



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-109

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

### **Appearances:**

Gina DeCrescenzo, PC, attorneys for petitioners, by Gina M. DeCrescenzo, Esq.

Guercio & Guercio, LLP, attorneys for respondent, by Douglas A. Spencer, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) complied with its child-find obligations for the 2019-20 and 2020-21 school years and that the educational program and services the district's Committee on Special Education (CSE) recommended for the student for the 2021-22 school year were appropriate. 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[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### III. Facts and Procedural History

The student in this case began receiving speech-language therapy at two years of age through the Early Intervention Program (EIP) (see Parent Ex. B at p. 2).<sup>1, 2</sup> At that time, the student demonstrated "age appropriate cognitive, adaptive, fine motor, gross motor, social, and emotional development, but there was a delay in his communication abilities" (id.). While exhibiting "age appropriate receptive language skills," the student exhibited "severe expressive language deficits" (id.). As a result, the student received speech-language therapy services for a "duration of six months" (id.).

According to the evidence, the student attended preschool for "three years on a full-time basis" (Parent Ex. B at p. 2).<sup>3</sup> In November 2015, the student underwent an evaluation conducted through the Committee for Preschool Special Education (CPSE), which revealed cognitive abilities in the "average range"; receptive, expressive, and pragmatic language skills in the "average" range, but "weak" articulation skills (i.e., "sound production errors and only 80 [percent] intelligibility"); "weaknesses for both fine and gross motor functioning, including grasping, visual-motor integration, handwriting, drawing, manipulating fine objects, bilateral coordination, balance, and strength" (as determined by the administration of an occupational therapy [OT] evaluation); and "no concerns about his sensory processing" skills (id. at pp. 2-3). At that time, the student "qualified for speech[-language therapy] and [OT], as well as, psychological counseling, but he did not receive services . . . due to a shortage of providers" (id. at p. 3).<sup>4</sup>

The student and his family thereafter relocated to the district (see Parent Ex. B at p. 3). For kindergarten (2016-17 school year), the student attended a district elementary school, and he received speech-language therapy that focused on the pronunciation of specific sounds,

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<sup>1</sup> When the parties presented their respective exhibits for the impartial hearing, the parents' attorney noted that a "number of them [wer]e duplicates" and then asked the IHO how she preferred to handle that situation (Tr. pp. 14-17). The IHO explained that the "way [she] deal[t] with duplicates [wa]s [she] just admit[ted] them" and in the decision, if the IHO referred to one document she would "footnote that it [wa]s the same as another document" (Tr. p. 15). The IHO then entered district exhibits 1 through 93 into the hearing record and similarly entered parent exhibits A through DD including several duplicates. As a reminder, State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

<sup>2</sup> The student's early educational history is drawn primarily from a privately obtained neuropsychological evaluation of the student, which took place over the course of three days in June 2018 (June 2018 neuropsychological evaluation) at the conclusion of first grade (2017-18 school year), as well as a privately obtained neuropsychological and educational reevaluation completed by a different evaluator, which took place over the course of three days in March 2021 (March 2021 neuropsychological evaluation) (see Parent Exs. B at pp. 2-3; T at pp. 1-3). The private evaluator who completed the June 2018 neuropsychological evaluation of the student indicated that the student's mother and the student served as informants for the "Background Information," as well as the evaluator's review of "extensive academic records" and the "results of previous assessments" (Parent Ex. B at p. 1).

<sup>3</sup> As later reported for the student's March 2021 neuropsychological evaluation, the student attended "pre-[k]indergarten . . . five days per week, beginning at age four" (Parent Ex. T at p. 2).

<sup>4</sup> The CPSE evaluation of the student was conducted in another school district, not the district involved in this administrative proceeding (see Parent Ex. B at p. 2).

"strengthening his oral motor muscles, and using whole body listening to attend to task[s]" (*id.*).<sup>5</sup> In February 2017, the student "was selected to receive small group reading support" two times per week due to his difficulties learning to read (Dist. Ex. 17 at p. 2; *see* Parent Ex. B at p. 3).<sup>6</sup> The student's report card from "[e]arly in the [school] year" reflected "concerns with letter sound correspondence, sight word recognition, spelling, providing details in his writing, and listening attentively" (Parent Ex. B at p. 3). However, by the end of that school year "most of these skills improved," while the student's reading skills reportedly remained "below grade level expectations" (*id.*).<sup>7</sup> The student's fourth quarter report card reflected that "his performance met or exceeded Common Core grade level standards, at that time, in all areas except for 'use[d] details in drawings'" (Dist. Ex. 17 at p. 2).

In first grade (2017-18 school year), the student continued to receive speech-language therapy and was "placed in a Leveled Literacy Intervention (LLI) reading group that met [five times per] week, for 30 minutes" (Dist. Ex. 17 at p. 2; *see* Dist. Ex. 46). In or around October 2017, the parents privately obtained an "Orton-Gillingham-based reading tutor" for the student and, as reported, the student "subsequently made rapid progress in his reading development and was reading on grade level by the end of the school year" (Parent Ex. B at p. 3; Dist. Ex. 17 at p. 2). Upon securing the Orton-Gillingham tutor for the student, the parents requested that the "school-based reading support be discontinued so as not to interfere with the specialized instruction being provided at home" (Dist. Ex. 17 at p. 2).

In November 2017, the district conducted an OT evaluation (November 2017 OT evaluation) of the student (*see* Parent Ex. B at p. 3; Dist. Ex. 9 at p. 1). As reflected in the evaluation report, the student demonstrated motor coordination skills that fell within the "low average" range when attempting to "control the pencil to stay within the [one-half inch] to [one-eighth inch] paths while copying forms" (Dist. Ex. 9 at p. 3). The November 2017 OT evaluation report further indicated that the student's fine motor skills, visual motor skills, visual perceptual skills, and visual-spatial skills all fell within the "average" range (*id.*). In addition, the evaluator noted that the student demonstrated "good focus and visual attention to tasks," but he had "difficulty . . . follow[ing] verbal directions for some tasks, requiring repetition and rephrasing" (*id.* at p. 4). As reported by the student's classroom teacher, he got "frustrated in any writing activities," he lacked awareness of "other people's space," he got "tired and want[ed] to jump to the next activity," and he often "tip[ped] his chair" and had "fallen off it several times" (*id.*). Overall, the evaluator recommended "[g]eneral [s]trategies" to address the student's needs "to improve spacing" of words, "to improve letter formation and sizing," "to improve sitting posture"

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<sup>5</sup> As later reported for the student's March 2021 neuropsychological evaluation, the student's mother had requested that the student receive "speech and language therapy in a small group on an informal basis" (Parent Ex. T at p. 2).

<sup>6</sup> As later reflected in the district's prior written notice dated November 1, 2018, the student's in-school reading supports were referred to as academic intervention services (AIS), which were terminated at the parents' request when they began providing the student with "home tutoring for reading" (Dist. Ex. 39 at p. 1).

<sup>7</sup> In the district's September 2018 social history, it was noted that "benchmark assessments indicated that [the student] entered [k]indergarten reading below Level A and was assessed to be reading on a Level D at the end of the school year," which, as described in a parenthetical, handwritten notation, indicated that the student was reading on "grade level" (Dist. Ex. 17 at p. 2).

and "shoulder and postural stability," "to promote fine motor skills and to strengthen the intrinsic muscles of the hands," "to promote tripod grasp," and "to improve attention and . . . modulation and organization" (*id.* at pp. 4-6). The evaluator also administered a "Functional Skills Assessment for School Based [OT]" (*id.* at pp. 7-8). Based on the student's testing results, the evaluator found that the student did not qualify for OT services at that time (*id.* at p. 9).<sup>8</sup>

At the conclusion of first grade in June 2018, the student's report card reflected that, in areas where he had previously received scores of "2s"—demonstrating that the student was making "progress[] toward Common Core grade level standards"—the student, thereafter in all areas, improved those scores to "3s"—demonstrating that he "me[t] Common Core grade level standards"—by the fourth marking period, with an exception noted regarding the student's use of "capitalization, punctuation and spelling in writing" (remained at a score of "2") (Dist. Ex. 10 at pp. 1-4; *see* Dist. Ex. 17 at p. 2). The evidence also reflects that, by the conclusion of first grade, the student was "reading at grade level," but he "seemed to struggle with math at school only when working under a time pressure" (Parent Ex. B at p. 3; *see* Dist. Ex. 24 at p. 1). In addition, "benchmark assessments indicated that [the student] entered [first] grade reading on a Level B and was assessed to be reading on a Level K at the end of the school year" (Dist. Ex. 17 at p. 2).

As previously noted, the parents privately obtained a June 2018 neuropsychological evaluation of the student at the conclusion of first grade (*see* Parent Ex. B at p. 1). The evaluator administered the following assessments to the student: the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI); the Behavior Assessment System for Children, 3rd Edition (BASC-3); the Behavior Rating Inventory of Executive Function, 2nd Edition (BRIEF-2); the Clinical Evaluation of Language Fundamentals, 5th Edition (CELF-5); the Contingency Naming Test (CNT); the Integrated Visual and Auditory Continuous Performance Test, 2nd Edition (IVA-2); the Feifer Assessment of Mathematics (FAM); the Feifer Assessment of Reading (FAR); Finger Tapping; the Lafayette Grooved Pegboard; the NEPSY-II Neurodevelopmental Test, Design Fluency; the Reynold's Interference Task (RIT); the SNAP-IV Teacher and Parent Rating Scale; the Test of Memory and Learning, 2nd Edition (TOMAL-2); the Tower of London, 2nd Edition (TOL-2); the Vanderbilt ADHD Diagnostic Teacher Rating Scale; the Wechsler Intelligence Scale for Children, 5th Edition (WISC-V), Writing Composite; and the Wechsler Individual Achievement Test, 3rd Edition (WIAT-III) (*see* Parent Ex. B at p. 4).

Based on the testing results, the evaluator described the student's cognitive abilities as "above average," however, he exhibited "inattention and distractibility in functional settings," with "weak sustained attention and executive functioning skills" that were confirmed by standardized assessments (Parent Ex. B at p. 10). According to the evaluator, the student performed inconsistently on measures of attention to tasks and his performance had been "highly affected by his ability to attend mentally and physically to the task[s]" (*id.*). In addition, the evaluator found that, although the student had "intact processing speed and fluid reasoning skills, there were weaknesses found on some of the more challenging tasks of executive functioning" (*id.*). In light

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<sup>8</sup> According to the November 2017 OT evaluation report, in order to qualify for school-based OT services, the student's testing results had to include "[s]ignificant delays (at least [four] or more scores of 'below age level') . . . in two or more domains in the Functional Skills Assessment AND [a] standard score of below 85 or percentile score of 15 [percent] (or less) . . . on at least [one] standardized test" (Dist. Ex. 9 at p. 9).

of the testing results, the evaluator concluded that the student met the diagnostic criteria for an attention deficit hyperactivity disorder (ADHD) (id.).

Next, the evaluator indicated that the student was a "capable learner with good memory functioning for both verbal and visual material" (Parent Ex. B at p. 10). The student benefitted from "repetition and rehearsal to improve consolidation and storage of information" (id.). At that time, the student demonstrated stronger expressive language skills and intact visual spatial and fine motor abilities (with an exception for graphomotor skills and fine motor speed) (id. at pp. 10-11).

With respect to academic achievement, the evaluator found that the student performed in the average range "with some areas of isolated weaknesses" (Parent Ex. B at pp. 11). The evaluator noted that the student worked slowly and "did not manage his time efficiently," and he "sacrific[ed] speed for accuracy" (id.). In reading, the student exhibited "intact" word decoding, fluency, and comprehension skills, but had "weaknesses with phonemic awareness and localization despite being provided with intensive reading interventions this past year" (id.). According to the evaluator, the student's "isolated low performance on a word recall task appeared to be due primarily to inattentiveness" (id.). In writing, the student performed "adequate[ly]" for alphabet writing fluency, spelling, and sentence composition, although he produced numerous fragmented sentences" (id.). In mathematics, the student had "average" skills in "problem-solving and computational math skills," but was "weak" in the areas of "math automaticity and fluency" (id.).

In summary, the evaluator concluded that the student "continue[d] to experience attention, executive functioning, speech, and motor developmental delays which [we]re impacting his academic performance" (Parent Ex. B at p. 11). She noted that, while the student had difficulty learning to read, he was "responding nicely to intensive reading interventions with only a few areas of remaining residual weaknesses" (id.). The evaluator also noted that the student would "benefit from continuing to focus on developing his sentence writing skills and memorization of math facts," and at school, the student would "continue to benefit from receiving academic support and receiving therapeutic intervention in order to reach his maximum long-term potential" (id.). At that time, the student received the following diagnoses: speech sound disorder, specific learning disorder with impairment in reading (significantly improved), developmental coordination disorder, and an ADHD (predominantly inattentive presentation, mild) (id.).

