



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-116

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:

Law Offices of Regina Skyer & Assoc., LLP, attorneys for petitioners, by Jesse Cole Cutler, Esq., and Linda A. Goldman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nathaniel Luken, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at Bay Ridge Preparatory School (Bay Ridge) for the 2021-22 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student in this case was initially referred to the CSE for an evaluation in January 2019 when the student was attending a general education classroom in second grade (2018-19 school year) (see Parent Ex. C at p. 1). At that time, the student's "reasoning and academic abilities " fell within the "average range"; however, due to the student's "difficulties focusing," the district found the student eligible for special education as a student with an other health-impairment and

developed an IEP (id.). The evidence reflects that the student received special education teacher support services (SETSS) in mathematics and reading to address her needs (id. at pp. 1, 5).¹

Shortly thereafter, the parents privately obtained a neuropsychological and educational evaluation of the student over the course of three days in March 2019 (March 2019 neuropsychological evaluation) (see Parent Ex. C at p. 1). Based on the testing results, the student received a diagnosis of an attention deficit hyperactivity disorder (ADHD) (predominantly inattentive type), and the evaluators noted that the student had "difficulty regulating her attention," which affected her ability to "successfully approach and complete tasks" (id. at p. 16). Academically, the student's testing results met the criteria for diagnoses of a specific learning disorder with impairments in reading (i.e., "phonological awareness, fluency, accuracy, comprehension") and mathematics (i.e., "fluency, calculation, word problems") (id. at p. 17). The evaluators indicated that the student exhibited "significant deficits in her foundational reading skills, including phonological awareness, [which] significantly impact[ed] her reading fluency and comprehension" (id.). In mathematics, the evaluators noted that the student's "deficits in attention and executive functioning interfere[d] with her ability to identify the type of problem and to hold multi-step problems in mind in order to perform the calculations" (id.). To address the student's needs, in part, the evaluators recommended that the student attend an "Integrated Co-Teaching (ICT) Classroom" with two teachers and with "other students with similar cognitive profiles, namely average reasoning skills contrasted with attention, executive functioning, and learning deficits" (id. at pp. 17-18). The evaluators further noted; however, that if the student did not "make progress in this setting, she w[ould] need a small classroom setting in a specialized school," and she "may need a placement that w[ould] provide a high teacher to student ratio in a small classroom with teachers trained in using a multi-sensory approach, cuing [sic], and scaffolding, to address her learning disorders" (id. at p. 18). Additionally, the evaluators recommended accommodations for the classroom and for testing (id. at pp. 18-19).

The evidence in the hearing record reflects that the student continued to attend a district public school for the 2019-20 (third grade) and 2020-21 (fourth grade) school years (see generally Parent Ex. O ¶¶ 5, 10). The evidence further reflects that, in third grade, the student received ICT services (see Parent Ex. D at p. 1). At the impartial hearing, the student's mother testified that, in third grade, the student experienced anxiety, which manifested as "cry[ing] every day before school" and "com[ing] home [] upset" (SRO Tr. p. 132; see Parent Exs. D at pp. 1-2; O ¶¶ 10-11).²

¹ The evidence in the hearing record also indicated that the student reportedly received "private tutoring once a week" (see Parent Ex. C at p. 1). The evidence in the hearing record does not include a copy of the student's IEP developed for the 2018-19 school year (see generally SRO Tr. pp. 1-163; Parent Exs. A-P; Dist. Exs. 1-6).

² When the district submitted the administrative hearing record to the Office of State Review, testimony received during the morning session of the impartial hearing held on June 29, 2022 was not included with the transcripts, and the remaining transcripts were not consecutively paginated; instead, the district mistakenly provided two copies of the testimony received during the afternoon session of the impartial hearing held on June 29, 2022. Upon request, the district submitted the missing transcript of the impartial hearing from June 29, 2022; however, the pagination errors were not rectified or explained, and for all intents and purposes, the pagination errors were further exacerbated. Having what appeared to be a full and complete transcript of the impartial hearing, staff of the Office of State Review—rather than spending the review time on ministerial matters seeking further clarity from the district—combined the transcripts and consecutively paginated the combined transcripts with bates-stamping. Therefore, for the purpose of clarity, citations to transcript pages will be referenced as "SRO Tr." with

The parents began treating the student's anxiety with medication in or around January 2020, prior to the school building closures in March 2020 that resulted from the COVID-19 pandemic (see SRO Tr. pp. 132-33; Parent Ex. D at p. 1). The student's mother also testified that, whether it was a result of the anxiety medication, or remote instruction (which the student "enjoyed"), or a combination of both the medication and remote instruction, the student appeared "happier" and school "worked well" (SRO Tr. p. 133).

During the 2020-21 school year (fourth grade), the student attended the district public school and continued to receive ICT services (see SRO Tr. p. 133; Parent Ex. O ¶ 10). In September 2020, the district implemented a hybrid learning program (i.e., in-person and remote instruction), and the student "returned back into the small classes in September" (SRO Tr. p. 134). As reflected by the evidence, the district's hybrid program for the student's ICT classroom consisted of the student attending school for 2.5 days per week and receiving remote instruction for 2.5 days per week, "along with a small cohort of peers" (Parent Ex. D at p. 2).

On February 3, 2021, the parents executed an enrollment contract with Bay Ridge for the student's attendance during the 2021-22 school year (fifth grade) (see Parent Ex. P at pp. 1, 3).³

In or around April or May 2021, the district resumed "in person school [instruction] on a full-time basis" (SRO Tr. p. 133). The student's mother testified that the student's anxiety "crept back up a little bit because she really enjoyed the small group class" (SRO Tr. pp. 133-34; see Parent Ex. D at pp. 1-2).

On April 19, 2021, the parents privately obtained a psychological and educational update of the student, which resulted in an evaluation report dated May 3, 2021 (May 2021 updated psychological evaluation) (see Parent Ex. D at p. 1).⁴ Based on the student's updated testing results, the evaluators found that the student continued to meet the criteria for the "previously diagnosed" specific learning disorder with impairments in reading (i.e., "phonological awareness, fluency, accuracy, comprehension") and mathematics (i.e., "fluency, calculation, word problems"), as well as an ADHD (predominantly inattentive type), and noted that the student's diagnoses "continue[d] to interfere with her daily functioning and result[ed] in severe and impairing functional limitations in her academic achievement" (compare Parent Ex. D at p. 9, with Parent Ex. C at pp. 16-17).⁵ According to the evaluators, the student's ICT services, together with speech-

the appropriate bates-stamped page numbers. For their reference, a copy of transcript, as bates-numbered, is being provided to the parties together with this decision.

³ The Commissioner of Education has not approved Bay Ridge as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

⁴ The parents obtained the May 2021 updated psychological evaluation of the student from the same learning center, and by two of the same evaluators, that performed the March 2021 neuropsychological evaluation of the student (compare Parent Ex. D at pp. 1, 10, and Parent Ex. C at pp. 1, 21). According to the May 2021 updated psychological evaluation report, the student's "teachers noted on her most recent report card that [she] was reading at a Level O, one year below grade level" (Parent Ex. D at p. 2).

⁵ Of the 21 subtests used to measure the student's academic functioning across six different assessments, 12 of the student's percentile scores fell within the average range, 3 were at the 16th percentile, and the remaining 6

language therapy and classroom and testing accommodations that she had received in third and fourth grade had "not yielded adequate improvement in her reading, writing, or math despite also receiving outside treatment for her attention deficits and clinically significant anxiety" (Parent Ex. D at p. 9). The evaluators further indicated that, during the COVID-19 pandemic, the student "received instruction through a hybrid in person and remote learning schedule that allowed her greater access to teachers and much smaller group instruction," and within this "smaller class setting her teachers [had] described [the student] as better able to regulate her emotions and attention deficits to participate in class" (*id.*). The evaluators indicated that, in light of the "severity of her learning and attention disorders, in conjunction with reported difficulties keeping up in the ICT classes and the results of this updated evaluation, it [wa]s clear that [the student] require[d] a new classroom setting" (*id.*). Specifically, the evaluators indicated that the student needed a "small classroom setting in a specialized school," as well as a "placement that w[ould] provide a high teacher [to] student ratio in a small classroom with teachers trained in using a multi-sensory approach, cuing [sic], and scaffolding, to address her learning disorders" (*id.*).⁶

