



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-046

**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 Ricki Parks, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for the student for a portion of the 2021-22 school year and for the entire 2022-23 school year were appropriate. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 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 related to

IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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 attended a district public school for kindergarten (2018-19 school year) and first grade (2019-20 school year), and then transferred to a nonpublic parochial school

in September 2020 for second grade (2020-21 school year) (see Parent Ex. C at p. 1; Dist. Ex. 11 at p. 1). For third grade during the 2021-22 school year, the student attended a general education setting in a different nonpublic parochial school, and continued to attend that same nonpublic parochial school throughout these proceedings (id.).<sup>1</sup>

During third grade, the parents referred the student to the CSE for an evaluation for special education on or about November 5, 2021 (see Parent Ex. L ¶ 5; see generally Dist. Ex. 15 [forwarding consent documents to parents to be signed and completed prior to the date scheduled to complete the social history]).<sup>2</sup> The evidence reflects that the district completed a social history on or about November 16, 2021 (November 2021 social history) and, on November 29 and December 13, 2021, the parents privately obtained an evaluation of the student (December 2021 private evaluation) (see Parent Ex. L ¶¶ 6-7; see generally Parent Ex. C). As part of the private evaluation, the student was administered the Wechsler Individual Achievement Test, Fourth Edition (WIAT-4) (Reading) (see Parent Ex. C at pp. 2-3). In addition, the private evaluator reviewed, and reported, the student's previous testing results completed on December 6, 2021 from the administration of the Wechsler Intelligence Scale for Children—Fifth Edition (WISC-V); as well as testing results obtained on September 3, 2019 from the administration of the Kaufman Brief Intelligence Test, Second Edition (K-BIT-2); and testing results obtained on October 3, 2019 from the administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III) (Reading) (id. at pp. 1-2).<sup>3</sup>

At the time of the December 2021 private evaluation, the evaluator noted that the student struggled with reading and was "at a level M (end of second grade level)" in reading (Parent Ex. C at p. 1). The evaluator also noted that the parents believed the student "may have [had] dyslexia" and that the student "had a reading tutor [four] times per week who use[d] Wilson strategies since 2020" (id.). As reflected in the evaluation report, although the student's "teacher [wa]s unfamiliar with the Wilson strategies," the evaluator indicated that the teacher was "open to instruction" and the teacher believed that the student might need special education teacher support services (SETSS) (id.). In addition, the evaluator noted that the student needed "vocabulary read to her, especially directions"; she "consistently skip[ped] prepositions, and ma[d]e spelling mistakes that skip[ped] the letter 's' or the letter 'r' in her daily journal"; she reversed "many letters" but "often self-correct[ed] them"; she "struggle[d] with the wording of math problems especially with the program used in class (enVision Math) that ha[d] lengthy directions"; and, as an accommodation,

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<sup>1</sup> The evidence in the hearing record does not indicate the size of the student's classroom at the nonpublic parochial school she attended for third grade (see generally Dec. 2, 2022 Tr. pp. 1-11; Jan. 4, 2023 Tr. pp. 1-108; Jan. 13, 2023 Tr. pp. 1-84; Parent Exs. A-M; Dist. Exs. 1-17).

<sup>2</sup> The November 2021 social history was not included as evidence in the hearing record (see generally Dec. 2, 2022 Tr. pp. 1-11; Jan. 4, 2023 Tr. pp. 1-108; Jan. 13, 2023 Tr. pp. 1-84; Parent Exs. A-M; Dist. Exs. 1-17).

<sup>3</sup> The student's previous testing results from the WISC-V obtained on December 6, 2021—which the private evaluator noted in the evaluation report—are the student's testing results from the district's psychoeducational evaluation of the student (compare Parent Ex. C at p. 1, with Dist. Ex. 11 at p. 3). In addition to the student's testing results obtained in 2019 per the administration of the K-BIT-2 and the WIAT-III, the December 2021 private evaluation report imbedded "Examiner Notes" within the evaluation report for both the K-BIT-2 and the WIAT—III, which, while unexplained in the hearing record and in the report, itself, appear to correlate to each of the respective testing sessions in 2019 (see Parent Ex. C at p. 2).

the student received "single sided pages for her math tests" so that she did not have to read directions on a separate page (id.).

Within the December 2021 private evaluation report, the evaluator noted the student's "Active Problems" as "Dyslexia" and "Specific learning disorder, impairment in reading, moderate" (see Parent Ex. C at p. 1). Based on the student's testing results, the evaluator determined that the student met the "criteria for the diagnosis of specific learning disorder (LD) with impairment in reading," noting further that the "proper label for these learning deficits [wa]s Dyslexia" and that the "treatment of LD consist[ed] of special education services and educational accommodations through an appropriate [IEP]" (id. at p. 3). The evaluator recommended the following as "Educational and Pre-Educational Intervention and Services": an IEP with an eligibility category of "Learning Disability," "special education services in a resource room," and "[i]ntensive reading instruction" (id. at pp. 3-4). In addition, the evaluator indicated that the student required "daily instruction with an evidence-based reading program such as the Wilson Approach or the Orton-Gillingham Method or their derivatives" (id. at p. 4). The evaluator also noted that, "[i]n the meantime, [the student] w[ould] need directions read and explained, as well as tests read to her," and the student should receive such services in a "Resource Room or by a SETSS provider" (id.).

In the midst of the parents privately obtaining an evaluation of the student, the district completed a classroom observation of the student on December 3, 2021 (December 2021 classroom observation) and a psychoeducational evaluation of the student on December 6, 2021 (December 2021 psychoeducational evaluation) (see Dist. Exs. 11 at p. 1; 12 at p. 1). During the district's evaluation, as the evaluator "transitioned from the cognitive evaluation (WISC-V) to the educational evaluation (WIAT-4)," the student informed the evaluator that she had "taken the same test one week prior" (Dist. Ex. 11 at pp. 1-2).<sup>4</sup> To determine the accuracy of the student's statement, the evaluator asked her to "recall any of the stories from the Reading Comprehension subtest," and the student "accurately recall[ed] [two] out of [three] stories" (id. at p. 2). As a result, the evaluator "canceled" the remaining testing (id.).

In an email to the district dated December 15, 2021, the parents forwarded a copy of the December 2021 private evaluation report, dated December 15, 2021, to the district (see Parent Exs.

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<sup>4</sup> During the district evaluation, the student self-reported that she was "on an independent reading Level L and on Level M with support" and that she received services from a "reading tutor after school four days a week (not on Fridays)" (Dist. Ex. 11 at p. 2). The district evaluator included information obtained from the parents' letter referring the student to the CSE for an evaluation, which reflected that the student had "struggled with reading since [kindergarten] in [a district public school]," that "[d]yslexia often show[ed] up in [t]hird [g]rade," and that they had "implemented Wilson strategies and a reading ruler at home to assist [the student] thus far but [t]hird [g]rade ha[d] been a struggle" (id. at p. 1). The evaluator further noted from the parents' referral letter that the student's "teacher ha[d] recommended that she be evaluated as [the student's] difficulty in reading [wa]s now interfering with her other subjects such as [m]ath and [r]eligion as she [wa]s having difficulty reading the directions and digesting content in short periods of time" (id.). The parents' referral letter also indicated that the student "underst[ood] the concepts and content but w[ould] require accommodations in the classroom setting"; she "exhibited letter and word reversals, skip[pe]d words, and ha[d] decoding and phonics issues"; and she "struggle[d] with controlling R and rhyming" (id.). The parents also indicated that the student's "i[R]eady results display[ed] below grade level" scores in English language arts (ELA) (id.).

C at p. 4; D). On January 27, 2022, the district completed an assistive technology evaluation of the student (January 2022 assistive technology evaluation) (see Parent Ex. B at p. 6).

On January 28, 2022, a CSE convened to conduct the student's initial eligibility meeting (see Parent Ex. B at p. 16). Finding the student eligible to receive special education as a student with a learning disability, the January 2022 CSE developed an IESP for the student that was to be implemented beginning on February 14, 2022 (id. at p. 1).<sup>5</sup> The January 2022 CSE recommended that the student receive five periods per week of SETSS in a group in a general education classroom, as well as assistive technology devices and services consisting of the use of a tablet (with the support of word processing, word prediction, auditory feedback, dictation, e-text reader, and PDF annotation) at home and at school (id. at p. 13). In addition, the January 2022 CSE recommended testing accommodations, including extended time (1.5), separate location (small group, quiet, limited distractions), revised test directions (read, reread, and simplified), revised test format (test read two times by a human reader), on-task focusing prompts (given when student was gazing around the room or out a window, or playing with other items for more than five minutes), and breaks during tests longer than 40 minutes in length (five minute break offered after first 30 minutes and every 30 minutes thereafter) (id. at p. 14). The January 2022 CSE also created annual goals targeting the student's needs in the areas of reading and reading comprehension (using assistive technology and graphic organizers) and mathematics (word problems) (id. at pp. 9-12).