The evaluator indicated that the student "continued to mildly struggle with his academic work despite receiving academic support, therapeutic services, and targeted interventions" (Parent Ex. B at p. 11). The evaluator further indicated that "[i]f this pattern continue[d] or worsen[ed] next year, he may benefit from being provided with an [IEP]," with either an other health-impairment, learning disability or speech or language impairment as a disability category (id.). The evaluator noted that the student "may benefit" from an integrated co-teaching (ICT) classroom, and that, based on the results of the testing, the student "w[ould] continue to benefit from receiving an evidence-based and multi-sensory language approach which target[ed] multiple aspects of the reading process (e.g., Orton-Gillingham methodology), until his reading weaknesses [we]re fully resolved, particularly his phonological processing skills" (id. at p. 12). In addition to recommending that the student strengthen his writing skills and mathematics facts, the evaluator noted that the student would benefit from continuing to receive speech-language therapy services and that he should receive OT services (id.). Going forward, the evaluator opined that the student

"may experience the type of academic weaknesses that [we]re commonly seen in the presence of [an] ADHD (e.g., weaknesses with reading comprehension, writing composition, math word problem solving, and accuracy with the details involved in the multiple steps of math computation)" (id.). According to the evaluator, "[t]hese academic skills should be carefully monitored and appropriate academic interventions provided as needed, including reading comprehension strategies, structured writing formulas, editing strategies, math word problem-solving techniques, and multiple methods of checking math computations" (id.).

In an email to the district's director of special education (director), dated August 13, 2018, the parents expressed that, due to "ongoing concerns," they obtained a neuropsychological evaluation of the student (Dist. Ex. 50 at pp. 2-3).<sup>9</sup> The parents noted that they received the results of the neuropsychological evaluation "at the end of last week," and further noted that the student received the following four diagnoses: "speech sound disorder," "specific learning disorder with impairment in reading (significantly improved)," "developmental coordination disorder," and an "attention-deficit/hyperactivity disorder" (ADHD) (id. at p. 3). The parents indicated that the student would be entering second grade, and they wanted to "meet as soon as possible to figure out how [they] c[ould] work together to make sure he receive[d] the supports he need[ed] in order to be successful in school" (id.).

The director responded to the parents via email later that same day (see Dist. Ex. 50 at p. 2). The director viewed the parents' email as a request to "initiate a referral to special education," and advised that she would have the "secretary mail [them] a consent for evaluation which include[d] cognitive and achievement testing" (id.; see Dist. Ex. 44). The director also noted that, since the parents had "just completed a neuropsych[ological] evaluation, it [wa]s likely that [the student] ha[d] already completed some of this testing so the evaluation process m[ight] be minimal" (Dist. Ex. 50 at p. 2). Thereafter, the director and the parents exchanged emails to schedule a meeting (id. at pp. 1-2).

On August 15, 2018, the parents consented to the district evaluation, and at the start of the 2018-19 school year when the student began attending second grade the district completed a September 2018 classroom observation of the student, a September 2018 physical therapy (PT) evaluation, a September 2018 OT evaluation, a September 2018 speech-language therapy evaluation, a September 2018 social history, and a September 2018 teacher report (see Dist. Ex. 44; see generally Dist. Exs. 12-17).

In second grade (2018-19 school year), the student attended an ICT classroom as a regular education student and received two sessions per week of speech-language therapy in a small group (Dist. Ex. 17 at p. 2). At that time, the student's regular education and special education teachers reported that he "complete[d] most work independently," he performed "very well in math but need[ed] some support in writing," and he benefitted from a "checklist for editing" (id.).<sup>10</sup>

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<sup>9</sup> In the September 2018 social history, the parents reported that they referred the student for a "psychological evaluation . . . due to concerns regarding his reading, speech and fine motor skills," as well as their concerns about the "impact" that the student's diagnoses resulting from the June 2018 neuropsychological evaluation would have on the student's "academic and social functioning" (Dist. Ex. 17 at p. 3).

<sup>10</sup> As reported for the student's March 2021 neuropsychological evaluation, as the student's "early reading skills

Recently administered benchmark assessments in reading indicated that the student was "reading on a Level K (independent[ly])" and could "read 195/200 sight words" (id.).<sup>11</sup> The evidence reflects that the student responded "very literal[ly]" to "comprehension questions," but appeared to "enjoy reading and always trie[d] his best" (id.). The student's then-current teachers also reported that he "follow[ed] all directions and want[ed] to do the right thing," he "demonstrate[d] age appropriate concentration but s[ought] assurance [or] reassurance and need[ed] directions to be validated throughout the school day" (id.). Socially, the student's then-current teachers described him as "generally very happy" and that he got along with peers and adults; however, the student "sometimes seem[ed] to be nervous or anxious" (id.).<sup>12</sup>

On October 12, 2018, a CSE convened for an initial eligibility determination and, at that time, found that the student was not eligible for special education because he "did not meet the criteria to be classified as a student with a disability and d[id] not require special education" (Dist. Ex. 39 at p. 1; see Dist. Ex. 1 at p. 1; see generally Parent Ex. C; Dist. Exs. 1; 12-17; 38). The district's prior written notice, dated November 1, 2018, reflected that the district did not conduct any "new testing" in light of the student's June 2018 neuropsychological evaluation, which the CSE had "accepted" (Dist. Ex. 39 at p. 1). The prior written notice indicated that the student was then-currently "reading on a Level L, which [wa]s above grade level" and that, although the student could be "inattentive," he responded to "redirection" (id.). In addition, the prior written notice identified concerns with regard to reports by the physical therapist and occupational therapist (id.). Notwithstanding that the October 2018 CSE found that the student was not eligible for special education, the CSE referred the student's case to the section 504 "Accommodation Committee" (504 Committee) (Dist. Ex. 1 at pp. 1, 5).

Following the October 2018 CSE meeting, the parents sent an email, dated October 18, 2018, to the director (see Parent Ex. G at p. 2). In the email, the parents expressed concern that the student's "needs would be better met with an IEP [rather] than a building-level support 504 plan" (id.). Overall, the parents focused their concern with respect to the student's OT needs (graphomotor needs), which were "consistent" with the student's testing results in the November 2017 OT evaluation report and which were "echo[ed]" by the information in the September 2018 classroom observation report (id. at pp. 2-4).

In an email sent to the parents on October 22, 2018, the director assured them that a "504 Accommodation Plan [wa]s a legally binding plan of accommodations and supports as [wa]s an IEP" (Parent Ex. G at p. 1). The director addressed the parents' concerns and pointed out that recommendations for school-based OT and PT "focus[ed] on requisite school based fine and gross motor skills" (id.). In addition, the director indicated that, after further discussions, she believed the "504 Committee would like to consider a direct OT service" for the student and that, as a direct

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improved, concerns emerged in other areas, including written expression and mathematics" (Parent Ex. T at pp. 2-3).

<sup>11</sup> "Level K" represents that the student was reading at a beginning of second grade level (see IHO Ex. I).

<sup>12</sup> At some point during second grade, the student's mother "discontinued his outside reading support" provided by the Orton Gillingham tutor, and the student "did not qualify for any other school-based supports" (Parent Ex. T at p. 2).



service, OT and PT would have "delineated goals and progress reports" (id.). The director also explained that an "educational classification occur[red] in relation to a student's response to assessment, academic progress and the demonstrated ability to learn when provided with explicit targeted instruction" (id.). She further explained that "[w]hen a student d[id] not demonstrate the ability to learn when provided with this type of instruction, an educational classification [wa]s indicated" (id.). Moreover, the director noted that "[w]hen a student respond[ed] to a targeted intervention, as [the student] ha[d], an educational classification [wa]s not warranted however, targeted intervention with progress monitoring in relation to standardized grade level expectations [wa]s needed" (id.). As a final point, the director indicated that she believed the student was "getting the support that he require[d]" and "if he [wa]s not making progress, [they] c[ould] revisit an educational classification" (id.).

On November 2, 2018, a 504 Committee convened to review the student's needs and to determine his eligibility for a section 504 accommodations plan (see Dist. Ex. 2 at p. 1; see generally Parent Ex. H). The November 2018 504 Committee found the student eligible for a 504 plan (see Dist. Ex. 2 at pp. 1-2). The November 2018 Committee recommended the following to address the student's needs: two 30-minute sessions per week of PT in a small group, two 30-minute sessions per week of speech-language therapy in a small group, and two 30-minute sessions per week of OT in a small group for 10 weeks (with a 10 week review of the student's OT services and classroom interventions) (id.). In addition, the November 2018 Committee recommended the following as supplementary aids, services, program modifications, and accommodations for the student: allowing for fidgeting and legitimate movement, highlighting work, refocusing and redirection, lined paper, repeated directions, preferential seating, and a visual schedule (id. at pp. 2-3). The November 2018 504 plan also included on-task focusing prompts as a testing accommodation: (id. at p. 3).<sup>13</sup>

According to the student's second grade report card for the 2018-19 school year, the student met or exceeded grade level standards in all areas by the final marking period, with the exception of using "conventions of capitalization and punctuation in writing," which remained consistently graded as "[p]rogressing toward grade level standards" across all three marking periods (Dist. Ex. 24 at pp. 1-2). In addition, progress reports for OT and PT reflected that the student made progress and was meeting, or had achieved, the skills worked on in both OT and PT (see generally Dist. Exs. 18-21).

On June 11, 2019, a 504 Committee convened and found that the student remained eligible for a 504 plan for the 2019-20 school year (third grade) (see Dist. Ex. 3 at p. 1; see also Parent Ex. L at p. 1). At that time, the June 2019 504 Committee discontinued the student's OT and speech-language therapy services and reduced the student's PT services to one 30-minute session per week for 10 weeks (see Dist. Ex. 3 at pp. 1-2). In addition, the June 2019 Committee recommended the following as supplementary aids, services, program modifications, and accommodations for the student: allowing for fidgeting and legitimate movement, refocusing and redirection, an agenda book signed by a teacher, a copy of class notes, repeated directions, and preferential seating (id. at

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<sup>13</sup> On November 12, 2018, the parents consented to the initial provision of accommodations under the November 2018 section 504 plan (see Dist. Ex. 2 at p. 6; see also Parent Ex. K).

p. 2). The June 2019 504 plan included on-task focusing prompts and breaks as testing accommodations (id. at p. 3).<sup>14</sup>

For the 2019-20 school year (third grade), the student attended an ICT class as a regular education student with his June 2019 504 plan (see Tr. pp. 409-10; see generally Dist. Ex. 3).<sup>15</sup> At the start of the school year, the student's "teacher immediately expressed concern about [his] attention in the classroom," and the student's pediatrician changed the medication prescribed to treat his ADHD; thereafter, his "attention seemed improved" (Parent Ex. T at p. 3). In or around December 2019, the student's medication for his ADHD changed again, and after the student returned to school in January 2020, the parents sent an email to his teacher to both inform her of the change in medication and to inquire about the student's behavior in light of the new medication (see Dist. Ex. 57 at pp. 1-2). The student's teacher responded, noting that the student's "attention ha[d] stayed consistent with what [they] were noticing before [winter] break," he followed "directions in a whole group setting, and when working independently [or] in a small group he benefit[ed] from occasional prompts to stay on task (which [wa]s on his 504 plan)" (id. at p. 2).

In March 2020, the district school buildings shut down as a result of the Covid-19 pandemic, and the district provided fully-remote virtual instruction to the student (see Tr. pp. 430-31, 1121). At the impartial hearing, the student's third grade teacher testified that, although she could not observe the student and "how he was doing the work," the student continued to complete "all assignments to the best of his ability" (Tr. p. 431). She also testified that she knew that the student received "a lot of parent support at home during that time when he was virtual" and, based on the parents' report, he was "having difficulty through the pandemic being able to get on the computer for that long," which was "very typical for all [thi]rd grade students" (Tr. pp. 431-32). The student's teacher testified that, near the conclusion of the 2019-20 school year, the parents reached out to her about obtaining books on tape for the student because he was having difficulty reading books on the computer (see Tr. pp. 449-50; Dist. Ex. 59 at p. 1). The teacher also testified that she "wanted to do everything [she] could in order to support him at home during this difficult time in the pandemic," so she "agreed" with the parents (Tr. pp. 450-51).

In an email to the parents dated June 11, 2020, a district school psychologist sought to confirm that the parents agreed "with everything rolling over" from the student's June 2019 504 plan from the 2019-20 school year in order to create the student's 504 plan for the 2020-21 school year (June 2020 504 plan) (see Tr. pp. 213-14, 230-32; Dist. Ex. 60 at p. 1; see generally Dist. Exs. 3-4; 58). In the same email, the school psychologist informed the parents that, as they had requested, the student's 504 plan for the 2020-21 school year would include two new accommodations, namely, access to audiobooks (i.e., books on tape) and access to a word processor (see Dist. Ex. 60 at p. 1). Later that same day, the parents responded that they were

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<sup>14</sup> Committee meeting notes reflected that the student's decoding skills were reported as a "Level N 99 [percent], [but his] comprehension [was] weaker" (Dist. Ex. 3 at p. 5). In addition, the meeting notes reflected that, on a spelling inventory, the student scored "72/82," his "vowel teams ha[d] improved," and he identified "174/200 sight words" (id.). The meeting notes also reflected that the student's "attention ha[d] improved" (id.).

