



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-111

**Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

**Appearances:**

The Law Office of Elisa Hyman, PC, attorneys for petitioners, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Deanna Everett-Johnson, 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 a decision of an impartial hearing officer (IHO) which denied the parents' request for compensatory education to remedy the respondent's (the district's) failure to offer their daughter an appropriate educational program and services for the 2019-20 and 2020-21 school years. The appeal must be dismissed.

#### II. Overview—Administrative Procedures

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

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

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

### **III. Facts and Procedural History**

The student attended general education classes through second grade (Parent Ex. Z at p. 2). In third grade, the student's mother referred her to the CSE due to concerns regarding possible academic delays and slow processing abilities (Parent Ex. J at p. 1). The district conducted a psychoeducational evaluation in April 2015 and a classroom observation in May 2015 and completed a written form for determining if the student met the eligibility criteria for a learning disability (id. at pp. 1, 7-9).<sup>1</sup> The student was classified as a student with a learning disability and

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<sup>1</sup> Although the student performed in the average range on measures of intellectual functioning and academic achievement, the district's "Specific Learning Disability Justification" form indicated that, despite Tier I and II level interventions, the student had made minimal progress with regard to classroom reading, writing, and

began receiving SETSS in third grade (Parent Ex. K at pp. 1-2). Thereafter the parents sought a private neuropsychological evaluation in December 2015 (fourth grade) which yielded diagnoses of specific learning disorder with impairment in reading, decoding, and fluency, moderate, and specific learning disorder with impairment in spelling and writing organization, moderate (id. at p. 11).<sup>2</sup> The evaluation report indicated that the student was at risk for an anxiety disorder if her academic difficulties were not addressed, and her skills continued to fall behind (id.). The student continued to receive SETSS through fifth grade (Parent Ex. Z at p. 2).<sup>3</sup>

On January 19, 2018 the district conducted an educational evaluation of the student "as part of a mandated triennial review to determine continued eligibility for services within special education" (Parent Ex. L at p. 1). The resultant report indicated that the student's performance on a standardized measure of academic achievement "coincide[d] with teacher assertions that [the student] display[ed] academic skills that [we]re at or approaching grade level" (id. at p. 2). According to the evaluation report, the primary concern of the student's teachers was the student's reserve in the classroom setting; the student rarely volunteered in class and did not request assistance when struggling (id. at p. 1). Still, the evaluation report indicated that "overall, it appear[ed] that [the student] ha[d] the academic capabilities to be successful in the general education setting" (id. at p. 2).

A CSE convened on January 22, 2018 (sixth grade) to review the results of the educational evaluation along with teacher reports of the student's educational performance (Parent Ex. D at pp. 1-2). The IEP generated by the January 2018 CSE indicated that the student required additional academic and social supports to help her succeed in the classroom setting as she displayed moderate challenges with ELA and math tasks, as well as with meeting the social demands of the educational environment (id. at p. 4). The CSE determined that the student remained eligible for special education as a student with a learning disability and recommend that she receive integrated co-teaching services (ICT) in math six times per week, and ICT services in ELA, social studies, and science five times per week each (id. at pp. 8, 12). The CSE also recommended that the student receive one 30-minute session of group (6:1) counseling services per week (id. at p. 8). In addition, the CSE recommended that the student be provided with testing accommodations of extended time, separate location/room, revised test directions, and revised test format (id. at p. 9).

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mathematics assessments (Parent Ex. J at p. 7). The form also indicated that the student had difficulty making inferences while reading, lacked fluency with math facts, was challenged by multistep word problems, and had difficulty elaborating on ideas when writing (id.). In addition, the form noted that that the student had difficulty consistently employing correct capitalization, punctuation, and spelling and furthermore that she required interventions in order to continue making progress in all academic areas (id.).

<sup>2</sup> The evaluator also noted the student's reading profile was typical of students with dyslexia (Parent Ex. K at p. 8).

<sup>3</sup> The student transitioned to a district secondary school for sixth grade (2017-18 school year) (Parent Ex. Z at p. 3). The student's mother reported that, unbeknownst to her, the student's SETSS was terminated at that time as the school did not offer SETSS and the student was placed in an "ICT Classroom" (id.). However, the student's IEP was not modified to reflect this change until January 2018 (compare Parent Ex. C at p. 1, with Parent Ex. D at pp. 1, 8; see Parent Ex. L at p. 1).

The student continued to attend the district's secondary school for seventh grade (2018-19 school year (see Parent Ex. Z at p. 4). On January 17, 2019, a CSE convened for an annual review and made changes to the student's program recommendations, effective February 1, 2019 (Parent Ex. E at pp. 1-4, 8-9). According to the attendance page, participants at the January 2019 CSE included a special education teacher, a general education teacher, and the parent (Dist. Ex. 1 at pp. 18-19).<sup>4</sup> Notably, the CSE increased the student's ICT services from five to six periods per week and discontinued counseling as a related service (compare Parent Ex. D at p. 8, with Parent Ex. E at pp. 8-9). The CSE made a new recommendation for supplementary aids and services of books on tape and study guide outlines of key concepts (compare Parent Ex. D at p. 8, with Parent Ex. E at p. 9). The CSE also recommended testing accommodations of extended time, separate location/room, revised test directions and revised test format (Parent Ex. E at p. 1).

Following the January 2019 CSE meeting, the student's mother sent an email to the assistant principal at the school the student was attending, expressing her concern regarding the lack of a second teacher in some of the student's ICT classes and questioning why the student's report cards demonstrated progress while her scores on State exams did not (Parent Ex. AA at pp. 2, 6).

The student continued to attend a district secondary school for eighth grade (Parent Ex. Z at p. 2). At the beginning of the 2019-20 school year (eighth grade) the student's mother emailed school staff to request a team meeting to "discuss the student's needs and difficulties" (Parent Ex. AA at p. 5). She noted that the student had expressed some anxiety about returning to school and some low self-esteem regarding her academic abilities (id.).

On January 14, 2020, a CSE convened for the student's annual review (Parent Ex. F). The CSE found the student remained eligible for special education as a student with a learning disability and recommended a continuation of the student's existing program, specifically that she receive ICT services in ELA and math six times per week and ICT services in social studies and science five times per week (id. at p. 8). The CSE again recommended supplementary aids and services of books on tape and study guide outlines of key concepts (id.). The CSE also recommended testing accommodations of extended time, separate location/room, revised test directions, and revised test format (id. at p. 9). The IEP indicated that the recommended services would be implemented beginning on January 6, 2020 (id. at p. 8).

In October 2020, during the 2020-21 school year (ninth grade), the student's mother requested a meeting with school staff to discuss the student's needs and ways to best help her be successful (Parent Ex. AA at p. 7). She noted the student's dyslexia diagnosis (id.). School staff responded the next day indicating that school staff were available to meet with the parents on November 4, 2020 (id. at p. 9).

In or around November 2020, the parents sought a private psychoeducational evaluation of the student due to their concern that she might "not be getting all the support she need[ed] to do

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<sup>4</sup> It is noted that both the district and the parent submitted copies of the January 17, 2019 IEP (see Parent Ex. E; Dist. Ex. 1). For the purposes of clarity, only the parent exhibit will be cited to, except where citation is made to the attendance page, in which instance the district exhibit will be cited because it contained the signed attendance page (see Dist. Ex. 1 at p. 19).

well academically in high school" (Parent Ex. M at p. 1). The results of the evaluation were set forth in a report dated January 28, 2021 (id.). The evaluation was conducted over three testing days in November 2020, December 2020, and January 2021 (id. at p. 2). In addition to the previously diagnosed learning disorders in reading and writing, the evaluation report indicated that the student had specific learning disorder with impairment in mathematics, calculation, problem solving, math fluency, moderate, and generalized anxiety disorder (id. at p. 10). The evaluation report stated that the student's weaknesses in reading, writing, and math were a concern and indicated that more intensive services were needed to remediate the student's learning disabilities than those being provided at the time (id. at p. 11). The report further stated that the student required small classes in an independent special education school equipped to address the constellation of learning issues presented by the student's special needs (id.). Lastly, the evaluation report highlighted recommended testing modifications and indicated that the student should receive multi-sensory instruction until an appropriate educational placement could be found as well as counseling to address the student's anxiety and to help her transition to a new school (id.).