On June 9, 2021, a subcommittee of the CSE (CSE subcommittee) convened to conduct the student's annual review and to develop an IEP for the 2021-22 school year (fifth grade) (*see* Dist. Exs. 1 at pp. 1, 17; 2-4). Finding that the student remained eligible for special education as a student with an other health-impairment, the June 2021 CSE subcommittee recommended ICT services for instruction in mathematics, English language arts (ELA), and social studies (*see* Dist. Ex. 1 at p. 12).⁷ In addition, the June 2021 CSE subcommittee recommended two 30-minute sessions per week of speech-language therapy in a small group (*id.*). The June 2021 CSE subcommittee also created annual goals for the student, and recommended strategies to address the student's management needs (*id.* at pp. 4-10). The June 2021 CSE subcommittee included the following as testing accommodations for the student: extended time, breaks, on-task prompting, separate location or room, revised test directions, and preferential seating (*id.* at p. 14). In addition, the June 2021 CSE subcommittee noted the parents' concerns in the IEP, including that they "believe[d] the smaller, structured classroom environment th[at] year ha[d] been beneficial to [the student's] progress," and their related concern "with [a] larger class size moving forward" and the student's ability to continue to make progress with more students in the classroom (*id.* at p. 2).⁸ The IEP also reflected the parents' concern that the student "benefited from a smaller class size this school year and believe[d] that a smaller class setting w[ould] help [the student] moving

percentile scores fell below the average range: blending words, 9th percentile; reading comprehension, 9th percentile; phonemic decoding efficiency, 13th percentile; sentence composition and sentence combining, 14th percentiles; and math facts fluency, 13th percentile (*see* Parent Ex. D at pp. 2, 12-13 [defining the average range for scaled scores (above 7 to 13) and standard scores (above 85-115) as "above the 16th to 84th percentile"]).

⁶ Upon review, this recommendation was, verbatim, the same recommendation made by the same evaluators in the March 2019 neuropsychological evaluation (*compare* Parent Ex. D at pp. 9-10, *with* Parent Ex. C at pp. 18, 21).

⁷ The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute (*see* 34 CFR 300.8[a][9]; 8 NYCRR 200.1[zz][10]).

⁸ Within the same section of the June 2021 IEP reflecting the parents' concerns, it was noted that the "teachers agreed" with the parents' sentiment that the "smaller, structured classroom environment . . . ha[d] been beneficial" to the student's progress (Dist. Ex. 1 at p. 2).

forward," as well as their concern about the student "continuing to make the progress she made this year when school continue[d] to acclimate back to normal" (id. at p. 18).

In a letter dated August 25, 2021, the parents notified the district of their intentions to unilaterally place the student at Bay Ridge for the 2021-22 school year and to seek funding for the costs of the student's tuition at Bay Ridge (see Parent Ex. B at pp. 1, 3). The evidence in the hearing record demonstrates that the student attended fifth grade at Bay Ridge for the 2021-22 school year from September 10, 2021 through June 15, 2022 (see Parent Exs. E-M).

A. Due Process Complaint Notice

By due process complaint notice dated April 12, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (see Parent Ex. A at pp. 1-2). More specifically, the parents alleged that the June 2021 CSE subcommittee failed to "conduct, secure, or rely on sufficient evaluative measures" to develop the student's present levels of performance, including her "educational and cognitive profile, and areas of need," and the student's "functional behavioral needs" (id. at p. 2). As a result, the parents contended that the June 2021 CSE subcommittee significantly impeded their ability to participate in the development of the student's IEP (id.). Next, the parents asserted that the June 2021 CSE subcommittee improperly recommended ICT services for the student, which ignored the parents' objections and concerns regarding the student's need for a "small, structured classroom setting grouped with students of similar disabilities and strengths" (id.). In addition, the parents alleged that the June 2021 CSE subcommittee failed to "meaningfully review any goals, management needs, or promotional criteria [or] transition planning" at the meeting (id.). The parents further alleged that, upon receiving the June 2021 IEP, they determined that the present levels of performance were "vague and did not adequately describe" the student's strengths and weaknesses "or the results of evaluations and [S]tate tests" (id.). The parents also indicated that the student's IEP failed to include or note their "concerns" (id.). Next, the parents alleged that the management needs in the June 2021 IEP failed to address "all the issues discussed" at the CSE subcommittee meeting and were "insufficient to adequately support" the student in the recommended program; additionally, the parents noted that the June 2021 IEP failed to contain adequate "program modifications and supports to address the management needs" in the IEP (id. at p. 3). The parents also alleged that the annual goals in the June 2021 IEP were "impermissibly vague, failed to address every area of [the student's] deficits," and failed to include a "baseline of functioning, actual targets to be achieved, or detail by what means the goal would be consider[ed] achieved" (id.). Turning to the recommended program, the parents asserted that it was not "consistent with or supported by the weight of the information provided and available" to the CSE subcommittee (id.). The parents further asserted that the recommended program did not provide the student with a "suitably structured" setting, and it was not the student's least restrictive environment (LRE) (id.). In addition, the parents contended that the recommended program failed to include "adequate supports to address the student's management needs or achieve the recommended annual goals" (id.). As a final point, the parents alleged that the district failed to "offer a placement suitable to implement" the student's IEP or that could provide the student with "an appropriate peer grouping" (id.).

As relief for the alleged violations, the parents requested reimbursement for the costs of the student's unilateral placement at Bay Ridge for the 2021-22 school year, as well as the provision of round-trip transportation for the student to attend Bay Ridge (see Parent Ex. A at p. 3).

B. Impartial Hearing Officer Decision

On May 19, 2022, the parties proceeded to an impartial hearing before the Office of Administrative Trials and Hearings (OATH), and, on that date, the IHO conducted a prehearing conference (see SRO Tr. pp. 1, 4). On June 9, 2022, the IHO held a case conference to discuss the district's efforts to potentially settle the case (see SRO Tr. pp. 17, 20). On June 29, 2022, the parties resumed the impartial hearing, which concluded on July, 11, 2022, after four days of proceedings (see SRO Tr. pp. 27, 144-63).

In a decision dated July 26, 2022, the IHO found that the district offered the student a FAPE for the 2021-22 school year and dismissed the parents' due process complaint notice (see IHO Decision at pp. 14-26). Initially, the IHO examined the district's burden of proof regarding the procedural requirements in the development of the student's IEP, and concluded that, although the June 2021 CSE subcommittee did not "reference" the May 2021 updated psychological evaluation in the June 2021 IEP and committed a procedural violation, such violation did not result in the district's failure to offer the student a FAPE (id. at pp. 17-19). The IHO noted that the student's special education teacher testified that "he read" the May 2021 updated psychological evaluation report prior to the June 2021 CSE subcommittee meeting, and "it corroborated what he knew of the [s]tudent's diagnoses and abilities" (id.). In addition, the IHO pointed to the testimony elicited from the student's speech-language pathologist, who noted that the "classroom teachers considered the [May 2021 updated psychological evaluation], even though it was not officially included in the IEP" (id.). Consequently, the IHO concluded that the "absence of the [May 2021 updated psychological evaluation report] did not impede the [p]arents' ability to participate in the IEP meeting," noting further that the parents attended the meeting and "participated in the development of the IEP" (id.). Again, the IHO pointed to testimony elicited from the student's speech-language pathologist, who testified that the CSE subcommittee had "an honest open dialogue about the areas that [the [s]tudent] did need further support in and it was [a] very productive meeting" (id.). The IHO also found, based on the speech-language pathologist's testimony, that the CSE subcommittee "attendees 'went over every single section of the IEP'" and that the "[p]arents shared their concerns" (id.).

Turning to the substantive appropriateness of the June 2021 IEP, the IHO found that, given the evidence of the student's progress during the 2020-21 school year, the district sustained its burden to establish that the June 2021 IEP offered the student a FAPE (see IHO Decision at pp. 19-23). Specifically, the IHO concluded that, consistent with the Supreme Court's finding that a "reviewing court may expect school district staff 'to be able to offer a cogent and responsive explanation for their decision that show[ed] the IEP [wa]s reasonably calculated to enable the child to make progress appropriate in light of his circumstances'"—the testimony by the student's fourth-grade special education teacher and speech-language pathologist established by a "preponderance of the evidence that the [s]tudent's IEP was a deliberate, well-designed reflection of the [s]tudent's progress and capabilities" and offered the student a FAPE (id. at p. 20, citing Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). Based on the special education teacher's testimony, the IHO found that "he and his co-teacher 'assessed [the Student] every day,

realistically," and the special education teacher had "described the tools he and his co-teacher used to delineate the [s]tudent's progress and develop the [s]tudent's IEP"—such as "informal assessments, observations, exit tickets, writing assignments, and other tools to determine what the [s]tudent needed and whether the [s]tudent was progressing" (IHO Decision at p. 20). According to the IHO, the special education teacher's testimony "about his work with the [s]tudent ma[de] it clear that the ICT environment—which was the IEP's recommendation for the 2021-2022 school year as well as the [s]tudent's fourth grade placement [during the 2020-21 school year]—provided the [s]tudent with exactly the type of educational 'scaffolding' that the [May 2021 updated] psychological" evaluation report had included as a recommendation (*id.*). In addition, the IHO noted that the special education teacher testified that he "considered the [s]tudent's report cards and conversations with the [p]arents" as well (*id.*). And finally, the IHO pointed to the special education teacher's testimony concerning how important the "social component" of the ICT setting was for the student, that she "'loved reading'" and "'expressing . . . ideas in writing,'" and that the student "'made a lot of progress in [m]ath'" (*id.* at pp. 20-21).