<sup>15</sup> As later reported for the March 2021 neuropsychological evaluation, the student and "his classmates transferred" to a different district elementary school for third grade (Parent Ex. T at pp. 2-3). It was also reported at that time that the student's "word recognition and spelling skills were much improved" by the time the student entered third grade, but his "reading comprehension became more problematic" (id. at p. 3).

"absolutely okay with everything rolling forward" and were very pleased about the additional accommodations for the student (id.).

As a result of the foregoing, the student's June 2020 504 plan for the 2020-21 school year (fourth grade) included the following recommendations as supplementary aids, services, program modifications, and accommodations: allowing for fidgeting and legitimate movement, refocusing and redirection, an agenda book signed by a teacher, a copy of class notes, access to a word processing program, books on tape, repeated directions, use of a graphic organizer, and preferential seating (see Tr. p. 234; Dist. Ex. 4 at pp. 1-3). The June 2020 504 plan included the following testing accommodations: on-task focusing prompts, breaks, and use of a word processor (see Dist. Ex. 4 at p. 3).

A review of the student's report card for third grade reflects that, during the first two marking periods prior to the school closures in March 2020, the student was either meeting or was exceeding grade level standards in all areas, or had otherwise improved his performance from meeting grade level standards to exceeding grade level standards (Dist. Ex. 24 at pp. 3-4).<sup>16</sup>

In fourth grade (2020-21 school year), the parents elected to have the student continue to receive fully-remote, virtual instruction for the entire school year (see Tr. pp. 235-36, 638-40, 642; Dist. Ex. 61). Consistent with a notation in the student's June 2020 504 plan, a 504 Committee convened on November 19, 2020 to review the student's program (see Tr. p. 236; Dist. Exs. 4 at p. 1; 5 at p. 1). At that time, the student was reportedly "doing well in math and E[nglish] L[anguage] A[rts]" (ELA), but he continued to need "prompting to elaborate and show evidence" (Dist. Ex. 5 at p. 1). In addition, the student needed "support to put his words into writing and benefit[ed] from graphic organizers" (id.). In reading, the student was "benchmarked at an instructional level Q," and "benefit[ed] from sketching a story to help him with his reading comprehension" (id.).<sup>17</sup> Overall, the recommendations in the student's November 2020 section 504 plan mirrored the June 2020 section 504 plan, except that the November 2020 504 Committee added the use of graphic organizers to the student's testing accommodations (compare Dist. Ex. 4, with Dist. Ex. 5).

In an email dated February 9, 2021, the parents informed a district school psychologist that the student was "really struggling at times, especially as the subjects [we]re getting harder" (Dist. Ex. 67). The parents noted that the student's teacher had "been wonderful with him, and he [wa]s getting good grades, but the getting there [wa]s so overwhelming at times" (id.). More specifically, the parents noted that the student, at times, could not understand the material and became very frustrated with his inability to understand it and he sometimes took a "long time to complete his work" or, as he had experienced with a recent math test, he took very long to complete it (although the student received a grade of 90 percent) (id.). The parents reminded the school psychologist of the student's upcoming neuropsychological reevaluation in March 2021, and further indicated that, "in the meantime," an individual ("tutor" or "learning specialist") was able to "work with [the student] on math, reading and writing" (id.; see Dist. Exs. 63; 65-66). According to the parents'

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<sup>16</sup> At the impartial hearing, the student's third-grade teacher testified that the third marking quarter in the student's report card was blank because the district had "transitioned to virtual learning" (Tr. pp. 430-31; see Dist. Ex. 24 at pp. 3-4).

<sup>17</sup> "Level Q" represents that the student was reading at a beginning of fourth grade level (see IHO Ex. I).

email, the individual would begin working with the student two times per week (see Dist. Ex. 67; see generally Dist. Ex. 68).

Over the course of three days in March 2021, the student underwent a neuropsychological and educational reevaluation (see Parent Ex. T at p. 1). The private neuropsychologist administered the following to assess the student: the WISC-V (intellectual functioning); the CELF-5 (language skills); the Boston Naming Test (BNT); the Grooved Pegboard Test and the VMI (Sixth Edition) (visual and motor functioning); the Conners Continuous Performance Test, Third Edition (CPT3) and a Developmental Neuropsychological Assessment, Second Edition (NEPSY-II) (attention and executive functioning); the Children's Memory Scale (CMS) (learning and memory); the Comprehensive Test of Phonological Processing, Second Edition, (CTOPP-2), the Kaufman Test of Educational Achievement, Third Edition (KTEA-3, Form A), and the Gray Oral Reading Test, Fifth Edition (GORT-5) (academic functioning); clinical interviews, the Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2; parent and teacher), the Conners 3 (parent short form), the Conners 3 (teacher short form), the Millon Pre-Adolescent Clinical Inventory (M-Paci), and the Swanson, Nolan, and Pelham (SNAP-IV) (social, emotional, and behavioral functioning) (see Parent Ex. T at pp. 17-21).<sup>18</sup>

Based on the student's testing results, the private neuropsychologist determined that the student had "made significant progress in his literacy skills, which [we]re now on grade-level" (Parent Ex. T at p. 10). The neuropsychologist indicated, however, that the student struggled in school to retain new concepts, especially in the areas of mathematics, written expression, and understanding assignments (id.). In addition, the student became "confused and then overwhelmed by schoolwork," which led to "more meltdowns" (id.). As reflected in the March 2021 neuropsychological evaluation, the parents reported "worries about [the student's] frustration, demoralization, and self-esteem as it pertain[ed] to learning" (id.).

After summarizing the student's clinical picture, and more specifically, his strengths and weaknesses as derived from the assessments administered to the student, the private neuropsychologist indicated that the student's "emotional functioning also warrant[ed] attention, as he ha[d] become increasingly anxious, frustrated, and demoralized by his academic struggles" (Parent Ex. T at pp. 10-11). The neuropsychologist concluded that the student met the diagnostic criteria for the following: an ADHD, combined presentation; other specific neurodevelopmental disorder, with weaknesses in aspects of nonverbal learning; developmental coordination disorder; and other specified anxiety disorder (id. at p. 12). In addition, the neuropsychologist indicated that the student also met the criteria for a language disorder and specific learning disability, with impairment in reading, "both by history" (id.). Finally, the neuropsychologist recommended the

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<sup>18</sup> On the KTEA-3, the student achieved the following standard scores (SS) and percentile ranks: academic skills battery, SS 104 (61st percentile); reading composite, SS 113 (81st percentile); written language composite, SS 100 (50th percentile); math composite, SS 100 (50th percentile) (see Parent Ex. T at p. 20). With respect to the reading subtests, the student achieved the following: letter and word recognition, SS 108 (70th percentile); word recognition fluency, SS 110 (70th percentile); nonsense word decoding, SS 108 (70th percentile); decoding fluency, SS 114 (82nd percentile); and reading comprehension, SS 115 (84th percentile) (id.). On the written language subtests, the student achieved the following: spelling, SS 106 (66th percentile); and written expression, SS 96 (39th percentile) (id.). The results of the GORT-5 reflected the student's oral reading index SS of 94 (34th percentile) and his rate (37th percentile), accuracy (25th percentile), fluency (25th percentile), and comprehension (50th percentile) (id.).

following, in part, to address the student's needs: finding the student eligible for special education as a student with an other health-impairment; building the student's confidence in learning with "ongoing check-ins"; placement in an ICT classroom to access the general education curriculum with the support of a special education teacher to "help clarify or modify instruction or scaffold assignments as needed"; "individualized learning support that cater[ed] to his own unique learning profile," "using explicit teaching strategies and modeling" to teach concepts, and teaching the student "one way of solving a problem . . . with ample opportunities to practice that new skill to mastery before moving on to the next new skill"; the use of "graphic organizers, story boards, concept webs, cause-and-effect boxes," for example, to "support [the student in] organizing information, drawing connections between concepts, concretizing abstract concepts, and promoting more integrated learning"; providing the student with classroom accommodations to "minimize the impact that his inattention, disorganization, nonverbal learning difficulties, and anxiety pose [to] his school functioning"; and providing executive functioning support (id. at pp. 12-16).

In an email dated May 27, 2021, the parents, in anticipation of the student's 504 Committee meeting scheduled for June 3, 2021, wrote to district personnel concerning "requests" about his "class placement" for the upcoming 2021-22 school year (Dist. Ex. 75). The parents indicated that the student had been "reevaluated," and as a result, his "learning profile ha[d] changed quite a bit, and he [wa]s struggling with inferential thinking/big picture thinking" (id.). The parents further indicated that the student would need a "teacher [or] teachers who [we]re very patient, explicit about what [wa]s expected, and who w[ould]n't mind a lot of teacher check-ins" (id.). The parents also noted that it would be "great" if the teachers had "training in ADHD [or] learning disabilities" (id.).

On June 3, 2021, a 504 Committee convened to develop the student's 504 plan for the 2021-22 school year (fifth grade) (see Dist. Ex. 6 at p. 1). Although the 504 Committee developed a plan for the student, the parents indicated that they would be "referring [the student] to [the] CSE as per a recommendation from the [n]europsychologist" and therefore, the 504 Committee continued the student's 504 plan "pending CSE results" (id.).

In an email to the director, dated June 4, 2021, the parents requested an evaluation for special education services and attached a copy of the March 2021 neuropsychological evaluation of the student (see Dist. Ex. 76 at p. 1). In a subsequent email to the director, dated June 10, 2021, the parents returned the "consent form and survey[s]" to the director (Dist. Ex. 77 at p. 1; see Dist. Exs. 28-29; 76 at p. 1).<sup>19</sup>

On June 14, 2021, the parents sent an email to the student's teacher, indicating that he had been "REALLY struggling" with an assignment on that day and had been crying (Dist. Ex. 79 at p. 1). In response, the teacher noted that she had not known that the student was upset, and that during the assignment, she had prompted the student, at times, and he had responded with the appropriate answers (id.). The teacher further noted that she would monitor the student's "levels of frustration" when the assignment continued the next day (id.).

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<sup>19</sup> The parents completed, and returned, two surveys to the director: a residency questionnaire (see Dist. Ex. 28) and a home language survey (see Dist. Ex. 29).

On June 15, 2021, the district conducted a classroom observation of the student as part of the referral to the CSE, as well as a social history (see Dist. Exs. 30 at p. 1; 31 at p. 1).

On August 4, 2021, a CSE convened for an initial eligibility determination meeting (see Dist. Ex. 7 at p. 1). At that time, the August 2021 CSE found the student eligible for special education as a student with an other health-impairment and developed an IEP for the 2021-22 school year (fifth grade) (id. at pp. 1-2). To address the student's needs, the August 2021 CSE recommended ICT services, as well as one 30-minute session per week of individual counseling (id. at p. 6). The August 2021 IEP included annual goals targeting the student's needs in reading, writing, and mathematics, as well as his social/ emotional and behavioral needs (id. at pp. 5-6). In addition, the August 2021 CSE recommended the following as supplementary aids, services, program modifications, and accommodations: allowing for fidgeting and legitimate movement; refocusing and redirection; an agenda book signed by a teacher; a copy of class notes; access to a word processing program; books on tape; repeated directions; use of a graphic organizer; verbal, visual, and written cues; breaks (stepping out of class or situations when overstimulated); clarification of assignments; simplified complex directions; breaking work down into small segments; checks for understanding; preferential seating; and support for organizational skills (id. at pp. 6-8). In addition, as supports for school personnel on behalf of the student, the August 2021 CSE recommended one 15-minute speech-language therapy consultation per week and a consultation with the school psychologist as needed to provide information about the student's disability and its implications for instruction (id. at p. 8). With respect to testing accommodations, the August 2021 IEP included the following: on-task focusing prompts, breaks, use of a word processor, use of graphic organizers, directions read and explained, answers recorded in any manner, and extended time ("time and a half") with breaks (id. at p. 9). According to a notation in the August 2021 IEP, the parents were "in agreement" with the IEP (id. at p. 1).

For fifth grade, the student continued to attend a district public school in an ICT class (see Tr. pp. 738-39). Consistent with the notation in the student's August 2021 IEP, a CSE convened for a program review on October 27, 2021 (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 8 at p. 1). The October 2021 CSE continued to find that the student was eligible for special education as a student with an other health-impairment (see Dist. Ex. 8 at p. 1). As a result of the meeting, the October 2021 CSE modified the student's IEP by changing the recommendation for the speech-language consultation from one 15-minute consultation per week to one 30-minute individual consultation per month on a direct/indirect basis (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 8 at p. 1). In addition, the October 2021 CSE noted in the present levels of performance that, at that time, the student "read text independently on a Level R with 100 [percent] accuracy, while scoring 8/9 on the comprehension portion of the assessment" (Dist. Ex. 8 at p. 3).<sup>20</sup> Moreover, the October 2021 IEP reflected that the student "read [on] a Level S text with 99 [percent] accuracy, while scoring 3/9 on the comprehension portion of the assessment" (id.).<sup>21</sup>

With respect to mathematics, the October 2021 IEP noted that the student demonstrated "good understanding of the concepts taught," he could "multiply and divide whole numbers," and he scored 80 percent on "his first test on multiplication of whole numbers" and 100 percent on "his

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<sup>20</sup> "Level R" represents that the student was reading at a mid-fourth grade level (see IHO Ex. I).