In addition to the psychoeducational evaluation, the parent had the student assessed by the director of EBL Coaching in March 2021 to help determine her reading, spelling, written language, and mathematics skills levels (Dist. Ex. 4 at p. 1). The director described EBL Coaching as "an organization that specializes in providing one-on-one tutorial support to students who have special education needs (Parent Ex. X at p. 1). In a letter dated March 3, 2021 the director of EBL Coaching stated that the student was in "critical need of multi-sensory instruction for reading and spelling, particularly using the Orton-Gillingham approach (Dist. Ex. 4 at p. 1). She indicated that it was also important that the student receive structured, multi-sensory instruction to build her written language, mathematics, and reading comprehension skills (id.). The director recommended that the student receive 700 hours of 1:1 multisensory tutoring using Orton-Gillingham and similar instructional tools to address the student's academic weaknesses (id.).

A CSE convened on March 23, 2021 to review the student's educational needs (see Parent Exs. H; BB; CC; Dist. Exs. 3; 8).<sup>5</sup> The March 2021 IEP indicated that the student was being reevaluated at the request of her parents to determine if she required additional special education supports and/or services (Parent Ex. H at p. 2). The IEP included a review of the parents' psychoeducational evaluation, teacher progress reports, parent concerns, and the results of a student interview (see Parent Ex. H at pp. 2-5). According to the present levels of performance included in the March 2021 IEP, the parents asserted that the student had been "struggling academically 'for a long time'" and needed a more restrictive setting (id. at p. 4). They noted that having had the opportunity to observe the student during remote instruction they were surprised to see how much she struggled (id.). The March 2021 CSE continued to recommend that the student receive ICT services; however, the frequency was changed to five times per week each in ELA,

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<sup>5</sup> The hearing record contains four copies of the March 23, 2021 IEP (see Parent Exs. H; BB; CC; Dist. Ex. 3). The parent exhibits are identical; however, the district exhibit varies slightly as it includes blank check boxes for progress in a section titled "IEP Progress Report" under each annual goal (see Dist. Ex. 3 at pp. 9-13). For the purposes of clarity, Parent Exhibit H will be cited to when referencing the March 23, 2021 IEP. Additionally, the hearing record includes two separate documents marked as Parent Exhibit BB; as one of those documents is one of the four copies of the March 2021 IEP, any further references to Parent Exhibit BB in this decision will be to the other Parent Exhibit BB, an affidavit of the neuropsychologist who conducted the January 2021 psychoeducational evaluation of the student (Parent Ex. BB; see Parent Ex. M).

math, science, and social studies (*id.* at p. 8). According to the school psychologist, who attended the meeting, the CSE offered to add SETSS and school-based counseling services to the student's IEP; however, the parents declined the service (Dist. Ex. 12 at p. 2). The IEP also indicates that the parents acknowledged that they declined school based counseling and had previously asked for it to be removed and further indicates that the parents requested a deferral to the CBST because they believed the student needed a special class placement in a specialized school (Parent Ex. H at pp. 4, 5).<sup>6, 7</sup> The CSE did not recommend any supplementary aids or services for the student, but recommended that she be provided testing accommodations of extended time, separate location/room, and revised test directions (Parent Ex. H at pp. 8-9).

Pre-assessment forms, completed by the student's teachers in April 2021, indicated that the student was performing below her peers in several skill areas (Dist. Ex. 5). With regard to reading, the student's English teacher indicated that the student was performing below her peers in reading comprehension (inference) and citing to evidence to support analysis (*id.* at p. 38). In terms of writing, the teacher indicated that the student was performing below her peers with regard to fluency/stamina, development of ideas, writing a claim with supporting evidence, and explaining a topic in a well-organized essay (Dist. Ex. 5 at p. 41-42). The student's science teacher also reported areas of reading and writing where the student was performing below her peers (*id.* at pp. 6, 10). The student's math teacher reported that the student was performing below peers with respect to basic mathematical operations, algorithms, word problems, learning new math concepts and relationships, and concept application (*id.* at pp. 23-24). The student's teachers indicated that she would benefit from small group instruction and one-on-one work, leveled work times, guided note-catchers, chunked assignments, use of a calculator, and use of anchor charts (*id.* at pp. 12, 28, 44). The student's science teacher noted that under normal circumstances the student's IEP might be adequate but given the difficulties of remote learning the student might require more support (*id.* at p. 14).

In an email to the district dated April 19, 2021, the student's mother indicated that although the parents initially declined counseling services, in light of her anxiety disorder diagnosis they had reconsidered and wanted counseling added to the student's IEP (Dist. Ex. 11 at p. 1). According to the parents, the district agreed with the parents' request (*see* Parent Ex. A at p. 1).

The CSE reconvened on May 18, 2021 to add SETSS and counseling services to the student's program (Dist. Ex. 7 at p. 5). The IEP indicated that the parents still believed that the student required a more restrictive setting, but until a more appropriate setting was recommended, additional services would benefit the student (*id.*). The May 2021 CSE continued to recommend ICT services five times per week each in ELA, math, science, and social studies (*id.* at p. 14). Additionally, the CSE recommended SETSS two times per week in both ELA and math and one

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<sup>6</sup> According to the student's mother, the parents discontinued counseling for the student at the student's request as the student did not find it helpful and did not want to be pulled out of class for it (Parent Ex. Z at p. 5).

<sup>7</sup> Although not defined in the hearing record in this matter, CBST likely refers to the district's central based support team, an entity which facilitates placement in nonpublic schools (*see, e.g., Application of a Student with a Disability*, Appeal No. 15-054; *Application of a Student with a Disability*, Appeal No. 15-051).

40-minute session of group counseling services per week, with an implementation date of September 1, 2021 (id. at pp. 14-15).

The parent signed an enrollment contract with Winston Preparatory School ("Winston Prep") on June 1, 2021 for the student's attendance for the 2021-22 school year (see Parent Ex. N).

By prior written notice dated June 9, 2021, the district reiterated its recommendation that the student receive ICT services, SETSS, and counseling services (Parent Ex. I at p. 1). The notice indicated that the student's mother was willing to accept the addition of SETSS to the recommended program "despite misgivings about their effectiveness" (id. at p. 2). The notice further indicated that the student's mother wanted to make clear that she believed that a deferral to CBST was the most appropriate recommendation for the student (id. at p. 2).

