with [the student] at Mary McDowell in a small classroom and small groups me[t] the standard as specially designed to address his special education needs and allow him to benefit from instruction" (*id.* at p. 54). Additionally, the IHO rejected the district's LRE argument with regard to the student's placement at Mary McDowell but expressed concern about the "wisdom" of a daily, 3.5-hour round-trip commute for a student with "multiple diagnoses" (*id.*).

Turning to the question of equitable considerations, the IHO concluded that the parents' failure to produce "any evidence of [their] contract with [Mary McDowell], or payment under such contract" weighed against the parents' request for reimbursement of the costs of the student's tuition at Mary McDowell for the 2015-16 school year (IHO Decision at pp. 54-56). However, the IHO rejected the district's contention that the parents failed to cooperate at the September 2015 CSE meeting, which the district argued was evidenced by the parents' "lack of meaningful participation at the meeting, remaining silent and failing to discuss their objections to the district program or the child's impending placement at Mary McDowell" (*id.* at p. 55). The IHO similarly rejected the district's request to "disregard" the entirety of the parents' testimony at the impartial hearing as being "consistently unreliable or simply incredible" (*id.*).

With respect to the parents' request to be reimbursed for round-trip transportation costs, the IHO denied this relief (*see* IHO Decision at pp. 56-57). The IHO, citing State law and the absolute absence of evidence about such costs, further noted that the hearing record failed to include "any evidence that the Mary McDowell program was similar to the program in the [district]" (*id.*). Significantly, the IHO pointed out that the parents selected Mary McDowell based upon the belief that the student needed "'something different and something very small,'" and the hearing record contained evidence distinguishing the two programs (*id.* at p. 57).²¹

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in finding that the district sustained its burden to establish that it offered the student a FAPE for the 2014-15 and 2015-16 school years. In addition, the parents assert that, although the IHO appeared to "limit the scope" of the parents' complaint to the June 2015 and September 2015 IEPs, neither the June 2015 IEP nor the September 2015 IEP was appropriate for the student.²² Next, the parents note that the IHO's use of the statute

²¹ The IHO also denied the parents' request to be reimbursed for the costs of an evaluation of the student conducted during the 2015-16 school year finding that it was "unclear what evaluations were the subject of the request" since the parents failed to provide any "further information" about this request at the impartial hearing (IHO Decision at p. 58).

²² The parents indicate that they "do not dispute" the IHO's determination about "which IEP was the subject of the dispute," but "merely note it as it provides the basis for the parents' contention on appeal that either IEP was inappropriate for [the student]" (Req. for Rev. ¶2). Also, the parents do not appeal the IHO's conclusion that their "objection to the program offered by the school district for the [20]15-16 school year was its recommendation that [the student] be placed in an ICT class as opposed to a more restrictive setting to address his individualized academic needs" (Req. for Rev. ¶ 4). The parents also do not appeal any of the IHO's findings related to assistive technology (devices, services or training) or the IHO's decision denying their request to be reimbursed for the costs of an evaluation of the student conducted in the 2015-16 school year; as such, the IHO's determinations on these issues have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a];

of limitations denied them the opportunity to present evidence (neuropsychological evaluation of the student) related to whether the "IEP" for the 2015-16 school year was appropriate.²³ The parents assert that the "program" offered to the student for the 2015-16 school year was "not appropriate" and failed to provide an "educational program reasonably calculated to enable a child to make appropriate progress appropriate in light of the child's circumstances"—consistent with the Supreme Court's holding in Endrew F. v. Douglas County School District RE-1, 580 U.S. ___, 137 S. Ct. 988, 1000 (2017). The parents further contend that the "special education program" offered by the district was not "appropriately ambitious" in light of the student's "deficits" in reading, writing, and mathematics. Finally, the parents argue that the IHO erred in finding that equitable considerations did not weigh in favor of their request to be reimbursed for the costs of the student's tuition at Mary McDowell for the 2015-16 school year, and the IHO erred in denying their request for reimbursement for round-trip transportation costs. As relief, the parents seek to overturn the IHO's findings that the district offered the student a FAPE for the 2014-15 and 2015-16 school years and that equitable considerations did not weigh in favor of their request for relief. In addition, the parents seek reimbursement for the cost of the student's attendance at Mary McDowell for the 2015-16 school year and reimbursement for the cost of round-trip transportation they provided to the student to attend Mary McDowell.

In an answer, the district responds to the parents' allegation and generally argues to uphold the IHO's decision in its entirety. Thereafter, the district argues that the parents' request for review should be dismissed for failing to comply with various regulations governing practice before the Office of State Review. As a cross-appeal, the district argues that the IHO erred in finding that Mary McDowell was an appropriate unilateral placement for the student for the 2015-16 school year.^{24, 25}

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.

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]).

²³ While asserting that the IHO's application of the statute of limitations precluded their ability to submit evidence into the hearing record, the parents do not argue that the IHO improperly analyzed the statute of limitations in this matter or improperly concluded that the portion of the due process complaint notice with allegations relevant to the time frame within the statute of limitations started at paragraph 94 (see generally Req. for Rev.).

²⁴ Although the parents filed an answer to the district's cross-appeal together with a reply to the district's answer for consideration on appeal, the parents' advocate failed to timely serve both pleadings on the district (see 8 NYCRR 279.4[f]; 279.5[b]; 279.6[a]-[b]). As a result, these pleadings will not be considered.

²⁵ While the district filed a memorandum of law in support of its answer and cross-appeal, it is unclear from the affidavit of service attached to the memorandum of law whether the district served it upon the correct party (see Dist. Mem. of Law Aff. of Service).

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., 137 S. Ct. at 999). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir.

2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).²⁶

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

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

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district contends that the request for review must be dismissed for failing to comply with the form requirements for pleading (8 NYCRR 279.8[a], [c][1]-[3]). Specifically, the district

²⁶ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

asserts that the request for review does not include consecutively numbered pages, and the parents did not properly sign the pleadings or properly cite page numbers of the IHO's decision. In addition, the district argues that the advocate assisting the parents with the appeal signed the notice of intent to seek review, the notice of request for review, and the request for review, in violation of regulations governing practice before the Office of State Review.

State regulations provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). Form requirements necessitate, in part, that all pleadings shall include "pages consecutively numbered" (8 NYCRR 279.8[a][3]), and, moreover, that all pleadings must be signed by an attorney, or by a party if the party is not represented by an attorney (8 NYCRR 279.8[a][4]).

State regulation also requires that a request for review shall set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
- (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.
- (4) any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer.