<sup>21</sup> "Level S" represents that the student was reading at an end-of-fourth grade level (see IHO Ex. I).

second test on division" (Dist. Ex. 8 at p. 3). At that time, the student independently asked for assistance when needed, and at times, he needed "reassurance from his teachers to ensure he [wa]s performing the correct operations when solving word problems" (id.).

In writing, the October 2021 IEP indicated that the student wrote "well-written narrative stories for homework," and he could "write a story with a clear beginning, middle, and end" (Dist. Ex. 8 at pp. 3-4). It was also noted that, at times, the student did not use commas correctly, but his "handwriting [wa]s legible" (id. at p. 4).

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

By due process complaint notice dated November 5, 2021, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20, 2020-21, and 2021-22 school years, as well as during summer 2020 and summer 2021 (see Parent Ex. A at pp. 1-2, 9-11).<sup>22</sup> Specifically, the parents asserted that the district violated its child-find obligations by failing to find the student eligible until August 2021 (id. at p. 9). The parents also asserted that the district failed to appropriately evaluate the student in all areas of suspected disability and failed to identify all of the student's needs (id.). Relatedly, the parents alleged that the district failed to appropriately consider the evaluative information available to the CSE (id.). Next, the parents contended that the district failed to offer methodologies and strategies based on peer-reviewed research (id.). In addition, the parents alleged that, "[b]y failing to provide [the student] with an IEP prior to August 2021 and providing an IEP for the 2021-22 school year that comport[ed] with the neuropsychologist's recommendations," the district failed to develop measurable annual goals "designed to track progress in all areas of [the student's] needs" and further failed to recommend appropriate related services (id. at p. 10). Finally, the parents alleged that the district failed to provide a program "reasonably calculated to enable [the student] to make progress appropriate in light of his circumstances" by failing to recommend adequate special education, supports, and services for "at least" all three school years, as well as during summer 2020 and summer 2021 (id.).

In addition, the parents alleged that, "[t]o the extent that the foregoing violations of law and regulation [wer]e procedural in nature, these allegations" impeded the student's right to a FAPE, significantly impeded their opportunity to participate in the decision-making process regarding the provision of a FAPE, and caused a deprivation of educational benefits to the student (Parent Ex. A at p. 10). The parents also alleged, pursuant to section 504 and the ADA, that the district failed to provide the student with instruction, services, or reasonable accommodations "in order to enjoy meaningful access to the benefits offered by a school district" (id. at pp. 10-11).

As relief, the parents sought findings that the district failed to offer the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years; an order directing the district to develop an "appropriate IEP including an appropriate program, related services, accommodations, and supports" for the student that were "consistent with the recommendations of the 2021

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<sup>22</sup> Initially, in the due process complaint notice, the parents indicated that they brought this action pursuant to the IDEA, Title II of the Americans with Disabilities Act (ADA) (42 U.S.C. § 12131 et seq.), and section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794[a]), as well as State law and regulations (see Parent Ex. A at p. 1).

neuropsychological evaluation," as well as including "appropriate, measurable, and meaningful goals and objectives" to address the student's needs; an order directing the district to reimburse the parents for the unilaterally obtained "learning support services" and for the neuropsychological evaluation relied upon by the district; and an order awarding compensatory educational services to be determined during the impartial hearing based upon the "testimony and evidence" presented (Parent Ex. A at p. 11).

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

On January 11, 2022, the parties proceeded to an impartial hearing, which concluded on May 27, 2022, after eight days of proceedings (see Tr. pp. 1-1146). In a decision dated July 20, 2022, the IHO found that the district complied with its child-find obligations, the district properly evaluated the student at all times relevant, the district used methodologies with the student that were based on peer-reviewed research to the extent practicable, and the district's 504 plans for the student for the 2019-20 and 2020-21 school years offered the student a FAPE (*id.* at pp. 25-34).

With respect to the parents' child-find allegations, the IHO noted that "to 'identify, locate, and evaluate' d[id] not mean to 'find eligible'"—noting further that the question of eligibility was a "separate inquiry" (IHO Decision at p. 25). Therefore, the IHO found that the district had no reason to suspect that the student was a "'child with a disability' in need of special education pursuant to the IDEA" prior to receiving the parents' June 2018 neuropsychological evaluation report (*id.*). The IHO further noted that, upon receiving the parents' privately obtained evaluation, the district evaluated the student, consistent with its child-find obligations (*id.* at pp. 25-26). Turning to the question of eligibility, the IHO concluded that the October 2018 CSE properly reviewed the parents' June 2018 neuropsychological evaluation, as well as district assessments and reports, and moreover, that the October 2018 CSE properly determined that the student was not eligible for special education pursuant to the IDEA because the student did not require "'specially designed instruction'" at that time, which was consistent with the information in the student's June 2018 neuropsychological evaluation report (*id.* at p. 31).<sup>23</sup>

Turning to the parents' allegations that the district failed to adequately evaluate the student in all areas of suspected disability, the IHO initially determined that the parents only contacted the district concerning a referral to the CSE after obtaining private neuropsychological evaluations of the student in June 2018 and March 2021 (see IHO Decision at p. 26). In addition, the IHO noted that the district accepted the neuropsychological testing results "rather than conduct its own repetitive evaluations" of the student, and that there "was no reason to repeat testing" (*id.* at p. 27). The IHO pointed out that a "'test-re-test' phenomenon" existed "such that one c[ould not] repeat instruments within one year due to the 'practice effect,' which c[ould] potentially inflate scores" (*id.*). Additionally, the IHO noted that the district would have had to use "other instruments and put [the student] through more testing when it was not necessary," and moreover, that the parents "shared the evaluations with the [d]istrict to have the [d]istrict accept the assessment results" (*id.*). Nevertheless, while the district accepted the neuropsychological testing results, the IHO noted that it did not "necessarily mean that the CSE accept[ed] all the recommendations made by a private evaluator" (*id.*). Here, the IHO opined about the differences between using a "medical model of

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<sup>23</sup> The IHO's discussion of eligibility, while referencing the October 2018 CSE, was set forth under a heading entitled "2019-2020 School Year (Third Grade—Eligibility)" (IHO Decision at p. 31).



disability"—which "private evaluators rel[ie]d on"—as opposed to an "educational model" used by school districts (id.). According to the IHO, the medical model was "driven by a diagnosis and aimed at healing, or minimizing the impact of the disability" and the "educational model" used by school districts focused on providing "special education and related services that address[ed] deficits that interfer[d] with the student's ability to benefit from instruction" (id.). As a result, the IHO noted that a private evaluator's recommendations "may, or may not be appropriate for any given student" (id.).

With this as a backdrop, the IHO turned to the evaluations conducted or obtained by the district in 2018: a speech-language evaluation, an OT evaluation, a PT evaluation, a teacher progress report, and a classroom observation of the student, in addition to the parents' privately obtained June 2018 neuropsychological evaluation (see IHO Decision at p. 27). The IHO noted that the June 2018 neuropsychological evaluation included a "medical history, social history, academic history, cognitive testing, executive functioning, visual-spatial abilities, fine motor functioning, and [the evaluator's] diagnostic impressions" (id.). In addition, the IHO found that the "CSE considered all evaluations and reports" and the student had been placed in an ICT classroom, which was consistent with the evaluator's recommendation (id. at pp. 27-28).

Turning to 2021 when the district received the March 2021 private neuropsychological evaluation of the student, the IHO similarly noted that the evaluation included a "developmental history, educational history, behavioral observations, with intellectual testing, language functioning, visual motor function, executive functioning and attention, academic function, and social/emotional functioning" (IHO Decision at p. 28). In addition, while the student continued to attend school virtually at that time, the district conducted a classroom observation and completed a social history (id.).

The IHO then turned to the parents' contention that the district "relied too heavily on the results [the student] achieved on Fountas and Pinnell," which was "used to determine a student's independent and instructional reading levels" (IHO Decision at p. 28). The IHO noted, however, that the student's then-current tutor testified that Fountas and Pinnell did not "look at reading skills in isolation so that a [student] who decode[d] well, like [the student], d[id] not have to answer many comprehension questions," testifying further that "Fountas and Pinnell [wa]s commonly used, 'but also very commonly debated'" (id.). On this point, the IHO initially noted that districts had the "authority to select methodology to assess students other than the mandated State assessments in particular grades and for certain Regents high school courses" (id.). However, the IHO found that the district did not "rely solely on Fountas and Pinnell to assess [the student]" (id.). Instead, the IHO found that, in third grade, the district used a "variety of tools" to assess the student, including "i-Ready three times per year, classroom quizzes, and math unit tests" (id.). In fourth grade, the IHO indicated that "assessment procedures were limited" due to virtual instruction, and "teachers could not keep their usual reading record that year" (id. at pp. 28-29). Nevertheless, the IHO found that the district "accepted the [parents'] reports of how [the student] was struggling and frustrated with virtual instruction and put [their] report into [the student's] IEP[s]" (id. at pp. 28-29). And in fifth grade, the IHO noted that teachers used "i-Ready again, and [the student's teacher] kept daily data and noted benchmarks toward the student[s] IEP goals using checklists" (id. at p. 29).

In light of the foregoing, the IHO found that the district complied with federal and State law by "either conduct[ing] its own evaluations or acquired evaluations in all areas of suspected disability and properly considered them at all times relevant to this hearing" (IHO Decision at p. 29).

Turning to the parents' contentions with regard to methodology, the IHO took judicial notice that the district used "GO Math!" and, based on the publisher's website, that the "program incorporate[d] research-based strategies for effective teaching to maximize student learning" (IHO Decision at pp. 29-30 [emphasis in original]).<sup>24</sup> Similarly, the IHO took judicial notice that the district used the "Columbia University Teachers College Reading and Writing Project (TCRWP) for ELA" (id. at p. 30). The IHO found that the "American Institutes for Research (AIR) conducted a multi-year evaluation" of the TCRWP, which had been used as "an approach to literacy instruction for students in elementary and middle schools"; the results of this study demonstrated that "differences in test scores between the TCRWP schools and the comparison control schools grew larger the longer the school had been implementing the TCRWP program" (id. at pp. 30-31). As a result, the IHO concluded that the district's methodologies were "based on peer-reviewed research to the extent practicable" (id. at p. 31).

Next, the IHO found that the district offered the student a FAPE for the 2019-20 and 2020-21 school years under section 504 (see IHO Decision at pp. 31-34).

With respect to the 2021-22 school year, the IHO determined that the district offered the student a FAPE, noting that the hearing record failed to include any evidence of procedural violations, and the annual goals in the August 2021 IEP were measurable and did not require either "benchmarks or short-term objectives" because the student was not alternately assessed (IHO Decision at pp. 34-35). The IHO further noted that, contrary to the parents' contention, the progress the student made in fifth grade could not be solely attributed to the "one hour per week of private tutoring" he received, nor could the student's progress be dissected between the private tutor or the district's full week of instruction (id. at pp. 35-36). In addition, the IHO found that pulling the student out of class for 1:1 instruction would have violated the least restrictive environment (LRE) mandate (id. at pp. 36-37).

In light of the foregoing, the IHO concluded that the district offered the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years, and denied the parents' requested relief (see IHO Decision at p. 37).

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

The parents appeal, arguing that the IHO erred by finding that the student was not eligible for special education during the 2019-20 and 2020-21 school years and that the district complied with its child-find obligations. The parents also contend that the IHO erred by finding that the

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<sup>24</sup> In a footnote, the IHO pointed out that although the June 2018 neuropsychological evaluation report included a recommendation that the student receive a "multi-sensory reading program for [the student], 'e.g. (for example) Orton Gillingham,'" the district did not provide it to the student (IHO Decision at p. 30 n.9). In addition, the IHO noted that the student's then-current tutor used the "Wilson Language System"—"another multi-sensory program"—to help "fill in some gaps" for the student (id.). The IHO noted that the March 2021 neuropsychological evaluation report "did not suggest any specific methodology for [the student]" (id.).

district's 504 plans developed for the student for the 2019-20 and 2020-21 school years offered the student a FAPE, and, relatedly, by finding that the district did not violate either section 504 or the ADA.<sup>25</sup> In addition, the parents assert that the IHO erred by finding that the district adequately evaluated the student between 2018 and 2021. The parents also assert that the IHO erred by finding that the district offered the student a FAPE for the 2021-22 school year because the district failed to sustain its burden of proof and improperly relied on retrospective evidence of the student's progress. In addition, the parents allege that the district failed to include the parents in the development of the annual goals, which significantly impeded their participation in the decision-making process regarding a FAPE. In addition, the parents describe the annual goals as "immeasurable and not sufficiently comprehensive." With respect to relief, the parents argue that the IHO erred by denying their request for an order directing the district to prospectively develop an appropriate IEP for the student that was consistent with the recommendations in the March 2021 neuropsychological evaluation report and by denying their requests to be reimbursed for the costs of privately obtained services and for the costs of the March 2021 neuropsychological evaluation of the student.