In a letter dated August 25, 2021, the parents notified the district that they intended to unilaterally enroll the student at Winston Prep for the 2021-22 school year and seek funding from the district for the student's tuition (see Parent Ex. B).<sup>8</sup>

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

The parents filed a due process complaint notice dated September 1, 2021, which consisted of 84 enumerated paragraphs together with over 50 subparagraphs (see generally Parent Ex. A). The parents asserted that the student was denied a free appropriate public education (FAPE) for the 2019-20, 2020-21, and 2021-22 school years (id. at pp. 2, 6). The parents' due process complaint notice also raised claims regarding section 504 of the Rehabilitation Act of 1973 (Section 504), Article 89 of the New York Educational law, and 42 U.S.C. § 1983 (section 1983) (id. at p. 1).<sup>9</sup>

After reviewing the student's educational history (Parent Ex. A at pp. 3-6), the parents asserted nine "general allegations" regarding the three school years they were contesting (id. at pp. 6-7). The allegations were as follows: the district (a) failed to "legally and adequately" evaluate the student in all areas of disability; (b) "applied blanket policies and procedures relative to the provision of IEP-based services;" (c) did not provide sufficient 1:1 instruction; (d) did not provide appropriate related services; (e) did not offer or provide research-based instructional strategies; (f) did not develop substantively appropriate IEPs; (g) did not develop procedurally appropriate IEPs; (h) failed to issue prior written notices in accordance with the IDEA; and (i) failed to issued legally valid procedural safeguards (id. at p. 7). Moreover, the parents argued that the district "applied systemic predetermination" and made several claims regarding alleged systemic issues and violations by the district (id. at pp. 7-8).

Regarding relief, initially, the parents requested a finding that the district denied the student a FAPE for all school years at issue and a determination that the district's conduct as alleged in the due process complaint notice was illegal (Parent Ex. A at p. 8). The parents then requested that

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<sup>8</sup> Several documents regarding Winston Prep were entered into the hearing record (see Parent Exs. P; Q; R; S; T; V).

<sup>9</sup> The parents' allegations regarding Section 504 included that the district adopted systemic and blanket policies and discriminated against the student based on her disability (Parent Ex. A at p. 1).

the district be ordered to "fund comprehensive IEEs to be conducted on an interim basis" including speech-language, assistive technology, and central auditory processing evaluations (*id.*)<sup>10</sup> Additionally, the parents requested reimbursement for the neuropsychological evaluation they obtained (*id.*). Further, the parents contended that since the student had not been properly evaluated and had not received appropriate services, "it was not possible to identify every potential compensatory remedy" but at a minimum, they requested a bank of private 1:1 instruction and remediation in reading, writing, and math to be provided by an instructor of their choosing, make-up services for any services that were not provided as mandated in the student's IEPs for the school years in question, assistive technology supports and services, and transportation costs for any relief awarded (*id.* at p. 9).<sup>11</sup> The parents also requested placement at Winston Prep in their request for compensatory relief (*id.*). Additionally, the parents requested that Winston Prep be found to be appropriate for the student, that equities favor the parents, and that funding for Winston Prep be ordered (*id.*).<sup>12</sup>

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

The parties convened for a prehearing conference on January 5, 2022 (Tr. pp. 1-13). The parties next convened for the introduction of evidence on February 18, 2022, and after two additional status conferences on April 1, 2022 and May 6, 2022, the hearing commenced on May 20, 2022 and concluded on June 23, 2022 after four days of hearings (Tr. pp. 14-323). In a decision dated July 24, 2022, the IHO found that although the district presented documentary evidence, the district conceded the issue of FAPE and only presented a rebuttal witness on the issue of compensatory education (IHO Decision at pp. 3, 14).<sup>13</sup>

After the district conceded FAPE, the IHO stated that the only remaining issue before her for the 2019-20 and 2020-21 school years was whether the student was entitled to compensatory education services due to the denial of FAPE (IHO Decision at pp. 4, 12). The IHO determined that the parents' request for 700 hours of compensatory education was not supported by the weight of the evidence in the hearing record, "particularly the testimony of the Academic Dean of the Private School" (*id.* at pp. 12-13). The IHO noted that the private school "ha[d] the depth and breadth of individualized and specialized curriculum and services to adequately address the Student's unique needs" (*id.* at pp. 12-13). Further, the IHO held that the evidence supported finding that the student "made significant progress under her current program which include[d]

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<sup>10</sup> The parents argued that the evaluations should be granted because they were "entitled to them, given the [district's] deficiencies in and lack of evaluations, the parents' noted disagreement with [the district's] evaluations and request for independent evaluations, and/or pursuant to the IHO's authority to order comprehensive assessments to inform the hearing process" (Parent Ex. A at p. 8).

<sup>11</sup> The parents requested that the private 1:1 instruction be for use, either after-school or as a push-in service in school, and that the district directly fund all awarded services at prevailing market rates (Parent Ex. A at p. 9).

<sup>12</sup> The parents requested that they be reimbursed "for any actual or accrued costs associated with the provision of education and services to [the student] during the years in question and through the pendency of this actions, including tutoring costs" (Parent Ex. A at p. 10).

<sup>13</sup> The district conceded the issue of FAPE during the impartial hearing (Tr. p. 61).



SETSS" (id. at p. 13). The IHO found that the addition of SETSS "provide[d] reinforcement" that the student needed in light of her unique circumstances (id.).

Next, with respect to the denial of FAPE for the 2021-22 school year, the IHO determined that the private school "provide[d] the Student with the requisite level of specialized support based on her unique needs in terms of broken down multi-sensory learning methods, a small teacher-student ratio, and a well-matched peer group consisting of positive cognitive and social models" (IHO Decision at p. 13). The IHO found that the student benefitted from and made progress in the program at Winston Prep and, therefore, the IHO granted the parents' request for direct funding for the student's attendance at Winston Prep for the 2021-22 school year (id.). Lastly, the IHO held that equitable considerations favored the parents (id. at p. 14).

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

The parents appeal. The parents state that they are not appealing the favorable aspects of the IHO's decision ordering the district to directly fund their unilateral placement of the student at Winston Prep for the 2021-22 school year or the IHO's finding that the district failed to offer the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years. However, the parents assert that the IHO erred by failing to grant their request for compensatory education services.

Initially, the parents argue that the IHO failed to hold the district to its burden of production and persuasion regarding remedy as the district submitted no evidence to establish an appropriate remedy. According to the parents, the IHO erred by shifting the burden to the parents to establish an appropriate remedy.

Additionally, the parents argue that the IHO erred in her analysis of compensatory education services. According to the parents, the IHO erred in denying the student an award of compensatory education for the 2019-20 and 2020-21 school years based on the student's placement for the 2021-22 school year. The parents contend that the student "is entitled to be made whole for the FAPE deprivation" and that although the IHO recited the correct legal standard she did not apply it to the facts of this matter. The parents contend that there was no dispute that the unilateral placement was an appropriate program for the student for the 2021-22 school year; however, this fact does not "obviate [the student's] need for remediation so that she can catch up due to the [district's] past denial of FAPE." The parents contend that the IHO should have relied on the testimony of the private neuropsychologist, who testified that the student required compensatory education, even though she was now in the appropriate placement.

The parents further argue that they are entitled to their requested remedy of compensatory education because they established that the student "should have received individualized and intensive 1:1 instruction/tutoring and academic support for each" school year at issue. The parents assert that the evaluations and testimony of the private neuropsychologist support their request for compensatory education, as does the evidence from EBL Coaching. The parents contend that they are entitled to the requested 700 hours of 1:1 compensatory education to make up for the denial of FAPE for two school years. The parents also argue that the IHO was wrong to rely on the district's arguments about maximization and compensatory education raised in the district's post-hearing brief. However, even if the district was correct about maximization, the parents assert that a compensatory education award in this case is not an attempt to "maximize" the student's potential

because the failure of the district to provide a FAPE has caused a "significant detriment" to the student and the student required compensatory education "to remediate her sub-grade-level performance to catch up to her peers."

The parents contend that the IHO's award of tuition funding only grants "a partial victory." The decision does not "come close to fully remedying the extensive, [three]-year FAPE violation" which caused the student to "fall further behind academically." According to the parents, the IHO's reasoning that the student performed well academically during the 2021-22 school year and "may, hypothetically, reach grade level" in the current program was in error. The parents contend that they are not trying to maximize the student's potential but are seeking to address the student's needs.