Next, the IHO described evidence of the student's progress elicited from the speech-language pathologist's testimony at the impartial hearing (see IHO Decision at p. 21). Here, the IHO noted her testimony concerning the student's progress in speech-language therapy during the 2020-21 school year and that, according to the speech-language pathologist, the parents were "'thrilled' with [her] progress" (*id.*). With respect to the 2021-22 school year, the speech-language pathologist testified about the annual goals targeting the student's receptive and pragmatic language skills, the "exercises [she] would use when working with the student and the type of data [she] would track to ensure" that the student "reached [her] goals" (*id.*). In addition, the IHO noted that the speech-language pathologist testified about her "efforts to work with the [s]tudent on [her] anxiety," and that by fourth grade, the student was "'excited to go to school'" (*id.*).

Turning to the May 2021 updated psychological evaluation of the student, the IHO was not persuaded by the recommendation in the evaluation report that the student "needed 'a small classroom setting in a specialized school'" (IHO Decision at p. 21). The IHO found that in the previous March 2019 neuropsychological evaluation, it was noted that the student "would require a small classroom setting in a specialized school if the [s]tudent did not make progress in the ICT classroom" (*id.*). However, the IHO found that, as the district witnesses' testimony demonstrated, the student "did make progress in the ICT classroom," and moreover, the IHO indicated that the May 2021 updated psychological evaluation revealed that the student "showed improvement in several areas," including her ability to "'decode novel words when provided with ample time to read at [her] own pace,'" her writing skills fell in the "'average range,'" and the student had demonstrated improvement in mathematics "since the last evaluation" (*id.* at pp. 21-22 [emphasis in original]). The IHO acknowledged that "[t]his progress did not bring the [s]tudent up to grade level in all areas, but [then further acknowledged] that it was appropriate in light of the [s]tudent's circumstances—which, in this case, included the COVID-19 pandemic" (*id.* at p. 22). Additionally, the IHO noted that the May 2021 updated psychological evaluation report "discusse[d] the benefits the [s]tudent received as a result of learning remotely during the COVID-19 pandemic in terms of [her] anxiety without even acknowledging the accompanying truth that virtually all students who learned remotely during the pandemic had some amount of academic regression during late 2020 and early 2021" (*id.*).

Next, the IHO examined the parents' closing argument, which emphasized that the student made progress during the 2020-21 school year "in a classroom that consisted of only [10] to [11] students, and that the CSE subcommittee did not address [their] concern regarding the potential impact of a larger class size in [the] 2021-2022 [school year] on the [s]tudent's anxiety" (IHO Decision at p. 22). The IHO noted, however, that both district witnesses had testified that the parents "agreed" that ICT services were "appropriate" for the student for the 2021-22 school year at the CSE subcommittee meeting (*id.*). In addition, the IHO noted that the district special education teacher testified that the parents "stated that the [s]tudent benefited from the smaller class size that resulted from the COVID-19 pandemic, but the [same witness] also noted that all students benefit[ted] from a smaller class size" and furthermore, that every student benefitted from a smaller class size (*id.*).

In light of the evidence in the hearing record, and the applicable legal standards, the IHO concluded that, at the time of the June 2021 CSE meeting, the student's anxiety "exhibited in third grade had abated significantly, and the [s]tudent was excited about fifth grade" (IHO Decision at pp. 22-23). The IHO also concluded that the student had been receiving "special education services tailored to [her] needs at the [district p]ublic [s]chool and was making reasonable progress in light of [her] circumstances" (*id.* at p. 23). Overall, the IHO determined that the June 2021 IEP developed for the 2021-22 school year provided the student with an "opportunity greater than trivial advancement," and thus, offered the student a FAPE for the 2021-22 school year (*id.*).

Having found that the district offered the student a FAPE for the 2021-22 school year, the IHO indicated that she need not reach a determination regarding whether the parents' unilateral placement of the student at Bay Ridge was appropriate (*see* IHO Decision at p. 23).⁹ Therefore, the IHO dismissed the parents' due process complaint notice with prejudice.

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by finding that the June 2021 CSE subcommittee's failure to consider the May 2021 updated psychological evaluation did not rise to the level of denying the student a FAPE. The parents contend that the failure to consider the student's most recent evaluative information deprived them of the right to meaningfully participate in the development of the student's IEP. Next, the parents argue that the IHO erred by finding that the June 2021 IEP offered the student a FAPE when the program recommendation and annual goals and management needs in the IEP did not address or provide supports related to the student's "anxiety, executive functioning, dysregulation, [or] social/emotional supports." In addition, the parents argue that the June 2021 CSE subcommittee did not recommend "sufficient specialized reading interventions," or consider related services, such as counseling for the student. The parents

⁹ Notwithstanding these findings, the IHO indicated that even if the district had failed to offer the student a FAPE and the parents' unilateral placement was found to be appropriate, equitable considerations barred relief in this case (*see* IHO Decision at pp. 23-25). In support of this conclusion, the IHO's analysis focused on the district witnesses' testimony, which, according to the IHO, credibly established that the parents "made their decision to remove the [s]tudent from the public school system for reasons wholly unrelated to the [district's] supposed failure to provide a FAPE" (*id.* at pp. 24-25). The IHO also noted the testimony elicited from the student's mother on this issue, which the IHO ultimately found to "lack credibility" (*id.* at pp. 25-26). As a result, the IHO concluded that equitable considerations would have warranted a denial of the parents' request to be reimbursed for the costs of the student's tuition at Bay Ridge for the 2021-22 school year (*id.*).

also argue that the IHO erred by finding that the June 2021 IEP was reasonably calculated to enable the student to make progress, and more specifically, that the June 2021 CSE subcommittee failed to consider the impact of a larger classroom environment on the student's anxiety and failed to consider a more restrictive program.

With respect to the parents' unilateral placement of the student at Bay Ridge, the parents argue that, although the IHO did not make a determination on this issue, Bay Ridge was an appropriate unilateral placement. The parents argue that the evidence in the hearing record supports a finding that Bay Ridge was appropriate. In addition, in a footnote, the parents assert that the IHO's failure to address this issue constitutes an unfavorable determination against the district, and thus, absent a cross-appeal by the district on this issue, the "lack of a finding that the unilateral placement was inappropriate should be final and binding and should not be a basis for denying reimbursement."

As a final point, the parents argue that the IHO erred by finding that equitable considerations did not weigh in favor of the parents' requested relief. The parents contend that the evidence in the hearing record supports a finding that they cooperated at all times with the district and, contrary to the IHO's findings, they acted in good faith and did not engage in any misrepresentations warranting a denial of reimbursement on an equitable basis.

In an answer, the district responds to the parents' allegations by generally arguing to uphold the IHO's decision in its entirety. The district further asserts that the hearing record failed to contain sufficient evidence to establish that Bay Ridge was an appropriate unilateral placement. With respect to equitable considerations, the district contends that this issue need not be addressed because the district offered the student a FAPE for the 2021-22 school year.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress.

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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]).¹⁰

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. June 2021 CSE Subcommittee Process—Consideration of Evaluative Information

On this point, the parents argue that the failure to consider the May 2021 updated psychological evaluation at the June 2021 CSE subcommittee meeting—as required by State and federal regulations—deprived them of the opportunity to participate in the development of the student's IEP. In support of this contention, the parents initially assert that, regardless of the type of CSE meeting held—i.e., an annual review or a reevaluation review—both State and federal regulations require that a CSE must consider the most recent evaluation of the student (see Req. for Rev. at p. 5, citing 34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Relatedly, the parents assert that, while it is well-settled that a CSE is not required to adopt the recommendations from privately obtained or independent evaluations, a CSE is required to consider the report, as well as their concerns.