As relief on appeal, the parents seek to reverse the IHO's findings that the district complied with its child-find obligations during the 2019-20 and 2020-21 school years; that the district offered the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years; and that the district adequately evaluated the student. In addition, the parents seek the following as relief for these alleged violations: reimbursement for the costs of privately obtained services and for the costs of the March 2021 neuropsychological evaluation.

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision in its entirety. The district further asserts that the parents' request for review must be dismissed for the failure to comply with practice regulations.

## **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

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<sup>25</sup> To the extent that the parents challenge the IHO's findings that the district's 504 plans for the 2019-20 and 2020-21 school years both offered the student a FAPE and that the district did not violate either section 504 or the ADA (see Req. for Rev. at pp. 3-5), an SRO lacks jurisdiction to consider challenges to an IHO's rulings, or failures to rule on section 504 or ADA claims, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at \*11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO would have no jurisdiction to review any portion of a parents' claims regarding section 504 or the ADA, and the parents' arguments pertaining to the student's 504 plans for the 2019-20 and 2020-21 school years—and the IHO's findings that the district offered the student a FAPE for the 2019-20 and 2020-21 school years under section 504—will not be further addressed.

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

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

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

omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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

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

## **VI. Discussion**

### **A. Preliminary Matters—Compliance with Practice Regulations**

The district contends that the request for review must be dismissed for failing to comply with State regulations governing the initiation of the review and the form requirements for pleadings (see 8 NYCRR 279.4[a]; 279.8[c][2]-[3]). Specifically, the district alleges that the parents' request for review fails to comply with section 279.8(c) because it "does not contain a

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

clear and concise statement of the issues presented for review and relief requested" and "contains sparse reference to the relevant page number(s) in the hearing decision and fails to properly number the paragraphs, allegations and/or claims" (Answer ¶¶ 12, 17).

State regulations provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]).

In relevant part, section 279.8(c) of the State regulations requires that a request for review shall set forth:

(2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and

(3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c][2]-[3]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]; 279.13; see Davis v. Carranza, 2021 WL 964820, at \*12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at \*23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at \*4-\*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

In this case, a review of the parents' request for review does not support the district's contentions to the extent that it requires dismissal of the request for review. For example, the parents enumerated eight distinct issues presented for review, as well as some bases for overturning the IHO's findings under the heading for each issue identified (see generally Req. for Rev.). To be sure, some of the parents' arguments are not identified in a clear manner. For example, it is altogether unclear why the parents raise their substantive arguments about the IEPs underlying their FAPE claim under "Issue 4," which argues that the IHO erred in ordering the district to

provide an appropriate IEP prospectively as relief. In any event, the district does not assert any prejudice in its ability to either prepare an answer responding to the parents' allegations or in its ability to do so in a timely manner. To the contrary, the district formulated an answer responsive to the specific issues raised in the parents' request for review. Consequently, there is no basis upon which to reject the parents' request for review for the failure to comply with practice regulations.

## **B. Child-Find**

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at \*11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at \*7 [S.D.N.Y. Oct. 28, 2019], aff'd, 2021 WL 745890 [2d Cir. Feb. 26, 2021]; E.T., 2012 WL 5936537, at \*11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child-find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have "overlooked clear signs of disability" and been "negligent in failing to order testing," or have "no rational justification for deciding not to evaluate" the student (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 [2d Cir. 2018], quoting Bd. of Educ. of Fayette County, Ky. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]).

Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]), see also 8 NYCRR 100.2[ii]).

The United States Office of Special Education and Rehabilitative Services has indicated that, if a student has received limited instruction or made little academic progress due to educational disruptions related to the Covid-19 pandemic, the student should not necessarily be referred for an evaluation, and districts should work with families to determine appropriate general education supports and interventions that can meet the student's needs attributable to limited instruction as a result of the Covid-19 pandemic ("Return to School Roadmap: Child Find under Part B of the Individuals with Disabilities Education Act," 79 IDELR 140 [OSERS 2021]).

### **1. 2019-20 School Year**

Initially, the parent has not challenged the district's child find procedures or argued that such procedures were lacking.

On appeal, the parents argue that, as set forth in their due process complaint notice, the district failed to meet its child-find obligations because it did not find the student eligible until August 2021. The parents further argue that the IHO erred in her child-find analysis because she confined the analysis to whether the district "had notice of potential special education eligibility prior to the 2018 neuropsychological evaluation," and failed to examine the parents' arguments that, after the June 2018 neuropsychological evaluation, the district failed to "monitor [the student's] potential eligibility prior to August 2021." Indeed, as described above, the October 2018 CSE found that the student was not eligible for special education as a student with a disability (Dist. Ex. 39 at p. 1). There is no indication in the hearing record that this determination was challenged by the parents.<sup>27</sup> Accordingly, as the parent argues, the IHO's analysis seemed focused on a period of time that predated the relevant school years (see IHO Decision at pp. 25-26). However, examining what the district knew thereafter (K.B., 2019 WL 5553292, at \*8 [noting that the child find inquiry "must focus on what the [d]istrict knew and when"], quoting J.S., 826 F. Supp. 2d at 652), the hearing record does not indicate that the district had sufficient new information warranting another referral to the CSE prior to the parent's referral of the student in June 2021 (see Ridley Sch. Dist. v. M.R., 680 F.3d 260, 273 [3d Cir. 2012] ["When a school district has conducted a comprehensive evaluation and concluded that a student does not qualify as disabled under the IDEA, the school district must be afforded a reasonable time to monitor the student's progress before exploring whether further evaluation is required. . . . The IDEA does not require a reevaluation every time a student posts a poor grade."]).

The parents contend that the evidence in the hearing record demonstrates that, during the 2018-19 school year in second grade, the student struggled in reading and mathematics, and his

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<sup>27</sup> On appeal, the parents seem in some respects to conflate the questions of whether the district complied with its child find obligations and whether the student met the criteria as a student with a disability in need of special education prior to August 2021. However, as the IHO noted in the decision, a student's eligibility is an inquiry separate from a child-find inquiry (see IHO Decision at p. 25).



teacher found that the student needed "additional instruction, modified teaching, small group work, or extra help in math." The parents further contend that, at the conclusion of second grade, the student performed at "an early second grade level" in mathematics. The parents assert that the student's difficulties in the 2018-19 school year support a finding that the student was "experiencing precisely the type of 'academic weaknesses that [we]re commonly seen in the presence of [an] ADHD," which the district should have "carefully monitored and addressed" through the provision of "appropriate academic interventions." To be clear, the parents' due process complaint notice included allegations limited to the 2019-20, 2020-21, and 2021-22 school years (see Parent Ex. A at pp. 9-11). Therefore, to the extent that the parents now attempt to assert that the district violated its child-find obligations during the 2018-19 school year and, relatedly, that the district failed to offer the student a FAPE for the 2018-19 school year, such claims are barred by either the statute of limitations or because the parents are raising these issues for the first time on appeal.

With respect to the 2019-20 school year when the student was in third grade, the parents argue that the student's third grade teacher was not aware of "how long lessons" took for the student but was aware that the student had a "great deal of parent support at home." The parents further argue that the same teacher could not "explain why he only passed 50 [percent] of the lessons" in reading comprehension. In addition, the parents assert that the student made no progress in mathematics during third grade and the district's measures used to track the student's reading skills demonstrated that the student could decode but could not comprehend.

With respect to the 2019-20 school year (third grade), the evidence in the hearing record demonstrates that, with the supports in his 504 plan, the student was meeting or exceeding grade level standards in reading (see Dist. Ex. 24 at pp. 3-4). Teacher comments from the first marking period described the student as a "self-motivated reader who ha[d] broadened his understanding of fiction texts by making text-to-text, text-to-self, and text-to-world connections to what he read[]" (id. at p. 4). In addition, the teacher comments indicated that the student "support[ed] his statements with evidence from the text when discussing traits pertaining to a specific character within a story" (id.). In writing, the teacher comments indicated that the student "did a fantastic job adding sensory details to make his narrative piece 'come to life'" and that he was "continuing to understand how to organize his writing into well-organized paragraphs that follow[ed] a chronological sequence" (id.). With respect to grammar, the teacher comments reflected that the student applied "grade-level grammar and mechanics to all written pieces with little assistance" (id.). With respect to mathematics, the teacher comments revealed that the student "demonstrate[d] problem solving skills in his ability to solve basic computation and one-step word problems," he "applie[d] new math concepts with ease," and he was "currently working towards mastering his multiplication facts in the near future" (id.).

Teacher comments for the second marking period reflected that, in reading, the student "was able to comprehend information from a variety of nonfiction texts and appl[ied] that information to his writing" (Dist. Ex. 24 at p. 4). At that time, the student continued to "demonstrate strong writing skills," and he took "pride in crafting his nonfiction book about Hofstra" (id.). The teacher comments noted that the student was "working hard to include creative text features that make his book interesting to read" (id.). In mathematics, the teacher comments indicated that he "was able to "solve problems involving both multiplication and division" and that

he benefitted from "support in order to breakdown and make sense of multistep word problems" (id.).

As previously noted, the student's report card for the third marking period in the 2019-20 school year (third grade) was left blank due to the school's approach to remote instruction during school closures. Based on the testimony elicited from the student's third-grade teacher, it was during this portion of the 2019-20 school year when she could not observe "how long his lessons were actually taking or how he was . . . doing with virtual learning" (Tr. p. 451; see Tr. p. 431). However, she also testified that she saw the student's completed assignments and that he had completed all of his assignments "to the best of his ability" (Tr. p. 431). She also acknowledged that the student received a "lot of parent support at home" (Tr. pp. 431-32). However, she further testified that, overall, the student's inattentiveness related to his diagnosis of an ADHD "did not impact his progression in the classroom in the subject areas" (Tr. pp. 432-33).

At the impartial hearing, the student's third-grade teacher testified that she used the following to monitor a student's progress: benchmarks administered three times per year (reading) (i.e., Fountas and Pinnell benchmarks); i-Ready diagnostics (reading and math) three times per year; mid-chapter tests in math (third grade math had 12 chapters), as well as a quiz and a unit test at the end of each chapter; exit tickets; anecdotal notes (reading) when doing small groups or pull-out groups individually; and classroom observations (see Tr. pp. 420-21, 436, 447).<sup>28</sup> In reading, the teacher testified that he entered third grade in September 2019 reading at a Fountas and Pinnell level "N" (beginning of grade three level) and progressed to a level "O" (a mid-third grade level) by January 2020 (Tr. pp. 428-29).

On appeal, the parents point to the student's i-Ready diagnostics reports generated in reading and mathematics during the 2019-20 school year to support their assertion that the student did not make any progress in reading and mathematics that school year. At the impartial hearing, the student's third-grade teacher, in reviewing the student's performance on i-Ready diagnostics administered during the 2019-20 school year, explained that the "Personalized Instruction Activity Summary (Grade 3)" represented the "lessons that [the student] completed throughout virtual learning" (Tr. p. 433; Dist. Ex. 22 at p. 3). According to the teacher, the diagnostic report reflected that the student completed "40 lessons out of 51 lessons in reading" and overall, the student "did well" as he "passed 86 percent of the vocabulary lessons," "83 percent of the comprehension lessons," and 50 [percent] on close reading" (Tr. pp. 433-34; Dist. Ex. 22 at p. 3). When asked about the student's score of 50 percent, the teacher testified that the lessons had been "assigned based on where [the student] was in i-Ready at the time and he was virtually learning" and she could not, now, recall "exactly what those question looked like" (Tr. p. 434).<sup>29</sup>

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<sup>28</sup> The third-grade teacher described exit tickets as presenting two to three questions directly from the lessons to determine if a student had grasped the lessons provided that day (see Tr. pp. 421-22). Depending on what the exit tickets revealed—that is, whether a group of students had incorrect responses or if it was just a few students with incorrect responses—the teacher could adjust instruction by providing another day on that topic or by providing small group instruction or just a quick 5-to-10 minute reteaching of the lesson (see Tr. pp. 422-23).

<sup>29</sup> The third-grade teacher later explained that "i-Ready populate[d] a series of lessons based on [the students'] diagnostic results" and she did not, herself, design the lesson (Tr. p. 462).

At the impartial hearing, the student's third-grade teacher was also asked to review his i-Ready diagnostic reports generated for mathematics during the 2019-20 school year (see Tr. p. 434; Dist. Ex. 23 at p. 3). The teacher explained that the "Diagnostic Performance Summary (Grade 3)" demonstrated that the student scored in the "Grade 2" level (score of 424) and that, although the student still scored in the "Grade 2" level on a later administration of the assessment, "he did progress on his i-Ready score" from a 424 to a 447 (Tr. p. 435; Dist. Ex. 23 at p. 3). She also pointed out that the student "did score in the mid grade 3 [level] in algebra and algebraic thinking," as well as in the domain of "measurement and data" in the middle of third grade (Tr. p. 435; Dist. Ex. 23 at p. 3). The teacher further testified that the student scored at a "grade 2 in geometry which [wa]s not addressed until the end of [the] year in [thi]rd grade" (Tr. p. 435). Turning to the next page, the teacher explained that the student passed "90" percent of the lessons given to him via i-Ready, and he "completed 47 out of the 52 lessons that were available to him at that time during virtual learning" (Tr. pp. 435-36; Dist. Ex. 23 at p. 4).