Lastly, the parents argue that the IHO erred by failing to order document production pursuant to a subpoena. The parents contend that they served the district with a subpoena requesting communication, including emails concerning the student and the school years at issue and that they raised the issue of the district's failure to comply with the subpoena at the impartial hearing. According to the parents, the IHO should have either directed the district to comply with the subpoena or made an adverse inference against the district based on its failure to comply.<sup>14</sup> The parents assert that an adverse inference should be made that the emails the district did not produce would have supported the parents' assertion that the district was aware of the student's needs and the parents' requests for additional services, which would support the request for compensatory education.

The parents request 700 hours of 1:1 instruction/tutoring along with any additional relief an SRO may deem appropriate.

In its answer, the district responds to the parents' allegations. The district contends that the IHO properly applied the burden of production and persuasion. The district asserts, that contrary to the parents' statement, it presented documentary evidence and testimony to support its position. The district argues that compensatory education services "are not designed for the purpose of maximizing a student's potential or to guarantee the student achieves a particular grade-level in the student's area of need." Also, the district contends that compensatory education is not to penalize a school district for its failure to offer a FAPE and there is nothing in the hearing record to demonstrate that the student needs compensatory education. The student received special education services throughout each school year at issue and is now attending a special education

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<sup>14</sup> The parents also allege in the request for review that the IHO erred in failing to rule that the district violated section 504 and request that the SRO make such a finding (Req. for Rev. at pp. 9-10). An SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. May 12, 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at \*11 [S.D.N.Y. Aug. 5, 2016]). Therefore, I do not have jurisdiction to review any portion of the parent's claims regarding violations of section 504 and they will not be further discussed.

school that adequately addresses her needs. The district argues that there is no need for the student to receive additional services "merely as a defacto penalty for the lack of FAPE."

Next, the district asserts that the IHO applied the correct analysis and properly determined that the student was not entitled to compensatory education services. The district argues that it would only be responsible for the amount of services that would be necessary to provide the student with a FAPE and again that compensatory education is not meant to be used to maximize a student's potential, even though the parents might wish to provide the student with such services. The district asserts that the evidence from EBL Coaching does not support a finding that compensatory education is necessary as the evaluation did not include teacher reports, communication with teachers, a classroom observation, or testing. The district contends that the student has made significant progress under her current program and the parents are requesting what is tantamount to a default judgement.

The district argues that the parents request for an adverse inference is not supported by the record as the district witness testified that she turned over all information regarding the student. Further, the parents failed to articulate a reason as to how they were harmed by the alleged failure to produce documents. Lastly, the district contends that the IHO did not have jurisdiction over the parents' Section 504 claims and the IHO appropriately did not review those claims.

## **V. Applicable Standards**

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];<sup>15</sup> 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

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<sup>15</sup> If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student is entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever first occurs (Educ. Law § 4402[5][a]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

## **VI. Discussion**

### **A. Preliminary Matters**

Initially, I note that neither party appealed the IHO's findings that the district denied the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years, or that, with respect to the 2021-22 school year, Winston Prep was an appropriate placement for the student, equitable considerations weighed in favor of granting the parents' relief, and the parents were awarded funding of the student's tuition at Winston Prep (IHO Decision at pp. 13-14). As such, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

Next, the parents argue that the IHO denied the parents' due process rights by failing to order document production pursuant to a subpoena (Req. for Rev. at p. 9). Specifically, the parents claim that they requested communications including emails in the subpoena, which the district failed to provide (id.). The parents contend that the IHO should have either ordered the production of these emails or drawn an adverse inference against the district for its failure to comply with the subpoena (id.). In response, the district asserts that all the documents they had were produced and that the parents failed to demonstrate any prejudice (Answer at ¶ 14).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). And an IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]).

Upon my independent review of the impartial hearing record, there is insufficient evidence to support the parents' contentions that the IHO prevented the development of the hearing record, violated the parents' due process rights, or otherwise abused her broad discretion regarding the conduct of the impartial hearing. In this instance, the parents subpoenaed a number of documents from the district and, according to a discussion during the hearing, both the CSE and the student's school submitted responses to the parent's request for documents (Tr. pp. 58-59). According to counsel for the parents, the responses from the district did not include requested email correspondence regarding the student between staff at the student's school as well as to the parents (Tr. p. 59). In considering the parents' continued request for the school's emails, the IHO noted that there were a limited number of issues and the hearing record included "a lot of evidence related to the key issues" and was "somewhat complete" (Tr. pp. 216-23). Nevertheless, counsel for the parents had the opportunity to question the district school psychologist about the emails and the district witness testified that she turned over what she had pertinent to the student and that all other information should have been uploaded to the district's computer system, SESIS (Tr. p. 268). She testified that she does not keep emails and has never been informed that she had to (id.). However, as noted by the parents, the hearing record did include email correspondence between the district school psychologist and the student's mother (Dist. Ex. 11). The school psychologist testified that the district had requested the email and that in responding to the subpoena, she did not know what to turn over (Tr. pp. 268-69). Considering the above, while the counsel for the parents' exasperation with the district's efforts to comply with the subpoena is understandable, during the course of the hearing the IHO found that the hearing record included sufficient information to determine as to the issues presented. On appeal, the parents have not addressed this aspect of the IHO's findings and, accordingly, there is no reason for departing from the IHO's decision on this issue.

Accordingly, my review of the hearing record demonstrates that the parents had the opportunity to present a case at the impartial hearing and that the impartial hearing was conducted in a manner consistent with the requirements of due process by the IHO (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]).

## **B. Compensatory Relief**

Turning to the substance of the parties' dispute on appeal, the parents contend that the student requires 700 hours of 1:1 compensatory education services for the district's failure to offer the student a FAPE for the 2019-20 and 2020-21 school years. The parents argue that without an award of compensatory education the student is left without a full remedy and the hearing record supports their request for compensatory education services. In contrast, the district contends that the IHO correctly determined that the student did not require compensatory education services to remedy the denial of FAPE and any compensatory education services would be for maximization of the student's education, which is not required by the IDEA.

Initially, I will address the parents' arguments that compensatory education services should be awarded because without such an award they are left without a full remedy for the two year denial of FAPE. Such an argument could be interpreted to be a request for a default judgment. An outright default judgment awarding compensatory education—or all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005] [rejecting "lump sum" grant of tutoring as a compensatory remedy for a multi-year denial of FAPE]). In this case, although the district conceded FAPE (Tr. p. 61), the district did participate in the impartial hearing as it offered documentary evidence and presented a rebuttal witness. Therefore, the parents' request for a default judgment is denied and an analysis of the evidence of whether the student is entitled to compensatory education services will be conducted.

In this instance, although the district conceded FAPE for the 2019-20 and 2020-21 school years, one of the questions that must be addressed is what educational outcomes would likely have been perceptibly different if she had been provided with an appropriate program as an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123; Draper, 518 F.3d at 1289). Answering this question requires a fact specific inquiry addressing factors, such as what the student's areas of need were at the time of the denial of FAPE—including what services would have met those needs, what special education services the student received, how the student performed with the program provided by the district, and how the student should have been expected to have performed if provided with appropriate services.

While the student's programming is easy to identify as it is established by the IEPs included in the hearing record (Parent Exs. E; F; H), the student's progress, or lack thereof, under each of the IEPs is more difficult to define as this information is derived from a combination of the IEPs—which overlapped separate school years—and reporting by the student's parents and teachers, which is generally easier to associate to a specific school year. Accordingly, the analysis will first address the programming that the student received under each of the IEPs, followed by a review

of the information included in each of the IEPs related to the student's progress with the reporting of the student's parents and teachers incorporated therewith.