In response, the district asserts that, as the IHO correctly determined, the June 2021 CSE subcommittee's handling of the May 2021 updated psychological evaluation did not result in the failure to offer the student a FAPE. The district argues more specifically that State and federal regulations cited by the parents require a CSE to consider the results of the student's most recent evaluation in the development of an IEP, but do not stand for the proposition that a CSE must consider the same information at an annual review, which was the nature of the June 2021 CSE meeting (see Answer ¶ 19, citing 34 CFR 300.324[b]; 8 NYCRR 200.4[f]). As a result, the June

¹⁰ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

2021 CSE subcommittee did not fail to consider any necessary evaluation. Alternatively, the district contends that even assuming the June 2021 CSE subcommittee was required to consider the May 2021 updated psychological evaluation of the student, the evidence in the hearing record supports a finding that the failure to do so did not deny the student a FAPE, pointing to evidence of the student's progress in an ICT setting during fourth grade.

In developing the recommendations for a student's IEP and when conducting an annual review of the student's IEP, State regulations require that a CSE must consider the results of the initial or most recent evaluation, as well as 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; and any special factors as set forth in federal and State regulations (see 8 NYCRR 200.4[d][2]; [f][iii]; see also 34 CFR 300.324[a]-[b]).

Although neither party applies the correct regulations in full to this issue, the district's interpretation is legally unsound and, therefore, the district's argument is unpersuasive and without merit.¹¹ Notably, the district argues that 8 NYCRR 200.4(f) and its federal counterpart, 34 CFR 300.324(b), apply in this case because the June 2021 CSE subcommittee conducted an annual review of the student.¹² The cited State regulation generally describes an annual review—using that specific language—in part, as that process whereby a student's IEP "shall be reviewed and, if appropriate, revised, periodically but not less than annually to determine if the annual goals for the student are being achieved" (8 NYCRR 200.4[f]). The State regulation further requires that "[a]ny meeting to develop, review or revise the IEP of each student with a disability to be conducted by the [CSE] or subcommittee thereof, . . . , shall be based upon a review of a student's IEP and other current information pertaining to the student's performance" (*id.*). Contrary to the district's legal argument, the same State regulation mandates, in relevant part, the following: "Such review shall consider the following factors: (i) the strengths of the student; (ii) the concerns of the parents for enhancing the education of their child; [and] (iii) the results of the initial or most recent evaluation of the student" (8 NYCRR 200.[f][1][i]-[iii][*emphasis added*]).¹³ To be clear, the district's

¹¹ While the parents cite to 8 NYCRR 200.4[d][2] in support of their contention that the June 2021 CSE subcommittee's failure to consider the May 2021 updated psychological evaluation constituted a procedural violation that denied the student a FAPE, it is the subsection of the State regulation discussed herein—8 NYCRR 200.4[f][1][iii]—that is most adverse to the district's position.

¹² While the cited federal regulation concerns what appears to be an annual review of a student's IEP based on the use of similar, if not identical, language, to the State regulation; however, the federal regulation does not specifically designate such meeting as an "annual review," as in the State regulation (compare 34 CFR 300.324[b][i], with 8 NYCRR 200.4[f]). In addition, the federal regulation does not require the "IEP team" to consider a student's most recent evaluation as part of this annual review process, in contrast to the State regulation (compare 34 CFR 300.324[b][i], with 8 NYCRR 200.4[f]). The district's efforts to "categorize" CSE meetings into special subtypes does not absolve it of the procedural responsibility that it has in every CSE meeting—to listen, consider, and provide a response to concerns raised by the parent in a prior written notice. In this case, the CSE ultimately addressed the parents' concerns with the placement of the student, notwithstanding its distorted viewpoint that the parent had to request another meeting.

¹³ While not specifically identified as such by either party at the impartial hearing, a review of the June 2, 2021 meeting notice reflects that the district had scheduled a "meeting of the Subcommittee of the [CSE]," and the notice further reflects that while a school psychologist was not an anticipated member of that CSE

argument was remiss in that it failed to include a recitation of this subsection of the State regulation requiring that a CSE, when conducting an annual review, must consider a student's most recent evaluation (see Answer ¶ 19). Therefore, based solely on State regulation, it is undisputed that if the June 2021 CSE failed to review or consider the May 2021 updated psychological evaluation of the student at the meeting as the most recent evaluation of the student, the district committed a procedural violation.¹⁴

The next question in this inquiry, while generally not disputed in this matter, is whether the June 2021 CSE reviewed or considered the privately obtained May 2021 updated psychological evaluation report. Regarding privately obtained evaluations, 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]).

The evidence in the hearing record establishes that the parents shared the May 2021 updated psychological evaluation report with the district after receiving the meeting notice—dated June 2, 2021—which indicated that the student's annual review was scheduled for a CSE subcommittee meeting on June 9, 2021 (see SRO Tr. pp. 65-67; Dist. Exs. 1 at pp. 1, 17; 3 at p. 1). At the impartial hearing, the district special education teacher (i.e., the student's fourth grade special education teacher in her ICT classroom), who acted as the district representative at the June

subcommittee—noting parenthetically, "except under certain circumstances"—the notice also reflects that the parents could "request in writing [that] the [s]ubcommittee refer the matter to the CSE" (Dist. Ex. 3 at pp. 1-2). In the IHO's decision, the IHO pointed to the State regulation that describes the mandated members of a CSE subcommittee, which includes a "school psychologist, whenever a new psychological evaluation [wa]s reviewed or a change to a program option with a more intensive staff/student ratio, as set forth in section 200.6(h)(4) of this Part, [wa]s considered" (IHO Decision at p. 18, citing 8 NYCRR 200.3[c][2][v]). The same State regulation notes, however, that another individual who is also a mandated member of a CSE subcommittee—other than a school psychologist—may "interpret the instructional implication of evaluation results" at a meeting convened with a CSE subcommittee (8 NYCRR 200.3[c][2][vi]). State regulations do not dictate whether a CSE or a CSE subcommittee convenes to develop a student's IEP or to conduct an annual review of the student's IEP.

¹⁴ Neither party disputes that the May 2021 updated psychological evaluation of the student constituted the student's most recent evaluation. There may be instances in which an evaluation is so recent (i.e. provided so close prior to the meeting date), that the CSE members have inadequate time to review the materials that they find it necessary to defer its consideration and reconvene the CSE a second time, but those factual circumstances are not present here and were not argued by the district in this case.

2021 CSE meeting, acknowledged receiving the evaluation report by email shortly before the June 9, 2021 CSE meeting (see SRO Tr. pp. 53-54; Dist. Exs. 2; 3 at p. 1). The special education teacher also testified throughout the impartial hearing that when he received the evaluation report, he "probably" read, "look[ed]" at, or "scanned" the evaluation report, but he was not "allowed to review" the evaluation report at an "annual review" (SRO Tr. pp. 47-48, 53-54, 65). He further testified that, as a special education teacher, he was not qualified to "read that document and have a full understanding of it within an IEP meeting" (SRO Tr. p. 54). According to the special education teacher, if the parents wanted to review the May 2021 updated psychological evaluation at a CSE meeting, district procedures required that the parents ask for a "reevaluation" and convene a full CSE with a school psychologist in attendance (SRO Tr. p. 54; see SRO Tr. pp. 47-48). The special education teacher also testified that the parents did not ask for a reevaluation meeting or for a full CSE meeting to review the updated evaluation report at the June 2021 CSE subcommittee meeting (SRO Tr. p. 54; see Dist. Ex. 1 at p. 19 [reflecting that both parents attended the June 2021 CSE subcommittee meeting]). Finally, the special education teacher testified that, having read the May 2021 updated psychological evaluation report, it "confirm[ed] many of the things that we already knew about [the student]," as she had been in his fourth grade classroom and he had thus known her "over 10 months" (SRO Tr. pp. 55-56). The special education teacher testified that "while [he] appreciated the report, [it] also just confirmed many of the things in terms of her abilities and what she needed more support in"—noting that the student was diagnosed as having an ADHD, she had "mild anxiety," and that she needed support in "reading specifically but also in writing and math" (SRO Tr. p. 56). Additionally, the special education teacher testified that the June 2021 CSE subcommittee was able to "generate an IEP that was reflected by the things that we already knew about her since we did know her thought this—the whole school year" (SRO Tr. p. 56).