As strategies to address the student's management needs, the January 2022 CSE first noted that the student's "overall performance on the [visual spatial index (VSI)] was [l]ow [a]verage compared to other children her age" and that "[c]hildren with low visual spatial skills may have difficulty understanding information that [wa]s presented nonverbally" (Parent Ex. B at p. 8). The January 2022 CSE further noted that, as a result, the student "may benefit from interventions aimed at analyzing and synthesizing visual information" (id.). Within the same section of the IESP, the January 2022 CSE recommended the following strategies and interventions, in part, to address her needs: "[a]void relying excessively on visual models, diagrams and demonstrations during instruction" and "[a]ccompany visual demonstrations with oral explanations"; "[e]ncourage [the student] to clear [her] desk of extraneous materials, leaving only those that [we]re required for a task"; given that the use of "charts, graphs and tablets" to gain information may confuse the student, "take time to explain these systems of representing information" and use, if necessary, individual assistance with the student to "retrieve information from such visual systems"; and "[h]ighlight or underline in color important information on a page to help [the student] scan" (id.). In addition to the foregoing, the January 2022 CSE recommended other strategies, including, in part, "specially designed instruction in the area of reading comprehension" and "small group explicit instruction" (id.).

The January 2022 CSE also described the effect of the student's needs on her involvement and progress in the general education curriculum (see Parent Ex. B at p. 9). Specifically, the January 2022 CSE noted that the student had received a diagnosis of dyslexia with "phonological and orthographic deficits in reading" (id.). The CSE further noted that the student "tend[ed] to struggle to comprehend what she read[] independently" and required "more time than peers to

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<sup>5</sup> The January 2022 IESP indicated that the student's anticipated annual review date was January 28, 2023 (see Parent Ex. B at p. 1).

recall information automatically and therefore ha[d] more difficulty handling larger amounts of information at a time" (id.). As reflected in the IESP, the student's need for "prompting, redirection, and repetition of content effect[ed] [her] independent participation and progress within the general education environment," and at that time, the student required "reading interventions and strategies from teachers to support her learning" (id.). In addition, the IESP reflected that the student benefited from "praise and encouragement," and required the use of "models, multi-sensory teacher techniques, verbal prompts, manipulatives, graphic organizers, and charts to help her complete assessments and assignments," as well as "extra time and refocusing prompts" (id.). Therefore, the January 2022 CSE concluded that the student would benefit from SETSS (id.).

As an area of concern to the parents and as relevant to these proceedings, the January 2022 IESP documented that the parents had indicated that the student "expresse[d] frustration with reading" and tended to give up when frustrated (Parent Ex. B at p. 6). The parents expressed that they wanted "an evidence based reading program" for the student (id.). When the January 2022 CSE engaged in a discussion of counseling services to address the student's "frustrations" and "frustration tolerance," the parents indicated that the student "did not need counseling at th[at] time and referred to evidence based reading programs" (id. at p. 7).

The evidence in the hearing record reflects that, following the January 2022 CSE meeting and after receiving the student's January 2022 IESP, a district special education evaluation placement officer (SEEPO) "sent out an email blast to 417 independent SETSS providers to determine which provider c[ould] service this student for the school year" (Dist. Ex. 4 ¶¶ 1, 5; see Dist. Ex. 9 at pp. 5-7).<sup>6</sup> The evidence further reflects that the district had already "contracted with two independent SETSS providers to provide services to students at [the student's nonpublic parochial school]" for both the 2021-22 and 2022-23 school years (Dist. Ex. 4 ¶ 4). According to the evidence, the SEEPO reached out to one of the SETSS providers located within the student's nonpublic parochial school to determine whether the SETSS provider could deliver services to the student for the remainder of the 2021-22 school year, and the SETSS provider informed her that

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<sup>6</sup> The evidence in the hearing record does not indicate the exact date the SEEPO sent the email blast to 417 independent SETSS providers (see generally Dec. 2, 2022 Tr. pp. 1-11; Jan. 4, 2023 Tr. pp. 1-108; Jan. 13, 2023 Tr. pp. 1-84; Parent Exs. A-M; Dist. Exs. 1-17). Based on the evidence, the earliest email sent by the SEEPO seeking a SETSS provider for this student was dated February 23, 2022 (see generally Dist. Exs. 3; 9). In the February 23, 2022 email, the SEEPO indicated that she was looking for a SETSS provider for a student in third grade who attended a nonpublic parochial school, and the student had been diagnosed as having dyslexia (see Dist. Ex. 9 at p. 7). Almost immediately, the SEEPO received a response from one SETSS provider who had experience working with students with dyslexia and who indicated that she was available to provide services to this student "after school hours" (id.). After forwarding this SETSS provider's contact information to the parent that same day, the parent responded that the student "require[d] services to be provided in person during school hours"; however, the SETSS provider indicated that she did not have any "day time availability" (id. at pp. 6-7). Later in the day on February 23, 2022, the SEEPO indicated in an email to the parent that she had "sent out a blast e-mail to 417 independent providers as well as multiple agencies" and that they were the "same providers given in the link listed on the P4 form" (id. at p. 5). The SEEPO also noted in the email to the parent that she had received "some replies however some providers c[ould] only provide remote, and [she] kn[ew] [the parent] want[ed] in person" services (id.). At the impartial hearing, the SEEPO testified that the SETSS could not start unless and until the parent filled out the P4 authorization form and sent it to the district (see Jan. 4, 2023 Tr. pp. 51-52). The evidence also reflects that, in a group email dated March 29, 2022, the parent reached out to several individuals to ask about their respective availability to provide services to the student at her nonpublic parochial school during the school day (see Parent Ex. E).

she had already been in contact with the parents and had "offered to make room in her schedule to service [the student] for the remainder of the 2021-2022 school year"—but that the parents "refused to accept services from [this provider] for SETSS to implement [the student's] IESP because the parent[s] only wanted a SETSS provider certified in Orton[-]Gillingham instruction"—and she did not possess that certification (id. ¶ 6; see Dist. Ex. 5 ¶¶ 1, 3).

The evidence in the hearing record reflects that the district's efforts to secure a SETSS provider for the student for the remainder of the 2021-22 school year continued through March and April 2022 (see Dist. Exs. 3 at pp. 5-25; 4 ¶ 3; 6 at pp. 1-2; 9 at pp. 1-5). However, the district was unable to secure a SETSS provider for the student who was acceptable to the parents, and therefore, the student did not receive the SETSS recommended in the January 2022 IESP from February through June 2022 (see Jan. 4, 2023 Tr. p. 46).

With respect to the provision of SETSS during the 2022-23 school year, the evidence in the hearing record reflects that, in August 2022, the SEEPO reached out to one of the two SETSS providers already located within the student's nonpublic parochial school to determine if she could fulfill the student's SETSS mandated in the January 2022 IESP (see Dist. Exs. 4 ¶ 7; 5 at ¶ 4). At that time, the SETSS provider indicated that she "was available to provide SETSS" to the student, and in an email to the parents, dated September 1, 2022, the SEEPO informed the parents that a SETSS provider was available to provide the student with SETSS (see Dist. Exs. 4 ¶ 7; 5 at ¶ 4). In an email dated September 2, 2022, the SEEPO scheduled a telephone conference with the parents, herself, and the SETSS provider to discuss the "implementation of SETSS" (Dist. Ex. 4 ¶ 7; 8 at pp. 2-3). In response, the parents asked the SEEPO for a copy of the SETSS provider's resume, noting further that the SETSS provider did not have "any O[rton-]G[iillingham] training or certification and [that the student] require[d] O[rton-]G[iillingham] because she [wa]s dyslexic" (Dist. Ex. 8 at p. 2). As a result, the parents indicated that the SETSS provider "w[ould] not be taking [the student's] case" and that the SEEPO would "be hearing from [their] representatives" (id.). The SEEPO responded to the parents in an email, dated September 2, 2022, and informed the parents that she did not share resumes with families and that it was "unfortunate that [they] [we]re rejecting [the SETSS provider's] services" (id. at pp. 1-2). Shortly thereafter, the parents emailed the SEEPO, stating that they were "not rejecting services" and noted that the student required a "provider who ha[d] the capability and credentials to work" with the student (id. at p. 1). The parents again noted that this particular SETSS provider did not have any Orton-Gillingham "training or certification" and thus, could not take the student's case (id.).

In the midst of communicating with the parents and one of the SETSS providers already located at the student's nonpublic parochial school, the SEEPO was also communicating with the second SETSS provider who provided services at the student's nonpublic parochial school (see Dist. Exs. 4 ¶ 9; 7 at p. 1). In an email to the second SETSS provider, dated September 1, 2022, the SEEPO confirmed that this second SETSS provider had "availability" to provide the student's services (Dist. Ex. 7 at p. 1).