According to the third-grade teacher, the progress the student made during the 2019-20 school year "up until the point where [they] transitioned to virtual learning" was "proven on his benchmark assessment scores" and his i-Ready diagnostics, and that he was "meeting all grade level expectations" (Tr. p. 436). She added that her impression of the student's progress was not based on "just one data point," but, rather, for reading it was based on several data points, including the "student's benchmark assessments, anecdotal notes, classroom observation, as well as the i-Ready diagnostic scores" (Tr. p. 436). Similarly, she testified that the student's progress in mathematics was derived from his i-Ready diagnostic scores, as well as his exit tickets, quizzes, and tests, which were "aligned with [the district's] curriculum" (Tr. p. 437).

During cross-examination, the student's third-grade teacher was questioned about whether, in fact, the student "moved beyond the [seco]nd grade level in the area of math" based on his performance reported by the i-Ready diagnostics, which reflected scores at a "Grade 2" level (Tr. pp. 456-58; Dist. Ex. 23 at p. 3). The teacher testified that the student's lessons were "based on his diagnostic scores," and that based on "i-Ready's standards," the student's grade level remained the same (Tr. pp. 457, 460). She repeated her previous testimony that, with respect to his geometry scores, the student had not yet received instruction in geometry when he took the i-Ready diagnostic assessments (see Tr. pp. 457-58). The teacher further testified, however, that regardless of the grade level assigned to the student's performance, his scores did improve from 424 to 447 (Tr. p. 458; Dist. Ex. 23 at p. 3).

Overall, the foregoing evidence demonstrates that the district continued to monitor the student's progress and that the student, with the supports in his 504 plan, made progress during the 2019-20 school year. Thus, the evidence in the hearing record does not reflect that the district "overlooked clear signs of disability" and had been "negligent in failing to order testing," or have "no rational justification for deciding not to evaluate" the student (Mr. P., 885 F.3d at 750).

## **2. 2020-21 School Year**

Turning to the 2020-21 school year (fourth grade), the parents argue that the district violated its child-find obligations because the hearing record contains evidence of the student's continued struggles in reading and mathematics, as well as evidence of the student's increasing

anxiety and frustration, and as a result, the district should have revisited the student's eligibility and reevaluated the student but failed to do so.

With respect to the 2020-21 school year (fourth grade), the evidence in the hearing record demonstrates that, with the supports in his 504 plan, the student was meeting or exceeding grade level standards in reading, mathematics, and writing during all three marking periods for that school year (see Dist. Ex. 24 at p. 5).<sup>30</sup> As previously noted, the student remained on fully-remote, virtual instruction for the 2020-21 school year. The student's fourth grade teacher, who was dually certified as a regular education and as a special education teacher, testified that, during that school year, virtual instruction was as close as it could be to a "regular school day" (Tr. pp. 638-39, 641-42). The teacher described the virtual school day as beginning and ending at "regular school time[s]," with instruction blocks for literacy, writing, math, social studies, and science (Tr. p. 640). Virtual students also had lunch and recess (see Tr. p. 640). According to the teacher, she "modeled what [the fourth grade classes] were doing and just did it virtually" (Tr. p. 640).

With regard to curriculum and instruction, the student's fourth-grade teacher testified that she used the Teacher's College Reading, Teacher's College Writing, and Go Math programs (see Tr. pp. 645-47). During the 2020-21 school year, the number of students in her virtual class fluctuated; at the start of the school year, she had 12 students, which eventually rose to approximately 20 students, and by the end of the school year, the teacher had 9 students in her class (see Tr. p. 663). At the beginning of the school year, the teacher assessed the student with the i-Ready diagnostic (reading and math) program (see Tr. p. 672). The teacher also used a running records assessment (reading) and a "show what you know" assessment for math (Tr. p. 673).

According to the student's fourth grade teacher, the student presented with grade level skills in reading and math at the start of the 2020-21 school year based on assessments, including the i-Ready diagnostic (see Tr. p. 674). The teacher added that the student's math assessment indicated that he did not "need additional math support" (Tr. pp. 674-75). Reviewing the i-Ready "2020-2021 Diagnostic Performance Summary (Grade 4)" in reading at the impartial hearing, the teacher testified that it reflected the student's reading skills, and in particular, his "phonological awareness, phonics, high frequency words, vocabulary, comprehension in literature and informational text" (Tr. pp. 675-76; Dist. Ex. 22 at p. 4). According to the report, the student—as of the administration of the assessment in October 2020—"tested out" in the areas of phonological awareness, phonics, and high frequency words (Tr. p. 676; Dist. Ex. 22 at p. 4).<sup>31</sup> And in the areas of vocabulary and comprehension (in literature and informational text), the student's scores placed him in the early to late fourth-grade level (see Tr. pp. 676-77; Dist. Ex. 22 at p. 4). By the end of the 2020-21 school year, the student's i-Ready diagnostic scores improved in the areas of vocabulary (from early fourth grade to mid fourth grade), comprehension in literature (from late fourth grade to fifth grade), and remained the same in comprehension of informational text (from late fourth grade to

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<sup>30</sup> The student's report card for the 2020-21 school year did not include teacher comments, as had accompanied the reports cards for the 2018-19 and 2019-20 school years (see generally Dist. Ex. 24).

<sup>31</sup> The fourth-grade teacher explained that "tested out" meant that the i-Ready program "stops testing you at that point because you've reached . . . the max" (Tr. p. 676).

late fourth grade) (see Tr. pp. 677-78; Dist. Ex. 22 at p. 4).<sup>32</sup> The teacher explained that, according to the i-Ready report, the student "reached his typical growth and even exceeded that, and he reached his stretch growth" (Tr. p. 678). Based on the i-Ready diagnostics, the teacher testified that the student made progress in reading during the 2020-21 school year (see Tr. p. 678).

Turning to a review of the "2020-2021 Diagnostic Performance Summary (Grade 4)" in mathematics, the student's fourth-grade teacher testified that his scores placed him at an overall third-grade level in October 2020 (Tr. p. 682; Dist. Ex. 23 at p. 5). The teacher testified that it was "important to know where he's starting so that you know how he may approach a lesson that you're doing" and that the student may "need that small group instruction" or "more supports" (Tr. p. 682). Notably, the teacher also testified that the "whole class received a lot of support because this was [the school year] right after the COVID year," and teachers saw, "as a whole, a lot of decline" (Tr. p. 683). She also noted that the student received "more small group and a lot more checking for understanding, but as a whole because of the COVID year, it was typical" (Tr. p. 683). The teacher testified that, by the end of the 2020-21 school year, the student's scores had improved and placed him at an overall mid-fourth grade level (see Tr. pp. 683-84; Dist. Ex. 23 at p. 5).

Notwithstanding the student's progress in both reading and math, his fourth-grade teacher also testified about difficulties he encountered during the 2020-21 school year. For example, the teacher testified that, in reading, the student "struggled with theme"—or "understanding the message of the story" or the message the author was presenting (Tr. p. 686). She addressed this issue by working "together a lot when he had to write about what the theme was," and she would "read the text to him again really emphasizing what was going on in the story" (Tr. p. 686). The teacher testified that she would also "highlight some of the important information in the text, sentence starters, maybe breaking down the problem" when the student was using his PowerPoint to help him understand (Tr. p. 686). By the end of the school year, the student did better with the concept of theme in some stories, but "he just still struggled with trying to find the theme by himself" (Tr. p. 687).<sup>33</sup> As reflected in his fourth-grade report card, the student was meeting or exceeding grade level standards in all areas of reading and writing during the 2020-21 school year (see Tr. p. 690; Dist. Ex. 24 at p. 5).

In mathematics, the student's fourth-grade teacher testified that he would "struggle and he would sometimes get stuck so he needed more teacher support" (Tr. p. 688). To address this issue, the teacher did "a lot of small group instruction" or individual work with him (Tr. p. 688). The teacher testified that she would go over problems with him, as well as the steps, and "he did really well" with that support (Tr. p. 688). In particular, the teacher testified that the student struggled with converting "[f]ractions to decimals," which was a "hard concept" (Tr. pp. 688-89). By the end of the school year, the teacher—while reviewing his report card for the 2020-21 school year—testified that he was either meeting or exceeding grade levels standards in all areas of math, except

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<sup>32</sup> The i-Ready diagnostic report for the 2020-21 school year reflected that the student continued to "test out" in the areas of phonological awareness, phonics, and high frequency words throughout that school year (Dist. Ex. 22 at p. 4).

<sup>33</sup> With respect to writing, the student's fourth-grade teacher testified that she had no concerns, noting that he was a "great writer" and that he had a "[g]reat narrative voice" (Tr. p. 688).

for the area of multiplying fractions by a whole number, where the student received a "P" (i.e., "Progressing toward grade level standards") (Tr. p. 690; Dist. Ex. 24 at p. 5).

In addition to the student's struggles described above, the fourth-grade teacher testified that, at times when "completing some assignments, [the student] would shut down a little bit and kind of glaze over," and "it seemed to be that like all comprehension in those moments was lost" (Tr. pp. 692-93). The teacher testified, for example, that if he got "stuck on converting the fraction," the student would "shut down" and he "could not tell [her] what the numerator was, [or] what the denominator was"—which were "[t]hings that he did know" (Tr. p. 693). When that happened, the teacher indicated that "we kind of had to reset and then move on from there" but then she would "reteach the lesson" or return to it "another time" (Tr. pp. 693-94). However, by using those techniques with the student, he was able to "reset and to get back to it," and he "did well" (Tr. p. 694).

On cross-examination, the student's fourth-grade teacher was asked to review the meeting information portion of the student's June 2021 504 plan (see Tr. p. 709; Dist. Ex. 6 at p. 1). The fourth-grade teacher participated at the June 2021 meeting as the regular education teacher (see Dist. Ex. 6 at p. 1). As noted in the meeting information summary, the teacher agreed that the student "struggled with fractions," he had "difficulty with subtraction and regrouping," he became "confused when taught multiple strategies to complete a concept" and when presented with "math vocabulary," he could not "retain concepts previously taught," and he had "difficulty with [the] carryover to new concepts" (Tr. pp. 709-10; Dist. Ex. 6 at p. 1). According to the June 2021 504 plan, the student needed a "lot of support to do well on tests," and the teacher testified that he "did well with the small group support" (Tr. p. 711; Dist. Ex. 6 at p. 1).

With respect to the student's social/emotional functioning during the 2020-21 school year, the fourth-grade teacher testified that she did not agree that the student struggled in that area because during "check-ins," the student was "doing well" (Tr. p. 722). She also testified that she did not observe the student getting upset or becoming emotional during the school year and only learned of those concerns at the June 2021 504 Committee meeting (Tr. p. 723). The teacher testified about "one instance where [the student] was having trouble with an assignment and [she] did not even know at all that he was struggling" (Tr. pp. 723-24). When she learned about the student "immediately start[ing] to cry" after logging out of school one day, she "felt horrible and then [she] would work on the assignment with him" and she continued to "monitor for [his] level of frustration" (Tr. p. 724).

Overall, the foregoing evidence demonstrates that the student, while experiencing difficulties in reading and mathematics, continued to make progress with the supports in his 504 plan during the 2020-21 school year, and the "IDEA's child find provisions do not require districts to evaluate as potentially 'disabled' any child who is having academic difficulties" (J.S., 826 F. Supp. 2d 635, 663, citing A.P., 572 F. Supp. 2d at 225; see D.K., 696 F.3d [finding that the district did not violate child find where it offered the student "substantial accommodations, special instructions, additional time to complete assignments, and one-on-one and specialist attention en route to eventually finding a disability"])). Thus, the evidence in the hearing record does not reflect that the district "overlooked clear signs of disability," had been "negligent in failing to order testing," or had "no rational justification for deciding not to evaluate" the student (Mr. P., 885 F.3d at 750). This is especially true where, as here, the parents referred the student to the CSE for an

evaluation on the day after the June 2021 504 Committee meeting, and upon receiving consent from the parents, completed a social history and a classroom observation of the student in June 2021 (see generally Dist. Exs. 30-31).<sup>34</sup>

## **C. August 2021 and October 2021 CSE Processes and IEPs**

### **1. Sufficiency and Consideration of Evaluative Information**

Here, the parents arguments are twofold: first, the parents contend that because the district failed to monitor the student's academic progress, the district failed to reevaluate the student between 2018 and 2021 and they were forced to privately obtain the March 2021 neuropsychological evaluation; and second, that the August 2021 CSE's decision to ignore the recommendations for "1:1 instruction" and "peer-reviewed, explicit and 1:1 systematic instruction" in the March 2021 neuropsychological evaluation resulted in an IEP that was not substantively appropriate for the student.