(8 NYCRR 279.8[c][1]-[4]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Upon review and notwithstanding the accuracy of the district's contentions relative to the form and content of the parents' request for review, I decline to dismiss the request for review on

these grounds given that the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that the district suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058). In this instance, although the parents' failure to comply with the practice regulations will not ultimately result in a dismissal of their appeal, the parents—and their advocate—are cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). However, in light of the foregoing, the district's arguments regarding the form of the parents' request for review are dismissed.

2. Additional Evidence

Related to the parents' challenge to the IHO's finding that equitable considerations did not weigh in favor of their requested relief due to a lack of evidence, the parents ask the SRO to convene a hearing "solely to allow them to submit" documentary evidence, including "the contract, invoices, receipts, etc." as related to the parents' unilateral placement of the student at the Mary McDowell School for the 2015-16 school year in order "to complete the hearing file" (see Req. for Rev. ¶¶ 20-30). In furtherance of this request, the parents attach a document to the request for review (see Req. for Rev. Ex. 1). Alternatively, the parents ask the SRO to remand the case to the IHO to allow them to submit such evidence into the hearing record (see Req. for Rev. ¶ 28). While the district does not affirmatively object to the additional documentary evidence submitted with the parents' appeal, the district argues that the parents could have offered the documentary evidence at the impartial hearing and failed to do so and that, at this juncture, "[i]t is too late to do so" (see Answer & Cr. App. ¶¶ 18-26, 40).

Initially, since the parents attached the additional documentary evidence they seek to enter into evidence as part of the administrative hearing record, it is unnecessary to convene a hearing for such purposes or, alternatively, to remand the matter to the IHO to receive such evidence (see 8 NYCRR 279.10[a], [c]). Instead, the parents' submission of the document will be construed as a request for the SRO to consider the additional documentary evidence on appeal (see 8 NYCRR 279.10[b]).

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the parents argue that the unforeseen

departure of their attorney during the impartial hearing resulted in "confusion" and left them unable to submit the relevant documents—such as the Mary McDowell contract and "other documents"—as evidence into the hearing record prior to resting their case-in-chief for the 2015-16 school year (Req. for Rev. ¶¶ 25-27). The district counters that the parents—having elected to proceed with the impartial hearing with their advocate even after the attorney's departure—had a total of approximately two years to submit such proof: namely, from May 19, 2016, the date due process complaint notice was served, until February 16, 2018, the expiration of the final extension request in this matter (see Answer & Cr. App. ¶¶ 22-23, 40). The document now proffered by the parents was available at the time of the impartial hearing and it is not now necessary to consider the document in order to reach a decision in this matter. Accordingly, I decline to exercise my discretion to accept the parents' additional documentary evidence.

B. 2014-15 School Year Progress and IEPs for the 2015-16 School Year

Turning now to the merits of the parents' appeal, a student's progress under a prior IEP may be a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. June 24, 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]).

As noted above, the IHO, in finding that the district offered the student a FAPE for the 2015-16 school year, relied in part upon evidence in the hearing record establishing that the student made progress in a similar program (to wit, a general education class with ICT services, along with related services and various other supplementary aids and services, program modifications and accommodations) during the 2014-15 school year. Before reaching the parents' specific objections to the IHO's analysis, a review of the student's needs, as documented in the relevant IEPs and as elaborated upon by testing conducted by the district and testimony presented at the impartial hearing, while not directly at issue, frames an understanding of the CSEs' view of the student's strengths and needs over time during the 2014-15 school year (see Endrew F., 137 S. Ct. at 999 [noting that "the essential function of an IEP is to set out a plan for pursuing academic and functional advancement"]; see also Questions and Answers on U. S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1, 71 IDELR 68 [OSEP 2017] [advising that "[p]arents and other [CSE] members should collaborate and partner to track progress appropriate to the child's circumstances" and that a CSE should "revise, as appropriate, the IEP to address the lack of progress," if any]).

When the May 2014 CSE initially developed the student's IEP for the 2014-15 school year (third grade), the CSE described the student—who had received ICT services during the 2013-14 school year (second grade)—as "hard working" and one who displayed a "positive and willing attitude towards any task required of him" (Parent Ex. B at pp. 1, 4). The student was noted to "keep his materials in an organized, neat fashion in his desk," and to follow "all classroom rules and routines on a consistent basis" (*id.* at p. 4). In addition, the CSE noted that the student took the "initiative to seek teacher assistance when faced with an academic challenge," and he worked

"successfully in the small and large group teaching setting" and was a "highly active participant in small group lessons and activities" (id.).

In reading, the May 2014 CSE noted that the student had developed a "larger sight word vocabulary" and was "currently reading at a guided level F independently" (Parent Ex. B at pp. 1, 4).²⁷ At that time, he "recogniz[ed] high frequency words on a more consistent basis" and, although he "experience[d] difficulties with the decoding process," the student "employ[ed] known strategies to support himself when faced with an unknown word" (id. at p. 4). Also reported in the area of reading, the CSE indicated that the student was "beginning to blend letters together to make sounds, and continue[d] to work in order to differentiate between long and short vowel sounds" (id.). The CSE also reported that the student had a "solid comprehension of the stories he read[] on his guided level" (id.).

In the area of writing, the May 2014 CSE described the student's ability to "generate his own ideas when writing" (Parent Ex. B at p. 4). The student "carefully tap[ped] out words to encode, and, although this [was] a challenge for him, it d[id] not stop him from trying his best" (id.). At that time, the student was described as "slowly developing an encoding vocabulary of words he automatically kn[ew] how to spell and [was] able to generalize this skill into his writing" (id.).

Turning to mathematics, the May 2014 CSE indicated in the IEP that the student's "number sense ha[d] strengthened this school year," and the student could "add and subtract without regrouping independently" (Parent Ex. B at p. 4). According to the May 2014 CSE, the student—" [w]ith the support of the small group"—used "concrete problem solving strategies to tackle a variety of mathematical problems" (id.). Finally, the CSE noted that the student "experience[d] difficulties with less concrete math concepts, as well as skip counting" (id.).

In the area of social development, the May 2014 CSE described the student as a "kind and polite young boy," who interacted "well with peers and adults" (Parent Ex B at p. 5). At that time, the student "demonstrated progress with his ability to use positive strategies when faced with a social conflict involving peers or adults" (id.). In addition, the CSE noted in the IEP that the student was "patient and fair when interacting with his peers and [was] respectful of adults in the school environment" (id.). Next, the CSE noted that while the student did not display any "outward signs of anxiety . . . during the school day, he reportedly had a hard time with homework completion and presented with somatic complaints" (id.). In the area of physical development, the May 2014 CSE noted that the student "present[ed] with needs related to independent writing tasks" and in differentiating the "size of his letters" (id.). Additionally, the CSE indicated that, during OT sessions, the student "require[d] structure and support to complete writing activities," as well as "cuing to produce independent writing" (id.). At that time, the student could "copy from a near point," and his time to complete work "need[ed] to be monitored during sessions" (id.).