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

By due process complaint notice dated October 27, 2022, the parents alleged that the district failed to "properly fulfill its equitable duties in the implementation of an educational program for [the student]" for a portion of the 2021-22 (February 2022 through June 2022) and for

the entire 2022-23 school year (see Parent Ex. A at pp. 1, 3). As reflected in the due process complaint notice, the parents, at the January 2022 CSE meeting, "expressed their concern about the appropriateness of the [SETSS] recommendation" for five periods per week in a group setting and had "reported that [the student] required a SETSS provider who use[d] Orton[-]Gillingham methodology and need[ed] SETSS to be provided individually" (*id.*). The parents alleged that the district failed to implement SETSS for the remainder of the 2021-22 school year from February 2022 through June 2022 (*id.* at pp. 2-3). With respect to the 2022-23 school year, the parents asserted that the district failed to implement SETSS, and they "maintained that [the student] needed a SETSS provider with Orton[-]Gillingham training and that it should be provided individually" (*id.* at p. 2). The parents alleged, therefore, that the district failed to implement the SETSS recommendation in the January 2022 IESP for a portion of the 2021-22 school year and for the entire 2022-23 school year (*id.* at p. 3). In addition, the parents asserted that they were denied the opportunity to meaningfully participate in the development of the student's IESP (*id.*). As a final point, the parents noted that the district failed to "recognize this student's need for an enhanced, comprehensive, clinically supported, individualized, daily, special education instructional program" (*id.*). As relief for these violations, the parents sought an order directing the district to provide the student with 82 hours of compensatory educational services (by a provider selected by the parents) for the failure to implement SETSS from February 2022 through June 2022 (*id.*). In addition, the parents requested an order directing the district to directly fund five periods per week of individual SETSS for the entire 2022-23 school year (by a provider selected by the parents and at an enhanced rate) (*id.* at p. 4).

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

On December 2, 2022, the parties proceeded to an impartial hearing before the Office of Administrative Trials and Hearings (OATH) which concluded on January 12, 2023, after three total days of proceedings (see Dec. 2, 2022 Tr. pp. 1-11; Jan. 4, 2023 Tr. at pp. 1-108; Jan. 13, 2023 Tr. at pp. 1-84).<sup>7</sup> In a decision dated February 7, 2023, the IHO concluded that the January 2022 IESP, which included a recommendation for five periods per week of SETSS in a group and which did not include a recommendation for a specific methodology, was appropriate to meet the student's needs (see IHO Decision at pp. 11-14). Before reaching this conclusion, the IHO discerned that although the parents' "primary claim" consisted of the failure to implement the January 2022 IESP, "implementation [wa]s not the determinative issue," noting further that the "underlying issue [wa]s [the parents'] contention that [the s]tudent needed O[rton-]G[illingham] based instruction as opposed to group SETSS for reading" (*id.* at pp. 9-10). As a result, the IHO indicated that, initially, she would consider the appropriateness of the recommendations in the January 2022 IESP for group SETSS rather than Orton-Gillingham instruction (*id.* at p. 10).

In analyzing the appropriateness of the January 2022 IESP, the IHO addressed the parents' claims that the student needed a "clinically supported, individualized special education instruction program" and that the January 2022 CSE deprived them of the opportunity to meaningfully participate in the development of the January 2022 IESP (IHO Decision at p. 10). First, the IHO found that the evidence in the hearing record demonstrated that the January 2022 CSE considered

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<sup>7</sup> The transcripts submitted from the impartial hearing are not consecutively paginated; for the purpose of clarity, the transcripts will be cited to in this decision by the hearing date and corresponding page number.



the December 2021 private evaluation, as well as "other materials," and that the December 2021 private evaluation was the "only report that recommended an evidence based reading program such as O[rtton-]G[illingham] or Wilson" for the student (id. at p. 11). As noted by the IHO, the January 2022 IESP reflected "data and test results" from the December 2021 private evaluation report, but it did not "follow" the recommendations contained therein for an "evidence based reading program" (id.). In addition, the IHO noted that the "CSE reviewed and incorporated results" from the student's then-current classroom teacher, which demonstrated that the student was "about two years delayed in reading skills" (id.). Based on the foregoing, the IHO concluded that the January 2022 CSE considered the December 2021 private evaluation report (id.).

Next, the IHO similarly concluded that the January 2022 IESP reflected the parents' concerns "in a number of places, including [their] concern that [the s]tudent needed evidence based reading methodologies" (IHO Decision at p. 11). Consequently, the IHO found that the parents were not deprived of the opportunity to meaningfully participate in the development of the student's IESP (id.).

With regard to an argument advanced by the district that there was "no 'clear consensus' that [the s]tudent required O[rtton-]G[illingham] methodology in order to make progress," the IHO indicated that the hearing record contained "conflicting" evidence on this point, but overall, the weight of the evidence supported the district's contention (IHO Decision at p. 11). According to the IHO, the district special education teacher who attended the January 2022 CSE meeting testified that the student's IESP did not "specify a particular reading instruction methodology because the special education SETSS providers [we]re trained in a variety of methodologies to 'drive student achievement'" (id.). The IHO also noted that the hearing record contained "mixed" evidence about the "severity of [the s]tudent's reading deficits and whether [she] needed O[rtton-]G[illingham] instruction in order to remedy those deficits" (id.). For example, the IHO pointed to the reported input from the student's then-current classroom teacher at the January 2022 CSE meeting compared to "her observations and data [about the student documented] in the Teacher Report" (id. at pp. 11-12).<sup>8</sup> In her direct testimony by affidavit, the district special education teacher who attended the January 2022 CSE meeting testified that the student's classroom teacher had "told the CSE that [the s]tudent was 'doing great in E[nglish] L[anguage] A[rts] in reading and writing and [was] making progress in the class' without any O[rtton-]G[illingham] instruction, and that she did not recommend O[rtton-]G[illingham] or Wilson or other evidence based instruction" for the student, as she was reportedly making progress "without it" (id. at p. 12). However, the IHO noted that, in contrast, the "Teacher Report"—prepared by the student's then-current classroom teacher and reviewed by the January 2022 CSE—reflected that the student was "at a first grade level for decoding and reading comprehension, significantly below peer level, and always need[ed] adult support in reading" (id.). The IHO also noted that, as reported by the parents, the student's then-current classroom teacher was the individual "who recommended th[e s]tudent for evaluation" (id.).

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<sup>8</sup> The student's then-current classroom teacher who attended the January 2022 CSE meeting did not testify at the impartial hearing, therefore, her input was described by others who attended the same CSE meeting (see IHO Decision at pp. 11-12).

Next, the IHO indicated that although the December 2021 private evaluation was the "only clinical evidence in the [hearing] record regarding [the s]tudent's current reading skills and needs, and recommend[ed] evidence based reading methodology," the private evaluator who completed that evaluation did not testify at the impartial hearing (IHO Decision at p. 12). As a result, the IHO indicated that the private evaluator was "not available to answer questions about whether the multisensory methodologies that a [district]-funded SETSS provider might use could meet [the s]tudent's needs" (*id.*). The IHO opined that the private evaluator "could have provided some insight into why, if [the s]tudent needed an evidence based methodology, a significant amount of 1:1 Wilson-based tutoring [ha]d not help[ed]," noting further that the hearing record did not provide any clear rationale to explain "how, if [the] 1:1 Wilson methodology was not enabling [the s]tudent to transfer what she learned to the classroom, the O[rton-]G[illingham] methodology applied 1:1 in the classroom would be effective" (*id.*).

Given the evidence, the IHO found that, consistent with the district's contention, there was "no 'clear consensus' on what methodology" the student required, notwithstanding that the evidence in the hearing record demonstrated the student "required reading remediation" (IHO Decision at p. 12). Additionally, the IHO noted that it was "not clear, however, that the [district's] recommendation could not have met [the s]tudent's needs," and the district's providers had not been "given the chance to try" (*id.*). Sympathizing with the parents' desire for what they considered to be "optimal" for the student, the IHO noted, however, that it was the within the "CSE's discretion to propose a methodology it believed to be suitable," and, overall, the evidence in the hearing record supported a conclusion that the January 2022 CSE's recommendation for a "daily period of group SETSS with multisensory instruction and other techniques" was reasonably calculated to enable the student to make progress appropriate in light of her circumstances (*id.* at pp. 12-13).

Next, the IHO examined whether, as asserted by the parents, the district failed to implement the January 2022 IESP (*see* IHO Decision at pp. 13-14). The IHO concluded that, based on the testimonial evidence, the district "could have implemented" the January 2022 IESP, and further concluded that the district did not do so "only because [the s]tudent's mother declined to work with any [district] SETSS provider who was not both O[rton-]G[illingham] certified and able to work with [the s]tudent 1:1 in the classroom" (*id.* at p. 13). Additionally, the IHO noted that the parents' claims as to the district's failure to implement the IESP were effectively the same as the parents' contention that the January 2022 IESP was substantively inappropriate because it did] not mandate Orton-Gillingham methodology, which the IHO previously addressed in the decision (*id.*).

Turning to the testimonial evidence, the IHO noted that one witness testified that all of the district's SETSS providers had "'methodologies to be able to work with student[s] with dyslexia'" (IHO Decision at p. 13). According to the IHO, the same witness testified that, upon receiving the student's January 2022 IESP, emails were sent to "417 independent SETSS providers, attempting to find one who could [provide] services [to the s]tudent for the remainder of that year" (*id.*). The parents also sent out "over 500 emails between February 14, 2022 and April 5, 2022 to [district] providers on a list she received from the CSE," who could provide services to the student in the classroom and who were also "licensed" in Orton-Gillingham—but the parents could not locate a provider (*id.*). In addition, a district staff member who worked in the student's school had spoken with the parents about her ability to work with the student for the "remainder of the 2021-2022 school year," but the student's mother "declined those services" because the staff member was not certified in Orton-Gillingham (*id.*). As a result, the IHO indicated that the student did not receive

SETSS from February 14, 2022 through the conclusion of the 2021-22 school year because the parents "declined to use available [district] providers" (*id.*).