The hearing record demonstrates that there were three IEPs in effect during the school years at issue, January 2019, January 2020 and March 2021, with each of the IEPs overlapping portions of different school years (see generally Parent Exs. E; F, H; Dist. Ex. 1). For example, the January 2019 IEP was set to be implemented on February 1, 2019; accordingly the January 2019 CSE developed the student's IEP for the remaining portion of the 2018-19 school year and fall of the 2019-20 school year (see Parent Ex. E at pp. 9, 16).<sup>16</sup> Similarly, the January 2020 IEP had an implementation date of January 26, 2020 and was in effect beginning with the implementation date in January 2020 and continuing well into the 2020-21 school year (see Parent Ex. F at pp. 1, 8). The March 2021 IEP had an implementation date of April 13, 2021 and would have been in effect from that date through to the conclusion of the 2021-22 school year (see Parent Ex. H at pp. 1, 8).<sup>17</sup>

The January 2019 CSE recommended ICT services for six periods per week in ELA and math and ICT services for five periods per week in social studies and science (Parent Ex. E at pp. 8-9). The January 2019 IEP included supplementary aids including books on tape, study guide outlines of key concepts and testing accommodations including, extended time, separate location, revised test directions, and revised test format (*id.* at pp. 9, 11). The January 2019 IEP also noted that the student "needed academic support in order for her to succeed in her content area curriculum classroom settings" and indicated that she would receive support through ICT services in ELA, social studies, math, and science "which w[ould] offer additional teacher instruction to reinforce all academic tasks," as well as modeling of instructional expectations, and small group learning (*id.* at p. 4). According to the parent, the student also received one-on-one tutoring "once a week after school" during the 2018-19 school year, and the student's special education teacher worked with the student after school and "at different times throughout the day as necessary," "offering her on-on-one help as much as she was able to within the classes as she was often the second teacher assigned" (Parent Ex. Z at p. 4). The parent noted that this additional support was not included on the student's IEP (*id.*).

The January 2020 CSE recommended ICT services for six periods per week in ELA and math and for five periods per week in science and social studies (Parent Ex. F at p. 8). The January 2020 IEP provided for supplementary aids including books on tape, study guide outlines of key concepts, and testing accommodations (*id.* at pp. 8-9). According to the parent, the student also attended "a small group tutoring class for math before first period remotely," which was not included in her IEP (Parent Ex. Z at pp. 6-7; see Parent Ex. M at p. 2).

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<sup>16</sup> It is noted that the 2018-19 school year was not raised in the due process complaint notice; therefore, the January 2019 IEP is at issue in this case as of the start of the 2019-20 school year (Parent Ex. A at pp. 2, 6, 8).

<sup>17</sup> The March 2021 IEP would have also been in effect at the beginning of the 2021-22 school year; however, the parents are not asking for compensatory education for that school year as they have already been awarded direct payment of the student's tuition at Winston Prep for that school year.

The March 2021 CSE recommended ICT services for five periods per week each in ELA, math, science, and social studies (Parent Ex. H at p. 8).<sup>18</sup> The March 2021 IEP noted that the student required extended time to complete assignments, checklists to help organize and keep track of work, visual and verbal on-task focusing prompts, opportunities to review and revise work, consistent redirection when doing independent work, instructions and tasks broken into smaller steps, directions repeated and rephrased paired with visual supports, modeling, pre-teaching and re-teaching concepts, small group instruction, additional time to respond to verbal queries and the option of using a laptop to respond to longform questions, along with testing accommodations of extended time, separate location, and revised test directions (Parent Ex. H at pp. 5, 8-9). In addition, while details are limited, the hearing record shows that the student also received at-risk services (Tier 2) during the 2020-21 school year (Dist. Ex. 5 at pp. 12, 28, 44).

This is not a case in which the services called for by the IEP were not implemented. The parents have not alleged that the student did not receive any of the services recommended by January 2019, January 2020, and March 2020 CSEs as they did not make a claim regarding implementation. Accordingly, based on the above, including the recommendations contained in the IEPs, the hearing record supports finding that the student received ICT services during the school years at issue—as well as some additional services not included in the IEP. Although the hearing record is not defined as to the additional services the student received, it supports finding that the student received at least some small group instruction in math during the 2019-20 school year, as well as some at-risk services during the 2020-21 school year (Parent Ex. M at p. 2; Dist. Ex. 5 at pp. 12, 28, 44).

This is a case in which the parents contend that the student would have made greater progress had the student had different programming on her IEPs. Turning to the student's progress during the 2019-20 and 2020-21 school years, the parents' expectation was that the student "ha[d] the cognitive and academic potential to perform at grade level and beyond," but was held back by a lack of services (Parent Ex. Z at p. 7), with the district, observing the same student, and noting that the student did not require compensatory services as "she was making academic gains and she was on track to graduate with an Advanced Regents Diploma" (Dist. Ex. 12 at p. 2). This raises an argument as to relief that traditionally arises when assessing the appropriateness of a given district program, as the Supreme Court explained long ago that whether "children are receiving sufficient educational benefits ... presents a ... difficult problem" (Endrew F., 137 S. Ct., at 998 quoting Rowley, 458 U.S., at 192). The Court in Rowley explicitly rejected the idea that a FAPE required a district to ensure that a student's full potential be realized (Rowley, 458 U.S., at 198-99). The Court in Endrew F. reaffirmed some of the points articulated in Rowley, such as the fact

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<sup>18</sup> The district school psychologist noted that in response to the parent's concern that the student was regressing despite the "current level of supports," the March 2021 CSE "offered to add SETTS to address [the] parent's worries about reading comprehension and math skills, as well as school based counseling to address perceived impairments in social emotional functioning" but the parent declined the additional services (Dist. Ex. 12 at p. 2). Consistent with the school psychologist's testimony, the IEP reports that the parents declined counseling and indicated that she wanted a deferral to CBST (Parent Ex. H at pp. 4, 5). According to the school psychologist, approximately one month after the March 2021 CSE meeting, the parents requested that the CSE add SETSS and counseling (Dist. Ex. 12 at p. 2). The CSE reconvened on May 18, 2021 to add SETSS and counseling to the student's program; however, these services were not set to begin until September 1, 2021 (Dist. Ex. 7 at pp. 5, 14-15). Accordingly, they were not available to the student during the school years at issue on appeal, the 2019-20 and the 2020-21 school years.



that, for a student fully integrated in the general education classroom, an IEP would be appropriately ambitious if it was "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade" (Endrew F., 137 S. Ct. at 992, quoting Rowley, 458 U.S. at 204). The high court explained that intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside (Rowley, 458 U.S. at 192). Additionally, the Second Circuit has explicitly stated that "when a learning-disabled child is in a mainstream class, 'the attainment of passing grades and regular advancement from grade to grade' will generally constitute evidence of satisfactory progress" (Cerra v. Pawling Cent. Sch. Dist., 427 F. 3d 168, 196 [2d Cir. 2005], quoting Walczak v. Fla. Union Free Sch. Dist., 142 F. 3d 119, 130 [2d Cir. 1998]).