²⁷ At the impartial hearing, the parents testified that the "difference between [an] instructional level and [an] independent level" was "mastery"—meaning that an "independent level [was] a mastered level" (Tr. pp. 1482-93).

After summer 2014, the CSE reconvened in September 2014 and, in the IEP, reported much of the same information about the student's reading skills as reported in the May 2014 IEP (compare Parent Ex. C at p. 6, with Parent Ex. B at p. 4). However, the September 2014 CSE also added information to the IEP, noting that the student had "developed a larger sight word vocabulary this school year, utilizing the Sidewalks Level B Kit (grade 2)" and continued to read at a "guided level F instructionally" (compare Parent Ex. C at p. 6, with Parent Ex. B at p. 4).²⁸

The September 2014 CSE also noted that, in the decoding process, the student used a "'strategy card,' to support himself when faced with an unknown word" (compare Parent Ex. C at p. 6, with Parent Ex. B at p. 4). The September 2014 CSE further modified the student's IEP to report that he "benefit[ed] from a multisensory teaching approach" and that his "listening comprehension skills [were] stronger than his reading comprehension levels" (compare Parent Ex. C at p. 6, with Parent Ex. B at p. 4). In writing, the CSE added information indicating that the student "benefit[ed] from a multisensory teaching approach," the student's "creative verbal abilities [were] stronger than his abilities to write for length," and the student "often wr[ote] sentences of three to four words in length although he ha[d] demonstrated writing longer sentences" (compare Parent Ex. C at p. 6, with Parent Ex. B at p. 4). In the area of social development, the September 2014 CSE added to the IEP that, per parent report, the student experienced "feelings of anxiety over the summer"; the CSE also noted, however, that "he did not outwardly display signs of anxiety upon return to school," and he "continue[d] to be reminded of school based resources" (compare Parent Ex. C at p. 7, with Parent Ex. B at p. 5).

At the impartial hearing, the district special education teacher described the student's abilities, academically, at the start of third grade in the 2014-15 school year (see Tr. pp. 733-34).

²⁸ At the impartial hearing, the district director testified that the district used "Reading Streets" as the "reading program and the curriculum work" for general education students; "Sidewalks" was "an alternative program that align[ed] with Reading Streets, but it [was] used for struggling readers" and provided an "alternative presentation of the material" (Tr. pp. 145-46; see Tr. pp. 757-58). The student's special education teacher during the 2014-15 school year testified that she used the "Reading Sidewalks" program for reading instruction in the "small group" lessons, noting that the program included a "decoding component, a vocabulary component, comprehension, a variety of stories to read on every genre, and it worked hand-in-hand with the reading program that was taught in the general education class" (Tr. p. 758). She further explained that the "Sidewalks" program was "leveled by kits so Kit A correspond[ed] with first grade" and "Kit B, which [they] were using at the [20]14-15 school year, correspond[ed] with the second grade" (id.). The special education teacher further testified that, during the 2014-15 school year, she completed the "entire second grade" level of the reading program within her small group reading instruction, which included this particular student (Tr. pp. 758-59). She also testified that, although she had worked with the student in the 2012-13 and 2013-14 school years, he "made the most progress" in reading during the 2014-15 school year because he had a "solid reading program"—which included the reading instruction provided outside the classroom with the "special reading teacher"—that afforded him the "opportunity to make more progress that school year than in the previous two years combined" (Tr. p. 759). To measure the student's improvement in sight words, the district special education teacher testified that she used "hard data" from September to December 2014, then after December, she began to use spelling words the student mastered with his "reading teacher in the Orton-Gillingham reading [c]lass" to complement and build upon as his sight word vocabulary (Tr. pp. 759-60; see generally Dist. Ex. 35). Here, referring to district exhibit 35—which was identified as a "list of Sidewalks sight words from the Level A kit" (first grade level)—the district special education teacher explained that, in September 2014, the student "could recognize 68 of the 102 words automatically" (Tr. pp. 762-63). To administer this assessment for sight words, the district special education teacher "handed [the student] word cards, and . . . asked him to read them" (Tr. p. 769).

Consistent with the description of the student in his May and September 2014 IEPs, the special education teacher described the student's academics at the start of the 2014-15 school year overall as "below the third grade level"; she characterized his reading as at a "middle of first grade reading level"; she noted that the student could add and subtract, "but could not regroup" (characterizing his mathematics as at an "end of first grade" level); in writing, she indicated that he could "write a basic three to five-word sentence with support" (describing his writing as at an "end of first grade" level); and as a speller, she testified that he "struggled" (Tr. pp. 733, 928-29).²⁹

When the CSE reconvened in December 2014, the student's IEP was modified to reflect that, in reading, the student was "currently reading at a guided level G independently" and further, that his "reading skills ha[d] stabilized over the course of this school year" (compare Parent Ex. D at p. 6, with Parent Ex. C at p. 6).³⁰ The CSE did not modify the student's IEP in the area of writing, but in mathematics, the CSE repeated much of the same information and modified the December 2014 IEP to reflect that the student needed "previously taught concepts, such as adding and subtracting with and without regrouping, revisited often for increased retention" (compare Parent Ex. D at p. 6, with Parent Ex. C at p. 6). In addition, the December 2014 IEP noted that the student needed to "continue to maintain skills already mastered by having skills retaught and spiraled during the school year" (compare Parent Ex. D at p. 6, with Parent Ex. C at p. 6).³¹ Consistent with the IEP modifications to reflect the student's progress, the December 2014 CSE thereafter modified the student's annual goals, changing either the criteria used to measure if the goal had been achieved, by adding updated "baseline[s]" (i.e., reading level "F" modified to reading level "G"), and by adding more annual goals overall (compare Parent Ex. D at pp. 8-11, with Parent Ex. C at pp. 8-10).

Next, although the CSE next reconvened in February 2015 to develop the student's IEP for the 2015-16 school year, the IEP generated at that meeting continued to reflect the student's progress in the 2014-15 school year. Notably, at that time, the February 2015 CSE reported that

²⁹ In October 2014, the district special education measured the student's ability to recognize sight words from "Sidewalks Level B kit, which [was] a second grade Sidewalks kit" (Tr. p. 69; see generally Dist. Ex. 37). In October 2014, the student recognized "42 of the 84 words [she] presented" to him on that day (Tr. p. 769). By December 2014, the student recognized "62 out of 78" sight words on the "Sidewalks Level B kit" (Tr. pp. 770-71; see generally Tr. pp. 803-21; Dist. Exs. 38; 44).