With respect to the implementation of the January 2022 IESP during the 2022-23 school year, the IHO found that the district had two SETSS providers available to work with the student at the start of the school year, except neither was certified in Orton-Gillingham and thus, the parents "declined to use either of those two providers" (IHO Decision at pp. 13-14). The IHO also noted that three additional providers were available to work with the student, but, similarly, the parents "declined them" for "various reasons (either they were not O[rton-]G[illingham] certified, or they could not work in [the s]tudent's classroom)" (*id.* at p. 14). According to the IHO, the parents also searched for a district SETSS provider, but could not locate one "who would provide the services [they] wanted" (*id.*).

Based on the foregoing, the IHO concluded that the district sustained its burden to establish that the "IESP provided [the s]tudent with the equitable equivalent of a F[ree] A[ppropriate] P[ublic] E[ducation] and that the [district] was capable of implementing the [January] 2022 IESP" (IHO Decision at p. 14). Consequently, the IHO denied the parents' requested relief (*id.*).

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

The parents appeal, arguing that the IHO erred by finding that the January 2022 IESP was appropriate and, moreover, that the IHO improperly shifted the burden of proof to the parents to demonstrate that the student required a specialized reading program. Next, the parents contend that the IHO erred by failing to address the student's need for 1:1 SETSS instruction. The parents also contend that the IHO erred by finding that the district was capable of implementing the January 2022 IESP for both the 2021-22 and 2022-23 school years. As relief, the parents seek an award of 82 hours of compensatory educational services for the district's failure to implement an appropriate IESP for a portion of the 2021-22 school year. In addition, the parents seek an award of direct funding for five periods per week of individual SETSS "at an enhanced rate" that is retroactive to the start of the 2022-23 school year. The parents also seek to select the SETSS provider and to be reimbursed for any out-of-pocket expenses already paid for such services.<sup>9</sup>

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision in its entirety. In addition to arguing to uphold the IHO's decision, the district also argues that, because the parents failed to provide evidence of a written contract with the unilaterally obtained SETSS provider, the parents failed to establish a financial obligation to the provider and, thus, the parents were not entitled to public funding for the cost of the SETSS provider's services. The district further asserts that the parents failed to provide the district with a

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<sup>9</sup> The parents do not appeal the IHO's determinations that the January 2022 CSE considered the December 2021 private evaluation in the development of the student's January 2022 IESP and that the parents were not deprived of the opportunity to meaningfully participate in the development of the January 2022 IESP (*see generally* Req. for Rev.; Reply). As a result, these determinations—which were adverse to the parents—have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; *see M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

10-day notice prior to initiating the self-help remedy of unilaterally obtained SETSS, and therefore, equitable considerations did not weigh in favor of the parents' requested relief.

The parents, in a reply to the district's answer, respond to the district's arguments by asserting that the district failed to offer the student equitable services, the parents demonstrated that they incurred a financial obligation to the unilaterally obtained SETSS provider and were entitled to direct funding of those services, and they were not required to provide the district with a 10-day notice to unilaterally place the student as this case was not for tuition reimbursement.

## V. Applicable Standards

A board of education must offer a free appropriate public education [FAPE] to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).<sup>10</sup> "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.)."<sup>11</sup>

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<sup>10</sup> State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

<sup>11</sup> State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State

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—January 2022 IESP**

The crux of the parents' appeal focuses on whether the IHO addressed the student's need for 1:1 SETSS as opposed to the group SETSS recommended in the January 2022 IESP, and relatedly, whether the IHO erred by finding that the district was not required to recommend a specific methodology (i.e., an evidence-based reading program) in the IESP based on a "clear consensus" of the evaluative information available to the January 2022 CSE. Therefore, to provide a context for the analysis of these issues, it is necessary to review the evaluative information available to the January 2022 CSE, which informed the CSE's decision-making process.

### **A. Evaluative Information**

The evidence in the hearing record establishes that the January 2022 CSE reviewed and considered the following evaluative information to develop the student's January 2022 IESP: the November 2021 social history, the December 2021 classroom observation, the December 2021 psychoeducational evaluation, the December 2021 private evaluation, a January 2022 "Teacher Report" prepared by the student's then-current classroom teacher at the nonpublic parochial school, the student's "Report Card of Academic Achievement" (report card, reporting first trimester grades), and the January 2022 assistive technology evaluation (see Dist Ex. 16 ¶¶ 2-7; see also Jan. 4, 2023 Tr. pp. 84-86; Parent Exs. B at pp. 1-5; C at p. 1; Dist. Exs. 11-13). In addition, the evidence in the hearing record reflects that the January 2022 CSE also considered input from the parents and the student's then-current classroom teacher from the nonpublic parochial school as attendees at the CSE meeting (see Dist. Exs. 10; 16 ¶¶ 4-5; see also Jan. 4, 2023 Tr. pp. 84-85; Parent Exs. B at pp. 6-7; L ¶¶ 9-10).<sup>12</sup>

According to the December 2021 classroom observation report, the student sat near the front of the classroom (see Dist. Ex. 12 at p. 1). During the observation, the student's class was reviewing a "Nigerian folktale," which was projected onto a smartboard while each student had a copy of the text (*id.*). The classroom observation report noted that, during the review, the student followed directions, raised her hand to answer questions, and read twice during the evaluation—once after being called on by the teacher and once by volunteering to read (*id.* at pp. 1-2). As reflected in the classroom observation report, the student "used her pencil to track" words when reading aloud when called upon; the evaluator indicated in the report that the student "read word by word without fluency," and she "substituted the word 'a' for 'to' and then self-corrected" (*id.* at

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(NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*).

<sup>12</sup> At the impartial hearing, the parents testified that the student's then-current classroom teacher—who participated at the January 2022 CSE meeting as a regular education teacher—also held a certification as a special education teacher and did not attend the entire January 2022 CSE meeting (see Jan. 13, 2023 Tr. pp. 29-31).

p. 1). In addition, when the student "got to the word 'harvest' she paused," and the "teacher reminded her to 'sound it out'" (id.). The student then "looked at the word, took a few seconds to think, and then read it correctly," and "continued to read until the end of the paragraph" (id.). In addition, the evaluator indicated that, when other students were reading, the student "followed along tracking [words] with her pencil" (id.).

After the student's teacher reread the text to the class, the teacher began asking questions about the story, and, at one point, the teacher called on the student to answer a question (see Dist. Ex. 12 at pp. 1-2). According to the December 2021 classroom observation report, the student accurately responded to the teacher's question, with the teacher "compliment[ing] her for her answer" (id. at p. 2). As the observation progressed, the student "started to move around in her seat and stood up next to her chair"; however, with redirection from her teacher, the student reseated herself (id.). The student then continued to "follow[] along" and volunteered to read (id.). The student was observed to, again, track words with her finger as she read "word by word in a choppy manner and needed to be corrected a few times" (id.). As the student read, the evaluator noted that she "substituted 'her' for 'there' and had difficulty with the word 'masquerade'"; in addition, the student "substituted the word 'how' for 'now'" (id.). When the class completed the review of the folktale, the teacher gave the class directions, which the student followed (id.). As a summary, the evaluator noted that the student "presented herself as a third grade student will[ing] to engage in learning," she was "on task and engaged throughout the lesson with one redirection," the student "raised her hands a few times and tried her best to answer questions," she "volunteered to read aloud," and, according to the student's teacher, "this was a typical day for [the student]" (id.).

Next, the December 2021 psychoeducational evaluation report reflected that the student was administered approximately 10 subtests from the WISC-V, which demonstrated that the student's overall cognitive functioning fell within the average range with a full-scale intelligence quotient (IQ) of 103 (58th percentile rank) (see Dist. Ex. 11 at p. 3).<sup>13</sup> In addition, the student's composite scores on the verbal comprehension index (VCI), the visual spatial index (VSI), the fluid reasoning index (FRI), the working memory index (WMI), and the processing speed index (PSI) ranged from low average (VSI) to high average (FRI), with the remaining indices falling within the average range (id.). As noted by the evaluator, the student's performance on visual spatial testing—which was low average compared to her same-aged peers and which "emerged as an area of personal weakness" for the student when "compared to her overall ability"—indicated that she "may have difficulty understanding information that [wa]s presented nonverbally" and that she "may benefit from interventions aimed at analyzing and synthesizing visual information," such as "learning to read maps and creating maps of her house, school, or neighborhood" (id. at pp. 9-10). The evaluator further explained that "[i]n addition to having difficulty understanding purely visual information, children with this pattern of functioning c[ould] sometimes be awkward in social situations because they may not understand others' subtle nonverbal cues," and discussing

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<sup>13</sup> As explained in the report by the evaluator, all of the student's scaled scores on the 10 subtests administered to her fell within the average range ("scores between 8 and 12 typically considered average"), except for the visual puzzles subtest for visual spatial skills (Dist. Ex. 11 at p. 3). With respect to the student's "primary index scores" and full-scale IQ, the evaluator explained that "scores ranging from 90 to 109 [we]re typically considered average" and all of the student's index scores ranged from a low of 89 on the visual spatial index (low average) to a high of 115 on the fluid reasoning index (high average) (id.).

expectations with the student prior to a "new situation" may be helpful (id. at p. 10).

During the December 2021 psychoeducational evaluation process, the evaluator observed that the student demonstrated age-appropriate "attention, concentration and perseverance," and the student "worked diligently on all items administered and displayed great enthusiasm for visually based tasks" (Dist. Ex. 11 at p. 2).

