



The University of the State of New York
The State Education Department
State Review Officer
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No. 22-090

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 New York City Department of Education

Appearances:

Law Offices of Regina Skyer and Assoc., LLP, attorneys for petitioners, by Jaime Chlupsa, Esq. and Linda A. Goldman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 their son's tuition costs at the Windward School (Windward) for the 2019-20 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student attended preschool at age three and reportedly was "behind his peers with regard to his ability to identify letters, numbers, shapes, and colors" (Parent Ex. J at p. 1). For the 2015-16 school year the student attended a prekindergarten program at which time his "teachers noticed problems with attention, hyperactivity, oppositional behavior, articulation, and fine motor skills" (Parent Ex. J at p. 1; Dist. Ex. 6 at p. 2). During that school year the parents requested a CSE evaluation; subsequently the CSE determined that the student was eligible for special education as a student with a speech or language impairment and recommended that he receive speech-language therapy, counseling, and occupational therapy (OT) in a general education placement (Parent Ex. J at p. 1).

During the 2016-17 school year (kindergarten) the student attended a district elementary school where he received the recommended related services and reportedly "struggled with regard to reading and writing, and he became work and school avoidant" (Tr. pp. 226-27; Parent Ex. J at p. 1). The parents reported that they first became concerned about the student's behavior at age five and pursued privately obtained counseling services for the student (Dist. Ex. 6 at p. 2).

For the 2017-18 school year (first grade), the student continued to receive related services and began receiving specialized reading instruction pursuant to an IEP (Tr. pp. 238-40; Dist. Exs. 3 at p. 1; 6 at p. 2). In February 2018, the parents shared their concerns about the student's academic progress with district staff and inquired when "additional testing" they had agreed to in January 2018 would occur (Parent Ex. L at p. 1). The parents requested assessments of the student's visual perceptual skills and fluid reasoning, and also "testing for dyslexia" (id.).

In March 2018, the student's occupational therapist reported to the parents the results of recent assessments of the student's visual motor, visual perception, and motor coordination skills, which indicated that his abilities in all three areas were in the average range (Parent Ex. M at p. 1). Additionally, the occupational therapist informed the parents that the student's oculomotor abilities, including tracking, saccades (movement of eyes between two points), convergence, and divergence skills were adequate (id.). Further, the student was able to write letters legibly in isolation and copy sentences "somewhat legibly, but his placement [wa]s not consistent" (id.). At that time, the occupational therapist reported that the student's "quality of work and participation in OT [wa]s inconsistent" and that recently his "behavior and attention ha[d] caused more of an interference" (id.). Specifically, the student needed frequent redirection, encouragement to attend and put in effort, and he often stated that tasks were easy for him when they were difficult (id.).

On April 21, 2018, the district conducted a psychoeducational evaluation of the student at the request of his parents and school staff due to academic delays (Parent Ex. J at p. 1; Dist. Exs. 3 at p. 1; 6 at p. 2). Results of cognitive assessments indicated that the student's overall abilities fell within the low average range, with weaknesses in processing speed and working memory noted (Dist. Ex. 3 at p. 5). At that time, the student's early reading, reading comprehension, and decoding skills were in the average range, although the evaluator noted that the student had "some difficulty reading words" and spelling "was a weakness" (id.). Regarding the student's social/emotional functioning, the evaluator reported that the student "presented as a respectful student who was able to follow all directions" and that his IEP noted that he "may become frustrated when completing academic demands" (id.).

Over two dates in May and June 2018, the student participated in a private research study conducted by the Department of Child and Adolescent Psychiatry at NYU Langone Health which consisted of "tests selected based upon [the health center's] study goals" (Dist. Ex. 6 at p. 1).

During summer 2018, the parents "hired an Orton-Gillingham trained tutor" who worked with the student twice weekly (Tr. p. 243).

The student received integrated co-teaching (ICT) services together with counseling, OT, and speech-language therapy during the 2018-19 school year (second grade) (Parent Ex. J at p. 2).¹

Over four dates in January, February, and March 2019 clinicians conducted a private neuropsychological evaluation of the student at the parents' request due to "ongoing academic struggles that [were] resulting in increased emotional and behavioral difficulties" (Parent Ex. J at pp. 1, 9).

On April 6, 2019, the district conducted an assistive technology evaluation of the student (Dist. Ex. 5).

On May 5, 2019, the parents signed an enrollment contract with Windward for the student's attendance during the 2019-20 school year (Parent Ex. G).²

On June 11, 2019, a CSE convened for the student's annual review and developed an IEP with a projected implementation date of June 21, 2019 (Dist. Ex. 1). Finding the student was eligible for special education as a student with a learning disability, the CSE recommended that the student receive ICT services in math, English language arts (ELA) and social studies in a general education classroom (Parent Ex. B at p. 2; Dist. Ex. 1 at p. 10).³ Related service recommendations were for one 30-minute session per week of counseling in a group of three, two 30-minute sessions per week of OT in a group of two, and two 30-minute sessions per week of speech-language therapy in a group of three (Dist. Ex. 1 at p. 11). The CSE recommended that the student use assistive technology at home and school consisting of a "touchscreen tablet with specialized apps including word processing and word prediction" and also recommended various testing accommodations (*id.* at pp. 11, 12). According to the IEP, the parents disagreed with the recommendation and "felt that a small specialized classroom was what would be best to support [the student]" (*id.* at p. 3). In a prior written notice, dated June 24, 2019, the district notified the parents of the June 2019 CSE's recommendations (Dist. Ex. 4).

In an email dated June 18, 2019, the parents provided the district school psychologist with the June 2018 research study evaluation report and the phone number for the neuropsychologist who conducted the March 2019 neuropsychological evaluation (Parent Ex. C; see Parent Ex. J at p. 12). The parents reiterated their disagreement with the school psychologist's characterization that the student was "thriving in his current setting" and opined that he needed a "small, structured special education class within a small specialized school" (*id.*).

By letter dated August 21, 2019, the parents informed the district that they rejected the June 2019 IEP and intended to place the student at Windward for the 2019-20 school year and seek

¹ The parent indicated that the specialized reading instruction the student had received during the 2017-18 school year was discontinued (Tr. pp. 238-40).

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

³ The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

funding for that unilateral placement from the district (Parent Ex. B). The student attended Windward during the 2019-20 school year (Parent Exs. D; H; I at pp. 2-6).

A. Due Process Complaint Notice

In a due process complaint notice dated October 13, 2020, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2019-20 school year (Parent Ex. A). Initially, the parents asserted that they were denied a meaningful opportunity to participate in the development of the student's IEP, that the CSE refused to consider a more supportive program, and that the June 2019 IEP was predetermined prior to the start of the meeting (*id.* at pp. 2-3). The parents alleged that the CSE failed to consider the whole continuum of possible educational placements, such as a special class (*id.* at p. 3).

The parents further asserted that the student's academic needs could not be met in a general education class with the support of ICT services (Parent Ex. A at p. 3). According to the parents "a general education classroom [wa]s too academically overwhelming for [the student] because it c[ould] [not] provide him with the necessary individualized attention and support he require[d] in order to learn" (*id.*). The parents also asserted that the student failed to make progress in the previous school year with the support of ICT services, counseling, OT, and speech-language therapy (*id.* at p. 2). The parents alleged that the student was exhibiting increased emotional and behavioral difficulties in school and in the home and that the June 2019 IEP recommendation for one session of group counseling per week was insufficient to address his social/emotional needs (*id.*).

The parents contended that, on June 18, 2019, the parents emailed a district school psychologist about their disagreement with the result of the June 2019 CSE meeting and noted that they provided the district with a "recent neuropsychological evaluation" that recommended that the student be placed in a "specialized school setting" (Parent Ex. A at p. 3). The parents assert that the district never responded to this email to discuss the findings of the evaluation, rather the parents were provided with a copy of the June 2019 IEP "which did not include or address the updated evaluative information" (*id.*). Therefore, the parents contended the district had failed to conduct all necessary evaluations, hold a review meeting, and make a placement recommendation within the proscribed time period after a parent referral of a student for evaluation (*id.*). Relatedly, the parents asserted that the district had failed to provide prior written notice indicating that it had received the "updated evaluation" or that it had reviewed the parents' request and refused to initiate or change the identification, evaluation, or educational placement of the student (*id.* at pp. 3-4).

Lastly, the parents asserted that the unilateral placement of the student at Windward was an appropriate unilateral placement for the student and that there were no equitable considerations barring reimbursement (Parent Ex. A at p. 4). The parents requested an order for tuition reimbursement and transportation for the student's unilateral placement at Windward for the 2019-20 school year (*id.*).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 12, 2021, and concluded on April 28, 2022, after five days of proceedings (Tr. pp. 1-268).⁴

In a decision, dated June 16, 2022, the IHO determined that the district offered the student a FAPE for the 2019-20 school year and denied the parents' request for tuition reimbursement and transportation (IHO Decision at pp. 14-30, 35). The IHO addressed each of the parents' claims, making findings regarding the participation of the parents, social/emotional support, annual goals, consideration of evaluative material, provision of prior written notice, the recommended program with ICT services, the student's progress in reading, writing, and math, the student's behaviors, the student's need for a structured environment, and management needs (*id.* at pp. 14-30).