Initially, it is altogether unclear whether the parents' first argument described above—the district's alleged failure to evaluate the student between 2018 and 2021—pertains to their claims that the district violated its child-find obligations, which have already been found to be unsupported by the evidence in the hearing record and will not be readdressed herein, or whether those arguments relate to an alleged failure by the district to sufficiently evaluate the student consistent with its obligations pursuant to State regulations governing the initial evaluation of the student, which the district undertook for the 2021-22 school year after the parents' privately obtained the March 2021 neuropsychological evaluation and referred the student to the CSE for an evaluation. Regardless, the parents' arguments are not supported by the weight of the evidence and thus, there is no reason to disturb the IHO's findings that the district adequately evaluated the student and that the district offered the student a FAPE for the 2021-22 school year.

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). 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], [B]; 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

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<sup>34</sup> To the extent the parents assert otherwise, a district does not violate its child-find obligations because, as in this case, the student is later found eligible for special education under the IDEA. That is, a school's failure to identify a student with a disability at the earliest possible moment is not per se actionable (A.P., 572 F. Supp. 2d at 226).

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]; see Application of the Dep't of Educ., Appeal No. 07-018).

The evidence in the hearing record indicates that, after receiving the parents' referral of the student to the CSE for an evaluation on June 4, 2021, the district completed a classroom observation of the student and a social history on June 15, 2021 (see Dist. Exs. 30 at p. 1; 31 at p. 1; 76 at p. 1). The evidence also reflects that when the parents referred the student to the CSE on June 4, 2021, they provided the district with a copy of the student's March 2021 neuropsychological evaluation report (see Dist. Ex. 76 at p. 1). As reflected in the prior written notice, dated August 4, 2021, the district considered all of the aforementioned evaluative information to develop the student's August 2021 IEP, as well as considering "teacher, parent, and tutor reports" (Dist. Ex. 42 at pp. 1-2).<sup>35</sup> At the impartial hearing, the district school psychologist who participated at the August 2021 CSE meeting testified that, after receiving the parents' consent to evaluate the student, she reviewed the March 2021 neuropsychological evaluation and, in discussions with the director, determined that it was a "full evaluation, very thorough and had everything that we would have normally done" (Tr. pp. 255-56). The school psychologist also testified that the parents did not request additional testing (Tr. pp. 256-57).

Indeed, a review of the March 2021 neuropsychological evaluation demonstrates that it included assessments to measure the student's intellectual functioning, language functioning, visual and motor functioning, attention and executive functioning, learning and memory, academic achievement (reading, written expression, and mathematics), and social/emotional functioning (see Parent Ex. T at pp. 5-9). In addition, the March 2021 neuropsychological evaluation report included thorough reports of the student's developmental history, medical history, educational history, evaluation and treatment history, family and social history, and behavioral observations (id. at pp. 1-5).

The school psychologist observed the student virtually on June 15, 2021, in his remote class during a social studies and ELA lesson (Dist. Ex. 30 at p. 1). A social history dated June 15, 2021, detailed the student's family make up, developmental and medical history, medical diagnoses, family health history, educational history, parental view of the student's strengths, difficulties, present functioning, and concerns, as well as his social relationships (Dist. Ex. 31 at pp. 1-5).

On October 27, 2021, a CSE convened to review the student's transition back to school and his progress (Dist. Ex. 43 at p. 1; see Tr. pp. 80-81; 276). In addition to the information considered

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<sup>35</sup> The August 2021 IEP identified the evaluative information considered by the CSE as reports conducted in 2018 (Dist. Ex. 7 at p. 2). The district representative testified that this was a clerical error, and that the IEP should have been updated to reflect the more current information (Tr. p. 274). The IEP present levels of performance reflect information from the March 2021 neuropsychological evaluation report (compare Dist. Ex. 7 at pp. 2-4, with Parent Ex. T at pp. 8-9).



by the August 2021 CSE, the October 27, 2021 prior written notice indicated that the committee also considered summary comments from teachers, the parent, and providers (Dist. Ex. 43 at p. 2).

The parents do not identify any area of need that was not described in the evaluations available to the CSE. Based on the foregoing, the CSEs had sufficient information upon which to base its recommendations for the student.

The crux of the parents' arguments pertaining to evaluations is that the CSEs did not adopt the recommendations of the March 2021 neuropsychological evaluation. 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]). Regarding privately obtained evaluations—here, the March 2021 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 or adopt their recommendations (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

Here, the parents contend that the August 2021 CSE's decision to ignore the recommendations for "1:1 instruction" and "peer-reviewed, explicit and 1:1 systematic instruction" in the March 2021 neuropsychological evaluation resulted in an IEP that was not substantively appropriate for the student. As explained below, the evidence in the hearing record does not support the parents' contentions.

In this instance, the evidence in the hearing record shows that the August 2021 CSE reviewed and considered the March 2021 neuropsychological evaluation report, determined that the student was eligible for special education, and adopted several of the recommendations made by the private neuropsychologist. For example, the neuropsychologist initially recommended that the district find the student eligible for special education services as a student with an other health-impairment, and the August 2021 CSE found the student eligible as a student with an other-health impairment (compare Parent Ex. T at p. 12, with Dist. Ex. 7 at p. 1). The neuropsychologist recommended that the student attend an ICT classroom "so that he ha[d] access to the general education curriculum [and had the] benefits from the support of an additional special education teacher in the classroom to help clarify or modify instruction or scaffold the assignments as

needed" (Parent Ex. T at p. 13). The August 2021 and October 2021 IEPs reflect, in the management needs, that the student required the "additional support of special education services to be successful in the regular education classroom" (Dist. Exs. 7 at p. 4; 8 at p. 5). The neuropsychologist recommended that the student's anxiety be closely monitored and accordingly, the student's IEP included a recommendation for counseling and included an annual goal targeting the student's anxiety and coping strategies (compare Parent Ex. T at p. 16, with Dist. Exs. 7 at p. 6; 8 at pp. 6-7). Consistent with the neuropsychologist's recommendations, the IEPs included recommendations for refocusing and redirection, simplified complex directions, support for organizational skills (to support the student during transitions), work broken down into smaller segments (step-by-step approach to tasks), clarification of assignments (the student will be given rubrics for assignments to provide him with help in understanding the expectations), access to books on tape, verbal visual and written cues, breaks allowed when overstimulated, directions repeated (directions to be repeated and/or clarified and the student will be asked to repeat the directions as a statement), an agenda book, checks for understanding, access to a word processing program, and preferential seating (compare Parent Ex. T at pp. 14-15, with Dist. Exs. 7 at pp. 6-8; 8 at pp. 7-8). Many of the neuropsychologist's recommendations for testing accommodations were also included as recommendations in the student's IEP for the 2021-22 school year, such as extended time (time and a half), directions read and explained, answers recorded in any manner (no scantrons), and use of word processor (compare Parent Ex. T at p. 15, with Dist. Exs. 7 at p. 9; 8 at p. 9).

However, the parents contend that the student's IEP failed to include the neuropsychologist's recommendations for "1:1 instruction" and "peer-reviewed, explicit and 1:1 systematic instruction."<sup>36</sup> In the March 2021 neuropsychological evaluation report, the neuropsychologist recommended that the student receive "individualized learning supports that cater[ed] to his own unique learning profile" (Parent Ex. T at p. 13). She further indicated that "[c]oncepts need[ed] to be taught to [the student] using explicit teaching strategies and modeling"

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<sup>36</sup> In their Request for Review the parents also assert that "[the student's] profile resulted in needs that simply could not be met in a general education program" and cite the neuropsychologist's "unrebutted" testimony that the discrepancy between the student's fluid reasoning scores and other indices scores "[wa]s so clinically significant that fewer than 5% of children ha[d] such a gap" (Req. for Rev. at p. 5). The parents further cite the neuropsychologist's explanation that in school such a discrepancy would translate into "significant weaknesses 'with novel problem solving, with abstraction, with higher level thinking skills, with drawing connections between content areas, with uncovering patterns'" (id.; see Tr. p. 944). The neuropsychologist indicated that "math problem solving require[d] [a student] to look at a novel problem and come up with a way to solve it on [their] own. Higher level reading comprehension also require[d] [a student] to really be able to incorporate, integrate information and synthesize information which [wa]s rooted in th[e] fluid reasoning score" (Tr. p. 944). To the extent that the parents argue that the district ignored the student's weaknesses resulting from poor fluid reasoning during for the 2021-22 school year, the hearing record does not support their claim. Both the August 2021 and October 2021 IEPs include a math problem solving goal along with a reading goal that required the student to answer inferential questions and a reading goal that required the student to summarize the main idea of informational texts in content area subjects (Dist. Exs. 7 at p. 5-6; 8 at p. 6; see Parent Ex. T at pp. 13-14, 22). The IEPs recommend the use of a graphic organizer, which the neuropsychologist identified as one tool that should be used to support the student with "organizing information, drawing connections between concepts, concretizing abstract concepts, and promoting more integrated learning" (Parent Ex. T at p. 13; Dist. Exs. 7 at p. 7; 8 at p. 7). The neuropsychologist also stressed the importance of the student mastering a skill before moving on to a new skill and the IEPs stated that the student "benefit[ed] from skills taught to mastery before moving on to new skills" and that he required "documentation of strategies" (Tr. pp. 971-72; Parent Ex. T at p. 13; Dist. Ex. 7 at p. 4; 8 at p. 5).

(id.). Initially, it seems that the recommendation for "individualized" supports thereafter morphed into a recommendation for individual or 1:1 instruction for the student; however, individualized would generally mean specifically tailored to the student (see, e.g., 20 U.S.C. 1414[d][1][A][i] [defining the term "individualized education program"]; 34 CFR 300.320[a] [same]; 8 NYCRR 200.1[y] [same]). In any event, the CSE discussed the possibility for a recommendation of 1:1 instruction for the student but determined that the student would benefit from ICT services in order to receive a FAPE in the LRE.

The district school psychologist, who attended the August 2021 CSE meeting as the CSE chairperson, testified that the CSE discussed ICT services, as well as that the neuropsychologist "wanted [the student] to have . . . the one-to-one instruction to work on his integrating information and problem solving and executive functioning" (Tr. pp. 264, 267). The school psychologist testified that "many other things were offered in that way, executive functioning support through extra help or with a counselor" but that the neuropsychologist "continued to push for the one-to-one instruction" (Tr. pp. 264-65). With respect to the ICT program, the school psychologist testified that the CSE felt it was "appropriate for [the student] based on his anxiety" and that a support such as "resource room," would not be appropriate given that the student would have to be "pull[ed] out" of class and would be "missing work from the day" (Tr. p. 266). According to the school psychologist, the CSE felt the student needed the support from two teachers throughout the day and that the teachers could "provide a lot of that small group, . . ., one-to-one instruction within the classroom (Tr. pp. 266-67).

At the impartial hearing, the director testified that, at the August 2021 CSE meeting, the CSE discussed the ICT program, and more specifically, about the student "receiving one-to-one instruction with his special education teacher within the classroom where [the student] wouldn't be pulled out, where he wouldn't miss work, [and] where he wouldn't increase in anxiety and frustration" (Tr. p. 296). The director also testified that, in the ICT program, the student would receive "small group instruction, which [wa]s exactly what [the neuropsychologist] was saying he might require in the 1 to 1" (Tr. p. 296). She also testified that the student could receive "one-to-one instruction within the ICT" because that was how the ICT program operated (Tr. pp. 296-97).

With respect to the recommendation to use "explicit teaching" with the student, the director testified that the neuropsychologist "wanted him to have . . . a rubric of what [wa]s expected of him," and she wanted him to have "scaffolding" and "re-teaching of skills" (Tr. p. 297). In addition, the director testified that the neuropsychologist wanted the student to "gain these skills, then utilize them to be able to generalize them to other areas" (Tr. p. 297). The director further testified that the student could receive all of the above in an ICT classroom, and that that was "what the [CSE] was looking at in terms of the least restrict environment where he could get all of that" (Tr. p. 297).

At the impartial hearing, the student's fifth-grade special education teacher testified that, during the 2021-22 school year, she provided students with small group instruction and, if a student required it, she provided "individualized instruction," which would have been provided "within the classroom at a small group table" (Tr. pp. 749-50). She explained that a "small group table" included herself and two to three students "having difficulties" (Tr. p. 750). If a "student require[d] further reengagement into a lesson that they d[id]n't understand," the special education teacher

testified that the student "would just be pulled to a small group table to work either one-on-one or with other children" (Tr. pp. 750-51).<sup>37</sup>

Based on the evidence in the hearing record, the August 2021 CSE had sufficient evaluative information available from a variety of sources to develop the student's IEP for the 2021-22 school year, including the private March 2021 neuropsychological evaluation report, which was the CSE considered and, in large part, incorporated into the August 2021 IEP. In addition, the evidence demonstrates that the August 2021 CSE considered and discussed the recommendations in the March 2021 neuropsychological evaluation report, and the CSE's decision not to adopt all of the recommendations of the neuropsychologist did not constitute a procedural violation or otherwise render the student's 2021-22 IEP substantively inadequate.