Next, the January 2022 CSE considered the December 2021 private evaluation of the student, which included the administration of the WIAT-4 (Reading) to the student (see Parent Ex. C at pp. 2-3). As indicated by the evaluator, the student's testing results across the composite score in reading and the supplemental composite scores in basic reading, decoding, reading fluency, orthographic processing, phonological processing, and dyslexia all ranged from a low standard score of 77 (phonological processing) to a high standard score of 86 (orthographic processing) (with corresponding percentile ranks ranging from the 9th to the 18th percentiles), all of which the evaluator characterized as falling within the very low or low average ranges (id. at pp. 2-3). In addition, the private evaluation report included a subtest score summary for the student's testing results in word reading, reading comprehension, spelling, pseudoword decoding, oral reading fluency, orthographic fluency, decoding fluency, and phonemic proficiency, which ranged from a low standard score of 75 (pseudoword decoding) to a high standard score of 90 (spelling) (with corresponding percentile ranks ranging from the 5th percentile to the 25th percentile) (id. at p. 3).

During the administration of the WIAT-4 to the student, the private evaluator—in a section titled "Examiner Notes"—documented observations of the student, noting that she "appeared fidgety" (i.e., she "swayed back and forth in her seat, left her seat multiple times to walk around the room, and fidgeted with her shoes") and she "appeared impulsive at times (i.e., she "turned through the pages in the stimulus book after the examiner instructed her to wait before doing so") (Parent Ex. C at p. 3). In addition, the private evaluator noted that the student "verbalized that she disliked reading on multiple occasions" (i.e., stating that she did not "'like reading,' 'this [wa]s hard,' and asked if she could answer math questions instead") (id.). During a "subtest measuring [the student's] development of phonological, phonemic skills (Phonemic Proficiency)," the evaluator documented that the student "sounded out the letters within words before verbalizing her response," and she "appeared easily fatigued, verbalizing 'how many more of these do I have to do'" (id.). On a subtest requiring the student to "read aloud a list of regular and irregular words (Word Reading), [the student] was able to correctly pronounce words such as 'crumb,' 'photograph,' and 'distance'" (id.). The evaluator noted that, at times, the student "incorrectly omitted or substitute[ed] parts of words she read," such as pronouncing "'fight' as 'ight' and 'seat' as 'sit'" (id.). In addition, during the subtest measuring the student's "phonic decoding skills (Pseudoword Decoding), she appeared to work quickly and made several errors"; however, when the evaluator asked the student to "look closely at the non-words that she initially read quickly and incorrectly," the student "re-read several of the non-words correctly"—but the evaluator could not "score these items correctly due to the standardized instructions of the assessment" (id.).

With respect to "subtests measuring her reading fluency," the evaluator observed that, when assessed for "word reading accuracy per minute across two passages (Oral Reading Fluency)," the student "read the passages quickly, finished reading before the amount of time given," and "made several omissions errors (e.g., omitting words such as 'a' and 'to') and substitution errors (e.g.,

pronouncing 'growing' as 'grow and 'certainly' as 'really')" (Parent Ex. C at p. 3). The evaluator further noted that, on a "subtest measuring phonic decoding fluency (Decoding Fluency)," the student "pronounced non-words in segmented pieces (e.g., pronouncing 'zet' as 'z-et')" at times, and "correctly pronounced non-words such as 'reeb' and 'glib'" (id.).

Finally, on a subtest requiring the student to "read narrative and expository passages and answer inferential and literal questions (Reading Comprehension)," the student "appeared frustrated" and verbalized the same, and the student's mother "instructed her to 'be cooperative' on the questions" (Parent Ex. C at p. 3). The evaluator opined that the student's "frustration and tendency to work quickly may have impacted her scores on the WIAT-4" (id.).

As previously noted, the private evaluator found that the student "me[et] the criteria for the diagnosis of specific learning disorder (LD) with impairment in reading," and noted that the "proper label for these learning deficits [wa]s [d]yslexia" (Parent Ex. C at p. 3). The evaluator recommended that the student receive an IEP with a classification of learning disability, the provision of "special education services in a resource room," and "[i]ntensive reading instruction" (id. at p. 4). The evaluator further recommended that the student receive "daily instruction with an evidence-based reading program such as the Wilson Approach or the Orton-Gillingham Method or their derivatives" and that these services "c[ould] be provided in a [r]esource [r]oom or by a SETSS provider" (id.).<sup>14</sup>

Turning next to the January 2022 Teacher Report, the student's then-current third grade classroom teacher described the student as an auditory and visual learner and as having an average rate of progress in acquiring skills and retaining information taught as compared to her peers (see Dist. Ex. 13 at pp. 1-2).<sup>15</sup> In addition, the classroom teacher noted that the student could concentrate and focus during "[w]hole group, [s]mall group, [and i]ndependent work" (id. at p. 1). The classroom teacher also noted that the student's work pace was average to below average (id. at p. 2). In describing the student's ability to focus on tasks and complete assignments in a timely

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<sup>14</sup> SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district; therefore, unless the parties and the IHO take the time to develop a hearing record on the topic in each proceeding, it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047). In contrast, State regulation defines a resource room program in the State continuum of special education services as the following: "Resource room programs shall be for the purpose of supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" and further clarifies that, generally, a resource room program "shall not exceed five students per teacher, except that, in the city school district of the city of New York, the commissioner shall allow a variance of up to 50 percent rounded up to the nearest whole number from the maximum of five students per teacher" (8NYCRR 200.6[f], [f][3]).

<sup>15</sup> For clarity, the student's then-current third grade classroom teacher was the individual who, according to the parents, suggested referring the student to the CSE for an evaluation during the 2021-22 school year and who thought the student required SETSS (see Parent Ex. C at p. 1; Dist. Ex. 11 at p. 1).



manner, the classroom teacher reported that the student "sometimes struggle[d] keeping up with group work because of reading" and "when subjects involve[d] lengthy word problems, [the student] struggled" (id. at p. 2).

With respect to reading, the student's then-current classroom teacher reported the student's reading level as "I/J" and as a "Grade Equivalent" of "1" (Dist. Ex. 13 at p. 2).<sup>16</sup> Similarly, the classroom teacher estimated the student's "independent grade level for decoding" and her "independent grade level for reading comprehension" as first grade (i.e., "1") (id. [emphasis in original]). With regard to the student's skills in the areas of sight word recognition, decoding, vocabulary, reading comprehension (literal), and oral reading fluency, the classroom teacher described the student as "[s]ignificantly [b]elow [p]eers" in all areas, and she further noted that the student "[a]lways" required adult support with reading (id.). The classroom teacher described the student's reading weakness as "often mix[ing] up letters within different words" and "add[ing or] replac[ing] words within a given reading passage"; however, the classroom teacher described the student's reading strengths as being "very motivated" and "willing to learn new things" (id.). The classroom teacher reported the student's "[r]eversal of letters" as evidence of perceptual delays in reading, writing, or spelling (id.).

The third grade teacher reported that the student's mathematics skills were "average," that the student "sometimes" required adult support with math and skill areas in calculations/operations, problem solving, and math fluency were comparable to peers, with the area of concepts reported as below peers' level (Dist. Ex. 13 at p. 3). The teacher reported that the student was able to copy notes from the board and the student's graphomotor skills (i.e., pencil grip, cutting, printing), writing fluency, spelling skills, mechanics, development of ideas related to creative, narrative, and expository writing were comparable to peers, with syntax and grammar below peers (id. at pp. 3-4). The teacher did not have concerns with the student's executive functioning skills as related to attention, planning, organizing, executing tasks, or shifting between tasks (id. at p. 5). As related to instructional strategies and/or modifications that had been attempted to assist the student, the teacher reported that the "repetition of directions" and "small group intervention, both seem[ed] to be successful" (id. at p. 7).

The district special education teacher, who attended the January 2022 CSE meeting, testified that, at the January 2022 CSE meeting, the student's then-current classroom teacher "reviewed her school progress report and the student's report card grades" (Dist. Ex. 16 ¶¶ 1, 2, 5). The special education teacher's testimony further reflects that the student's third grade classroom teacher reported at the CSE meeting that the student was "doing great in ELA in reading and writing and [was] making progress in the class" (id. ¶ 5). According to the special education teacher, the student's classroom teacher "did not use any Orton[-]Gillingham instruction in her class for ELA," and she did not "recommend Orton[-]Gillingham or Wilson instruction for [the

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<sup>16</sup> The hearing record does not provide any information concerning the classroom teacher's report that the student was reading at an "I/J" level, or more specifically, how the classroom teacher arrived at this estimated level (see generally Dec. 2, 2022 Tr. pp. 1-11; Jan. 4, 2023 Tr. pp. 1-108; Jan. 13, 2023 Tr. pp. 1-84; Parent Exs. A-M; Dist. Exs. 1-17). For example, the hearing record does not contain any evidence that the "I/J" estimated level arose from a "Fountas and Pinnell (F&P)" assessment or some other reading assessment administered to the student by her classroom teacher (see generally Dec. 2, 2022 Tr. pp. 1-11; Jan. 4, 2023 Tr. pp. 1-108; Jan. 13, 2023 Tr. pp. 1-84; Parent Exs. A-M; Dist. Exs. 1-17).

student] nor did she recommend any evidence based reading instruction for the student since [she] was making progress in her ELA class" (id.; see Parent Ex. C at p. 1 [noting that the student's third grade classroom teacher was "unfamiliar with the Wilson strategies but [wa]s open to instruction"]).