With respect to parent participation and CSE predetermination the IHO found that the CSE did not predetermine the content of the June 2019 IEP, rather the CSE considered the parents' concerns with the recommendation for ICT services and their interest in a special class or placement in a nonpublic school (*id.* at pp. 14-15).

With respect to the parents' claims regarding the sufficiency and consideration of the evaluative information at the June 2019 CSE meeting, the IHO found that there was some confusion in the hearing record about what evaluations the CSE may have had before it; however, the IHO determined that the CSE possessed and discussed the results of the 2019 private neuropsychological evaluation offered by the parents and the CSE made choices based on the available information about what to include in the IEP with respect to the student's needs and present levels of educational performance (IHO Decision at pp. 21-25). The IHO determined that the fact that the IEP did not include specific data from the private neuropsychological evaluation did not mean that the CSE did not consider the results of the evaluation (*id.* at p. 23). The IHO determined that the June 2019 IEP contained diagnoses and recommendations from both the 2018 private research study and the 2019 private neuropsychological evaluation and noted that the educational placement recommendations within those evaluations differed, in that the 2019 private neuropsychological evaluation recommended a special class placement and the 2018 private research study recommended continuing the student's placement in a general education setting (*id.*). The IHO surmised that she found no reason to disagree with the conclusions the CSE drew regarding the student's needs and levels of performance based on its review of the evaluative information and testing including teacher and provider input discussed at the June 2019 CSE meeting (*id.* at p. 25).

The IHO next determined that the CSE was not required to reconvene as the parents asserted because it had already considered the contents of the 2019 private neuropsychological evaluation among other available evaluative information (IHO Decision at p. 25). Relatedly, the IHO determined that there was not a need for the CSE to issue a prior written notice indicating it had received the parents' "updated evaluation" or that it had reviewed the parents' request and refused to initiate or change the identification, evaluation, or educational placement of the student

⁴ At the start of the hearing, the parties indicated that the original due process complaint notice had been withdrawn and refiled approximately one year prior to the start of the hearing (Tr. pp. 3-4).

because the evaluation in question was not "in fact new" but was an older evaluation from 2018 not requiring issuance of a prior written notice (id.).

The IHO next found that the CSE appropriately addressed the student's social/emotional needs (IHO Decision at pp. 16-19). With respect to the parents' claim that the CSE should have conducted an FBA, the IHO determined that an FBA was not required because the student's teachers testified that they were aware of the triggers for the student's interfering behaviors and were able to address them and keep the student engaged in classroom tasks and activities at the time of the CSE meeting (id. at pp. 17-18). The IHO noted that while the June 2018 research study evaluators offered the student a diagnosis of oppositional defiant disorder (ODD) and recommended that an FBA be conducted, the more recent neuropsychological evaluation report did not include such a diagnosis and did not recommend an FBA (id. at p. 19). Additionally, the IHO found that the IEP addressed the student's social and emotional needs with the related service of counseling and appropriate annual goals (id. at pp. 18-19).

The IHO also determined that the annual goals and management needs included in the June 2019 IEP were appropriate and met the student's needs (IHO Decision at pp. 12, 20-21, 29-30). Specific to goals, the IHO disagreed with the parents' claim that the goal for 200 sight words was already met, finding that the sight word goal would be assessed at the next grade level in the 2019-20 school year, and found that there were sufficient academic and counseling goals. (id. at pp. 20-21, 30). With respect to management needs, the IHO noted that preferential seating, directions chunked into smaller steps, reminders, math manipulatives, visual supports, timers, countdowns, checklists, routines as well as other classroom recommendations for the student's learning styles within the IEP were sufficient to meet the student's needs (id. at p. 29).

The IHO also addressed the claim that the student's educational placement in a classroom with ICT services was not appropriate and found that because the student was doing well in a class with ICT services, it was reasonable to continue the same recommendation (IHO Decision at pp. 25-26). Having found that the ICT recommendation was appropriate, the IHO reviewed the evidence in the hearing record regarding the student's progress in reading, writing, and math and the student's behaviors, which the IHO observed as showing the student was making academic and social/emotional progress within a class with ICT services during the 2018-19 school year (id. at pp. 25-28).

Turning to the unilateral placement at Windward, the IHO determined that the school would not be a "good fit" for the student and would not be an appropriate unilateral placement (IHO Decision at pp. 30-34). In sum, the IHO found that although Windward's focus on multisensory reading instruction would be beneficial for the student, there was insufficient evidence that the student made progress at Windward, and insufficient evidence that Windward addressed the student's other educational and social/emotional needs through specialized instruction or related services (id.).

The IHO held that the district offered the student a FAPE during the 2019-20 school year and denied the parents' request for tuition reimbursement (IHO Decision at p. 35).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2019-20 school year and erred in finding that Windward was not an appropriate unilateral placement for the student.

First, with respect to arguments that the CSE did not follow appropriate procedures in developing the 2019-20 IEP, the parents contend that they were denied meaningful participation in the development of the June 2019 IEP because they were denied an opportunity to document their request for a more intensive program by the district's "failure to distribute" the 2019 private neuropsychological evaluation report to all CSE members. The parents next contend that the IHO erred in finding that the June 2018 CSE had sufficient evaluative information and appropriately considered it because the district did not clearly prove what the CSE considered; according to the parents, the evidence shows that not all CSE members had the 2019 private neuropsychological evaluation prior to the meeting and the IHO should not have "combed through the evidence" and speculated as to what the CSE considered and incorporated into the June 2019 IEP. The parents also assert that if the entire CSE did not have access to the 2019 private neuropsychological evaluation report prior to the June 2019 CSE meeting, the CSE should have reconvened to consider the evaluation and its recommendations.

Turing to the parents' arguments concerning the content of the June 2019 IEP, the parents first contend that the IHO erred in finding that the IEP adequately addressed the student's social, emotional, and behavior needs because the student required individual counseling, an FBA and a behavior intervention plan (BIP), as well as "more tailored" counseling goals. The parents also contend that the IHO erred in finding that the IEP goals and management needs were appropriate because the June 2019 IEP should have included small group instruction as a management need and should have included annual goals for reading fluency, spelling, verbal speech-language therapy, and OT. The parents also assert that the IHO erred in finding that the CSE's recommendation for the student's educational placement in a class with ICT services was appropriate because the recommendation was not for a special class, which the student required, and was only part-time in ELA, social studies, and math. The parents assert that the student required more support in every class during the school day.

Lastly, the parents assert that the IHO erred in finding that Windward was not an appropriate unilateral placement for the student and request tuition reimbursement and transportation reimbursement for the student's attendance at Windward during the 2019-20 school year.

In an answer, the district argues that the IHO correctly held that the district offered the student a FAPE for the 2019-20 school year and asks that the parents' appeal be dismissed. With respect to CSE process, the district asserts that the IHO correctly determined that the CSE had and considered sufficient evaluative information in developing the 2019-20 IEP. The district admits that the hearing record is unclear as to whether the "IEP team had the full results" of the private March 2019 neuropsychological evaluation at the time of the June 2019 CSE meeting. Nonetheless, the district contends that the CSE considered sufficient evaluative information and "incorporated ... at least test scores from the March 2019 neuropsychological," an April 23, 2019 psychoeducational evaluation, an AT evaluation, and "other evaluative materials detailing [the

student's] academic performance during the [20]18-19 [school year] that were not captured by the snapshot impression" obtained by the 2019 private neuropsychological evaluation.

The district also asserts that the IHO correctly held that no FBA of the student was required and that the June 2019 IEP met the student's social, emotional, and behavior needs because testimony supports finding that the student's confidence, schoolwork, and peer relations had improved during the 2018-19 school year. The district contends that although the student still had social-emotional needs, and was distractible, self-conscious about his academic abilities, and occasionally avoided non-preferred activities, the recommended weekly counseling and the annual goal to improve self-esteem would have addressed this along with his teacher's classroom strategies. The district asserts that the student did not currently exhibit behaviors that warranted an FBA.