³⁰ Identifying district exhibit 36 as a "list of Sidewalks Level A sight words," the district special education teacher testified that the results reflected in this document demonstrated that the student "recognized 100 of the 102 sight words on the list," which further indicated that the student had improved his sight word recognition from 68 words in September 2014 to 100 words in December 2014 (Tr. pp. 766-67; compare Dist. Ex. 36, with Dist. Ex. 35).

³¹ In the December 2014 IEP, the parents reported that they had "seen an improvement with [the student's] ability to read and his level of confidence in the area of reading" (compare Parent Ex. D at p. 6, with Parent Ex. C at pp. 6-7). At that time, however, the parents' concerns shifted focus from the student's reading skills to his mathematics skills, and in particular, the parents expressed that the student exhibited difficulty completing mathematics homework (compare Parent Ex. D at pp. 6-7, with Parent Ex. C at p. 6). In response to these newly expressed concerns, the December 2014 CSE recommended parent counseling and training to "address the home behaviors and homework issues" and to "focus on helping the parent[s] to set up routines and procedures for successful homework completion" (Parent Ex. D at pp. 6-7).

the student was "currently reading at an independent level H," and he participated in "daily small group reading instruction, using different approaches (Sidewalks Kit B and Orton Gillingham)" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). The CSE further noted that "this level of [reading] support ha[d] afforded [the student] the opportunity to acquire new sight words on a steady basis" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). Additionally, the February 2015 CSE indicated that the student could "generalize this skill as he read[] stories from the Sid[e]walks (Level B) Kit," noting further that the student used "strategies to help sound out and blend the [unfamiliar] word" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). Next, the CSE reported that the student continued to "benefit from cues when faced with words that ha[d] long vowels" and the student would "support himself to respond to teacher directed comprehension questions by looking back in the story for evidence" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6).³²

In the area of writing and as compared to information reflected in the December 2014 IEP, the February 2015 IEP indicated that the student "love[d] to write on topics he kn[ew] a great deal about, and show[ed] enthusiasm to write about teacher/curriculum selected topics as well" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). At that time, the student could "generate his ideas independently, as well as use sequencing words (first, next, then, last, etc.) to organize his pieces" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). The February 2015 CSE also noted that while it was "easier" for the student to "verbally" express his ideas, he could "express them in writing" with support (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). In addition, the student, at that time, followed the "rules of capitalization and punctuation as he beg[a]n each sentence with a capital and end[ed] with the appropriate punctuation mark"; the student did, however, receive "support to capitalize proper nouns and utilize commas" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). As of February 2015, the student could "write a 5 [to] 7 word sentence with independence," but at times would make "encoding errors" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). Finally, the February 2015 IEP indicated that the student "greatly benefit[ed] from a word bank to utilize a variety of grade level vocabulary when writing" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6).

Next, the February 2015 CSE reported about the area of mathematics, which reflected that the student "enjoy[ed] math lessons and activities" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). At that time, although the student demonstrated "mathematical application skills below grade level," he could "practice problem solving strategies" when provided with "extra examples" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). According to the IEP, the student could "count using tallies, interpret information from a graph, and . . . add and subtract up to 3 digit

³² At the impartial hearing, the student's special education teacher testified about the information she conveyed to the CSE at the February 2015 meeting (see Tr. pp. 739-40). More specifically, she testified that the student was a "hard worker," he was making a "lot of progress," and that he was "growing as a reader, a writer and a mathematician" (id.). The special education teacher also reported to the February 2015 CSE that the student's sight word vocabulary increased from "68" words to "189" words from September through December 2014 (Tr. p. 740). She also reported that, while the student continued to "struggl[e]" as a speller, she was "coordinating with his reading teacher to help him meet with more success as a speller" (id.). As described further below, the special education teacher also testified that she discussed the student's testing results in reading that she obtained from administering the Wechsler Individual Achievement Test, Third Edition (WIAT-III) to the student (see Tr. pp. 740-41; see generally Dist. Ex. 28).

numbers without regrouping" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). The student could also "regroup tens and ones" with "gentle reminders," as well as "solve one digit multiplication problems by skip counting or drawing an array (as the numbers g[o]t larger)" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). The February 2015 CSE also noted that the student understood the "concept of division as a process of sharing," but had "difficulties understanding the language related to word problems as he labor[ed] to find the correct operation to solve" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). The student, however, "readily look[ed] for and underline[d] key words to support himself" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). To address these needs, the February 2015 CSE indicated that the student needed "concepts revisited regularly to increase his overall retention and comprehension" (compare Dist. Ex. 20 at p. 7, with Parent Ex. D at p. 6). As in December 2014, the February 2015 CSE thereafter modified the student's annual goals, changing either the criteria used to measure if the goal had been achieved, by adding updated "baseline[s]" (i.e., reading level "G" modified to reading level "I"), and by wholly regenerating the annual goals overall (compare Dist. Ex. 20 at pp. 10-11, with Parent Ex. D at pp. 8-11).³³

In June 2015, the CSE convened to further develop the student's IEP for the 2015-16 school year and reflected additional progress the student made from February 2015 to the end of the 2014-15 school year. In the area of reading, the June 2015 CSE reported that the student was "currently reading at an independent level J (18), and began the school year at an independent DRA level F (10)" (compare Dist. Ex. 12 at p. 7, with Dist. Ex. 20 at p. 7).³⁴ In writing, the CSE characterized his overall "level of writing" as the "end of the first grade level" (compare Dist. Ex. 12 at p. 7, with Dist. Ex. 20 at p. 7). The student, at that time, could "write a 7 [to] 9 word sentence with independence," but he continued to, at times, make "encoding errors" (compare Dist. Ex. 12 at p. 7, with Dist. Ex. 20 at p. 7). To support the student's needs in writing, the June 2015 CSE indicated that the student would receive "[s]mall group writing instruction provided by the special education team" and recommended the use of a "graphic organizer" (compare Dist. Ex. 12 at p. 7, with Dist. Ex. 20 at p. 7). In the area of mathematics, the June 2015 CSE reported that the student recently

³³ At the February 2015 CSE meeting, the CSE modified the information within the area of speech-language as well, noting the recent administration of the "Test of Problem Solving-3 Elementary (TOPS-3), the Language Processing Test-Three (LPT-3)" and the CELF-5 to the student (Dist. Ex. 20 at p. 7). The February 2015 CSE described the student's "language skills" as within the "above average to the below average range" and reported the student's progress on his annual goals in the same section of the IEP (id.). The February 2015 CSE also included information from the recent administration of the "Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V)" to assess the student's "intellectual ability" (id. at p. 8). Here, the CSE reported that "[s]ignificant differences exist[ed] between the five index scores, rendering [the student's] Full Scale IQ less meaningful for interpretation" (id.). Additionally, the CSE noted that the "pattern of [the student's] scores indicate[d] that his verbal comprehension abilities [were] significantly better developed than his visual spatial, fluid reasoning, and working memory abilities" (id.). Similarly, the student's "processing speed abilities [were] significantly better developed than his working memory abilities"; overall, the student's "[i]ndex scores range[d] from the average to the very low average" (id.).