With the above standards in mind, the student had received diagnoses of specific learning disorder with "moderate" impairment in reading (dyslexia), reading fluency, and reading comprehension; specific learning disorder with "moderate" impairment in written expressions, spelling, grammar, punctuation, and writing fluency; specific learning disorder with "moderate" impairment in mathematics, calculation, problem solving, and math fluency; and generalized anxiety disorder (Parent Ex. M at p. 10). She was a cooperative but quiet and shy student who lacked self-confidence in larger group settings (Parent Ex. E at pp. 1, 3). The student needed encouragement to advocate for herself and seek clarification or support on her own, rather than waiting for support to be offered to her (*id.*). The student's March 2021 IEP noted that her teachers' "primary concern [was] inconsistent motivation" and that the student did not always complete her assignments or "re-engage" with the material when given an opportunity (Parent Ex. H at pp. 2-3).<sup>19</sup> Academically, the hearing record shows that the student's instructional level was consistent with her grade level and the student's grades in the core subjects of ELA, math, science, and social studies, as reported on the January 2020 and March 2021 IEPs, were between 2.0-3.3 (Parent Exs. F at pp. 1, 12; H at p. 2).<sup>20</sup>

The January 2020 IEP provided information on the student's progress during fall 2019 (Parent Ex. F). According to the IEP, in ELA, the student had a grade of 3.0, was working on developing her analysis skills, vocabulary, grammar, and mechanics, and was "improving greatly on the analysis section" (*id.* at pp. 1, 2). She needed "more time to process and write out her answers," than most other students but her work was "insightful because she took that time" (*id.* at

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<sup>19</sup> The school psychologist testified that the school allowed for "re-engagement," although she was not intimately familiar with it (Tr. pp. 298-99). She explained that because the school was a "mastery-based school" students were able to submit an assignment, have a teacher review it and provide feedback, and then resubmit the assignment applying the teacher's feedback (Tr. p. 299). She testified that she did not know if students' "testing grades" were changed as a result of re-engagement (Tr. pp. 299-301). The student's mother reported that re-engagement allowed students to "'re-engage' on assignments and tests to improve grades" (Parent Ex. Z at p. 3).

<sup>20</sup> The grading scale used by the district is not explained in the hearing record. However, the student's grades of 2.0, 2.3, and 2.4 were described as "below grade standards" on her March 2021 IEP while her score of 3.3 was characterized as "exceed[ing] grade standards" (Parent Ex. H at p. 2). On an earlier IEP, the student's grade of 2.5 was described as "approaching grade level" and a grade of 3.0 was described as "on grade level" (Parent Ex. C at p. 1). The scoring appears to work similarly to a four-point rubric used in State assessments (see, e.g. Definitions of Performance Levels for the 2021 Grades 3-8 English Language Arts Tests, available at <https://www.p12.nysed.gov/irs/pressRelease/20211028/documents/ela-2021-scale-score-performance-level-conversion-charts.pdf>).

p. 2). The student was noted to prefer working in small groups but was able to complete individual assignments (id.). She needed "support when reading independently and/or several check ins [sic]" (id.). In math, the IEP indicated that the student had a grade of 2.0 in fall 2019 and was working on slope and equation of a line (id. at pp. 1, 2). The student was "making adequate progress achieving goals" in Living Environment and her progress was measured through "Regents style quizzes, tests, projects and a Socratic Seminar" (id. at p. 2). Although the student's grade "varied drastically" from 1-3, the student's "overall score" was a 2.8, which indicated that she was "approaching mastery" (id.). The IEP noted that in social studies, the student had a grade of 3.0, was noted to be "studious" and did well on her work in class but did not participate in classroom discussions (id.).

The record is sparse regarding the student's academic performance during the spring of the 2019-20 school year which coincided with the shutdown of all school buildings statewide at the beginning of the COVID-19 pandemic; however, the student's mother asserted that during remote learning the student's academic struggles began to show and she "was able to observe how much difficulties [sic] [the student] was really having with her class work" (Parent Ex. Z at pp. 5-6). The parent related that she received a progress report for the one-month period from May 18, 2020 through June 19, 2020 that reported grades of 2.4 in ELA, 1.7 in algebra, 1.3 in Living Environment and 1.5 in US History; however, no progress report for spring 2020 is included in the hearing record (id. at p. 6).<sup>21</sup> The student's permanent record did not contain final grades for these courses, but showed that the student obtained credit for English 9, US History, algebra, and Living Environment (Dist. Ex. 6).

Turning to the student's progress during the 2020-21 school year, the parent reported that in fall 2020, the student attended a combination of hybrid and remote instruction (Parent Ex. Z at p. 6). The parent obtained a private psychoeducational evaluation of the student in January 2021 because she reasoned that "an updated evaluation might be helpful in obtaining essential accommodations for [the student's] exams as well as assist [sic] the school in where they needed to focus in helping [the student]" (id. at p. 6; see Parent Ex. M). The student's cognitive functioning was assessed using the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) and she obtained a Full Scale IQ of 107 (68th percentile), which was noted to be at the high end of the average range (Parent Ex. M at p. 3). In the January 2021 psychoeducational evaluation report, the neuropsychologist related that there was some variability on subtests of processing speed and working memory; however, the student's composite scores on the WISC-V were all within the average range (id. at pp. 3-5).

To assess the student's academic achievement the neuropsychologist administered the Wechsler Individual Achievement Test-Third Edition (WIAT-III) and the Gray Oral Reading Test-Fifth Edition (GORT-5) (Parent Ex. M at p. 5). On the WIAT-III, the student obtained a total reading composite standard score of 94 (34th percentile), a basic reading composite standard score of 98 (45th percentile), a reading comprehension and fluency composite standard score of 93 (32nd

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<sup>21</sup> The student's mother testified that she received a June 2020 progress report, which included grades in algebra, Living Environment, and US History (Parent Ex. Z at p. 6). As noted above, the 2019-20 school year was the student's 8th grade school year. Review of the student's permanent record shows that the student received high school credit for three of the courses identified by the parent that she took in 8th grade (Dist. Ex. 6). Accordingly, it appears the student was taking high school level courses during her 8th grade school year.

percentile), and a written expression composite score of 95 (37th percentile) (id.). The neuropsychologist reported that the student's basic reading skills were variable, with decoding and phonics being adequate when assessed by reading lists, but weaker when she read from text (id. at p. 6). Despite this discrepancy, on the WIAT-III word reading subtest the student obtained a standard score of 97 (42nd percentile) and on the pseudoword decoding subtest she obtained a standard score of 101 (53rd percentile) both of which were within the average range (id. at pp. 6, 13). The neuropsychologist noted that the student's "reading rate on the WIAT-III and GORT-5 fell at the 16th-25th [percentiles]," which was "below expectations" and the student's "reading fluency, taking accuracy and rate into account, was also weak falling at the 16th-27th [percentiles]" (id. at p. 6).

The student's WIAT-III writing subtest scores were within the average range with the exception of the spelling subtest, where she obtained a standard score of 89 (23rd percentile); her written expression composite standard score was a 95 (37th percentile), which was in the average range (Parent Ex. M at pp. 7, 13).

On the January 2021 administration of the WIAT-III the student obtained a mathematics composite standard score of 86 (18th percentile) and a math fluency composite standard score of 85 (16th percentile), which were both noted to be "below average" (Parent Ex. M at p. 7-8, 13). In her report, the neuropsychologist described student's math skills as "an academic weakness" and asserted that this "[wa]s a concern, as mathematics was an area of strength in 2015" (id. at p. 7). She opined that although the district was providing the student with math support in the morning before school the student's "significant drop in math require[d] more intensive intervention" (Parent Exs. M at p. 7; BB at p. 12). She further reported that the student "me[t] the criteria for a learning disorder in math, which she did not meet in 2015" (id. at p. 8).

The neuropsychologist also assessed the student's social/emotional functioning and behavior as part of her January 2021 evaluation (Parent Ex. M at pp. 8-9). On the Conners 3rd Edition (Conners 3), responses by the student's mother yielded "significant" scores on scales assessing learning problems, executive functioning, and inattentive behavior (Parent Ex. M at pp. 8, 14). Teacher ratings on these scales, completed by the student's math teacher for 8th and 9th grade, yielded scores in the average range (id.).<sup>22</sup> With respect to anxiety, the neuropsychologist indicated that the student's teacher "did not significantly rate items screening for anxiety, but [the student's] mother did" (Parent Exs. M at p. 9; BB at p. 15-16). Similar to the teacher's responses on the Conners 3, the student's responses on the Multi-Dimensional Anxiety Scale for Children (MASC-2) did not result in any significant scores (id.).<sup>23</sup> Still, the neuropsychologist reported that although the student had managed to pass and get by academically, she had steadily fallen behind her peers and developed a pessimistic outlook (id.). Further, the neuropsychologist stated that the

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<sup>22</sup> The neuropsychologist noted that despite not rating the student as "significantly" on the learning problems scale the teacher gave the student a mark of 70 for the first semesters of eight and ninth grade (Parent Ex. M at pp. 8-9).