Concerning the educational placement recommended in the June 2019 IEP, the district asserts that the IHO correctly held that the placement with ICT services was appropriate because the CSE members knew the student, they reported that student was doing very well with ICT services during the 2018-19 school year, the student demonstrated progress, and ICT services remained the right placement and was the student's least restrictive environment (LRE). The district also contends that the IHO correctly determined that the June 2019 IEP goals and management needs were appropriate because the hearing record supports a finding that the goals were appropriate and the IHO considered each goal and its appropriateness in detail.⁵

Lastly, the district contends that the IHO correctly determined that Windward was not an appropriate unilateral placement for the student for the reasons cited by the IHO, and requests that the appeal be dismissed and the IHO's decision be upheld.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in

⁵ The district asserts that the parents have waived an argument about management needs by failing to assert what is missing from the IEP; however, the parents have asserted that small group instruction should have been included in the IEP management needs section, so this claim will be addressed below (Req. for Rev. at p. 7; Answer ¶ 13).

an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's

needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁶

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

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

VI. Discussion

The parents allege that the IHO's decision was "replete with speculative findings," citing instances in which the IHO found that the CSE "may" have employed certain reasoning during the development of the IEP, rather than relying on the evidence in the hearing record in rendering the decision (Req. for Rev. ¶7, at p. 9; see IHO Decision at pp. 23-24). The parents are correct that in several instances the IHO described several possible rationales that the CSE may have relied upon in its decision making when deciding which aspects of the evaluative information to give greater weight to, but that the hearing record does not contain written evidence confirming such back and forth reasoning in the CSE's deliberations.⁷ Notwithstanding the statements in the IHO's decision,

⁶ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

⁷ It appears to me that the IHO added some brief rational basis commentary to her other findings to demonstrate that the CSE had substantial evidence from which it could have drawn its conclusions, namely that relevant evidence was present that a reasonable mind might accept as adequate to support the CSE's conclusions. But her decision was not "replete" with such findings as the parents allege. I note that such a standard does not even need to reflect a preponderance of the evidence as long as the public agency's conclusions are reasonable. At the same time, it's not unheard of for reviewing courts to employ rational basis language from time to time in an IDEA case (see e.g., Pawling Cent. Sch. Dist. v. New York State Educ. Dep't, 3 A.D.3d 821, 825 [3rd Dep't 2004]; Bd. of Educ. of Baldwin Union Free Sch. Dist. v. Sobol, 160 Misc. 2d 539, 545 [Sup. Ct. Nass. Cty 1994]), but the federal courts much more frequently cite the standards described above, namely the procedural standards set forth under IDEA and state regulations and the substantive standards set forth in Rowley and its progeny in the Second Circuit. Those are the standards that I employ in my review, and I will not overturn the IHO's decision merely because she offered her own thoughts regarding the CSE's possible avenues of logic in addition to her other

I have conducted this review based upon the documentary and testimonial evidence present in the hearing record in rendering my determinations in this decision.

A. CSE Process

There are three procedural violations argued on appeal, the parents' claim that they were denied meaningful participation in the development of the student's IEP, their claim that the CSE failed to obtain and consider sufficient evaluative information, and their claim that the CSE should have reconvened to consider additional evaluative information. I will address each argument in turn.

1. Parent Participation

In this appeal, the parents assert that they were denied a meaningful opportunity to participate in the development of the student's June 2019 IEP because of the district's alleged "failure to distribute" the 2019 private neuropsychological evaluation report to all of the CSE members, depriving the parents of an opportunity to fully document their request for a more intensive program, and further that the district's failure to show what the CSE did consider also interfered with their participation (see Req. for Rev. at p. 9).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that "[a] professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to

findings that were based upon the evidentiary record.

participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

Initially, I note that the parents' assertion that the 2019 private neuropsychological evaluation report was not fully distributed to all CSE members by, presumably, the district is far better considered as a question of whether the CSE obtained and considered sufficient evaluative information than it is as a meaningful parental participation claim (see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 578-82 [S.D.N.Y. 2013] [holding that the IDEA "does not require that the team review every single item of data available" or that all evaluative information considered be physically present at the CSE meeting]). There is no question that the parents had access to the document or whether they could have used it because they are the ones who obtained it in the first place. Instead, the question of a document's physical distribution during a CSE meeting has been held to be far less important than whether it was considered by the CSE, and that topic will be addressed further in the section below.

But before leaving the topic of parental participation, a review of the hearing record shows there is ample evidence to support the IHO's findings with respect to the alleged lack of parental participation and predetermination.

The student's mother testified that she and the student's father both attended the June 2019 CSE meeting which lasted between one and two hours, and the CSE discussed the student's social/emotional needs—including the mother's opinion that the student's self-esteem was low as a result of his concerns about academic abilities (Tr. pp. 242-43, 244-45). The student's mother related that she discussed her views with the CSE and her concerns that the student required full-time special education in a small, homogeneous classroom in a specialized school for students with language-based disorders and who were of above-average intelligence (Tr. pp. 243-44). The student's mother testified that the 2019 private neuropsychological evaluation was discussed at the CSE meeting, including some disagreement with district CSE members about some of the test results as well as a "disparaging" and "dismissive" take on the evaluation from a district CSE member (Tr. p. 248). The mother further testified that she was able to express her concerns with the CSE's recommendations at the June 2019 CSE meeting, noting that the parents had "very strong opinions" about the recommended educational placement in a classroom with ICT services not being appropriate, that the student was "not thriving," that the student required a "small, structured special ed class" throughout the school day, and that he "needed to be around kids [who] were like him" (Tr. pp. 249). Furthermore, the parent's concerns on these points is reflected on the June 2019 IEP, demonstrating that the rest of the CSE was listening to the parent's input (Dist. Ex. 1 at pp. 3, 14). Additionally, the IEP discussed the other educational placement options considered by the June 2019 CSE, which specifically included consideration of placing the student in an "NYSED-Approved Non Public School - Day" which aligned with parents' concern that the student required "a more restrictive setting" in a "specialized school" (id. at. pp. 14-15), albeit the CSE ultimately did not recommend that option.

In light of the evidence above, I find that the IHO was correct in finding that the CSE did not predetermine the content of the June 2019 IEP and the fact that the parents and district members of the CSE had differing opinions does not lead me to the conclusion that the district significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student.

2. Sufficiency and Consideration of Evaluative Information

On appeal the parents assert that the IHO erred in concluding that the June 2019 CSE had sufficient evaluative material and appropriately considered the March 2019 neuropsychological evaluation. Specifically, the parents argue that the CSE relied on teacher-based assessments in the IEP.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The evidence in the hearing record contains some inconsistency with respect to what evaluative information was before the June 2019 CSE. For example, the prior written notice regarding the June 2019 CSE meeting indicates that the IEP was based on the March 2019 neuropsychological evaluation, an April 23, 2019 psychoeducational evaluation, and a June 3, 2019 assistive technology evaluation (Dist. Ex. 4 at p. 1). The hearing record does not contain psychoeducational or assistive technology evaluation reports reflecting those dates (compare Dist. Ex. 4 at p. 1, with Parent Exs. A-N and Dist. Exs. 1-3, 5-11).⁸ However, the evaluation results section of the June 2019 IEP does not specifically refer to any of the above documents, rather, it reflects information from a May 31, 2019 Teachers College Running Record Assessment, a June

⁸ The school psychologist was unsure but "guess[ed]" that the April 23, 2019 psychoeducational evaluation report date on the June 2019 prior written notice was "probably a clerical error" (Tr. pp. 72-73).

10, 2019 Teachers College Sight Word Assessment Word List, the student's performance on assessments of various writing tasks spanning October 2018 to May 2019 according to the Teachers College Writing Continuum, and results of Units 1-8 post assessments for mathematics also spanning October 2018 through May 2019 (Dist. Ex. 1 at p. 1). Those records were not listed in the prior written notice, thus the prior written notice is, overall, an example of sloppy procedural practices on the part of the district, but I am not convinced that it leads to a denial of a FAPE.

In addition to the Teachers College reading and writing assessment and mathematics unit post assessment information included in the June 2019 IEP, according to the district school psychologist, "the parents also came in with their external evaluations" (Tr. p. 47; see Dist. Ex. 1). The parent testified that she provided the June 2018 research study evaluation report to the district "twice"; the first time "in part . . . just the portion that had to do with classroom accommodations" to the student's teachers, and the second time, "in its entirety" to the school psychologist after the June 2019 CSE meeting upon her request (Tr. p. 241; Parent Ex. C). The student's counselor testified that she saw the June 2018 research study evaluation report prior to the June 2019 CSE meeting (Tr. pp. 87-88, 108). Although uncertain when she received the June 2018 research study evaluation report and whether it was considered at the June 2019 CSE meeting or a prior CSE meeting, the school psychologist testified that some of the management needs included in the June 2019 IEP "probably" came from the "external evaluations" (Tr. pp. 68, 70, 73-76).

Regarding the March 2019 neuropsychological evaluation, the parent testified that she provided the report to the school psychologist although a timeframe for that submission was not indicated (see Tr. p. 242). However, handwritten notations on the June 2019 CSE meeting attendance sign-in sheet by the school psychologist and the parent's and special education teacher's testimony indicated that the March 2019 neuropsychological evaluation was discussed at the meeting (Tr. pp. 182, 194, 200, 248; Dist. Ex. 2; see Dist. Ex. 4 at p. 1).