³⁴ As noted in the hearing record, "DRA" refers to the "Developmental reading assessment" (Tr. p. 503; see generally Dist. Exs. 15-16; 22-23; 31-32). According to the hearing record, the student's special class reading instructor (2:1 ratio) administered all of the DRAs to the student entered into the hearing record, except for the DRA administered to the student in June 2014 at the end of second grade (see Tr. p. 552; Dist. Ex. 32 at p. 1).

"scored a 58% on the 3rd grade district wide end of year Math Assessment," and noted that the student would "participate in small group math instruction with his special educator in a location with minimal distractions" (compare Dist. Ex. 12 at p. 7, with Dist. Ex. 20 at p. 7). The IEP further noted that the student would "bring his math workbook home daily to support doing homework" and a "pack-up schedule w[ould] include a reminder to bring home his notebook" (compare Dist. Ex. 12 at p. 7, with Dist. Ex. 20 at p. 7).³⁵ With respect to the annual goals, the June 2015 CSE updated "baseline" information and added annual goals for assistive technology (compare Dist. Ex. 12 at pp. 10-11, with Dist. Ex. 20 at pp. 10-11).³⁶

As further evidence of the progress the student made in the ICT placement during the 2014-15 school year, the student's special class reading teacher (2:1 ratio) administered the "Gallistel-Ellis Test of Coding Skills" (Gallistel-Ellis) to the student at the beginning of—and at the end of—the 2014-15 school year to "assess the effectiveness of the remediation" (Dist. Ex. 5 at p. 2; see Tr. pp. 551-52).³⁷ Documentary evidence characterized the Gallistel-Ellis as an "informal reading test which measure[d] a student's ability to decode real and nonsense words" and defined the "purpose" of the assessment as a measure to "gauge starting points for instruction and assess skills" (Dist. Ex. 5 at p. 2). The Gallistel-Ellis consisted of the following 10 subtests: "Closed Syllables"; "Closed Syllables with Digraphs, Trigraphs, and Blends"; "Silent-e and Open Syllables"; "2 Sounds of S, C, and G, -tch/-dge"; "Vowel Teams and -alk, cvvc"; "Vowel-r, vre, eer, cvr"; "Short Vowel, -ar with Syllabication and Silent-e and Suffixes"; "Consonant-le Syllable and Final Stable Syllables"; "Multi-Syllabic Words"; and "Phonetically Irregular Words" (id.). A comparison of the student's Gallistel-Ellis scores from September 2014 and May 2015 revealed that the student improved in all 10 subtests ranging from a 12 percent improvement on the "Multi-Syllabic Words" subtest to an 84 percent improvement on the "Vowel Teams and -alk, cvvc"; and "Short Vowel, -ar with Syllabication and Silent-e and Suffixes" subtests (id. at p. 1).³⁸

In addition to reporting the results of the Gallistel-Ellis, the same document reported that, in reading, the student started the 2014-15 school year at a "DRA-2" "Independent Level 10 (F)"

³⁵ It was also noted in the June 2015 IEP that the parents "stated that [they] d[id] not want Parent Counseling and Training at home to support the homework" (Dist. Ex. 12 at p. 8).

³⁶ At the impartial hearing, the district special education teacher testified that, at the end of the 2014-15 school year, the student performed at the "end of second grade level" in mathematics, at the "[m]iddle to end of second grade" level in writing, and at the "[m]iddle to end of second grade" level in reading (Tr. pp. 928-30).

³⁷ The district coordinator testified that the student's special class reading teacher reported the student's progress at the June 2015 CSE meeting, and noted the student's ability to perform some of the Gallistel-Ellis subtests in May 2015 that he could not otherwise perform in September 2014 (Tr. pp. 560-61).

³⁸ At the impartial hearing, the district coordinator testified that the student did not receive scores for the Gallistel-Ellis subtests identified by numbers "5, 7, 8 and 9," in September 2014 because he was "unable to perform that task when presented with those type of words" (Tr. pp. 552-53; Dist. Ex. 5 at p. 1). The subtest scores obtained from the readministration of the Gallistel-Ellis in May 2015 reflected that the student "improved in all areas, and was able to demonstrate skills set in some of those areas that in September he couldn't test at" (Tr. p. 553; Dist. Ex. 5 at p. 1).

and "Instructional Level 12 (G)" (Dist. Ex. 5 at p. 1; see generally Dist. Exs. 31-32).³⁹ It further noted that, in reading, the student ended the 2014-15 school year at a DRA-2 "Independent Level 18 (J)" and "Instructional Level 20 (K)" (see Dist. Ex. 5 at p. 1; see generally Dist. Exs. 15-16).⁴⁰ At the impartial hearing, the district coordinator testified that the DRA assessments were "used to determine a student's specific reading level" (Tr. pp. 544-45).⁴¹ She further explained that, in order for a DRA score to be characterized as "independent," the student's scores in "all three areas"—meaning, "oral reading fluency," "[c]omprehension," and "miscues or accuracy"—must fall within certain parameters (Tr. pp. 546, 678-79; see Dist. Ex. 15 at pp. 3, 6). For example, on May 21, 2015, when the student was assessed at a DRA level 16, he achieved an oral reading fluency score of "13," a comprehension score of "22," and a "miscues or accuracy" score of "4-6"—all of which fell within the category identified as "IND" or "Independent" (see Dist. Ex. 15 at pp. 1, 3, 6). Therefore, at that time, the student achieved a DRA independent reading level of "16" (id. at p. 1). On the same date, the student was assessed at a DRA level 18, and his scores demonstrated that he achieved a DRA independent reading level of "18" (Dist. Ex. 16 at pp. 1-2, 5; see Tr. p. 548). The district coordinator explained that a comparison of the student's DRA score of 10 at the beginning of the 2014-15 school year with his DRA score of 18 at the end of the 2014-15 school year indicated that he made "significant progress, what [the district] would consider a full year's growth in reading, which [was] what you would expect of a typically developing student, so to have a classified student make that growth was remarkable" (Tr. pp. 548-49; see Tr. pp. 774, 789-90).