## 2. Annual Goals

As to the appropriateness of the annual goals, the parents argue that the annual goals were neither measurable nor sufficiently comprehensive to address the student's needs.<sup>38</sup>

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<sup>37</sup> Although the Second Circuit has held that a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP," testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'" [internal citations omitted]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]). The special education teacher's testimony about the ICT classroom is the type of testimony that explains or justifies the program. On appeal, the parents also argue that, during the impartial hearing, the district relied upon retrospective testimony from school personnel about progress that the student made in the program. However, the parents do not cite any pages from the transcript, and it is unclear to what testimony they are referring. In any event, I have not relied on any retrospective testimony about the student's progress under the August or October 2021 IEPs that was not before the relevant CSEs in order to find that the district offered the student a FAPE for the 2021-22 school year.

<sup>38</sup> To the extent the parent argues on appeal that the CSE did not discuss the annual goals at the meeting, this argument is raised for the first time on appeal. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Here, the parents' due process complaint notice cannot be reasonably read to raise the issue of parent participation as it related to the development of the annual goals in the student's IEP for the 2021-22 school year (see generally Parent Ex. A); instead, the parents raised the more specific issue concerning whether the annual goals were measurable (id. at p. 10). Moreover, a review of the hearing record reflects that the parents did not seek the district's agreement to expand the scope of the impartial hearing to include this issue or file an amended due process complaint notice to add this claim. Nor can it be said that the district "opened the door" to this claim by raising evidence as a defense to a claim that was not identified in the due process complaint notice (M.H., 685 F.3d at 250-51). To be clear, the issue of whether the parents participated in the development of the student's annual goals for the 2021-22 school year was first raised by the parents' attorney during the cross-examination of a district witness—the director—who testified that the special education teacher who participated at the CSE created the annual goals, but she, herself, did not "hear the team discuss or create those goals during [her] participation at the meeting" (Tr.

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]).

To address the student's needs, the August 2021 CSE created five annual goals in the areas of reading, writing, mathematics, and social/emotional development (see Dist. Ex. 7 at pp. 5-6).<sup>39</sup> With respect to reading, the present levels of performance in the August 2021 IEP reflected that the student "struggled to answer inference questions, which require[d] him to integrate information and read beyond the explicit text in order to draw conclusions, make predications, determine intentions, and understand symbols and broader themes" (id. at p. 3). The IEP also reflected the parents' concerns about the student needing "to improve inferential comprehension" and "to improve [his] ability to summarize a text read" (id.). To address these needs, the August 2021 CSE developed two annual goals (id. at p. 5). The first reading goal targeted the student's ability to "answer text based and inferential questions while explicitly citing text details and examples to support his thinking" when presented with "narrative and/or informational text from [his] content area subjects" (id.). The second goal targeted the student's ability to "summarize the text, including the theme, main idea, and text based details" when presented with "narrative and/or informational text from [his] content areas" (id.). For both goals, the August 2021 IEP identified the required criteria by which to measure the annual goals as "[three] out of [five] trials over [four] weeks," and further identified the method to measure progress through the student's "[w]ork samples" and established the schedule to measure progress as "[e]very [two] weeks" (id.).

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pp. 118-19). The director also testified that she did not know if the annual goals were created "after the fact without the input of the other members" (Tr. p. 119). Subsequently, another district witness testified on direct that, after the listening to the student's strengths and weaknesses found in the March 2021 neuropsychological evaluation, the CSE used that information to develop the present levels of performance in the IEP and as a basis to discuss "what goals would be appropriate" for the student based on his needs (Tr. pp. 265-66). On cross-examination, the same witness testified that the special education teacher created the student's annual goals in the IEP, and that, similar to her direct examination, the neuropsychological evaluation served as the basis for the discussion of the annual goals (see Tr. p. 299). She further testified on cross-examination that the annual goals were "not individually written at the CSE," but they were "discussed in terms of what he required and the goals were then generated after" by the special education teacher (Tr. pp. 299-300). Therefore, this issue was not properly raised during the impartial hearing. Moreover, any failure to draft the annual goals at the CSE meetings would not support a finding that the district denied the student a FAPE (see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*8 [S.D.N.Y. Sept. 29, 2012] [recognizing that the IDEA does not require that goals be drafted at the CSE meeting]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F.Supp.2d 387, 394 [S.D.N.Y.2010] [explaining that parental presence is not required during actual goal drafting]).

<sup>39</sup> For the purpose of discussing the student's annual goals, references are to annual goals in the August 2021 IEP, even though the student's October 2021 IEP contains the same annual goals (compare Dist. Ex. 7 at pp. 5-6, with Dist. Ex. 8 at p. 6).

With respect to writing, the present levels of performance in the August 2021 IEP reflected that the student "demonstrate[d] difficulty summarizing a text read as he share[d] every event of the story" and "add[ed] many additional details not pertaining to the main idea of the story" (Dist. Ex. 7 at p. 3). The IEP also reflected the parents' concern that the student needed "to improve [his] ability to write with [a] logical flow of ideas" (id. at pp. 3-4). To address these needs, the August 2021 CSE developed an annual goal that targeted the student's ability to organize his writing "by developing an introduction, body of text, and conclusion with clear sequencing of ideas," including the "use of transitional words and phrases" through the use of a graphic organizer (id. at p. 5). The August 2021 IEP identified the criteria to measure the annual goal ("80 [percent] success with moderate assistance over [six] weeks"), the method to measure progress ("[w]ork samples"), and the schedule to measure progress ("[e]very [four] weeks") (id.).

In mathematics, the present levels of performance in the August 2021 IEP reflected that the student "struggle[d] with identifying the important information and clue words to determine what operation to use," and he had "'trouble recalling or executing the procedures, [and] mixing up steps,'" which led to "errors" (Dist. Ex. 7 at p. 3). The present levels of performance further noted that, as reported by his classroom teacher, the student had "difficulty in subtraction and regrouping," and he became "confused when introduced to new concepts and a variety of strategies" (id.). According to the classroom teacher, the student "work[ed] well with teacher support and prompting" (id.). In addition, based on the "evaluation," the student demonstrated some "gaps in [his] knowledge of fractions, decimals, and place value" (id.). The August 2021 IEP also reflected the parents' concern that the student needed to work on skills related "to solving word problems" (id. at pp. 3-4). To address these needs, the August 2021 CSE developed one annual goal, which stated that, "[w]hen solving single or multistep word problems, [the student] w[ould] identify the operations to use and solve the problem using the operations of addition, subtraction, multiplication, and division" (id. at pp. 5-6). The August 2021 IEP set forth a criteria to measure progress ("[three] out of [five] trials over [four] weeks"), the method to measure progress ("[w]ork samples"), and the schedule to measure progress ("[e]very [two] weeks") (id. at p. 6).

Lastly, the present levels of performance in the August 2021 IEP identified that the student was "increasingly anxious, frustrated, and demoralized by his academic struggles" (Dist. Ex. 7 at p. 4). The IEP also reflected that the student had become "self-conscious, worry-prone, and quick to react when he bec[a]me[] stuck" and that his "anxiety about performing well [wa]s also abutting his cognitive weaknesses" (id.). The IEP documented the parents' concern that the student "need[ed] to communicate frustration with academic tasks in an appropriate manner and learn coping strategies" (id.). To address his social/emotional needs, the August 2021 CSE developed one annual goal for the student to "implement coping strategies (e.g., self-talk, counting to 10, deep breaths, accessing assistance), to help lessen [his] feelings" of anxiety "due to academic frustration" (id. at p. 6). To assess progress relative to this annual goal, the IEP included a criteria to measure progress ("[three] out of [five] trials over 10 weeks"), a method to measure progress ("[s]tructured interview"), and a schedule to measure progress ("[e]very [two] weeks") (id.).

On appeal, the parents cite to testimony elicited from the student's tutor, who attended the August 2021 CSE meeting, as an attack on the annual goals in the August 2021 IEP (see Req. for Rev. at p. 7, citing Tr. pp. 1068-73; Parent Mem. of Law at pp. 12-13). At the impartial hearing, the tutor testified that, although the annual goals in the August 2021 IEP were "consistent" with

what she was working on with the student, she did not think the annual goals were "comprehensive enough" (Tr. p. 1068; see Dist. Ex. 7 at pp. 5-6). She then altered her testimony by stating that that the annual goals were actually "too big" and "not broken down enough" and would be "difficult to measure" (Tr. p. 1069). For example, she indicated that the two annual goals for reading would be difficult to measure "because there [was] so much within each" annual goal (Tr. p. 1069; see Dist. Ex. 7 at p. 5). The tutor also criticized the annual goals because, although they described the skills targeted, "there [wa]s nothing about the instruction" to be used with the student to achieve the annual goals (Tr. pp. 1069-70). When asked if she "describe[d] her view on how [the student] should be taught, this explicit teaching" at the August 2021 CSE meeting, the tutor testified that she did, but she did not recall how the CSE responded (Tr. p. 1070).

Contrary to the tutor's testimony, however, neither the IDEA nor State or federal regulations require a CSE to embed an instructional method or methodology within the annual goals in an IEP in order to comply with the requirements concerning the development of annual goals. Instead, the law requires a CSE to develop annual 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]). Also contrary to the parents' assertion that the annual goals were not sufficiently comprehensive, upon review, the annual goals in the student's August 2021 IEP directly align with the student's needs identified in the present levels of performance, and thus, are consistent with the applicable statutory and regulatory requirements.

With respect to the measurability of the annual goals—meaning, for example, as documented in the August 2021 IEP, "three out of five trials over four weeks"—the tutor testified that it was problematic because each skill listed within the annual goals would need to be measured "separately," and the student "really need[ed] to work on one skill to mastery, assess that he's acquired it, and then move onto the next" skill (Tr. pp. 1070-71; see Dist. Ex. 7 at p. 5). Overall, the tutor's testimony similarly criticized the annual goals in the August 2021 IEP targeting the student's needs in writing, mathematics, and social/emotional development (see Tr. pp. 1071-74; Dist. Ex. 7 at pp. 5-6). In addition, the tutor testified that the annual goals were "missing" "language skills," such as "understanding multiple meanings of words, [and] being more flexible with language" (Tr. p. 1075).

To be measurable, compliance with State regulation requires an annual goal to 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]). A review of the annual goals reflects that, consistent with this standard, each annual goal included the evaluative criteria (i.e., three out of five trials over four weeks, 80 percent success with moderate assistance over 6 weeks), the evaluation procedures or method to measure progress (i.e., work samples, structured interview), and the schedule to measure progress (i.e., every two weeks, every four weeks) (see Dist. Exs. 7 at pp. 5-6; 8 at p. 6). Consequently, contrary to the parents' assertions and the tutor's testimony, the annual goals in the August 2021 complied with the applicable standard and were measurable.

In addition, the student's fifth-grade special education teacher in his ICT class, who was a certified reading teacher and who was dually certified in regular education, testified at the impartial hearing about the implementation of the student's annual goals in the 2021-22 school year (see Tr. pp. 735, 737-39, 742, 768).<sup>40</sup> With respect to the first reading goal in the IEP, the teacher testified that she measured the student's progress by having the student answer inferential questions based on a passage that he read and whether the student answered the questions "right or wrong" (Tr. p. 769; Dist. Ex. 8 at p. 6). For the second reading goal, the teacher explained that, at times, she provided the student with an activity or worksheet presented to the student to summarize in writing (see Tr. p. 769; Dist. Ex. 8 at p. 6). With regard to the writing goal, the teacher testified that the student was sometimes given a graphic organizer, and sometimes the student created his own graphic organizer to use (see Tr. pp. 770-71; Dist. Ex. 8 at p. 6). At that time, the student could independently formulate paragraphs for the body of his nonfiction featured article (current topic) through research and was "progressing towards writing an introduction [and a] conclusion" (Tr. p. 771; Dist. Ex. 8 at p. 6). In mathematics, the teacher testified that the student was "doing excellent with single step word problems," and at times, when working on multistep word problems, the student needed "clarification to ensure that he [wa]s performing the correct operation"—and generally, the student's "computation [wa]s pretty much always spot on" with just a "little bit of clarification" (Tr. pp. 771-72; Dist. Ex. 8 at p. 6). And with regard to the student's annual goal targeting his social/emotional development, the teacher testified that this goal was "shared with the counselor," and she would "document any academic frustration that [the student] exhibit[ed]" (Tr. p. 772; Dist. Ex. 8 at p. 6). At the time of her testimony in March 2022, the teacher had not observed any academic frustration "so far this year" (Tr. p. 772). The teacher also testified that, overall, the student was "very happy in school" and to "be back at school" (Tr. p. 773).

In light of the foregoing evidence, I find there is no basis to overturn the IHO's finding that the student's annual goals were measurable and sufficiently comprehensive.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the IHO's findings that the district proceeded in a manner consistent with its child find obligations during the 2019-20 and 2020-21 school year and developed IEPs that offered the student a FAPE for the 2021-22 school year, the necessary inquiry is at an end and there is no need to discuss the parents' requested relief.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
September 30, 2022**

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**SARAH L. HARRINGTON  
STATE REVIEW OFFICER**

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<sup>40</sup> At the impartial hearing, the student's fifth-grade teacher—when discussing the annual goals in the IEP—was referring to the October 2021 IEP; however, as previously indicated, the annual goals in the August 2021 IEP and the October 2021 IEP were the same (compare Dist. Ex. 7 at pp. 5-6, with Dist. Ex. 8 at p. 6).