As to what information from those evaluation reports was reflected in the June 2019 IEP, the school psychologist testified that the academic present levels of performance indicated that the student had received a diagnosis of ODD and ADHD, which referred to the June 2018 research study evaluation report (Tr. p. 49; compare Dist. Ex. 1 at p. 1, with Dist. Ex. 6 at p. 8).⁹ Review of the June 2018 research study evaluation report also showed that some recommendations were similar to management needs and testing accommodations included in the June 2019 IEP, such as preferential seating, directions chunked into smaller steps, checklists and routines, and extended time and breaks (compare Dist. Ex. 1 at pp. 4, 12, with Dist. Ex. 6 at p. 9).

The June 2019 IEP reflects the student's learning disability diagnosis and that he was "aware of his diagnosis of dyslexia," stemming from the March 2019 neuropsychological evaluation (compare Parent Ex. J at p. 10, with Dist. Ex. 1 at pp. 1, 4). Further, the school psychologist testified that "on one of the reports they wanted a smaller program," consistent with the recommendation from the March 2019 neuropsychological evaluation and concerns of the parents included in the June 2019 IEP (compare Tr. pp. 54-55, with Parent Ex. J at p. 10, and Dist. Ex. 1 at p. 3). Also consistent with the March 2019 neuropsychological evaluation recommendations, the June 2019 IEP included information that the student benefitted from

⁹ The June 2018 research study evaluation report was the only evaluative information in the hearing record to reflect the student's ODD diagnosis (compare Dist. Ex. 6 at p. 8, with Parent Ex. J, and Dist. Exs. 3; 5; 8-11).

preferential seating, reminders to stay on task, directions "chunked" into smaller steps, manipulatives/multisensory approach to learning, and testing accommodations, as well as recommendations for counseling and assistive technology (compare Parent Ex. J at pp. 10-12, with Dist. Ex. 1 at pp. 1, 4, 12). Additionally, the school psychologist testified that the IEP included information from an assistive technology evaluation, including the recommendation for a touch screen tablet and annual goals specific to the student's use of assistive technology (Tr. pp. 50-52; compare Dist. Ex. 1 at pp. 1-4, 8, 10, 11, with Dist. Ex. 8 at pp. 3, 4).

To the extent the parents argue on appeal that the teachers' assessments of the student were "not standardized" and "modified," the regular education teacher testified that "every student was given the same assessment" and that they did not change the questions for students with IEPs, rather, they changed how the assessment was given; for example, the student had only one question per page, "but the questions themselves stayed the same" (Tr. pp. 115, 126). Further, although the private neuropsychologist testified that the student's reading "percentile scores ha[d] gone down on apples-to-apples same test"—possibly referring to the Wechsler Individual Achievement Test-Third Edition (WIAT-III) word reading subtest, the only subtest administered consistently among the April 2018 psychoeducational, June 2018 research study, and March 2019 neuropsychological evaluations—his testimony does not account for the student's progress exhibited according to the Teachers College Running Record Assessment over the course of the 2018-19 school year or testimony from the student's special education teacher that the student's performance on standardized tests was inconsistent due to factors such as anxiety and being unfamiliar with the evaluator (Tr. p. 222; compare Parent Ex. J at pp. 2, 14-15, and Dist. Exs. 3 at pp. 1-2, 4-5; 6 at pp. 1, 12, with Tr. pp. 195-98 and Dist. Exs. 1 at p. 1; 9; 11).

Therefore, contrary to the parents' assertion on appeal, review of the evidence in the hearing record shows that the June 2019 CSE had available sufficient evaluative information from a variety of sources, including the March 2019 neuropsychological evaluation report, and does not reflect the parents' allegation that the CSE failed to consider that information or solely relied on "teacher-based assessments" (Dist. Ex. 1 at pp. 1-4, 8, 10, 11). Regarding the parents' claim that the IHO erred insofar as she should have found that the CSE failed to review and consider the private neuropsychological evaluation, a CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; see S.W. v. New York Dep't of Educ., 92 F. Supp. 3d 143, 158 [S.D.N.Y. 2015]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *17 [S.D.N.Y. Feb. 25, 2015]; Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Further, the June 2019 IEP contained results from Teachers College assessments and math unit post assessments that yielded levels corresponding to benchmarks and percent accuracies, contrary to the parents' claim that the district failed to sustain its burden that the CSE relied on "sufficient objective data" (Dist. Ex. 1 at p. 1). Rather, as discussed above, while the June 2019 IEP did not set forth the standardized test results from the parents' private evaluations, the evidence

shows that it was consistent with information and some recommendations from each of those evaluation reports (compare Dist. Ex. 1 at pp. 1, 4, 11, 12, with Parent Ex. J at pp. 10-11 and Dist. Ex. 6 at p. 9). As alluded to above, although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., Mr. P., 885 F.3d at 753; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]). This is not a case in which the reports and evaluative materials yielded a clear consensus such that the district was required to adopt the placement and recommendations favored by the parents' expert (see, e.g., A.M. v. New York City Dep't of Educ., 845 F.3d 523, 543 (2d Cir. 2017)).

As such, I find no adequate basis to overturn the IHO's findings regarding the sufficiency and consideration of the evaluative information available to the June 2019 CSE. Additionally, any flaw in the description of which evaluations were before the June 2019 CSE would amount to a procedural violation. But in order to find a denial of a FAPE, the effect of such a violation must lead to an inappropriate IEP for the student, a concern which is addressed in further detail below.

3. CSE Reconvene

The IHO determined that the CSE was not required to reconvene for the reasons that the parents asserted because it had already considered the contents of the March 2019 private neuropsychological evaluation report among other available evaluative information (IHO Decision at p. 25).

As a general matter, the district has an obligation to review the IEP of a student with a disability periodically but at least annually, and the CSE, upon review, must revise a student's IEP as necessary to address: "[t]he results of any reevaluation"; "[i]nformation about the child provided to, or by, the parents" during the course of a review of existing evaluation data; the student's anticipated needs; or other matters (20 U.S.C. 1414[d][4][A]; 34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]). State regulations additionally provide that, if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). In guidance letters, the United States Department of Education indicated that it is the district's responsibility to determine when it is necessary to conduct a CSE meeting but that parents may request a CSE meeting at any time and, if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Frumkin, 79 IDELR 233 [OSERS 2021]; Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). The United States Department of Education's Office of Special Education Programs has indicated that "[g]enerally, an IEP meeting must take place before a proposal to change the student's placement can be implemented" (Letter to Green, 22 IDELR 639 [OSEP 1995]).

In the parents' June 2019 email to the district that followed the CSE meeting, the parents attached a copy of the research study evaluation report and expressed their disagreement with the

CSE's recommendation for the 2019-20 school year; however, the parents ended their correspondence by requesting a copy of the IEP "for our review once you have finalized your recommendation"; the parents did not request a reconvene of the CSE (Parent Ex. C). Accordingly, the parents' argument that the CSE was required to reconvene after receipt of the parents' June 2019 email rests entirely on the premise that attaching the evaluative information to the June 2019 email and stating their disagreement triggers an obligation on the part of the school district to reconvene the CSE (see Parent Ex. A at p. 3). The parents overstate the district's obligations. As discussed above, the June 2019 CSE reviewed the results of the March 2019 neuropsychological evaluation report and had available information from the June 2018 research study evaluation report. Additionally, to the extent that the parents assert that some CSE members did not have access to the March 2019 neuropsychological evaluation report prior to the June 2019 CSE meeting and for that reason the CSE was required to reconvene to consider the evaluation and its recommendations anew, as set forth above, the IDEA does not mandate that every member of the CSE read a particular evaluation report in order for the evaluation to have been "considered" by the CSE in developing a student's program. The district was not required to reconvene the CSE or to issue a prior written notice describing the reasons for a "refusal" to reconvene, especially when the parents' email simply requested a copy of the IEP with a finalized recommendation and lacks a request for a follow-up CSE meeting.

Accordingly, there is no basis in the hearing record to overturn the IHO's determination with respect to reconvening the CSE meeting.

B. June 2019 IEP

As discussed above, the evidence in the hearing record shows that the district had information from the June 2018 research study evaluation, the March 2019 neuropsychological evaluation, and the April 2019 assistive technology evaluation. Additionally, although the June 2019 IEP present levels of performance are not in contention on appeal, a discussion of the student's needs is necessary to determine whether the June 2019 CSE's recommendations regarding annual goals and management needs were appropriate, how to address the student's social/emotional needs, and whether the recommendation for ICT services in conjunction with related services and other supports would have provided the student with an appropriate educational program for the 2019-20 school year.