Turning to the parents' specific contentions on appeal, the parents argue that the IHO failed to consider the student's objective assessment results when determining that the student made progress during the 2014-15 school year (third grade). More specifically, the parents assert that a comparison of the certain subtest scores provides "concrete examples of how the district's recommended program for the [20]14-15 school year was not appropriate and contradicts the IHO's

³⁹ At the impartial hearing, the district coordinator testified that there were different ways to monitor a student's progress in reading (see Tr. p. 556). When asked by the IHO whether the DRA numbers—i.e., "Level 16"—correlated to the letters noted on the IEPs, the coordinator explained that the DRA used numbers to report progress, while the "Fountas & Pinnell" approach used letters (Tr. pp. 556-60; see, e.g., Dist. Ex. 12 at p. 7). She further explained that the letter levels were "oftentimes how teachers w[ould] classify their libraries, and even many of the libraries in the school w[ould] use that" (Tr. p. 557). The coordinator also testified that the reading letter levels on the student's IEP were reported by his reading teacher (see Tr. p. 558; Dist. Ex. 20 at p. 7). In terms of grade level equivalents, the coordinator testified that the letter levels, for example "Level H," were "gross" approximations, and "wouldn't be . . . specific," rather the letter levels would allow a teacher to say that a student was at the beginning, middle, or end of a grade level (Tr. p. 558). According to the coordinator, the basis for the letters was to level the books that were used "instructionally with students in school" (see Tr. p. 560). She also testified that parents sometimes reported that using letters and numbers was "confusing" (Tr. p. 557).

⁴⁰ The hearing record referred to this assessment interchangeably as "DRA," "DRA-2," or "DRA2 K-3" (Tr. pp. 504, 514; Dist. Exs. 5 at p. 1; 15 at p. 1). In describing the student's progress in reading during the 2014-15 school year with respect to the student's DRA levels, the district coordinator testified that "we would hope that a typically developing student would achieve ten levels of growth in a school year" (Tr. pp. 554-56).

⁴¹ The DRA "independent" or "instructional" level was identified numerically, i.e., "Level 10" or "Level 12"—whereas the letters, i.e., "(F)" and "(G)," referred approximately to the Fountas & Pinnell (F&P) grade-level equivalent of the DRA number (Tr. pp. 558-60, 699, 774, 789; Dist. Exs. 15 at p. 1; 16 at p. 1).

contention" that the evidence in the hearing record was "overwhelmingly clear" that the district's recommended programs for the 2014-15 and 2015-16 school years were appropriate.

In response, the district initially argues that the hearing record is replete with objective measures of the student's meaningful progress. The district also contends that relevant case law confirms that "standardized testing data and percentiles 'are not dispositive of progress for IDEA purposes,'" and furthermore, the parents fail to offer any credible evidence to support their contention that the "randomly selected standardized subtest scores [are] proof of anything." Finally, the district asserts that the IHO properly relied upon the evidence presented to find that the student made considerable progress and, absent "any law or evidence" to interpret the standardized score "fluctuations differently," the SRO should defer to the IHO's findings. Upon review, the evidence in the hearing record does not support the parents' contention that the IHO ignored or failed to consider the student's objective assessment results when determining that the student made progress during the 2014-15 school year (third grade). Instead, the evidence supports the IHO's conclusion that the student made progress during the 2014-15 school year.⁴²

In considering the parents' argument, a review of the IHO's decision initially appears to support their position in that the IHO did not examine the specific assessments the parents cite. After the conclusion of the impartial hearing, the parties submitted closing briefs to the IHO (see generally IHO Exs. VIII-IX). It is within the parents' closing brief to the IHO—which was prepared by their advocate—that the parents first referred to the student's scores on standardized assessments as an indicator of the student's lack of progress in the ICT placement (but as a basis upon which to conclude that the ICT placement was not appropriate for the 2013-14 and 2014-15 school years and not as an argument pertinent to the 2015-16 school year, as the parents seem to argue on appeal) (see IHO Ex. IX at pp. 1, 4-6; see generally Dist. Ex. 1 [noting the absence of any such allegations in the parents' due process complaint notice]). Similar to the parents' contention on appeal, the parents—in the closing brief—directed the IHO to a comparison of scores obtained from an administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III) to the student in 2012 and the subsequent administration of the WIAT-III to the student in 2014 in selected subtests (i.e., listening comprehension, math fluency, oral reading fluency, and sentence composition) as proof of the student's regression and/or lack of progress while attending an ICT placement (compare IHO Ex. IX at pp. 4-5, with Req. for Rev. ¶¶ 7-9). The parents' closing brief similarly pointed to selected subtest scores from an administration of the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4) to the student in 2012—when compared to the results of a subsequent administration of the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5) to the student in 2015—as further evidence of the student's regression and/or lack of progress in the ICT placement (compare IHO Ex. IX at p. 6, with Req. for Rev. ¶¶ 10-11). Turning back to the IHO's decision, because the IHO did not address the parents' arguments as articulated in the closing brief or otherwise indicated the merit of such arguments (see generally IHO Decision), it is not unreasonable for the parents to now argue

⁴² While the hearing record includes sufficient evidence of progress, it would be preferable to also have access to the student's reports cards and IEP annual goal progress reports. In its memorandum of law, the district cites to an annual goal progress report; however, while that report was marked for identification during the impartial hearing, it was never entered into evidence (Dist. Mem. of Law at p. 10; see Tr. p. 33).

on appeal that the IHO ignored or failed to consider the "objective assessments," which according to the parents, demonstrated that the student was "regressing in all academic areas."

However, while the parents continue to press this argument on appeal and urge the SRO to interpret a comparison of the student's performance on selected subtest scores on the WIAT-III in 2012 and 2014, as well as the CELF-4 and CELF-5, as evidence of regression or lack of progress in the ICT placement, the evidence in the hearing record does not support this interpretation.⁴³ Significantly, the parents do not point to any evidence in the hearing record to support the argument that the student's test scores reflect regression or a lack of progress (see Req. for Rev. ¶¶ 7-11). Moreover, when the district witness testified about the student's performance on the WIAT-III in 2014 that she administered to the student,⁴⁴ the parents' advocate—who conducted the cross-examination of the witness with the parents' attorney present—did not question the witness at all about the purported decline in subtest scores or what the purported decline in subtest scores meant with respect to the student's progress (see Tr. pp. 660-61, 724, 740-43, 801-02, 819-906, 938-39, 983-1020; see also Dist. Ex. 28 at pp. 1-2). Rather than offering evidence to support their interpretation of the student's scores, the parents ask the SRO to reach their preferred conclusion simply because the student's testing scores on the WIAT-III and the CELF-4 or CELF-5 declined