At the impartial hearing, the student's speech-language pathologist, who also attended the June 2021 CSE subcommittee meeting, testified similarly about the use of the May 2021 updated psychological evaluation report. For example, the speech-language pathologist testified that although the parents had submitted a "private report," the June 2021 CSE subcommittee could not "use any of that information" to develop the student's IEP because the meeting was scheduled as an annual review (SRO Tr. pp. 91-92). She also testified that "teacher[s] c[ould] review it," and while the May 2021 updated psychological evaluation report "was available," the CSE subcommittee could not use that information unless it was a meeting scheduled an a "triennial" review (SRO Tr. p. 92). The speech-language pathologist further explained that, as an "outside evaluation," a CSE subcommittee could consider it but it that did not mean that it would be "included in the IEP" (SRO Tr. pp. 92-93). According to the speech-language pathologist, "we looked at [the May 2021 updated psychological evaluation report] and we considered the information," and she further testified that the parents could "share some information" with the CSE subcommittee (SRO Tr. p. 93). However, she also testified that the parents did not "ask for any sort of re-evaluation or anything following the IEP meeting" and that the parents were "familiar with the IEP process" (SRO Tr. pp. 93, 99).

As emphasized above and described in State and federal regulations, the CSE was required to consider the privately obtained evaluation, contrary to the statements of their witnesses who

believed improperly that the parents were required to request a reevaluation from the district.¹⁵ Based on the foregoing evidence, there is no reason to disturb the IHO's ultimate finding that the June 2021 CSE subcommittee did not consider or review the May 2021 updated psychological evaluation report at the CSE meeting, and thus, the district committed a procedural violation (see IHO Decision at p. 10). However, as noted above, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits. Here, the IHO concluded that, based on the evidence in the hearing record, the absence of the May 2021 updated psychological evaluation report at the June 2021 CSE subcommittee meeting did not impede the parents' opportunity to participate at the meeting (see IHO Decision at p. 19).

On appeal, the parents contend that the IHO erred by failing to find that this procedural violation did not rise to the level of a denial of a FAPE, as the failure to consider the May 2021 updated psychological evaluation report deprived them of the opportunity to participate in the decision-making process regarding the provision of a FAPE and deprived the student of educational benefits. In support of these contentions, the parents more specifically assert that without considering the evaluation report, they were "unable to point to and discuss" the following: "the objective data, which showed significant deficits in academic areas such as reading comprehension"; the student's "executive functioning challenges and attentional deficits as they would manifest in a class that could be as large as [30] students"; and they could not "document the school-related anxiety the [student] experienced, which was not readily observable by her ICT teacher" when providing instruction virtually or in her small cohort of students.¹⁶

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not

¹⁵ The district made no argument that the privately obtained IEE failed to meet district criteria for IEEs.

¹⁶ The parents also contend that, contrary to the testimonial evidence adduced at the impartial hearing, the June 2021 CSE erred by failing to consider the May 2021 updated psychological evaluation because the district's own guidance document—the Standard Operating Procedures Manual [SOPM]—indicates that a CSE's actions were not limited by the type of meeting held (i.e., an annual review or a reevaluation review). Generally, defects arising out of the SOPM that do not also constitute a violation of State or federal laws and policy do not appear to constitute a deprivation of a FAPE (see, e.g., M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *9-*10 [S.D.N.Y. Aug. 27, 2010]). As a result, even if the June 2021 CSE in this case violated the district's policy as articulated by the parents, a violation of the district's policy or SOPM, standing alone, would not constitute a per se failure to offer the student a FAPE. Consequently, the parents' argument must be dismissed.

impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice").

After independently reviewing the hearing record and upon consideration of the parties' respective arguments on appeal, the evidence does not support the parents' arguments to reverse the IHO's finding that the absence of the May 2021 updated psychological evaluation report at the June 2021 CSE subcommittee meeting, and the failure to consider the evaluation report, did not impede the parents' opportunity to participate at the meeting (see IHO Decision at pp. 17-19). Instead, the evidence in the hearing record demonstrates that the IHO carefully and accurately recounted the issues to be resolved at the impartial hearing, the positions of the parties, as well as the procedural and factual background of the case (*id.* at pp. 1-14). In addition, the hearing record reflects that the IHO accurately identified and analyzed the crux of the parents' arguments related to the failure to consider the May 2021 updated psychological evaluation as a procedural violation, and whether the procedural violation constituted a failure to offer the student a FAPE for the 2021-22 school year by relying on the relevant facts and proper legal standards in order to reach her conclusions of law on this issue (*id.* at pp. 14-19). For example, the IHO found that the district special education teacher testified about the parents' participation at the June 2021 CSE subcommittee meeting, and specifically testified that the "most important thing for an IEP [wa]s to make sure that you have parent voice in it and that 'it [wa]s always explicitly stated at the beginning of an IEP meeting that we would like your concerns and your feelings and your thoughts in the IEP so it truly reflect[ed] not only what [the Student's] teachers and service pathologists fe[lt] about [the Student] and [the Student's] progress but also what the parents thought'" (IHO Decision at p. 19, citing SRO Tr. p. 63). The IHO further noted that the special education teacher testified that the June 2021 CSE subcommittee "'had an honest open dialogue about the areas'" the student continued to need "'further support in,'" and described the CSE subcommittee meeting as "'very productive'" (IHO Decision at p. 19, citing SRO Tr. p. 63). The IHO also pointed to the speech-language pathologist's testimony, which "emphasized that during the IEP meeting, the attendees 'went over every single section of the IEP'" and that the parents had "'shared their concerns'" (IHO Decision at p. 19, citing SRO Tr. p. 91). Similarly, my independent review of the hearing record leads me to find that, based on the testimonial and documentary evidence presented, the IHO relied on the proper legal standards to conclude that the district sustained its burden to establish that the June 2021 CSE subcommittee's failure to consider the May 2021 updated psychological evaluation report, as a procedural violation, did not constitute a failure to offer the student a FAPE for the 2021-22 school year (*id.* at pp. 15, 17-19). Her decision also shows that the IHO carefully recited and considered the testimonial and documentary evidence presented by both parties, and furthermore, that she carefully marshaled and weighed the evidence in support of her conclusions (*id.* at pp. 14-19).

While finding that there is no reason to disturb the IHO's findings, which were primarily drawn from the testimonial evidence adduced at the impartial hearing, the evidence in the hearing record further demonstrates, as described herein, that the parents' allegations on appeal are without merit. Initially, the hearing record is devoid of any evidence that the parents were unable to express their concerns regarding the recommended program and services—or the concerns now raised on appeal—or to otherwise participate at the June 2021 CSE subcommittee meeting without the May

2021 updated psychological evaluation report or the information contained within that report (see generally SRO Tr. pp. 1-163; Parent Exs. A-P; Dist. Exs. 1-6). Instead, the hearing record reflects that both parents attended the June 2021 CSE subcommittee meeting, and the June 2021 IEP documented several concerns raised by the parents (see Dist. Exs. 1 at pp. 2-3, 18-19; 2).

For example, with regard to the parents' concerns on appeal that they could not point to and discuss the student's deficits in the area of reading comprehension without the May 2021 updated psychological evaluation report, the June 2021 IEP reflected that the student made progress in reading and, "to help support her fluency and comprehension," the student needed "one-on-one conferences and small groups" (Dist. Ex. 1 at p. 1). The June 2021 IEP also reflected that, "in small groups, [the student] practiced fluency and chunking phrases with shorter texts," and that "[m]oving forward, as texts became more complex [the student] w[ould] need to slow down as well as pay more attention to punctuation and sentence structure" (id.). In addition, the June 2021 IEP reported that on the student's "most recent reading assessment, [she] skipped over a few words, but this did not deter from her comprehension" (id.). The June 2021 CSE subcommittee also developed an annual goal addressing the student's reading comprehension skills (id. at p. 8). Additionally, in the area of writing, the June 2021 IEP noted that the student made progress, and needed "support in using dialogue and stretching out the heart of her story" when writing fiction and that she needed "support" in spelling and in handwriting, as it could be "hard to understand" (id. at p. 1). When writing essays, the June 2021 IEP indicated that the student needed "support in creating more complex sentences that support[ed] a main idea" and needed "frequent check-ins to make sure she fe[lt] comfortable with the task at hand" (id. at pp. 1-2). With respect to mathematics, the June 2021 IEP reported that the student "respond[ed] well to repeated practice and clear steps to follow" "when learning a newer concept[] with larger digit numbers," and she needed "support in becoming more fluent with multi-digit division and the different strategies she c[ould] use, such as the algorithm/long division and partial quotients" (id. at p. 2). In addition, the June 2021 IEP indicated that the student needed "repeated practice of concepts, especially those with multi-steps," and "like many fourth graders, [the student] need[ed] the support of reading and determining what operation [wa]s being asked in a word problem" (id.).

The June 2021 IEP also identified the student's strengths, preferences, and interests, including that the student "enjoy[ed] coming to school and her anxiety ha[d] lessened with her feeling comfortable and confident in the classroom environment" (Dist. Ex. 1 at p. 2). The IEP also noted that the "structure of the year ha[d] allowed [the student] to feel safe and understand the expectations set forth in the classroom community" (id.). Additionally, the June 2021 IEP indicated that the student "enjoy[ed] frequent check-ins to make sure she underst[ood] a new concept," she "participated more in class discussions," she became "more of a reader and fe[lt] proud of her reading life," and that the student was motivated by the "social component of school" (id.).¹⁷ Overall, the June 2021 CSE subcommittee described the student's academic, developmental, and functional needs as needing the "support of one-one-one check-ins, as well as [] small groups to learn," while also noting that the student made a "great deal of progress and [wa]s a motivated student" (id.). The June 2021 CSE subcommittee also indicated that student

¹⁷ Within the present levels of performance and individual needs section of the June 2021 IEP describing the student's social development, the parents expressed "[n]o issues with [the student] socially," but indicated that she "might be starting a new school this fall and w[ould] need support in adjusting to a new environment" (Dist. Ex. 1 at p. 3).

"benefit[ted] from the support of ICT and having two teachers to help her throughout the school day" (id.).

As concerns expressed by the parents with regard to the student's academic, developmental, and functional needs, the June 2021 IEP documented their belief that the "smaller, structured classroom environment [during the 2020-21 school] year ha[d] been beneficial" to the student's progress, and their related concern that "with [a] larger classroom size moving forward and whether more [students] w[ould] hinder" the student's progress (Dist. Ex. 1 at p. 2).

Next, the parents argue that, absent the May 2021 updated psychological evaluation report at the June 2021 CSE subcommittee meeting, they were unable to discuss the student's executive functioning challenges and attentional deficits as they would manifest in a larger class. As reflected in the present levels of performance and individual needs section of the June 2021 IEP describing the student's physical development, the IEP documented—consistent with the May 2021 updated psychological evaluation report—that the student had been diagnosed as having an ADHD, a specific learning disorder with an impairment in both reading and mathematics, and anxiety (compare Parent Ex. D at p. 9, with Dist. Ex. 1 at p. 3). As parent concerns related to the student's physical development, the June 2021 IEP documented that the student took medication for ADHD and wore "glasses/contacts" (Dist. Ex. 1 at p. 3). To address the student's management needs related to executive functioning and attentional deficits, the June 2021 CSE subcommittee included the following strategies: one-to-one check-ins and small group instruction, graphic organizers, modeling, visual cues (such as reminders, charts, and checklists for multistep processes), a multisensory approach to learning, on task prompts, positive reinforcement, partner sharing of ideas, extra wait time while responding to questions, and movement or sensory breaks as needed (id. at p. 4).¹⁸ Upon review, the May 2021 updated psychological evaluation report had also recommended as supports—consistent with the June 2021 CSE subcommittee's recommendations—that the student receive small group instruction, a multi-sensory approach to learning, on-task focusing prompts, and visual cues including reminders, charts, and checklists for multistep processes (compare Dist. Ex. 1 at p. 4, with Parent Ex. D at p. 9). Furthermore, the CSE subcommittee recommended that the student receive one period per day each of ICT services in mathematics and social studies, and three periods per day of ICT services in ELA (see Dist. Ex. 1 at p. 12). To meet the student's language needs, the CSE subcommittee recommended two 30-minute sessions per week of speech-language therapy in a group (id.).

As a final point, the parents argue that, without the May 2021 updated psychological evaluation report at the June 2021 CSE subcommittee meeting, they could not "document the school-related anxiety the[student] experienced, which was not readily observable by her ICT teacher" when providing instruction virtually or in her small cohort of students. However, this assertion is belied by the evidence in the hearing record. At the impartial hearing, the student's mother testified that when the district resumed in-person instruction, full-time, in April or May 2021, the student's anxiety "crept back up a little bit because she really enjoyed the small group class" (SRO Tr. pp. 133-34). She also testified that the student's anxiety "kind of [returned] back

¹⁸ Upon review, the May 2021 updated psychological evaluation report did not include any recommendations to specifically address the student's executive functioning or attentional deficits, other than perhaps recommending a small class environment and "scaffolding for students with dysregulated attention" (see Parent Ex. D at pp. 9-10).

to where she was a little bit in third grade," "just very stressed, everyone together, a large number of kids," and notably, that she "discussed this anxiety" with the June 2021 CSE subcommittee (SRO Tr. p. 134).

The district special education teacher testified at the impartial hearing that he knew the student "had prior anxiety when she was in third grade but she did not exhibit the same type of anxiety that [he] thought she was going to" during the 2020-21 school year (SRO Tr. p. 76). More specifically, the special education teacher testified that the student had a "relatively anxious free school year in terms of the way she responded to our classroom" (SRO Tr. p. 76). In addition, the special education teacher testified that he was "never informed that [the student's] anxiety had changed when" the district resumed in-person instruction full time in April or May 2021 (SRO Tr. p. 77). Instead, the special education teacher testified that the student was "more excited because it felt like more real—more normal school" and that the student was "even more excited to be together as a full class, not just Cohort A and Cohort B" (SRO Tr. p. 77). In the June 2021 IEP, the CSE subcommittee noted that the student's anxiety had "lessened with her feeling comfortable and confident in the classroom environment" (Dist. Ex. 1 at p. 2).

In light of the foregoing evidence, there is no reason to disturb the IHO's finding that although the district committed a procedural violation by failing to consider the May 2021 updated psychological evaluation report at the June 2021 CSE subcommittee meeting, this procedural violation did not impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE for the 2021-22 school year.

B. ICT Services

The parents argue that the IHO erred by finding that the program recommendations in the June 2021 IEP—that is, ICT services for ELA, mathematics, and social studies—as well as the annual goals and strategies to address the student's management needs offered the student a FAPE for the 2021-22 school year. To support their argument, the parents point to the June 2021 CSE's failure to consider the May 2021 updated psychological evaluation and the information contained therein about the student's anxiety, her executive functioning and attention issues, the recommendation for a small class placement, and the impact of a larger classroom setting on the student in light of her impulsivity, hyperactivity, or executive functioning needs. In addition, the parents contend that the June 2021 CSE's failure to consider the May 2021 updated psychological evaluation resulted in an IEP without any annual goals or supports related to the student's "anxiety, executive functioning, dysregulation, [or] social/emotional support," and the student was not recommended to receive specialized reading interventions.

State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students and that the school personnel assigned to each class shall minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]).

The district special education teacher who provided the student's ICT services during the 2020-21 school year testified that ICT services were provided in a general education classroom composed of approximately 25 to 26 students, 40 percent of whom had IEPs, with a full-time regular education teacher and a full-time special education teacher (see SRO Tr. pp. 46, 57). According to the special education teacher, with ICT services, the student received support throughout the school day in reading, writing, mathematics, and social studies; it was a full-time special education program; and he was there as a special education teacher with the student throughout the entire day to help her and the other students in the class with IEPs (see SRO Tr. p. 50). He testified that the ICT services provided "consistent support every single day," and opined that "kids c[ould] grow and thrive, based on not only the support from teachers but also the modeling from peers" (SRO Tr. p. 58). The special education teacher testified that the student had access to general education students that were models for her just by being in their presence, for example, by demonstrating "correct behaviors or how to socialize," or modeling "certain reading behaviors that [the teachers] wanted [the student] to emulate" (SRO Tr. p. 58). He explained that with ICT services, a full-time second teacher was in the classroom in case students need help; for example, if students did not understand what was happening in the main lesson, they could get pulled from the small group right away but did not have to leave the classroom (see SRO Tr. p. 59).

For the 2021-22 school year, the June 2021 CSE subcommittee recommended that the student receive one period per day each of ICT services in mathematics and social studies, and three periods per day of ICT services for ELA, together with three 30-minute sessions per week of speech-language therapy in a group (see Dist. Ex. 1 at p. 12). As discussed below, the evidence in the hearing record supports the IHO's finding that based on the student's demonstrated progress with a program of ICT services and speech-language therapy during the 2020-21 school year, the June 2021 CSE subcommittee's decision to recommend the same services for the 2021-22 school year continued to be an appropriate recommendation (see IHO Decision at pp. 20-22).

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy

of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]).¹⁹

According to the June 2021 IEP, despite an "incredibly trying year," the student "made progress in all areas with the support of the ICT classroom and speech" (Dist. Ex. 1 at p. 1). Specific to academic performance, the IEP indicated that the student made progress in reading during the school year and, at the time of the June 2021 CSE subcommittee meeting, she was reportedly reading at grade level (id.). According to the IEP, the student had evolved as a reader, become more confident and sought out new books to read, responded to structured practice of reading skills, and made progress with fluency despite her need for continued support in that area (id.). The IEP indicated that the student had made progress in writing; she had creative ideas, liked explaining different story ideas, wrote one to two page entries in her notebook, and told a story with a clear beginning, middle, and end (id.). Further, the IEP indicated that the student created a fictional story with believable characters, felt comfortable sharing in front of the class, worked well in partnerships, and responded well to clear expectations during independent writing time (id. at pp. 1-2). In mathematics, the IEP indicated that the student had become a more confident mathematician, worked well in small groups and partnerships, responded well to repeated practice and with clear steps to follow, completed addition and subtraction problems with up to five digits and "4x1" digit multiplication problems, and understood the basic concept of division (id. at p. 2).

Next, regarding speech-language skills, the June 2021 IEP indicated that the student had "become much more independent and confiden[t] this school year" she demonstrated a very positive attitude towards school; and that her pragmatic language skills had improved, as she was able to initiate and maintain conversations for four to five exchanges (Dist. Ex. 1 at p. 2). The IEP further indicated that the student enjoyed going to school, "her anxiety ha[d] lessened with her feeling comfortable and confident in the classroom environment," "[t]he structure of the year" allowed the student "to feel safe and understand the expectations set forth in the classroom community," and she participated in more class discussions (id.). Additionally, the student demonstrated pride in her "reading life" having become "more of a reader," enjoying partnering with other people throughout the day, and found the social component of school very motivating for her (id.). The IEP reflected that the student had "made a great deal of progress" and she was a motivated student who "benefit[ed] from the support of ICT [services] and having two teachers to help her throughout the school day" (id.).

With respect to social development, the June 2021 IEP noted that the student "g[ot] along well with her peers and teachers" and was a "social student" who "made and strengthened

¹⁹ With regard to annual goals, State regulation, consistent with federal regulation, states that "[t]he IEP shall identify when periodic reports on the progress the student is making toward the annual goals (such as through the use of quarterly or other periodic reports that are concurrent with the issuance of report cards) will be provided to the student's parents" (8 NYCRR 200.4[d][2][iii][c]; see 34 CFR 300.320[a][3]). The IHO and the parties are reminded that the IHO can require the district to produce the student's educational records, such as progress reports on the student's IEP annual goals from his teachers and related services' providers while the student attended programming offered by the district through its CSEs and CPSEs. Such reports—specifically called for by Congress—are one of the primary focal points that Congress identified for conducting an annual review and revision of a student's IEP and are required by federal law (20 USC § 1415[d][1][A][i][III], [4][A][i]-[ii]). Yet these type of reports are rarely produced in administrative proceedings and are a severely underutilized area of inquiry in substantiating other evidence of a student's progress.

friendships throughout the year" (Dist. Ex. 1 at p. 3). The IEP indicated that the student "connect[ed] well with adults and enjoy[ed] interacting with her teachers (*id.*). According to the IEP, the student's parents expressed that there were no issues with the student socially (*id.*).

The June 2021 IEP also noted that the CSE considered a program of related services only or SETSS for the student but rejected both because it determined that the student needed "the consistent support of an ICT environment with speech and language services to fully support her," while related services alone or SETSS would not have given the student the appropriate level of support she needed throughout the day (Dist. Ex. 1 at p. 19).

The district special education teacher testified at the impartial hearing that, at the end of the June 2021 CSE subcommittee meeting, the team expressed that the student "was making progress because she was in the correct setting" (SRO Tr. pp. 50-51). In determining to continue recommending ICT services, the special education teacher testified that teachers assessed the student daily using informal assessments, observations, exit tickets, check ins, and reading alongside her, as well as "regular check-ins throughout the year to assess reading levels" (SRO Tr. pp. 50, 52-53). Specifically, he testified that Fountas and Pinnell running record assessments were used to measure her progress; the student came in to fourth grade reading at a level N, which was below grade level at that point of the school year, but that by the end of the school year she had progressed through reading levels O and P, and was reading at a level Q, which was at grade level (*see* SRO Tr. p. 51). In addition, he noted that this progress indicated that the student had moved through "four reading levels throughout the school year, which [was] typical for any student," whether they received regular education or special education instruction (*see* SRO Tr. pp. 51-52). The special education teacher also testified that report cards in November, February or March, and June were used to note progress for all students in the classroom (*see* SRO Tr. p. 52). He also further testified that the student made "meaningful progress," that the student "was a delight to have in our classroom," that she came in every day and "worked so hard," that she was "so independent," and that she was "really focused on making progress and she had a great year last year" (SRO Tr. p. 56). The special education teacher noted that by the end of the year, in June, when he was talking with the parents, he "really did feel like [the student] had made progress" and he was "very proud of her" (SRO Tr. p. 60). Further, the special education teacher testified that the June 2021 CSE subcommittee felt that the "ICT environment" gave the student "the proper support to make adequate progress"; that "[s]he was on grade level in some areas and in other areas, she needed the extra support of a [s]pecial [e]d[ucation] teacher to give her the proper support to make progress"; and that, at the meeting, "all agreed that the ICT environment was the best for her, including her parents" (SRO Tr. p. 57).

The student's speech-language pathologist for the 2020-21 school year testified that the student made meaningful progress in speech-language therapy and that the "parents were thrilled" (SRO Tr. pp. 90, 91, 128).²⁰ The speech-language pathologist explained that the student had come "a really long way" since the third grade, when the speech-language pathologist spoke with the parents to address the student's anxiety issues and helped the student transition into the classroom (SRO Tr. p. 95). According to the speech-language pathologist, during the 2021-22 school year,

²⁰ The speech-language pathologist testified that she also provided speech-language services to the student during the 2019-20 school year (third grade) (SRO Tr. p. 91).

the student was "excited to go to school; she no longer needed the speech-language pathologist's assistance to transition into the building; and she had "really progressed so well," such that the speech-language pathologist spoke to the parents about "decertifying" the student from therapy (see SRO Tr. pp. 95-96, 103). The speech-language pathologist stated that the student "progressed even more over Zoom" in speech therapy (SRO Tr. p. 96). Additionally, the speech-language pathologist testified that the CSE subcommittee reviewed "every aspect of the IEP," and that the parents knew what the CSE subcommittee recommended and agreed with those recommendations (SRO Tr. p. 99). Further, the speech-language pathologist testified that the parents did not have concerns about the student's anxiety in the classroom at the time of the June 2021 CSE meeting (see SRO Tr. 102).

Turning to the parents' specific arguments on appeal, the parents assert that ICT services were only provided for mathematics, ELA and social studies. The district special education teacher specifically noted that with the ICT services, the student received support throughout the school day in reading, writing, mathematics, and social studies; he testified that it was a full-time special education program; and, with ICT services, he was there as a special education teacher with the student throughout the entire day to help her and the other students in the class with IEPs (see SRO Tr. p. 50). The special education teacher testified that science was a "cluster program" at the school the student attended, and he acknowledged that the CSE subcommittee did not recommend ICT services in science (see SRO Tr. pp. 71-72). However, as discussed above, documentary evidence and witness testimony from the speech-language pathologist who worked with the student during third grade (2020-21 school year) shows that she made progress in reading and mathematics skills, and there was no indication that she required ICT services in science (see SRO Tr. pp. 50-53, 56, 57, 60; Dist. Ex. 1 at pp. 1, 2). Furthermore, given the evidence of the reduction in the student's anxiety, her improved independence and confidence, and her positive attitude about school—and contrary to the parents' assertions—a review of the evidence in the hearing record does not support a finding that the student required "full-time ICT services" in other classes to receive a FAPE (see SRO Tr. pp. 95-96, 103; Dist. Ex. 1 at pp. 1, 2).

Next, regarding the parents' argument on appeal that the regular education classroom where the ICT services would be implemented was "too large," the May 2021 updated psychological evaluation report indicated that the student required a "new classroom setting" based in the "severity of her learning and attention disorders, in conjunction with reported difficulties keeping up in ICT classes and the results of [the May 2021 updated psychological] evaluation" (Parent Ex. D at p. 9). The evaluation report noted that "[d]uring the COVID-19 pandemic, [the student] received instruction through a hybrid in person and remote learning schedule that allowed her greater access to teachers and much smaller group instruction," and that "[w]ithin that much smaller class setting her teachers described [the student] as better able to regulate her emotions and attention deficits to participate in class" (id.). The evaluators' recommendations included "a small classroom setting in a specialized school with teachers who [were] trained in using a multi-sensory approach, cuing (*sic*), and scaffolding, to address [the student's] learning disorders" as well as "a daily curriculum that incorporate[d] scaffolding for students with dysregulated attention, so that remediation [was] embedded in the daily curriculum" (id.). The evaluators opined that "[i]t [was] only through this level of support that [the student] w[ould] be able to profit academically from her learning environment" (id. at pp. 9-10).

The district special education teacher testified that the 2020-21 school year began with a hybrid model due to the ongoing COVID-19 pandemic, and the student attended school in-person with her 10 to 11 student cohort two or three days a week (see SRO Tr. pp. 63, 72). He explained that on the days that the student and her cohort were not in school, he would leave the classroom and provide instruction via Zoom with the students who were at home so that the student received instruction every day (see SRO Tr. p. 63). The special education teacher recalled that in spring 2021, students returned to school five days per week, at which time the student went to school "every day for the rest of the school year" (id.). He agreed that there was a discussion at the June 2021 CSE subcommittee meeting that the student had benefited from the smaller class size, and he opined that "the less students there are for any type of student, it's better for them" (SRO Tr. pp. 72-73). The special education teacher did not recall the parents sharing concerns about the student's anxiety increasing when the school returned to the full 25 students in the class, and stated that he was never informed that the student's anxiety had changed when they came back to 25 students (see SRO Tr. p. 77). Rather, he testified that, "if anything, [the student] was more excited because it felt like more . . . normal school" and opined that "she was more excited to be together as a full class" (id.). Additionally, the speech-language pathologist testified that she did not recall the parents having concerns about class size at the June 2021 CSE subcommittee meeting (SRO Tr. p. 102).

To the extent that the parents specifically argue that the June 2021 CSE subcommittee "did not address the impact of a large classroom on [the student's] attentional deficits or justify the program it recommended in light of [the student's] impulsivity, hyperactivity, or executive functioning needs," a review of the evidence in the hearing record does not support this claim. As discussed above, the June 2021 CSE subcommittee identified the student's management needs for one-to-one check-ins; small group instruction; graphic organizers; visual cues including reminders, charts, and checklists for multi-step processes; multisensory approach to learning; on-task focusing prompts; extra wait time while responding to questions; and movement or sensory breaks as needed (see Dist. Ex. 1 at p. 4). Further, the June 2021 CSE subcommittee developed annual goals to improve the student's use of active listening strategies, her ability to highlight curriculum-based text and refer back to it when provided with question prompts and visual or written aids, her ability to identify key words or details or main ideas from a story by restating directions and following multi-step directions, using strategies such as outlines to help focus on important information, reading guided questions before reading the text, summarizing or paraphrasing during reading, previewing vocabulary or important concepts, prioritizing specific information, using sentence frames, and completing mathematics problems with support including guided repeated practice and checklists (id. at pp. 6-10).

Overall, the evidence in the hearing record shows that the June 2021 CSE subcommittee recommended for the student an educational program for the 2021-21 school year that was designed to confer educational benefit and enable the student to make progress in the general education curriculum. In developing the student's IEP, the CSE subcommittee considered information from the student's special education teacher and speech-language provider, as well as the results of previous testing (with the exception of the May 2021 updated psychological evaluation which had at best only be "scanned" as noted above), and identified the student's areas of weakness. The CSE developed annual goals that targeted the student's deficit areas and recommended an educational program that would provide her with special education support throughout the day in the least restrictive environment as well as speech-language therapy as a

related service. Moreover, the student demonstrated progress in a similar program recommended by the CSE for the prior school year. As the hearing record supports finding that the student made progress during the prior school year, the June 2021 CSE subcommittee was reasonable when it recommended programming for the 2021-22 school year that was similar to what the student received during the 2020-21 school year, and it was also reasonable for the June 2021 CSE subcommittee to expect the student to continue to make progress (see S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10-11 [S.D.N.Y. Dec. 8, 2011] [decision to recommend continuation of the same program student had made progress in for prior school year was appropriate and a more restrictive placement was not necessary]).

As a final note, while the private evaluators who conducted the March 2019 neuropsychological and educational evaluation and subsequent May 2021 updated psychological evaluation of the student and authored the resultant reports were not obligated to consider the student's LRE in recommending a placement for the student, and the parents' desire for the student to be placed in a smaller setting with more individualized attention is understandable, the June 2021 CSE subcommittee was required to take into consideration the restrictiveness of the recommended placement and its place on the continuum of services when recommending an educational program for the student, and, accordingly, it was reasonable for the CSE subcommittee to reject a special class placement for the student based on her academic ability and concerns that a special class placement would be too restrictive for her, particularly given evidence that the student had benefitted from social modeling in the ICT classroom and the CSE subcommittee's view that the student's attentional, executive functioning and academic needs could be addressed through the support of a special education teacher during the student's academic classes, as well as the management needs recommendations and speech-language therapy. Given that a student's recommended program must also be provided in the LRE, the CSE should not be faulted in making LRE considerations a part of the CSE's deliberations (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo, 489 F.3d at 108; Walczak, 142 F.3d at 132). Moreover, having rejected related services alone and SETSS as insufficiently supportive for the student and finding that ICT services and speech-language therapy were appropriate to address the student's needs in the LRE, the CSE subcommittee was not required to consider a small class in a specialized school as was recommended in the May 2021 updated psychological evaluation report (see E.P. v. New York City Dep't of Educ., 2015 WL 4882523, at *8 [E.D.N.Y. Aug. 14, 2015] [finding that once the CSE decided on an appropriate placement in the least restrictive environment in which the student could have been educated, it was not required to thereafter consider other more restrictive placements along the continuum]; see also B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. 2014]; but see E.H. v. New York City Dep't of Educ., 164 F. Supp. 3d 539, 552 [S.D.N.Y. 2016][CSE was required to consider the parent's point of view that the student needed to be educated in the setting he was attending]).

VII. Hearing Record

One final matter bears mentioning in this State-level review. As noted above, the district's production of the hearing record for this appeal was concerning. At the close of the impartial hearing, the parents' counsel noted problems in the transcript for the impartial hearing (Tr. pp. 161-62). The IHO from OATH later explained to the district on September 28, 2022:

I should note that the correct transcript was, in fact, uploaded to IHS already; because it is so difficult to remove items from IHS once they are uploaded, there were two versions of the same hearing session on IHS— one corrected, and one uncorrected. I assume that the existence of multiple copies of the same transcript is what led to the administrative error.

However, the wrong transcripts were in fact provided to the Office of State Review. Thereafter the undersigned discovered that a redacted copy of the IHO's decision had been filed with the Office of State Review. The district was required to file the unredacted copy with my office. On October 17, 2022, the OATH IHO carefully explained to the district:

Attached please find my unredacted FOFD in this matter, [sic] was already uploaded to IHS. Please note that it is my practice to refrain from using personally identifiable information in my decisions, in the interest of protecting students' privacy. Therefore, even in my "unredacted" decisions, I use terms such as "student," "parent," and "attending school," and only include the personally identifiable information in an appendix.

Notwithstanding the IHO's indication that an unredacted copy was provided again and noting the availability of the same file in the district's IHS computer system, the district again submitted the same redacted copy to the Office of State Review that it submitted the first time, which uses the word "REDACTED" on the witness lists, and the student's age within the body of the IHO's decision. These redactions are separate and apart from OATH's use of an "Appendix B" that substitutes non-personalized nouns for specific identities listed in said appendix.²¹

I am well aware that IHOs are required to produce redacted copies for submission to the Office of Special Education for eventual publication in accordance with the redaction policies of that office (see Impartial Hearing Decisions, available at <https://www.p12.nysed.gov/specialed/dueprocess/decisions/home.html>). The district's inability to discern the correct documents in its computer system is not fatal to its case in this instance. But it has delayed and caused disruption to my review process and the submission of a redacted IHO decision only for an SRO's review under Education Law § 4404 will not be tolerated under any circumstances going forward. The district is on notice that it will face sanctions pursuant to 8 NYCRR 279.9(b) if it cannot reproduce the IHO's decision as drafted and transmitted to parties and accurately respond to directives of the Office of State Review related to the submission of the hearing record.

VIII. Conclusion

Having determined that the evidence in the hearing record establishes that, consistent with the IHO's determinations, the district offered the student a FAPE in the LRE for the 2021-22 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Bay

²¹ The OATH IHO's practice of using common nouns as a substitute for proper nouns and then identifying those substitutions in an appendix that lists the proper nouns is an efficient way to reduce and or eliminate personally identifiable information from the body of the decision and is clear, understandable and appropriate. I fully support the continued use of this practice.

Ridge was an appropriate unilateral placement for the student or whether equitable considerations support an award of tuition reimbursement (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 31, 2022**

**JUSTYN P. BATES
STATE REVIEW OFFICER**