Over two dates in May and June 2018, the student participated in a Department of Child and Adolescent Psychiatry at NYU Langone Health private research study consisting of "tests selected based upon [the health center's] study goals," which included cognitive, achievement, language and adaptive functioning assessments, autism measures, and parent questionnaires (Dist. Ex. 6 at p. 1). Following administration of the assessments, the evaluators concluded that the student met the criteria for diagnoses of attention-deficit/hyperactivity disorder (ADHD) and oppositional defiant disorder (ODD) - "Severe Impairment" (id. at p. 8).¹⁰ The evaluators opined that the student's "current placement in a general education classroom with related services to meet his academic and behavioral needs remains appropriate" and recommended various classroom behavioral strategies (id. at p. 9). Additionally, the evaluators recommended that the district

¹⁰ According to the research study evaluation report, the student's "presentation [wa]s not consistent with Autism Spectrum Disorder" (Dist. Ex. 6 at p. 8).

conduct a functional behavioral assessment (FBA) "to identify the purpose of [the student's] challenging behavior," that the student continue to receive specialized reading instruction and related services, and that he undergo a medication consultation for treating ADHD symptoms (*id.*).

Over four dates in January, February, and March 2019, at the parents' request, clinicians conducted a private neuropsychological evaluation of the student due to "ongoing academic struggles that [were] resulting in increased emotional and behavioral difficulties" (Parent Ex. J at pp. 1, 9). According to the evaluation report, cognitive, executive functioning, academic achievement, and social/emotional functioning assessments were administered to the student (*id.* at p. 2). After analyzing test results, the clinicians concluded that the student presented with difficulties consistent with a diagnosis of ADHD, and that he met the criteria for diagnoses of specific learning disorders with impairments in reading, writing, and mathematics (*id.* at p. 10). According to the clinicians, the student required a "small, structured, and supportive special education classroom within a small specialized school for children with average to above average intelligence who also have language based learning disabilities" (*id.*). The clinicians also recommended various classroom instructional strategies and accommodations for the student (*id.* at pp. 10-12). Other recommendations included obtaining a consult with a physician regarding medication to address ADHD symptoms, continuing with counseling, and conducting an assistive technology evaluation (*id.* at p. 12).

On April 6, 2019, the district conducted an assistive technology evaluation (Dist. Ex. 5). Following assessments of the student's performance on reading and written communication tasks, with and without the use of assistive technology, and word prediction programs, the evaluator suggested that the student complete a one-month trial using a touchscreen tablet with various applications to determine "whether this w[ould] assist in meeting curricular demands" (*id.* at pp. 3-5, 8). In a May 28, 2019 assistive technology follow-up report, the evaluator indicated that based on the results of the initial and follow up evaluation results, trial period, and interviews with the student and school staff, assistive technology was recommended for the student's use (Dist. Ex. 8 at pp. 1, 3).

Turning to the present levels of performance, the June 2019 IEP indicated that at that time, the student was in a second grade ICT "classroom" and had received diagnoses of a learning disability, ADHD, and ODD (Dist. Ex. 1 at p. 1). According to the IEP, the student was "currently taking medication for his ADHD, which ha[d] assisted with improvement of his behaviors" (*id.*). The IEP stated that the student's intellectual functioning, adaptive, and daily living skills were age appropriate, and the CSE identified that he benefitted from a multisensory approach to learning, preferential seating, directions chunked into smaller steps, reminders to stay on task, the use of manipulatives in math, visual supports, timers, and countdowns (*id.*). Also, the IEP indicated that the student worked best with a clear structure and routine across all subjects and while sitting in close proximity to a teacher in a space with less distractions, he benefitted from setting goals for himself to manage his own time, and he needed opportunities to work independently in order to increase his independence and reminders to stay on tasks (*id.* at p. 2).

According to the June 2019 IEP, the student "typically me[t] in a small group for guided reading" two to three times per week (Dist. Ex. 1 at p. 2). When not in guided reading, the student used a reading routine to manage his independent work time, which outlined activities for the student to work on that were chunked into smaller tasks for him (*id.*). Regarding reading skills, the IEP reflected that the results of a May 31, 2019 administration of the Teachers College Running

Record Assessment showed that the student was reading independently at level K (January of second grade level), indicating that he was "able to fluently read and decode words" and that he was "approaching grade level in reading" (*id.* at pp. 1, 2).¹¹ The present levels of performance indicated that the student had learned to use blends, digraphs, long and short vowel sounds, and to read multisyllabic words, and that his teachers had observed that he needed to work on applying strategies that he knew to read longer, multisyllabic words (*id.* at p. 2). Next, the IEP reflected that the student often relied on using meaning to determine unknown words, a strategy that worked well and that he should continue to use in addition to reading the word part by part and looking for patterns learned in his word study (*id.*). Further, assessment results showed that the student answered three out of four reading comprehension questions correctly, indicating that he was able to comprehend text independently at "level K," and that he needed to work on answering open ended reading comprehension questions (*id.*). With respect to sight words in isolation, as of June 10, 2019 the student read 200 out of 200 sight words according to the Teachers College Sight Word Assessment Word List, which allowed the student to increase reading fluency (*id.*).¹² The IEP indicated that the student "benefit[ted] from repeated activities to practice learned skills" and that he "need[ed] to continue to practice these sight words in order to retain the ability to read them fluently" using high interest, hands on, interactive games (*id.*). According to the IEP the student had "responded well to learning through hands on, kinesthetic activities and explicit phonics instruction"; his progression from September 2018, at which time he was reading at level F, to level K in June 2019 "indicat[ed] significant progress in reading across the school year in second grade" (*id.*).

The June 2019 IEP indicated that, with regard to writing, the student worked best in a small group and with frequent teacher conferences, and that he was approaching grade level in writing (Dist. Ex. 1 at p. 2). His writing pieces across genres had an organized structure that made sense to the reader; his narratives had a beginning, middle, and end, characters, and some feeling; his opinion pieces had a clear opinion with two examples supporting his opinion (*id.*). According to the IEP the student needed to work on elaborating in writing by verbally rehearsing his ideas and applying "craft moves" such as dialogue, action, inner thinking, and show not tell to write more (*id.*). The CSE identified that the student also needed prompting to rehearse his ideas before writing them and an iPad to say or type ideas to produce writing (*id.*). The IEP stated that the student was still working on his penmanship each school day and gravitated away from using a writing routine; at that time, he had become more independent and intrinsically motivated with the support of technology (*id.*).

Regarding math, the June 2019 IEP indicated that the student worked best in a small group math workshop and by engaging in hands on activities to learn new skills, and that according to post unit assessments, he was on grade level and meeting second grade level benchmarks (Dist. Ex. 1 at pp. 1, 2). The CSE identified that the student benefitted from visual supports including a place value chart with a ten frame, and opportunities to practice new and learned skills (*id.* at pp. 1).

¹¹ According to the IEP, the Teachers College Running Record Assessment measured the student's "ability to read and decode words in a given passage, the number of words read per minute and his reading comprehension" (Dist. Ex. 1 at p. 1).

¹² The IEP indicated that "[s]ight words are words that a reader automatically recognizes without having to use picture clues or a word attack strategy" (Dist. Ex. 1 at p. 1).

2-3). According to the IEP, when playing math games the student needed to work with a peer and teacher or alone, as he often became frustrated when losing the game or when the peer worked more quickly (*id.* at p. 3). The student benefitted from positive feedback from teachers and compliments about his positive behaviors (*id.*). The IEP indicated that the student needed to work on solving addition/subtraction word problems and relied on looking for key words to solve them (*id.*). He required support when the word problem had more than one step or was missing a part (*id.*).

In the area of speech-language skills, the June 2019 IEP indicated that the student benefitted from a consistent schedule to help with transitions to and from the classroom and "strategic grouping" with peers in therapy sessions (Dist. Ex. 1 at p. 3). He participated and made gains during speech-language therapy sessions, exhibited age-appropriate verbal expressive language skills, answered corresponding WH questions regarding a short passage/text read aloud, and made text to self-connections and accurate predictions (*id.*). The student also made progress in his ability to blend and segment sounds at the word, phrase, and phoneme levels, and perform tasks with the deletion of the first sound in consonant blends (*id.*). Administration of the Phonological Awareness Skills Test indicated that the student achieved mastery on phonemic skills up until the second grade level, although his ability to apply his skills in writing at the sentence level was an area of weakness (*id.*). Intervention had targeted the student's ability to learn and use strategies to help organize his thoughts and increase clarity in his planning and writing (*id.*). The present levels of performance described strategies such as using a "scrambled sentence," which helped the student write more independently, and a story grammar graphic organizer, which helped the student generate his own fiction story (*id.*). Additionally, using a completed graphic organizer, the student was able to write or type a three to four sentence story with ongoing support to use his planning page and spell words (*id.*). Further, the IEP stated that with the support of assistive technology, the student used verbal expression to help him demonstrate his receptive knowledge across a variety of writing tasks, and that it appeared to be a motivational tool that increased his quality and quantity of writing (*id.*).