⁴³ The parent asserts that the percentile scores on specific subtests of the WIAT-III decreased from 2012 to 2014; the percentile ranks, which the parents cite, are as follows with the additional information of the standard scores in parentheses: listening comprehension 61st (104) to 14th (84); math fluency—addition 18th (86) to 1st (64); math fluency—subtraction 30th (92) to 7th (78) (the parents incorrectly cite the 2014 scores as the 1st percentile); oral reading fluency 8th (79) to 1st (64); sentence composition 21st (88) to 2nd (69) (compare Parent Ex. B at p. 3, with Dist. Ex. 28 at pp. 1-2). Similarly, with respect to the CELF-4 (administered in 2012) and CELF-5 (administered in 2015), the percentile ranks (standard or scaled scores) are as follows: core language 42nd (97) to 14th (84); formulated sentences 84th (13) to 9th (6); language content 55th (102) to 32nd (93) (compare Parent Ex. B at p. 3, with Dist. Ex. 27 at p. 5). Other subtests of these administrations—which the parents do not cite—did not reflect a decrease in scores or ranks (compare Parent Ex. B at p. 3, with Dist. Ex. 28 at pp. 1-2, and Dist. Ex. 27 at p. 5). As discussed further above, the hearing record does not include an explanation of the scores, including any discussion of how to compare percentile ranks versus standard/scaled scores or raw scores, or, in the case of the CELF, different versions of the test.

⁴⁴ Significantly, the special education teacher testified that, at the February 2015 CSE, she discussed the student's testing results in reading that she obtained from administering the WIAT-III to the student (see Tr. pp. 740-41; see generally Dist. Ex. 28). According to her testimony, she reported to the CSE that the student's reading skills fell within the "below average range" (Tr. p. 740). When asked to explain the student's performance on the WIAT-III in light of the progress she had reported about the student's reading to the February 2015 CSE, the special education teacher testified that, "even though his classroom performance he was on the upswing and making progress, the scores [were] lower than what you would expect," but she "wasn't surprised" by his scores (Tr. p. 741). She explained that, for example, the "reading comprehension subtest where [the student] scored in the low range, that subtest . . . required [the student] to read a third grade passage that didn't have any pictures to complement it, and at the time [the student] was reading below a third grade level, so [she] wasn't surprised that his scores were in the low range" (Tr. pp. 741-42). Rather, the special education teacher testified that she was "pleased" because the student "was able to get enough, glean enough information from that passage to respond to two WH questions regarding the passage" (Tr. p. 742). The district special education teacher had to administer the WIAT-III to the student on a "third grade level" because that was "what the protocol" required—"you test[ed] for the level he [was] in" (*id.*). However, the special education teacher also tested the student on a second grade level with the WIAT-III, admittedly testing "beyond the limits," to determine "what his capabilities were" (Tr. pp. 742-73). Giving the student a second grade reading comprehension passage, the special education teacher testified that the student could "decode, comprehend, [and] participate in a meaningful conversation about what he read," which indicated to her that the "passage on a third grade level wasn't where he was reading" (Tr. p. 742).

between administrations of these particular assessments subtests over a period of time (*id.*). Without evidence speaking directly in support of the parents' interpretation of the subtest scores, these testing results, at best, reflect the student's performance on a given day, and most likely, without the benefits of testing accommodations afforded to him under his IEP; therefore, the results, standing alone, cannot provide as complete a picture of the student's abilities or progress over a given school year with the supports and services provided to him in the ICT class. Absent such evidence, the district's evidence reflecting the student's progress during the 2014-15 school year remains un rebutted and the parents' arguments must be dismissed.

Next, the parents argue that the IHO ignored the results of the KeyMath 3 Diagnostic Assessment (KeyMath 3) administered to the student in September 2015 at Mary McDowell, as well as the results of the State ELA assessment given to the student in third grade during the 2014-15 school year. The district responds, noting that the IHO described the KeyMath 3 and could only compare the student's testing results in one area—addition and subtraction—as it was the only subtest repeated between the two administrations of the test. With respect to the State ELA, the district contends that it offers little probative value in an IDEA proceeding.

Aside from one exhibit entered into the hearing record as documentary evidence—the results of the administration of the KeyMath 3 to the student—and a brief explanation about the assessment by the parents' witness from Mary McDowell, the hearing record provides little other information on the KeyMath 3. However, before even reviewing the results of this assessment, the parents' argument fails since the administration of the KeyMath 3 to the student did not occur until September 22, 2015, after the IEPs at issue for the 2015-16 school year (compare Parent Ex. QQ at p. 1, with Dist. Ex. 6). Even if the document reflected that the student had not made progress in the district program during the 2014-15 school year, the September 2015 CSE could not have had access to this information and such after-the-fact evidence may not be used to retrospectively evaluate the sufficiency of the program offered by the district (R.E., 694 F.3d at 186-88). In any event, the results of the September 2015 administration of the KeyMath 3 appear to correlate to where the district said the student ended up with respect to his math levels at the end of 2014-15 school year, which as discussed above, reflected progress compared to the beginning of the school year (compare Tr. pp. 1068-69 and Parent Ex. QQ at pp. 1-2, with Tr. pp. 928-29 [according to the district special education teacher, the student's math abilities progress from an "[e]nd of first grade" level at the beginning of the 2014-15 school year to an "end of second grade" level at the end of the 2014-15 school]).⁴⁵ The fact that the results were "below average" does not, in and of itself, reflect that the student did not make meaningful progress during the 2014-15 school year.

In light of the foregoing and given that the parents do not articulate anything more than a conclusory assertion that the IHO ignored the results of the KeyMath 3, it is unclear how the

⁴⁵ At the impartial hearing, the Mary McDowell witness—who held a master's degree in special education and was employed at Mary McDowell as the CSE coordinator—testified that Mary McDowell administered the KeyMath 3 to all incoming students in order to group the students for mathematics instruction (Tr. pp. 1038-39, 1067-68, 1089-90; see generally Parent Ex. QQ). The witness testified that, at the time of the September 2015 administration to this student, "most of the results [were] placing him as a second grade math learner" and demonstrated that the student was "below average for grade level" in the subtests assessed (Tr. pp. 1068-69; Parent Ex. QQ at pp. 1-2).

parents believe that the student's scores on this particular test—administered for the purpose of placing the student in a mathematics group for instruction at Mary McDowell—supports a finding that the student did not make progress in a general education class with ICT services. Without more, the parents' contention must be dismissed.

For the same reasons, the parents' assertion that the IHO ignored the results of the State ELA assessment must also be dismissed.⁴⁶ Initially, it is unclear from the hearing record when the State ELA assessment results were available and whether the September 2015 CSE had access to the scores. In addition, according to the ELA "Score Report 2014-15" (ELA report), the ELA examination was "one way for parents and educators to understand student performance," noting further, however, that "scores from these tests d[id] not tell the whole story about what a child kn[ew] and c[ould] do" (Parent Ex. JJ at p. 1). At the impartial hearing when referred to a copy of the student's ELA report, the district special education teacher testified that, although she taught the student during third grade (2014-15 school year), she never received the student's ELA report or his scores on the ELA examination (*see* Tr. pp. 850-54; *see generally* Parent Ex. JJ). She further testified that, even if she received the student's ELA report, the student's scores would not have changed how she delivered instruction to the student or affected the annual goals she wrote for him for either the 2014-15 school year or the following school year (*see* Tr. pp. 850-51, 978-79). The district special education teacher further testified that, "[a]s a teacher, [she taught] to the student and their needs" and she would "never teach to a test's needs" (Tr. p. 979). She further explained that the State ELA examination was given to the student as a "third grade test" and, as already established, the student "was not learning at a third grade level at that time so that test—those scores would be invalid in [her] book" (*id.*).

The Second Circuit has held that, in determining whether a student made progress, the SRO must examine the record for objective evidence (*E.S. v. Katonah-Lewisboro Sch. Dist.*, 487 Fed. App'x 619, 622 [2d Cir. July 6, 2012]). However, even assuming that the evidence in the hearing record explained that the standardized scores and assessment results cited by the parents reflected a lack of progress by the student during the 2014-15 school year, the hearing record as a whole (including both objective and subjective descriptors of the student's progress, as summarized above) reveals that the student demonstrated meaningful progress during the 2014-15 school year (*see E.S.*, 487 Fed. App'x at 622 [finding evidence of progress "despite . . . low test scores"]; *C.S. v. Yorktown Cent. Sch. Dist.*, 2018 WL 1627262, at *19-*24 [S.D.N.Y. Mar. 30, 2018] [finding various sources of evidence about a student's progress (including testimony of the student's teacher, evidence of progress on annual goals, and other measures) sufficient despite standardized test scores]; *M.H. v Pelham Union Free Sch. Dist.*, 168 F. Supp. 3d 667, 676-77 [S.D.N.Y. 2016] [finding based on the record "as a whole" that the student made progress despite evidence of declining test scores]; *H.W. v New York State Educ. Dep't*, 2015 WL 1509509, at *17 [E.D.N.Y. Mar. 31, 2015] [upholding the SRO's determination that, "even assuming that the [standardized] tests showed minimal progress," testimony from teachers and evidence of progress towards achieving annual goals showed that the student made meaningful progress]).

⁴⁶ The 2014-15 New York State ELA testing indicated that the student was performing at level one with a percentile rank of one, demonstrating limited gain toward proficiency of the expected common core standards for the third grade (Parent Ex. JJ at p. 1).

Having determined that the hearing record fails to contain evidence to support the parents' arguments—and that the parents do not otherwise challenge the IHO's findings related to the progress the student made during the 2014-15 school year—an independent review of the hearing record supports the IHO's findings with regard to the progress the student made during the 2014-15 school year. Accordingly, based upon the foregoing and consistent with the IHO's determination, the hearing record contains sufficient evidence upon which to conclude that the student made progress in reading, writing, and mathematics during the 2014-15 school year in a general education class placement with ICT services, along with small group reading instruction and related services.

With the foregoing in mind, the next issue to address is whether the educational program offered to the student in the June 2015 and September 2015 IEPs—which continued the special education programs and related services the student received during the 2014-15 school year—was reasonably calculated to enable the student to receive educational benefits.

"Although past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011], citing Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153 [10th Cir. 2008]; see also F.L. v. Bd. of Educ. of Great Neck U.F.S.D., 274 F Supp 3d 94, [E.D.N.Y. 2017] [finding a substantially similar program appropriate in light of the student's progress in the preceding school year]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 413-15 [S.D.N.Y. 2017] [examining carryover of goals and services from a student's IEP from a previous school year and noting that, "[w]here a student's needs and objectives remain substantially the same, '[i]t is especially sensible that [an IEP] would reflect continuity with [a student's] needs and objectives as of [previous years.]'", quoting L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *11 [S.D.N.Y. Sept. 27, 2016]; D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011] [determining that evidence of likely progress was "the fact that the [challenged IEP] was similar to a prior IEP that generated some progress"], aff'd, 506 Fed. Appx. 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011] [finding that when the student made some progress under a previous IEP, it was not unreasonable for the CSE to propose an IEP "virtually identical to" the previous one]; M.C., 2008 WL 4449338, at *16 [determining that when the IEP at issue mirrored a past IEP under which the student "demonstrated significant progress," the IEP at issue was reasonably calculated to afford the student educational benefit]; see generally Application of a Student with a Disability, Appeal No. 12-064; Application of the Bd. of Educ., Appeal No. 11-128).⁴⁷

Here, the gravamen of the parents' complaints focused precisely on the principle described above: namely, that the district recommended a program for the 2015-16 school year that was similar to the program the student attended in the 2014-15 school year. A comparison of the

⁴⁷ At least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

student's educational programs for the 2014-15 school year and the 2015-16 school year demonstrates that the programs were virtually identical, but for the June 2015 and September 2015 IEPs noting the additional support of small group instruction for both writing and mathematics—which the CSE added to address the parents' ongoing concerns with the student's rate of progress in these areas (compare Dist. Ex. 12 at pp. 1, 5-6, 12-15, and Dist. Ex. 6 at pp. 1, 5-6, 12-15, with Parent Ex. C at pp. 1, 6-7, 10-13, and Parent Ex. D at pp. 1, 6-7, 11-14, and Dist. Ex. 20 at pp. 1, 7-9, 11-13).⁴⁸ In light of the progress detailed above and the absence of evidence to support the parents' contention that the student did not make progress in the 2014-15 school year, there is no reason to disturb the IHO's conclusion that the educational program recommended by the district for the 2015-16 school year offered the student a FAPE.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2014-15 and 2015-16 school years, the necessary inquiry is at an end and there is no need to reach the district's cross-appeal regarding the issue of whether Mary McDowell was an appropriate unilateral placement for the student (Burlington, 471 U.S. at 370) or that portion of the parents' appeal regarding whether equitable considerations supports an award of tuition reimbursement (see M.C. v. Voluntown Bd of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
 June 8, 2018

SARAH L. HARRINGTON
STATE REVIEW OFFICER

⁴⁸ The CSE, in February 2015, discontinued the student's small group OT services because the student no longer had any physical needs to be addressed through OT; the February 2015 CSE did, however, continue to recommend OT consultation services for the 2015-16 school year (compare Dist. Ex. 20 at pp. 8-9, 11-12, with Parent Ex. C at pp. 1, 7, 12, and Parent Ex. D at pp. 1, 11, 13).