As noted, the January 2022 CSE also had the student's first trimester report card available to review (see Dist. Exs. 16 ¶ 3; 13 at pp. 8-9). In ELA, the student received an overall grade of "99," and a progress code of "4" ("Meeting Standard with Distinction") (in both areas of reading comprehension and phonics; however, she received a progress code of "2" ("Approaching Standard") in reading fluency (Dist. Ex. 13 at p. 8). In writing—which was reported as a part of ELA—the student received a progress code of "4" in all areas assessed, including "Writing for a Specific Purpose," "Presenting Knowledge through Writing," and "Responding to Literature" (id.). In the area of "Speaking and Listening"—a final component of ELA—the student received a progress code of "4" in all areas assessed, including "Engag[ing] Effectively in a Range of Collaborative Discussions," "Present[ing] Knowledge and Ideas," "Grammar Usage," and "Vocabulary" (id.). As for mathematics, the student received an overall grade of "96" and progress codes of "4" across all areas assessed in "Mathematical Practices" and "Mathematics Standards [and] Domains" (id.). In science and social studies, the student received an overall grade of "100" in both subjects, with progress codes of "4" in all areas assessed (id.). Next, the student's report card reflected areas assessed in "Personal Progress" (all areas denoted progress code "4"), "Classwork," (all areas denoted progress code "4," except for "Neatness/Handwriting," where the student received a progress code of "3"- "Meets Standards"), and "Homework" (all areas denoted progress code "4") (id. at p. 9). In the area of classwork, the student was assessed for "Comple[ing] Work on Time," "Neatness/Handwriting," "Manag[ing] and Organiz[ing] Materials," and "Effort" (id.).

In addition to the numerical grades, the student's report card included an area for "General Comments" (Dist. Ex. 13 at p. 9). Here, the student's classroom teacher reported that she "exhibit[ed] a positive outlook and attitude in the classroom"; she "cooperate[d] consistently with the teacher and other students, and c[ould] be depended on to do what they [we]re asked to do"; and she "stay[ed] on task with little supervision, and [wa]s a role model to others in the class" (id.). At that time, the student's classroom teacher encouraged her parents to "keep reading with her every night to help build her reading fluency" (id.).

In addition to the evaluative information noted above, the parents also provided input at the January 2022 CSE meeting during the development of the student's IESP (see Parent Exs. B at pp. 6-7; L ¶ 10). More specifically, the student's mother testified that she "disagreed" with the January 2022 CSE's recommendation for group SETSS, and "expressed concern" that the student required "individual SETSS with a provider trained in evidence-based reading programs such as Wilson or Orton[-]Gillingham" (Parent Ex. L ¶ 10). She also testified that she "voiced concern with the recommendation of group SETSS and that the [district] was unable to specify the actual size of the group" and, moreover, that "it was entirely unclear whether the recommended SETSS would use an evidence-based reading program as recommended by [the student's] evaluation" (id.).

## **B. SETSS**

Turning to the merits of the parents' appeal, as noted above, the parents argue that the IHO erred by failing to address their claim that the student required 1:1 SETSS, as opposed to the group SETSS recommended in the January 2022 IESP, in order to make progress in light of her circumstances. The district contends that the parents' characterization of the IHO's decision is not completely accurate, noting that the IHO addressed the recommendation for group SETSS when analyzing the appropriateness of the January 2022 IESP and indirectly addressed whether the student required 1:1 SETSS within her analysis and discussion concerning the December 2021 private evaluator's recommendation for an evidence-based reading program. Upon review, the evidence in the hearing record supports the IHO's finding that the January 2022 IESP—which included a recommendation for daily group SETSS—was appropriate and offered the student the equitable equivalent of a FAPE.

First, it must be noted that, having laid out the evaluative information available to the January 2022 CSE above, there was no information contained therein suggesting that the student required a 1:1 special education program, or more specifically, 1:1 SETSS, to make progress in light of her circumstances—including the December 2021 private evaluation report (see generally Dec. 2, 2022 Tr. pp. 1-11; Jan. 4, 2023 Tr. pp. 1-108; Jan. 13, 2023 Tr. pp. 1-84; Parent Exs. A-M; Dist. Exs. 1-17). Nevertheless, in support of their argument, the parents point to the input that they provided during the January 2022 CSE, wherein they expressed concern that the student required "individualized 1:1 SETSS instruction," which, according to the parents, was "consistent with information in [the student's] teacher report that [she] struggle[d] to keep up with the group and need[ed] proper guidance" (Req. for Rev. at p. 8, citing Parent Ex. L ¶ 10 and Dist. Ex. 13 at pp. 2, 7). An examination of the cited portions of the January 2022 teacher report reveals that, when describing the student's "Work Pace"—and more specifically, the student's ability to "focus on tasks and complete assignments in a timely manner" and where or when the student performed "better"—the classroom teacher reported that the student was "able to focus but sometimes struggle[d] keeping up with the group work because of reading," she tended to struggle "when subjects involve[d] lengthy word problems," and the student "Always" required adult support when reading (Dist. Ex. 13 at p. 2). The other cited portion of the January 2022 teacher report reflects that the student needed "proper guidance" to "succeed within the current educational setting" (id. at p. 7). Even assuming for the sake of argument that this information reported difficulties in a group setting, the common denominator among this information appears to relate more to the student's difficulties with reading rather than to her ability to make progress in a group setting.

Furthermore, that is not the only evidence the CSE had to rely upon. In contrast to the evidence cited by the parents, the December 2021 classroom observation report reflected no difficulties when the student was called upon, and then volunteered, to read aloud in a group setting (see generally Dist. Ex. 12). Rather, it documented the student's active and willing participation in the classroom activity, which was the review of a folktale (id.). In addition, the student's classroom teacher reported that her participation during the classroom observation was a typical day for the student (id.). Similarly, the January 2022 teacher report did not document any difficulties with respect to the student's ability to make progress in reading in a group setting (except to note that she was not on the same reading level as her peers and she "Always" needed adult support), or to make progress in mathematics in a group setting (noting that the student "Sometimes" required adult support in mathematics), or to make progress in writing in a group setting (see Dist. Ex. 13 at pp. 3-4). In writing, the classroom teacher reported that the student's

graphomotor skills, writing fluency, spelling skills, and mechanics were comparable to her peers, with syntax and grammar below her peers (*id.*). The classroom teacher also reported no concerns with the student's executive functioning skills as related to attention, planning, organizing, executing tasks, or shifting between tasks (*id.* at p. 5). And with respect to any instructional strategies or modifications that had been attempted to assist the student, the classroom teacher reported that both "repetition of directions" and "small group intervention" seemed "successful"—but she did not otherwise specify when or how these strategies had been used with the student or otherwise explain how many students were included in the "small group intervention" (*id.* at p. 7).

In addition, neither the student's grades on her first trimester report card nor the general comments noted therein reflected any difficulties with the student's ability to make progress in a group setting (*see* Dist. Ex. 13 at pp. 8-9). Instead, the student's grades and progress codes demonstrated that the student met the standards in place with distinction in all but approximately two areas assessed (i.e., reading fluency and neatness/handwriting) while receiving instruction in a group setting (*id.*). It was also noted on the student's report card that she cooperated consistently with the teacher and other students, stayed on task with little supervision, and was a role model to others (*id.* at p. 9).<sup>17</sup>

The district special education teacher who participated at the CSE meeting testified that, given the evaluative information available to the January 2022 CSE, the CSE recommended daily SETSS for the student (five periods per week) in a small group, but did not specify the number of students in that group setting (*see* Jan. 4, 2023 Tr. p. 79; Dist. Ex. 16 ¶ 4). He explained that the group could not be "more than eight, but [that] it c[ould] be as little as one other student[]" and that the ultimate size of the group for SETSS was determined by "whoever [wa]s implementing the support services" at the nonpublic school (Jan. 4, 2023 Tr. p. 79).<sup>18</sup> With respect to whether the January 2022 CSE recommended a "small group" setting for SETSS, the special education teacher testified that "small group explicit instruction" had been recommended as a strategy in the management needs portion of the student's January 2022 IESP (Jan. 4, 2023 Tr. p. 80; Parent Ex. B at p. 8). He also testified that a CSE could recommend individual SETSS (*see* Jan. 4, 2023 Tr. p. 81).

During testimony, the district special education teacher acknowledged that the January 2022 CSE reviewed and discussed the information in the December 2021 classroom observation report, as well as the January 2022 teacher report, which, as stated by the parents' attorney, noted that the student "struggle[d] keeping up when working in a group," as well as reviewing the

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<sup>17</sup> At the impartial hearing, the district special education teacher who attended the January 2022 CSE meeting testified that the CSE "had questions about" the apparent disparity between the student's overall report card grade of "99" in ELA compared to the information presented in the January 2022 teacher report, which estimated the student's reading level at first grade (Jan. 4, 2023 Tr. pp. 93-95; *see* Dist. Ex. 13 at pp. 2, 8).

<sup>18</sup> At the impartial hearing, one SETSS provider already delivering services at the student's nonpublic parochial school testified that she worked with students in groups with "[l]ess than five" students, and although "most of [her] students c[ould] be in a group as large as eight, . . . [she] never ma[d]e [her] groups that large" (Jan. 4, 2023 Tr. pp. 57, 69).

student's first trimester report card (Jan. 4, 2023 Tr. pp. 91-96).<sup>19</sup> However, the district special education teacher could not recall whether the January 2022 CSE specifically discussed the student's struggle to keep up during group work "before recommending SETSS in a group setting" (Jan. 4, 2023 Tr. p. 95).

Despite the parents' focus on the issue of whether the SETSS would be delivered individually or in a group setting, review of the student's January 2022 IESP reflects that it offered other services and accommodations to address the student's needs. The CSE also recommended the daily use of assistive technology, both at home and at school, which included a tablet with word processing, word prediction, auditory feedback, dictation, e-text reader, and PDF notation (see Parent Ex. B at p. 13). The January 2022 IESP also included testing accommodations on all classroom and standardized assessments, such as "[e]xtended [t]ime" (1.5), a "[s]eparate [l]ocation" ("small group—quiet with limited distractions)," "[r]evised [t]est [d]irections" ("read, reread and simplified"), "[r]evised [t]est [f]ormat," and "[o]n-[t]ask focus prompts" (when the student "display[ed] signs of disengagement and lack of focus . . . for more than [five] minutes") (*id.* at p. 14). Moreover, the student was recommended for five-minute breaks for tests longer than 40 minutes, after 30 minutes of testing, and at every 30-minute interval thereafter (*id.*).

Further, the January 2022 IESP included approximately eight annual goals to address the student's identified needs: one goal targeted the use of assistive technology to independently access grade level reading material and to write responses with legibility and good spelling; five annual goals targeted the student's reading, such as reading a list of 50 words with prefixes and suffixes, reading 20 multisyllabic words by separating the syllables on blocks and counting the syllables, reading a grade level story with visual supports and then asking and answering five questions, reading a grade-level text and taking notes with a graphic organizer in order to identify the main idea and key details, and using a graphic organizer to create an informative piece with a topic, facts, details, transition words, an illustration and a concluding statement; and two annual goals targeted the student's ability to solve one-step to two-step word problems in math by using manipulatives, pictures, or number sentences (see Parent Ex. B at pp. 9-12).

Within the January 2022 IESP, the CSE noted the effect of the student's needs on her involvement and progress in the general education curriculum by documenting the student's diagnosis of dyslexia and her presenting issues of phonological and orthographic deficits in reading (see Parent Ex. B at p. 9). The January 2022 CSE specifically reported that the student struggled to comprehend what she read independently, required more time than peers to recall information automatically, and therefore, had difficulty with larger amounts of information at one time (*id.*). Additionally, the CSE indicated in the IESP that the student needed prompting, redirection, and repetition, and "require[d] reading interventions and strategies from teachers to support her learning" (*id.*). Additional supports for addressing the student's needs included praise, encouragement, multisensory teaching techniques, verbal prompts, manipulatives, graphic

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<sup>19</sup> The January 2022 teacher report actually noted the following: the student was able to "focus but sometimes struggle[d] keeping up with group work because of reading" or when subjects "involve[d] lengthy word problems" (Dist. Ex. 13 at p. 2).

organizers, and charts to help the student complete assessments and assignments, and extra time and refocusing prompts (*id.*).

The January 2022 CSE also recommended various strategies to address the student's management needs, including the use of accommodations and supports such as models and guided practice, graphic organizers and charts, use of manipulatives, and assisting the student in retrieving information from visual systems through "highlight[ing] or underlin[ing] in color important information on a page to help [the student] scan" (Parent Ex. B at p. 8). Additional strategies included "specially designed instruction in the area of reading comprehension," "directions and questions read," "small group explicit instruction," "[e]ncouragement to check work for errors after completion," "[r]epetition," "actionable feedback and corrective feedback," "[a]dditional time for writing assignments and assessments," "[p]rompts," "[v]erbal praise and encouragement," and "[m]ovement breaks" and "[i]ntermittent short breaks" (*id.*).

Thus, the evidence in the hearing record demonstrates that the January 2022 CSE had several sources of evaluative information available to develop the student's January 2022 IESP, which reflected the student's relative strengths and weaknesses while participating in a group setting in her classroom. Yet, overall, and despite the difficulties pointed to by the parents, the student was making progress in her nonpublic parochial school with minimal supports and accommodations, as evidenced by her outstanding grades on her first trimester report card. Therefore, having independently reviewed and considered the evaluative information available to the January 2022 CSE, the evidence in the hearing record leads me to conclude the student did not require 1:1 instruction by a special education teacher and sufficiently supports the IHO's finding that the CSE's decision to recommend group SETSS was appropriate.

### **C. Methodology**

The parents' argument related to methodology is twofold: namely, that the IHO improperly shifted the burden of proof to the parents to demonstrate that the student required an evidence-based reading program, and relatedly, that the December 2021 private evaluation—as the "only evidence in the [hearing] record of objective, clinical, normative-based measures," together with its recommendation for an evidence-based reading program—constituted a clear consensus of the student's need for such program. As a result, the parents contend that the January 2022 CSE should have recommended the same in the student's IESP. In response, the district contends that, while the hearing record included the December 2021 private evaluation report with the recommendation for an evidence-based reading program, the recommendation was conclusory and did not explain why other methods of instruction would be less effective in addressing the student's reading difficulties. Upon review, the evidence in the hearing record does not support the parents' contentions that the district was required to specify a methodology in the student's IESP.

Initially, with respect to the parents' assertion concerning the burden of proof, under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (*see Schaffer v. Weast*, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

While the parents assert that some of the language used by the IHO appeared to place the burden on the parents to establish that the student required an "evidence-based reading program" in order to offer the student a FAPE or to make progress—pointing specifically to the IHO's decision wherein the IHO noted that the private evaluator had not been presented as a witness to, perhaps, clarify or explain the recommendation in the December 2021 private evaluation report for an "evidence based reading program"—the IHO's language, when read as a whole, did not fault the parents for not presenting this individual as a witness or otherwise "overtly suggest[]" that the parents should have presented the evaluator as a witness in order to meet a burden (IHO Decision at p. 12; Req. for Rev. at pp. 6-7). To be clear, the district also could have presented the private evaluator as a witness by issuing a subpoena for such testimony (see 8 NYCRR 200.5[j][3][xii] [allowing a party to compel the attendance of witnesses]). Instead, the IHO's reference to the lack of testimony explaining the private evaluator's recommendation appeared to highlight the IHO's finding that the hearing record included contradictory information, particularly with respect to the effectiveness of the 1:1 Wilson-based reading methodology the IHO found was being used with the student (see IHO Decision at p. 12).<sup>20</sup>

Thus, the available evidence in the hearing record proffered by the district led the IHO to find that the January 2022 IESP adequately addressed the student's needs; accordingly, the actual analysis of the relevant evidence by the IHO did not represent a shift of the burden of persuasion to the parents to demonstrate the January 2022 IESP's alleged substantive deficiency (see E.E. v. New York City Dep't of Educ., 2018 WL 4636984, at \*11 n.13 [S.D.N.Y. Sept. 26, 2018]; Application of a Student with a Disability, Appeal No. 18-058; see also C.F., 746 F.3d at 76 [noting that "the Department bears the burden of establishing the validity of the IEP"]). Further, the decision when read in its entirety reveals that the IHO made her decision based on an assessment of the relative strengths and weaknesses of the evidence presented by both the district and the parents rather than by solely allocating the burden of persuasion to one party or the other (see generally IHO Decision). Thus, even assuming the IHO misallocated the burden of proof to the parents, the error would not require reversal in this case insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H., 685 F.3d at 225 n.3).

With regard to the parents' contention that the December 2021 private evaluation constituted a clear consensus that the student required an evidence-based reading program, such as Wilson or Orton-Gillingham, since it was the only evaluation that recommended such a program for the student, the parents' argument is not supported by either the evidence in the hearing record or the applicable legal standards.

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<sup>20</sup> Given that the evidence reflects that the private evaluator had been aware that the parents had already provided the student with Wilson tutoring four nights per week since 2020, it was reasonable for the IHO to question the evaluator's continued recommendation in the December 2021 private evaluation report for an evidence-based program—i.e., Wilson—notwithstanding the fact that student's difficulties with reading persisted throughout the same timeframe that she received this particular methodology for instruction (see Parent Ex. C at p. 1; Dist. Ex. 11 at p. 1 [indicating that the student had struggled with reading since kindergarten (2018-19 school year)]).

Initially, State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a resource room program ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], [available at http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html](http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html)). In addition, the guidance specifies that the CSE should "consider what prior instructional methods and strategies have been utilized with the student to avoid reinstating programs that have not proven effective in the past" and further indicates that "[i]nstructional methodology may be discussed at the [CSE] but is not specified on an IEP" (*id.*).

More generally, the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (*Rowley*, 458 U.S. at 204; *R.B. v. New York City Dep't of Educ.*, 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; *A.S. v. New York City Dep't of Educ.*, 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; *K.L. v. New York City Dep't of Educ.*, 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; *R.E.*, 694 F.3d at 192-94; *M.H.*, 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (*R.B.*, 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and *R.E.*, 694 F.3d at 192-94).

However, when the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (*see, e.g., R.E.*, 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (*A.M. v. New York City Dep't of Educ.*, 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (*R.E.*, 694 F.3d at 194).

First, as described above, the January 2022 CSE had several sources of evaluative information available to develop the student's IESP, including the November 2021 social history, the December 2021 classroom observation, the December 2021 psychoeducational evaluation, the December 2021 private evaluation, the January 2022 Teacher Report, the student's first trimester report card, and input from the parents and the student's then-current classroom teacher (*see* Dist. Ex. 16 ¶ 3). A review of the evaluative information available to the January 2022 CSE reflects



that, while the only document with a recommendation for an "evidence-based reading program" was the December 2021 private evaluation, the evaluator did not actually find that one specific methodology must be placed on the student's IESP; rather, the recommendation indicated that the student needed an "evidence-based reading program such as the Wilson Approach or the Orton-Gillingham Method or their derivatives" (Parent Ex. C at p. 4 [emphasis added]).<sup>21</sup>

Second, contrary to the parents' assertion, the December 2021 private evaluation was not the only piece of evaluative information that provided information about the student's reading needs to the January 2022 CSE. For example, the student's then-current classroom teacher completed the January 2022 Teacher Report and verbally informed the January 2022 CSE about her performance in ELA, which was also reflected in the student's first trimester report card available to the CSE. Notably, the hearing record did not include any information concerning the reading instruction the student received during third grade that resulted in her outstanding performance in ELA, which, as previously noted, included assessments of the student in the areas of reading comprehension, reading fluency, and phonics (as well as writing and speaking and listening) (see Dist. Ex. 13 at p. 8). In addition, the December 2021 psychoeducational evaluation, while not reporting specific information particular to reading, reflected that the student demonstrated age-appropriate attention, concentration, and perseverance and that her cognitive abilities fell solidly within the average range and noted an exception for a low average score on the VSI. In the psychoeducational evaluation report, the evaluator explained that the student's "relative weakness on visual spatial subtests suggest[ed] that she may have relative difficulty understanding visual information when it [wa]s abstract or c[ould not] be figured out using words" (Dist. Ex. 13 at p. 6). As a result, the evaluator noted that the student's "performance on visual spatial tasks might be stronger when she c[ould] use a hands-on approach to figuring out puzzles rather than manipulating objects in her mind" (*id.*).

In this case, the January 2022 IESP does not list a specific methodology for use with the student (see generally Parent Ex. B). However, the IESP listed a multitude of strategies to address the student's management needs, including "specially designed instruction in the area of reading comprehension" and "small group explicit instruction"; moreover, in describing the effect of the student's needs with respect to her ability to access the general education curriculum, the IESP specifically noted, among other supports, the student's need for multisensory instruction in addition to "reading interventions and strategies from teachers to support her learning" (Parent Ex. B at p. 8-9).

Here, the IHO's decision demonstrates that the IHO examined the evaluative information in the hearing record, including the recommendation in the December 2021 private evaluation

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<sup>21</sup> It is not entirely clear what the private evaluator meant by "evidence based" and he could possibly have been referring to a general requirement that "special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child" (34 CFR 300.320[a][4]). On the other hand, it is equally possible that he meant that the student's reading instruction should be based upon objective assessments rather than based upon entirely subjective viewpoints of the student's teachers. The process followed by the CSE was not deficient due to lack of objective measurement, nor did the IESP merely call for whatever a teacher felt would be appropriate. The teachers would have to work on annual goals, most of which were targeted different aspects of reading as well as a writing goal and two goals to address word problems in math.

report, to determine that the evidence did not establish a "clear consensus" that the student required a specific methodology to make progress (IHO Decision at pp. 11-13). In reaching that conclusion, the IHO indicated that the district witnesses were "credible" and that, given the "discrepancies among the various reports and findings," the January 2022 CSE's recommendation for daily SETSS in a group with "multisensory instruction and other techniques as required by the [m]anagement [n]eeds section w[ere] reasonably calculated to enable [the s]tudent to make progress appropriate in light of her circumstances" (*id.*). Upon review, the evidence in the hearing record supports the IHO's determination and the parents' contentions must be dismissed.

#### **D. Implementation of IESP**

Having determined that the January 2022 IESP offered the student the equitable equivalent of a FAPE, the next inquiry focuses on whether the district's alleged failure to implement the SETSS mandated in the IESP resulted in a failure to offer the student a FAPE. The parents argue that the IHO erred by finding that the district was capable of implementing SETSS and by finding that they rejected or declined services by a SETSS provider.

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; *see* 20 U.S.C. § 1414[d]; 34 CFR 300.320).<sup>22</sup> With regard to the implementation of a student's IEP or IESP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP or IESP, and instead, the school district failed to implement substantial or significant provisions of the IEP or IESP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; *see also* Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP or IESP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; *see* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; *see also* Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

Here, the student appears to have been dually enrolled in the district for the purposes of receiving special education services for a portion of the 2021-22 and 2022-23 school years as the

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<sup>22</sup> In this case, the evidence indicated that in order to deliver the SETSS to the student and in order for the SETSS provider to get paid, the parents needed to "agree with the provider to get paid" by filling out and executing a "SETSS authorization form" (Jan. 4, 2022 Tr. pp. 51-52).

district developed an IESP for the student in January 2022 (see Parent Exs. A at pp. 1-2; B).<sup>23</sup> However, in stark contrast to several cases involving the alarming level of dysfunction regarding the provision of SETSS to dually-enrolled students and the procedural safeguards that are supposed to protect students, the district in this case presented sufficient evidence to establish that it was capable of implementing the SETSS mandated in the student's January 2022 IESP during the 2021-22 school year and the 2022-23 school year (see, e.g., Application of a Student with a Disability, Appeal No. 21-029; Application of a Student with a Disability, Appeal No. 21-025; Application of a Student with a Disability, Appeal No. 20-141; Application of a Student with a Disability, Appeal No. 20-140; Application of a Student with a Disability, Appeal No. 20-115; Application of a Student with a Disability, Appeal No. 20-099; Application of a Student with a Disability, Appeal No. 20-094; Application of a Student with a Disability, Appeal No. 20-087).

As previously discussed, the district in this case already had two SETSS providers delivering services to students at the student's nonpublic parochial school during both the 2021-22 and 2022-23 school years (see Dist. Ex. 4 ¶ 4). The evidence demonstrates that, in February 2022 when the SEEPO reached out to both of these SETSS providers, one SETSS provider had already "approached the student's parent . . . and offered to make room in her schedule to service [this student] for the remainder of the 2021-2022 school year" but the parents "refused to accept services" from this SETSS provider because the parents "only wanted a SETSS provider certified in Orton[-]Gillingham instruction" (id. ¶ 6; see Dist. Ex. 5 ¶ 3). However, given that the January 2022 IESP did not require the use of a specific methodology, the parents' refusal of this SETSS provider was unreasonable and does not negate the fact that the district had a SETSS provider who was capable of delivering the SETSS mandated in the student's IESP for the remainder of the 2021-22 school year.

Similarly, with regard to the 2022-23 school year, the evidence demonstrates that the district had the same two SETSS providers at the student's nonpublic parochial school who were both ready and available to deliver the student's SETSS for the 2022-23 school year (see Dist. Exs. 4 ¶¶ 7-10; 7 at p. 1). The evidence also reflects that, in an email to the parents dated September 1, 2022, the SEEPO informed the parents that the district had a provider ready to deliver the student's SETSS, but the parents rejected those services by stating in their response that the SETSS provider would "not be taking [their] daughter's case" because the SETSS provider did not have Orton-Gillingham training or certification (Dist. Ex. 8 at pp. 1-2). To the extent that the parents contend that they were not rejecting SETSS for the 2022-23 school year in this email exchange, a plain reading of the emails does not lead to any other conclusion. And while the evidence also reflects that this same SETSS provider later withdrew her availability to provide SETSS to this student, the evidence demonstrates that the district still had at least two other SETSS providers who could have fulfilled the mandates in the January 2022 IESP, one of whom already delivered services at the student's nonpublic parochial school (id.; see Parent Ex. G; Dist. Ex. 5 ¶¶ 5-6). The parents' protestations to the contrary are without merit.

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<sup>23</sup> To be clear, the hearing record does not include a letter from the parents seeking special education services from the district pursuant to Education Law 3602-c (see generally Dec. 2, 2022 Tr. pp. 1-11; Jan. 4, 2023 Tr. pp. 1-108; Jan. 13, 2023 Tr. pp. 1-84; Parent Exs. A-M; Dist. Exs. 1-17).

Therefore, consistent with the IHO's finding, the evidence in the hearing record supports a conclusion that the district was capable of implementing the SETSS mandated in the student's January 2022 IESP for the relevant portions of both the 2021-22 and 2022-23 school years and that, in this instance, the reason the student did not receive her mandated SETSS was not due to a failure on the part of the district in implementing the January 2022 IESP. Consequently, the parents' arguments must be dismissed.

## **VII. Conclusion**

After an independent review of the evidence in the hearing record, there is no basis upon which to disturb the IHO's conclusions that the student's January 2022 IESP offered the student a FAPE and that the district was capable of implementing the recommended SETSS at the student's nonpublic parochial school. Thus, the necessary inquiry is at an end.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
April 20, 2023**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**