In the area of social development, the June 2019 IEP stated that the student had "a strong presence in the classroom," that he was well liked by many students, and was a leader during sports activities (Dist. Ex. 1 at p. 4). The IEP also noted that while the student had "made a great deal of improvement, he c[ould] be defiant to adults" when he was not participating in a preferred activity, and he recognized that school could be difficult for him as he was aware of his dyslexia diagnosis (*id.*). However, the IEP indicated that the student tried and did his best, "particularly since he began taking medication to address focus issues" and that he needed to further recognize his ability to interact with all peers in a positive manner (*id.*). According to the IEP, the student had made progress with his peer interactions and school stamina, although noted the parents' concern about his self-esteem as he was still below grade level "in all academic areas" (*id.*). Further, the IEP indicated that the student's behaviors had "gotten better and this ha[d] assisted with improvements with peer relationships" (*id.*). The CSE determined that the student did not require positive behavioral interventions, supports, or other strategies, including a BIP to address behaviors (*id.* at p. 5).

The June 2019 IEP present levels of physical development described the student as having intermittent asthma and appearing to be in good physical health, was right hand dominant, and had a functional grasp for writing and coloring (Dist. Ex. 1 at p. 4). According to the IEP, the student presented with "weakness in position in space, a component of visual perception that affect[ed]

the ability to perceive an object's position in space and the direction in which it is turned" (*id.*). As reported in the IEP, over the course of the year the student had shown improved automaticity when writing lowercase letters without the use of a model, he was able to write letters legibly in isolation and during sentence copying, and he demonstrated improved line regard and letter placement (*id.*). Further, the student continued to benefit from indirect prompts for the placement of tall and descending lowercase letters and the orientation for other letters but was able to make corrections (*id.*). The student had shown progress in his ability to space his words evenly and consistently during copying tasks; however, due to difficulties with self-generated writing, an assistive technology evaluation was conducted that recommended its use (*id.*). The IEP indicated that the student had shown increased motivation and attention for writing since he started using assistive technology (*id.*). Additionally, the IEP stated that the student would benefit from engaging in 15 minutes of keyboarding practice throughout the instructional school day, handwriting practice, and activities to promote attention to detail and position in space by, for example visual perceptual worksheets or jigsaw puzzles (*id.*).

1. Social/Emotional and Behavior Needs

In their appeal the parents assert that the IHO erred in determining that an FBA was not needed despite the June 2018 research study evaluation recommendation and that the June 2019 IEP appropriately addressed the student's social/emotional and behavioral needs. Additionally, the parents argue that the CSE did not offer individual counseling, and that the student required "more tailored counseling goals" to address his social, emotional, and behavior needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to:

the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student' record and other sources including any relevant

information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

The Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F.3d at 190).

During the hearing, the discussion of an FBA appears to first occur during the testimony of the district school psychologist, who while being cross-examined stated that the CSE discussed that the student became frustrated at times working with peers or when losing a game (Tr. pp. 37-38, 66).¹³ Although the school psychologist testified that she did not know how often the student became frustrated during the course of the day, she did not think it was severe enough "because it would have been brought to my attention for a[n FBA]" (Tr. p. 67). Regarding the student's defiant behavior with adults when he was not participating in a preferred activity, the school psychologist similarly stated that she did not know how often that occurred; however, "any student who it be[came] problematic would have been referred to me for a[n FBA]" (Tr. pp. 67-68). When asked about the June 2018 research study evaluation recommendation that the school should conduct an FBA of the student, the school psychologist testified that it was "not a necessity of the school," that the student "never had challenging behaviors that [] warranted [an FBA]," and that the behaviors described in the evaluation report "c[ame] from a behavior rating form that most likely came from a parent" (Tr. pp. 68-69; see Dist. Ex. 6 at pp. 8, 9). Specifically, she testified that, during the parent interview portion of the research study evaluation, the parents reported that the student frequently argued with adults, intentionally disobeyed rules, and blamed others for mistakes; however, "[t]hat was not our experience at the school" (Tr. p. 69). During the hearing the parent testified about the student's inattentive and defiant behaviors, seemingly in reference to what he demonstrated in prior school years (see Tr. pp. 227-28, 233; Parent Ex. M at p. 1).

In describing the student's in-school behaviors, his counselor stated that, at times, the student avoided activities that were hard for him or that he didn't like by getting up out of his seat and verbalizing that he did not want to do something or that the activity was too hard (Tr. pp. 87-88, 92, 93). According to the counselor and the regular education teacher, the student also, at times, refused to do something, picked something else to do, walked away from an activity, or distracted another student to avoid an activity (Tr. pp. 101-02, 115, 157). However, the counselor disagreed that the student's defiant or any other behavior rose to the level of requiring that an FBA be conducted (Tr. p. 93). She continued that

it had been discussed, the FBA, because when [the student] was younger . . . everyone thought that might be a good support . . . in discussion with the team we felt . . . we observed his behaviors and

¹³ The parents' due process complaint notice does not allege that the district failed to conduct an FBA of the student (see Parent Ex. A).

we figured out the trigger, which was typically an activity that was hard for him. And then we saw the behavior, and then we would plan a strategy to help him reengage in the activity. So that was essentially what an FBA would do anyways. So we felt we already knew . . . had strategies to help him through those difficult activities

(Tr. pp. 93-94).

According to the counselor, the student's teachers observed the behaviors and "used their strategies to help [the student] reengage in the classroom" and supported him to help him get through the activity (Tr. pp. 92, 93). The regular education teacher additionally testified that when the student became frustrated by academic challenges and exhibited avoidance behaviors, "there was always an adult that would help him work through it" (Tr. pp. 157-58). She continued that staff learned what the student liked, provided him with choices, and purposely incorporated his interests into their lessons to make sure the student was invested and engaged (Tr. pp. 158-59).

The regular education teacher stated that at the beginning of second grade the student's defiant behaviors occurred more frequently, although "[a]s the year went on he would still show some defiant behaviors, but it definitely became less frequent as the year went on" (Tr. pp. 158, 159). Further, the counselor, who had worked with the student from kindergarten through second grade, also testified that over the course of those school years the student didn't avoid things as much, his "confidence was getting better," and by second grade he was making progress socially/emotionally and "feeling great about school" (Tr. pp. 87-90, 92-93). She continued that in second grade the student "spoke of being able to do more school work successfully" and although school work was hard for him, he was getting more support (Tr. pp. 89-90). Regarding the student's frustration, she stated that when he was younger he "struggled with losing" or if he felt someone was cheating he would not want to play anymore; however, by second grade "he was way more verbal and able to talk about things" (Tr. pp. 98-100).

Therefore, the evidence in the hearing record supports the IHO's decision and reflects that although the student exhibited some work avoidance/defiant behaviors—which were also identified in the June 2019 IEP—over the course of the 2018-19 school year, those in-school behaviors had decreased in frequency during the 2018-19 school year and district staff were able to address the student's behaviors. Additionally, as discussed below, review of the June 2019 IEP shows that it provided supports and services to address the student's social/emotional needs. The foregoing reflects that, although the district did not conduct an FBA of the student, the June 2019 CSE had sufficient information about the student's behaviors and, as further described below, included appropriate supports in the IEP to address the student's behavioral needs. "The 'purpose of an FBA is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors.'" (L.O., 822 F.3d at 111, quoting R.E., 694 F.3d at 190). Accordingly, the district's "[f]ailure to conduct an FBA . . . does not render an IEP legally inadequate under the IDEA so long as the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior" (M.W. v. New York City Dept. of Educ., 725 F.3d 131, 140 [2d Cir. 2013]).

Turning next to the parents' claim that the June 2019 CSE failed to offer appropriate counseling services and annual goals, the IEP indicated that the student was a natural leader, had many peer relationships at school, and had made progress with his peer interactions (Dist. Ex. 1 at

p. 4). The IEP reflected the parents' concerns about the student's self-esteem regarding below grade level academic performance (see id.). According to the IEP, during counseling sessions the student continued to work on his peer relationships with preferred and nonpreferred peers and recognized his progress in school and worked consistently towards achieving success in school (id.). For the 2019-20 school year, the CSE developed an annual goal to improve the student's self-esteem during small group activities by increasing his ability to focus, contributing equally to the task, and acknowledging his contributions by successfully completing the task with his peers with some teacher prompts (id. at p. 9). The CSE recommended that the student receive one 30-minute session per week of counseling in a group of three (id. at p. 11).