<sup>23</sup> The neuropsychologist opined that the student's scores might reflect that she was out of touch with her feelings or that she was wary of filling out the scale and revealing information about herself (Parent Ex. M at p. 9). The neuropsychologist reported that the student demonstrated performance anxiety during testing, that her "affect was somewhat blunted," and that "[t]here was a down trodden aspect to her outlook" (Parent Ex. BB at p. 16).

student was experiencing significant levels of anxiety that were exhausting and fatiguing and coloring her impression of the world so she had a dreary outlook (*id.*). The student's mother reported that the student became more and more anxious at the district's secondary school and her self-esteem plummeted (Parent Ex. Z at p. 3). She stated that she could not reconcile the student's apparent struggles with the grades she was receiving on her report cards (*id.*).

The parents assert that a comparison of the January 2021 psychoeducational evaluation with the prior neuropsychological evaluation of the student completed in December 2015 shows that the student "had fallen further behind academically" (Req. for Rev. at p. 4). The neuropsychologist, who conducted both evaluations, testified that at the time of the January 2021 psychoeducational evaluation, the student was "continuing to be behind her peers and below grade level" and this was concerning "because the [student's] scores had gone down in comparison to the 2015 scores in reading comprehension and in math" (Tr. at p. 185; *see* Parent Ex. BB at pp. 14). She noted changes between the December 2015 administration of the WIAT-III, where the student's subtest scores ranged from the 23rd-92nd percentiles, and the January 2021 WIAT-III where her subtests scores ranged from the 8th-66th percentiles (Parent Ex. BB at p. 8). The neuropsychologist testified that the student's GORT-5 oral reading index fell at the 50th percentile in 2015, and at the 14th percentile in January 2021 and opined that "[t]he drop in [the student's] scores indicated that she was not keeping up with her peers and she was falling behind" (*id.* at p. 9). She further asserted that the student "was struggling to keep up with her peers despite the additional time and effort she put[] into her studies" and opined that the services the student was receiving from the district "clearly hadn't been effective," adding that she "felt like . . . the [district] interventions were not meeting [the student's] needs, and she was falling behind" (Tr. at p. 190; Parent Ex. BB at pp. 10-11, 17-18). She opined that the student "really needed a specialized school" (Tr. at p. 190; Parent Ex. BB at pp. 2, 18). The neuropsychologist stated that it was her professional opinion, based on years of experience working with similar students, that had the student received appropriate academic intervention, she would have been performing at grade level or above based on her high cognitive potential (Parent Ex. BB at p. 19).

However, the record shows that despite the student having areas of difficulty that were reflected in her scores on portions of the January 2021 psychoeducational evaluation, at the time of the March 2021 CSE meeting, the student was engaging in grade level curriculum, including participating in an advanced placement (AP) class, and was receiving passing or better grades. The student's permanent record shows that the student finished the 2020-21 school year with a cumulative average of 80.50 percent and earned 21 credits toward graduation (Dist. Ex. 6). Additionally, while the student may have obtained lower scores on the January 2021 administration of the WIAT-III as compared to her performance on the December 2015 administration, her grades for ELA, math, science, and social studies as reported in her March 2017, February 2018, January 2019, and January 2021 IEPs, remained consistent, falling in the range of 2.0-3.0 (Parent Exs. C at p. 1; D at p. 1; F at p. 1; G at p.1; Dist. Ex. 1 at p. 1). According to the district school psychologist, at the time of the March 2021 CSE meeting "the majority of [the student's] standardized academic scores were within Average Range" and "her classroom grades were approaching or on grade level" (District Ex. 12 at p. 2). She noted that the student "was making academic gains and she was on track to graduate with an Advanced Regents Diploma" (*id.*). The school psychologist further asserted that while the student's performance "decreased in some areas, such as Reading Comprehension in the GORT-5, which is a measure of oral reading . . . under the [WIAT-III], which is an assessment to measure her academic skills, the

student performed average to above average of her same aged peers," and noted that while the student's "particular scores in subcategories may have varied, her academic performance skills remained consistent (id.).

In addition to the January 2021 psychoeducational evaluation, the parents assert that evaluative information from EBL Coaching supports their request for compensatory education. As noted above, the director of EBL Coaching assessed the student in March 2021 to determine her academic strengths and weaknesses as well as her instructional needs (Dist. Ex. 4 at p. 1). The director reported that, based on her administration of the Wide Range Achievement Test (WRAT), the Test of Written Language (TOWL), and the Qualitative Reading Inventory, the student tested at a low-fifth grade level for mathematics, a mid-sixth grade level for spelling, a low-eighth grade level for decoding, a sixth-grade level for reading comprehension, and a mid-eighth grade level for writing (id.). The director opined that based on her testing results along with her review of the 2015 neuropsychological evaluation, 2018 educational evaluation, 2021 psychoeducational evaluation, and the student's IEPs from 2015, 2017, 2018, and 2020, the student required 700 hours of 1:1 multisensory tutoring (Parent Ex. X at pp. 2-3; Dist. Ex. 4). However in making this recommendation the director acknowledged that she did not review teacher evaluations or reports, speak with the student's teachers, or observe the student in school (Tr. p. 74). She also conceded that she did not create written reports for the evaluations she administered, although she explained that she had raw data that she scored and put together in her affidavit (Tr. pp. 77-78).<sup>24</sup>

The record contains ample information to support that the student was making progress with grade level curriculum. The March 2021 IEP indicates that the student's teacher reported that in English, the student was "a capable reader and writer," and her knowledge and use of domain specific vocabulary "was comparable to peers" (Parent Ex. H at p. 3). She "struggle[d] to make inferences and/or cite evidence to support her thinking" but had recently received a 3 on "her final essay after reengagement, which was meeting expectations" and her teacher noted that the student used teacher feedback to improve her grade (id.). The student's English teacher reported that the student could "put herself in the shoes of the characters [the class] read [about] and respond to questions that [we]re asked about characterization in a text" (Dist. Ex. 5 at p. 36). The student needed "a little more time with tasks in class, especially writing tasks" and her English teacher reported that "one on one help with going over directions and making plans/outlines is helpful" (id. at p. 38). The English teacher further reported that the student's "strength is literal reading comprehension and answering questions about characters and conflicts in a text" but noted that "[the student] struggle[d] with thinking more about figurative language, and organizing her responses into writing using evidence" (id. at pp. 38-39). The student's English teacher for 9th grade estimated the student's writing skills to be at the 8th grade level (Dist. Ex. 4 at pp. 34, 41). However, the student's permanent record showed that in English 9 the student had semester grades of 85 and 75 (Dist. Ex. 6).

In Algebra II, the student demonstrated good number sense, recognized patterns, and understood pertinent math vocabulary but experienced "significant challenges with learning and applying new concepts," and with accurately computing basic mathematical operations and

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<sup>24</sup> It is not clear what affidavit the witness is referring to; there was no additional scoring data included in the director's testimony by affidavit other than what was included in the March 2021 letter (Parent Ex. X at p. 2; Dist. Ex. 4 at p. 1).

solving multi-step word problems (Parent Ex. H at p. 3). The student's Algebra II teacher noted that she "require[d] extra practice for multi-step skills to be absorbed in math"; the teacher reported "some gaps in [the student's] knowledge compared to where she should be for Algebra II," adding that she "[wa]s a hard worker, and overc[ame] those gaps by practicing and getting algorithms down, but struggle[d] to transfer knowledge from one unit to the next. (Dist. Ex. 5 at pp. 21, 24). The student was noted to be meeting standards and had a grade of 3.3 at the time of the March 2021 CSE meeting, and while the teacher progress report noted that she struggled with new material, she used supports such as guided note-catchers, anchor charts, regular small group instruction, and leveled worktimes effectively (Parent Ex. H at p. 2). According to the student's permanent record, in Algebra II the student had semester grades of 75 and 82 (Dist. Ex. 6).

In AP Human Geography, the student had a grade of 2.0 at the time of the March 2021 CSE, which was described in the March 2021 IEP teacher progress report as "well below mastery" (Parent Ex. H at p. 2). She struggled to compose clear, cohesive writing passages that addressed the prompt, did not fully develop her ideas in creative and expository pieces, and her fluency and stamina were not within grade expectations (*id.*). However, the student's AP Human Geography teacher described AP Human Geography as "a challenging class" and noted that the student "might be earning closer to a 2.5 in a non-AP" class (*id.*). The AP Human Geography teacher reported that the student's science skills were below her peers and she "struggle[d] with some assignments but g[ot] most of her work done" and noted that the student "trie[d] very hard but could use support with explicit and direct instructions for assignments" (Dist. Ex. 5 at pp. 11-12). In AP Human Geography the student obtained a grade of 70 for both semesters (Dist. Ex. 6).

In Earth Science, the student had a grade of 2.4 at the time of the March 2021 CSE meeting and the March 2021 IEP teacher progress report described that understanding scientific and technical data were a challenge for the student (Parent Ex. H at p. 2). The student needed assistance to find and cite evidence to support her analysis of informational text, was not able to gather relevant information from multiple sources and plan an experiment to answer a question without additional support, and for the student to represent or understand data expressed in visual form required additional explanation from the instructor (*id.*). The use of explicit and direct instructions for assignments was described as "an effective classroom support" (*id.*). In Earth Science the student obtained semester grades of 82 and 78 (Dist. Ex. 6).

While the parents point to the student's lower scores on the January 2021 psychoeducational evaluation as evidence that the student was regressing, there were multiple factors that may have impacted the student's performance on this assessment. As noted in the January 2021 psychological evaluation report, the student "lacked confidence in her abilities, often needing encouragement to attempt challenges," had a "vulnerable quality ... particularly when she was flustered by a challenging subtest," and "seemed anxious throughout much of the testing, particularly when time limits were involved" (Parent Ex. M at p. 3). The student was reported to "[respond] impulsively to get an item over with and to move on with a subtest" which resulted in "some scattered performances, i.e., missing easy items while passing harder items" (*id.* at p. 3). Further, the neuropsychologist testified that "during the evaluation performance anxiety was noted" (Parent Ex. BB at p. 15). Additionally, the January 2021 psychoeducational evaluation took place after the start of the COVID 19 pandemic and as noted by the district school psychologist, "[the student] was assessed after a pro-longed [sic] period of not receiving in-class instruction due to the COVID-19 pandemic and school closures. She had not received in class

instruction since March 2020 and it [wa]s not surprising that she showed regression in some areas" (Dist. Ex. 12 at p. 2).

Based on the above, there are some gaps in the hearing record regarding the student's performance during the period of the denial of FAPE, the 2019-20 and 2020-21 school years. For example, the hearing record does not include progress reports tracking the student's annual goals and although the student's permanent record identifies the student's grades, the student's grades were reported using different rubrics and they are not all described in detail in the hearing record. Additionally, review of the January 2021 psychoeducational evaluation in comparison to the December 2015 evaluation, along with the testimony of the neuropsychologist who conducted the evaluations shows that the student was not making as much academic progress as may have been expected considering her cognitive testing. However, the hearing record also includes information showing that the student was making progress while in the district's program, through the support of ICT services in a general education class. This evidence of progress is shown by the student's passing grades in a challenging district program with grade level curriculum, including one AP class, the student's advancement to the next grade, as well as by reports of the student's performance by the student's teachers. As noted above, advancement from grade to grade generally constitutes evidence of satisfactory progress (see Cerra, 427 F. 3d at 196).

Additionally, while the parents argue that a determination as to compensatory education should focus solely on the 2019-20 and 2020-21 school years, with the student's placement at Winston Prep for the 2021-22 school year used only as relief for the 2021-22 school year, it was appropriate for the IHO to take into account her order directing the district to fund the student's placement at Winston Prep for the 2021-22 school year when determining whether a compensatory education award was necessary for the prior two school years (see Demarcus L. v. Bd. of Educ. of the City of Chicago, 2014 WL 948883, at \*8 [N.D. Ill. Mar. 11, 2014] [denying compensatory education partially due to the prospective revisions to the student's IEP]; Phillips v. Dist. Of Columbia, 932 F. Supp. 2d 42, 50 [D.D.C. 2013] [even if there is a denial of a FAPE, it may be that no compensatory education is required for the denial either because it would not help or because the student has flourished in the student's current placement]).

The Winston Prep academic dean indicated that for the 2021-22 school year the student was grouped with a cohort of nine students composed of both 10th and 11th grade students (Parent Ex. W at p. 3). He reported that he was not aware of the student explicitly using Orton-Gillingham in any of her classes but that her teachers were using another, similar multisensory approach to learning (Tr. p. 112). At Winston Prep the student received daily 1:1 instruction via the school's Focus program (Tr. pp. 112-13). The academic dean described Focus as an individualized curriculum developed for a particular student that took into account the areas that they needed to work on most (Tr. p. 113). The student's Focus curriculum was primarily focused on building her expressive vocabulary, written expression, academic problem-solving skills, and reading comprehension (Parent Ex. W at p. 5). The hearing record shows that the student obtained As and Bs in all classes at the private school (Parent Ex. Q). The Winston Prep academic dean testified that the student had "responded to the program and goals" set for her and had "made progress in her writing, her reading, her decoding," noting that he expected that results from "the spring battery of tests" would show that "the grade levels at which she's functioning in those areas will have gone up" (Tr. at p. 118; see Tr. pp. 104, 105, 115). He opined that "if we can kind of apply the progress she's made this year to the next two years, I think that there's a very real probability that she can

graduate on grade level, assuming that she can internalize the strategies that we're teaching her" (Tr at pp. 118-119). The student herself testified that she was being "taught in a way that makes sense for me," noting that "because the classes are smaller, the teacher [wa]s able to include and help everyone as they need[ed] it," and added that she felt "very comfortable" at the private school (Parent Ex. Y at p. 2).

In view of the foregoing evidence, the IHO was reasonable in finding that Winston Prep was addressing the student's needs, that the student had made significant progress at Winston Prep, and that although she understood the parents' fears, the parents' request for compensatory education was not supported by the evidence, particularly the academic dean—who testified that the student could graduate on grade level if she could internalize the strategies being taught (IHO Decision at pp. 9, 12-13).

Accordingly, based on the above, the hearing record does not require reversal of the IHO's determination to deny compensatory education services in this instance. As noted, the student made progress in the district program and was passing from grade to grade; additionally, the student was flourishing at her current placement at Winston Prep. Under those circumstances, the hearing record does not require a finding that compensatory education services are necessary (see Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

## **VII. Conclusion**

Having conducted the analysis above, the hearing record does not support the parent's request to modify the IHO's determination regarding compensatory education relief. Accordingly, the parents' request for additional relief in this appeal is denied.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
October 27, 2022**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**