The school psychologist was questioned during the hearing about the student's frustration at times when playing a game with peers and when peers work more quickly, to which she responded that those situations were discussed at the June 2019 CSE meeting and opined that he "struggle[d] sometimes with relationships," and "that was most likely why we recommended a counseling mandate" (Tr. pp. 66-67). The student's counselor testified that during kindergarten she provided one individual and one session of group counseling to the student per week, which was subsequently reduced to remove the individual session and retain the once weekly small group session (Tr. pp. 87-88).¹⁴ She described the student's "progression" from kindergarten to second grade, observing that initially the student did not like school, did not want to be there, and had "very low self-esteem concerning school"; however, as the student "got older" and received services, "his confidence was getting better" (Tr. pp. 88, 89). The student continued to receive counseling in second grade and the counselor opined that the student was making progress in that he spoke of being able to do more school work successfully and was more connected with other students (Tr. pp. 89-90). The counselor testified that she continued to work with the student because "self-esteem was an issue because of his confidence with his school work" (id.). According to the counselor she saw the student in a small group, where they practiced small group activities such as sharing, taking turns, using respectful words, and it "became more evident that he was more successful in small groups in the classroom as well" (Tr. pp. 90-91). She opined that the recommendation for counseling was appropriate, as "from [her] vantage point" during second grade the student made social/emotional progress including that he was "feeling more confident in school" (Tr. pp. 96-97). The counselor further confirmed that the student's counseling annual goal to improve his self-esteem was related to his awareness of his academic deficits (Tr. pp. 106-07).

On appeal the parents point to the June 2018 research study evaluation report—which was conducted at the end of first grade—when describing the more significant aspects of the student's social/emotional presentation, including past suicidal ideation and diagnosis of ODD (see Dist. Ex. 6 at pp. 3, 8). The March 2019 neuropsychological evaluation—conducted in the spring of second grade—reflected that during testing the student was self-conscious of his abilities, he was less engaged during academic tasks, and he was most distractable on tasks he perceived as challenging (Parent Ex. J at pp. 1, 2). However, the neuropsychologist also reported that "[a]t times [the student] offered some initial resistance towards completing tasks although he was able to initiate work with support and positive reinforcement" and when he became distracted he was

¹⁴ The counselor believed that the removal of the individual counseling session occurred when the student was "going into [first] grade" (Tr. p. 88).

"easily redirected" in the 1:1 testing environment (*id.*).¹⁵ The report indicated that the student benefitted from supports such as standardized prompts, positive reinforcement, and extra time to think and process his thoughts before responding (*id.* at p. 3). According to the neuropsychologist, the student "often coped well with frustration" while also making "it known if he was having difficulty or if he needed a break"; consistent with district staff testimony that they successfully used reengagement strategies with the student during times of work avoidance and that his ability to verbalize when frustrated had improved during second grade (compare Parent Ex. J at pp. 2-3, with Tr. pp. 92-94, 98-100, 157-59).

As such, the evidence in the hearing record shows that the student continued to exhibit frustration, defiance, and work avoidance at the time of the June 2019 CSE meeting; however, as described above, those behaviors had decreased during the course of second grade, the IEP reflected those behaviors, district staff had identified strategies that successfully addressed the student's behaviors in the school environment, and the CSE developed an annual goal and recommended counseling services to address the student's needs in this area. Therefore, even in the absence of an FBA there would be no basis to depart from the IHO's finding that the CSE was aware of and appropriately addressed the student's social/emotional needs.

2. Annual Goals and Management Needs

In their request for review the parents assert that the IHO erred in endorsing the annual goals and management needs in the June 2019 IEP as sufficient. Specifically, the parents allege that the IEP lacked annual goals in "critical areas on need" including reading fluency, spelling, and OT.

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

Review of the June 2019 IEP shows that it included 10 annual goals to address the student's needs in the areas of reading, writing, math, phonemic awareness for writing, use of assistive technology, handwriting, and as discussed above, counseling (Dist. Ex. 1 at pp. 5-10). With regard to the parents' argument on appeal that the IEP lacked annual goals to address the student's reading fluency, review of the IEP shows that one of the student's reading annual goals was to improve his ability to read multisyllabic words using word patterns he knew, such as blends, digraphs, and long and short vowels (*id.* at p. 5). Another reading annual goal required the student to read the first 200 sight words from the Teachers College Sight Word List, which, according to the IEP, the student was already able to do (*id.* at p. 6; see id. at p. 1). The special education teacher testified

¹⁵ It appears that the student was able to be redirected in a 1:1 setting (see Parent Ex. J at pp. 2, 3). I note that the June 2019 IEP counseling annual goal was designed in part to improve the student's ability to focus in a group setting (Dist. Ex. 1 at p. 9).

that by the middle of second grade, the student "was starting to read multisyllabic words," and "really starting to make a major improvement" therefore, "at that point in the school year, his reading fluency was closer to grade level" (Tr. pp. 198-99). She stated that the student was approaching a second grade level, he was working and reading independently, and had a reading routine (Tr. p. 199).

Regarding the parents' assertion that the June 2019 IEP lacked spelling goals, in the area of speech-language and writing, the June 2019 IEP included an annual goal for the student to write monosyllabic words containing short and long vowels such as blends, digraphs, long and short vowels at the sentence level with 80 percent accuracy (Dist. Ex. 1 at p. 8). Another annual goal required the student to use assistive technology to complete a writing task with, among other things, "improved spelling" (*id.* at p. 10). With regard to the parents' claim that the CSE failed to include an "OT goal," the IEP reflected that the student presented with weakness in position in space (a component of visual perceptual skills) but that he demonstrated improved line regard, letter placement, and ability to space his words evenly and consistently during copying tasks (*id.* at p. 4). Additionally, the IEP reflected that the student exhibited a functional grasp for writing and the ability to write letters legibly in isolation and while copying sentences, and noted that he was "working on his penmanship each school day" (*id.* at pp. 2, 4). As such, the IEP included an annual goal for the student to write three to four sentences with good legibility, including no more than two unidentifiable words and consistent spacing, as measured by the teacher or therapist (*id.* at p. 9). Further, the CSE identified that the student would benefit from handwriting practice and activities to promote attention to detail and position in space (e.g. visual perceptual worksheets, jigsaw puzzles), and recommended that the student receive two 30-minute sessions of OT per week in a group of two and access to assistive technology to produce written responses (*id.* at pp. 4, 11). As such, the evidence in the hearing record shows that the June 2019 IEP identified and addressed the student's areas of need, albeit not solely via the annual goals.

While the parents argue that the IEP should have included reading fluency, spelling, and OT goals, the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need. (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *20-*21 [S.D.N.Y. Feb. 14, 2017]).

On appeal the parents state that the student had already mastered the sight word annual goal. The regular education teacher testified that students continue to practice sight words once they mastered them, "especially" students like the student in this matter who benefitted from repetitive practice (Tr. pp. 127-28; see Dist. Ex. 1 at p. 2). Additionally, the regular education teacher testified that the sight word assessment was conducted in isolation, and staff wanted to ensure that the student was able to "recognize the words, both in isolation and in the book" (Tr. pp. 128-29). To the extent the parents argue that the student's "speech goals were all writing based," review of the present levels of performance, which are not in dispute, shows that the student exhibited age appropriate verbal expressive language skills and after listening to a short passage or text read aloud, receptively was able to answer "WH" questions, and make text-to-self connections and accurate predictions (Dist. Ex. 1 at p. 3). Further review of the IEP shows that the student exhibited deficits in written language and phonological awareness skills, areas addressed by the annual goals (Dist. Ex. 1 at pp. 3, 6-8, 10; see Tr. p 52).

Additionally, the parents appeal the IHO's finding that the June 2019 IEP management needs were appropriate as the parents assert the student's needs "warranted small group instruction."

Management needs are defined by State regulations as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic achievement, functional performance and learning characteristics, and social and physical development (8 NYCRR 200.1[ww][3][i][d]).

The June 2019 CSE recommended that the student receive preferential seating, directions chunked into smaller steps, reminders to stay on task, use of manipulatives in math, visual supports, assistive technology, timers, countdowns, checklists, and routines; a number of which, as described above, were previously recommended in the June 2018 research study evaluation and March 2019 neuropsychological evaluation reports (compare Dist. Ex. 1 at p. 4, with Parent Ex. J at pp. 10, 11, and Dist. Ex. 6 at p. 9). The IEP present levels of performance indicated that the student "worked best in a small group and with frequent teacher conferences," that he received small group guided reading instruction, worked "best in [a] small group in math workshop," and that all of his related services were provided in a group of two to three peers (Dist. Ex. 1 at pp. 2,11). When asked about the student's need for small group instruction, the school psychologist testified that "in an ICT classroom, that is not uncommon to have small groups for reading" (Tr. p. 65). Accordingly, the IEP adequately identified and addressed the student's need for small group instruction.

Given the discussion above, the evidence shows that the IEP is not perfect insofar as one of the 10 annual goals had been achieved and the annual goals may not have addressed the student's reading fluency, spelling, or needs related to OT as explicitly as the parents would have preferred. However, the IEP otherwise focuses very well on supporting the student in his areas of deficit and the student would very likely progress appropriately under the IEP. Any deficiency in the annual goals and management needs does not rise to the level of a denial of a FAPE or provide a reason to overturn the IHO's finding that the claims regarding the annual goals were insufficient to deny the student a FAPE (see P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]).

3. Educational Placement — Integrated Co-Teaching Services

The parents appeal the IHO's finding that the June 2019 CSE's recommendation for the student to receive ICT services was appropriate. Specifically, the parents assert that the district did not sufficiently explain how a classroom of 22 or more students would meet the student's needs in light of his "significant focus, attentional and behavioral challenges." The parents also argue that ICT services were only offered in ELA, social studies, and math, and there was "no indication how [the student] was supposed to manage" in his other classes given the evidence in the hearing record that showed his difficulties were in all academic subjects and he required "full-time support" to use his reading and writing skills.

ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" in a classroom staffed "minimally" by a "special education teacher and a general education teacher" (8 NYCRR

200.6[g]). ICT services provide for the delivery of primary instruction to all of the students attending such a setting ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 14-15, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>).

The June 2019 CSE recommended that the student receive ICT services in ELA, math, and social studies (Dist. Ex. 1 at p. 10). The IEP reflects that, with the exception of the parents, the CSE members felt that the student was properly supported, he would have continued to progress with those supports, and he had "moved up in all academic subjects and [wa]s thriving in his current setting" (*id.* at pp. 14-15). As to the parents argument on appeal that a classroom with 22 or more students would not have met the student's attention and behavior needs, the second grade teacher described an ICT "classroom" as a general education classroom that includes students with IEPs, with a special education teacher and a regular education teacher, that provides "more opportunities for students to work in small groups, and they have a little bit more one-on-one attention because there are two teachers in the room as opposed to just one in a general education classroom" (Tr. pp. 184-85). Additionally, as previously noted, the June 2019 CSE recommended that the student receive preferential seating, directions chunked into smaller steps, reminders to stay on task, visual supports, timers, countdowns, checklists, and routines to address attention and behavior needs (Dist. Ex. 1 at p. 4). Further, as discussed below, testimony from school personnel who worked with the student during the 2018-19 school year testified to the progress he made in the classroom with ICT services.

Regarding the June 2019 CSE's recommendation for ICT services together with assistive technology and continuing OT, speech-language therapy, and counseling, the school psychologist testified that "the majority of the team felt that [the student] was doing really well in the classroom and was accessing the curriculum . . . with the support" (Tr. pp. 52-53). Review of the IEP shows that in September 2018 the student was reading at Teachers College Benchmark level F, and "getting stuck on [consonant-vowel-consonant] CVC and CVCe words"; however, by May 2019 he had progressed to reading at level K and had learned to use blends, digraphs, long and short vowel sounds, and read multisyllabic words (Dist. Ex. 1 at pp. 1, 2; see Tr. p. 166). Additionally, the IEP indicated that over the course of the school year the student "ha[d] been working on reading the first 200 sight words" and that by June 2019, he was able to read all 200, which allowed him "to increase his reading fluency and read text" approaching the second grade level independently (*id.*). In math, post-unit assessments results reflected that the student was "on grade level" and meeting second grade benchmarks (Tr. pp. 53-54; Dist. Ex. 1 at p. 1, 2). In writing, the student was approaching grade level (Dist. Ex. 1 at p. 2). The CSE recommended use of a touchscreen tablet with specialized apps including word processing and word prediction for writing responses as needed in school and at home, as he had shown "increased motivation and attention for writing since he started using this support" (*id.* at pp. 4, 11).

The regular education teacher indicated that objective measures of the student's performance showed that he made progress in her class during the 2018-19 school year in reading and math (Tr. pp. 122-29, 164-69; Dist. Exs. 9-11). Specifically, the regular education teacher testified that by the end of second grade, the student was at a middle second grade reading level (Tr. p. 166). She confirmed that the student's "strongest deficit in reading was decoding," and consistent with the special education teacher's testimony, testified that at the beginning of the school year the student was reading CVC words in level G books that did not have as many words on the page and had "a lot more picture support"; towards the end of the year the student was

independently reading multisyllabic words in level K books—described as "intro chapter books" with "some picture support"—that included blends and harder vowel concepts, and that were much longer, more complex, and had "much more reading work in terms of both decoding and comprehension" (Tr. pp. 166-68, 185-88). According to the regular education teacher, it would not be possible to read level K books primarily by having a strong sight word repertoire, as students would not "be able to read aloud fluently or really understand what's going on by just memorizing sight words for level K" (Tr. p. 67). She described that "from the beginning to the end of the year, [the student] had improved in reading across the board"; "in addition to moving up in reading levels, he was more excited to read, and participate, and share his thoughts, and work with the class" (Tr. pp. 129-30). Additionally, she testified that the student's math skills were improving, and that he was "writing more in writing," which "improved even more after the assistive tech was added"; concluding that the student "definitely improved a lot throughout the year" (Tr. p. 130). Further, the regular education teacher testified that the student was improving in the amount of work that he was doing, and he was more excited to show up to school (*id.*). At the beginning of the year, the regular education teacher explained that the student expressed that school was "boring" and that he didn't enjoy it much; as the year progressed, he told staff that he was starting to enjoy it (*id.*).

The special education teacher testified that the student "[d]efinitely" made progress in terms of his academics overall during second grade, including that he exhibited "quite a bit of progress" in reading and "improved every time" from pre- to post-assessment in math, which indicated that "he always showed growth" (Tr. pp. 185-89). She agreed with the June 2019 CSE recommendations because the student "was making significant progress with the support of ICT and the services he was receiving" and opined that "he would continue to soar in an ICT classroom with those services" (Tr. p. 189). As discussed above, the counselor opined that by second grade the student was "making progress . . . socially-emotionally, and he was more confident" (Tr. p. 88). For example, the counselor stated that the student "spoke of being able to do more school work successfully," he was "a leader," was getting more connected and felt more confident with other students, and his progress was "clear" (Tr. pp. 89-90).

Under the circumstances presented in this matter, I find that the June 2019 CSE was reasonable when it recommended programming for the 2019-20 school year that was similar to what the student received during the 2018-19 school year, under which the student had made progress in light of his circumstances and it was reasonable for the June 2019 CSE to expect the student would continue to make progress. Accordingly, the district offered the student a FAPE for the 2019-20 school year (*see S.H. v. Eastchester Union Free Sch. Dist.*, 2011 WL 6108523, at *10-11 [S.D.N.Y. Dec. 8, 2011] [decision to recommend continuation of the same program student had made progress in for prior school year was appropriate and a more restrictive placement was not necessary]).

Regarding the parents' argument on appeal that the IHO's finding that the student "required an environment in which special education teachers were available in all his classes" is inconsistent with the lack of a recommendation for ICT services in all classes, including science class, the hearing record offers little information other than the regular education teacher's testimony that in second grade students "stay in the same classroom for all of the core subjects. So reading, writing, math, science, social studies are all taught by [the regular education teacher] and [her] co-teacher in the same classroom," adding that students leave to go to a "specialized" class such as music or gym once per day (Tr. p. 121). Review of the evidence in the hearing record does not indicate that

during the 2018-19 school year the student required the support of a special education teacher in special classes. Although it is unclear why the June CSE did not state in the IEP that the student would receive ICT services in his third grade science lessons, the absence of that service in that subject area does not, by itself, lead me to the conclusion that the student was likely to regress under the IEP and thereby deny the student a FAPE in this instance.

Lastly, the school psychologist testified that the CSE considered other programs for the student including the parents' request for the "more restrictive setting of a" nonpublic school, but determined that ICT and related services were "most appropriate" and that "considering [the student's LRE], we felt that was what was best for him as he continued to improve" (Tr. pp. 54-55). She continued that LRE factored into her decision because it was "Federal law," and the CSE wanted "to give every student with a disability as much as possible the ability to be with nondisabled peers because the research supports that that's best for their wellbeing" (Tr. p. 55). As set forth above, a student's recommended program must also be provided in the LRE, and the CSE should not be faulted in making LRE considerations a part of its IEP recommendations (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, 489 F.3d at 108; Walczak, 142 F.3d at 132).

Therefore, review of the evidence in the hearing record supports the IHO's findings that the June 2019 CSE's recommendations for the student to receive ICT and related services, together with assistive technology, annual goals, and management needs were appropriate to meet his special education needs.

VII. Conclusion

Having concluded that the IHO did not err in finding that the district offered the student a FAPE during the 2019-20 school year, the necessary inquiry is at an end. I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 25, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER