



# **The University of the State of New York**

## **The State Education Department**

**State Review Officer**

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**No. 23-090**

**Application of a STUDENT WITH A DISABILITY, by his parent, 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:**

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request for relief and ordered the parent to make the student available for updated cognitive and academic testing. Respondent (the district) cross-appeals from that portion of the IHO's decision which found that it did not offer the student a free appropriate public education (FAPE) for the 2022-23 school year. The appeal must be sustained in part. The cross-appeal must be sustained.

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

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

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

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

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

The student has received diagnoses of autism spectrum disorder (ASD), attention deficit hyperactivity disorder (ADHD), combined presentation, and specific learning disorder with impairment in reading comprehension and written expression (Parent Exs. B ¶ 1; C at p. 4). The student's eligibility for special education programming as a student with autism is not in dispute (see Parent Exs. D; I).

An independent neuropsychological evaluation of the student was conducted on various dates in January 2019 (Parent Ex. C). At the time of the evaluation, the student was in fourth grade at a district public school in a "specialized . . . ASD program, NEST," which the evaluator described as "an integrated program that also include[ed] specialized social skills intervention"

(id. at p. 1). The student also received occupational therapy (OT), speech-language therapy, and counseling (id.). According to the results of the January 2019 independent neuropsychological evaluation, in addition to the student's then-current programming and given his learning needs in reading comprehension and written expression, the student required three sessions per week of special education teacher support services (SETSS) (id. at pp. 4-5).

On November 12, 2020, a CSE convened and for the remainder of sixth grade, recommended a general education placement with integrated co-teaching services (ICT) for English language arts (ELA), math, sciences, and social studies, two periods per week of SETSS (math) in a group, and three periods per week of SETSS (ELA) in a group in conjunction with OT and speech-language therapy (Parent Ex. D at pp. 1, 24-25).

As of May 2021, the student was receiving "SETSS as determined through the mediation process until the end of the year for academic support" in the form of five hours per week of "one to one tutoring" to address his reading, writing, and math deficits (Parent Ex. D at p. 4). The CSE reconvened in June 2021 at the parent's request to determine the need for additional SETSS, as the parent believed the student had made progress and "would like this service to continue for the next academic year" (id.).<sup>1</sup>

On October 21, 2022, district staff contacted the parent via email to remind her of a CSE meeting scheduled for October 24, 2022 (Parent Ex. E). Attached to the district's email was an "IEP data sheet" for the parent to review to help her prepare for the CSE meeting (id.). The data sheet reflected reports that the student received refocusing and redirection prompts in various classes and OT sessions (id. at pp. 2-4).

A CSE convened on October 24, 2022 to conduct the student's annual review and to develop an IEP for the student for the remainder of the 2022-23 school year (eighth grade) (Parent Ex. I at pp. 1, 25). According to the October 2022 IEP, the student had undergone foot surgery and was assigned a health paraprofessional to assist him in transitions throughout the building as part of his plan pursuant to section 504 of the Rehabilitation Act of 1973 (section 504 plan) (id. at pp. 3, 23). The October 2022 IEP noted that, prior to the surgery, the student was able to navigate the school building and follow his class schedule independently (id. at p. 5). The October 2022 IEP further noted that the parent expressed that she felt the paraprofessional was beneficial to the student and that she wanted to explore the possibility of having a paraprofessional added to the student's IEP (id. at pp. 3, 23). The CSE did not indicate that the student had physical limitations which affected his learning, behavior, or participation in school activities, limited mobility, or that he required an accessible school building (id. at pp. 22-23). The CSE did not recommend paraprofessional services for the student (see id. at pp. 15-16).<sup>2</sup>

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<sup>1</sup> The hearing record does not contain a copy of the student's IEP for the 2021-22 school year (see Parent Exs. A-Q; IHO Exs. I-II).

<sup>2</sup> The October 2022 IEP contained similar recommendations as those set forth in the November 2020 IEP except for reductions in the frequency of related service sessions (compare Parent Ex. D at p. 25, with Parent Ex. I at pp. 15-16).

On October 24, 2022, the parent emailed district staff and requested to have a health paraprofessional added to the student's October 2022 IEP "based on reports of [the student's] focus and redirection issues,"; the parent also asked that the district include in a prior written notice, the reasons for rejecting her request, and what type of evaluations the district planned to conduct to determine if the student needed a paraprofessional (see Parent Ex. F at p. 2). District staff responded to the parent the next day stating that the CSE had sent her request to the school-based support team and was not rejecting the parent's request at that time but was going through the process of reevaluating the student to determine his needs (id.).

On October 27, 2022, the parent emailed district staff a letter from the student's developmental pediatrician (Parent Ex. F at p. 1; see Parent Exs. A at p. 1; G). According to the letter, the developmental pediatrician opined that the student "benefit[ed] from a 1:1 paraprofessional to assist with redirection to task because of his inattention, cognitive inflexibility and tendency to perseverate" (Parent Ex. G).

In a prior written notice dated October 27, 2022, the district summarized the special education and related services recommended for the student for the 2022-23 school year and did not reference the CSE's discussion regarding paraprofessional services (see Parent Ex. J).

The district school psychologist performed a classroom observation of the student in social studies and science classes on December 13, 2022 and December 15, 2022 (Parent Ex. K). According to the December 2022 classroom observation report, the student demonstrated the ability to access classroom material independently and understand directives and instructions given by the teacher (id. at p. 1). Additionally, when learning a new topic, the student required increased support from the teacher in a small group to demonstrate understanding (id. at p. 2).

A CSE reconvened on December 20, 2022 to discuss the classroom observation, the student's slow academic progress within his current program, and the parent's request for 1:1 paraprofessional services (Parent Ex. L at pp. 2, 26).<sup>3</sup> As reflected in the resultant IEP, the parent largely attributed the student's lack of progress to his difficulty sustaining attention and focus in the classroom—noted in teacher reports—and her belief that with the support of a 1:1 paraprofessional, the student would stay on task and complete assignments (id. at p. 26). As part of a discussion regarding a 12:1 special class placement as an option, the student's teacher reported that they felt the student's difficulty in the classroom was attributable to his difficulty understanding material presented in a large group setting, and that his absences interfered with his performance and understanding in the classroom (id.). According to the IEP the parent was not in agreement with school staff, and the CSE agreed to continue the student's then-current program for the remainder of the school year (id.).

In a prior written notice dated January 11, 2023, the district summarized the special education and related services recommended for the student for the remainder of the 2022-23 school year (Parent Ex. M). The January 2023 prior written notice reflected the same information as noted in the December 2022 IEP regarding the 12:1 special class placement

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<sup>3</sup> The December 2022 IEP noted that the student's mother did not consent to updated cognitive and academic testing (Parent Ex. L at p. 2).

option and 1:1 paraprofessional services that the December 2022 CSE considered and rejected (compare Parent Ex. L at p. 26, with Parent Ex. M at p. 2). More specifically, the January 2023 prior written notice explained that the parent's request for 1:1 paraprofessional services did not align with the student's then-current education program (Parent Ex. M at pp. 2-3). The January 2023 prior written notice described the student's NEST program as being a specialized program with specific eligibility criteria to serve students with autism; that the program was supportive of students' social and pragmatic needs; and that students in the program have academic skills on or above grade level standards; additionally, the prior written notice indicated that students who met the criteria for this program were able to work independently with minimal support (id. at p. 2). The January 2023 prior written notice further explained that the CSE expressed that the support of 1:1 paraprofessional services would not be reflective of this program and that other programs would need to be explored if the CSE were to consider the support of 1:1 paraprofessional services for the student, in addition to additional academic supports (id. at pp. 2-3).

In or around February 8, 2023, the parent received a "[p]romotion-in-[d]oubt" letter from the district, which indicated that the student was not yet performing at the level he needed to be promoted to the next grade in June 2023 (Parent Ex. N). According to the letter, it was "possible" that the student would remain in eighth grade for the 2023-24 school year unless he made "significant progress" in social studies, noting that if the student had an IEP, he would "be held to the promotion criteria listed" in the IEP (id.).

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

By due process complaint notice dated December 21, 2022, the parent requested an impartial hearing to obtain 1:1 health paraprofessional services for the student (Parent Ex. A at p. 1).<sup>4</sup> The parent alleged that because of the student's diagnosis of ADHD, the student struggled with following directions as well as remembering what he needed to be working on and thus required more prompting and redirecting than the teachers alone could provide (id. at p. 2). Also, the parent alleged that the student's ADHD prevented him from obtaining a meaningful educational benefit without 1:1 health paraprofessional services (id. at p. 1).

The parent further alleged that, at the October 24, 2022 CSE meeting, she requested 1:1 health paraprofessional services but was told that "the case was not opened to consider such a recommendation" despite the CSE agreeing that the student needed constant refocusing and prompts and that he would benefit from the services of a "para" for refocusing (Parent Ex. A at pp. 1-2).

The parent also alleged that the observation of the student performed by the district school psychologist on December 13, 2022 and December 15, 2022 was not a thorough observation nor informative of the student's needs and further that the school psychologist

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<sup>4</sup> The parent did not state any other relief in her December 21, 2022 due process complaint notice other than obtaining 1:1 health paraprofessional services for the student (see Parent Ex. A).

recommended a more restrictive placement for the student in a 12:1 special class without first trying additional supports in the student's current placement (Parent Ex. A at pp. 1-2).<sup>5</sup>

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

On March 6, 2023, the parties participated in a prehearing conference before the Office of Administrative Trials and Hearings (OATH), which the IHO reduced to a prehearing conference summary and order, dated March 6, 2023 (see generally Pre- Hr'g Conf. Sum. & Order).<sup>6</sup>

An impartial hearing convened on March 23, 2023 and concluded on the same day (Mar. 23, 2023 Tr. pp. 1-42). During the impartial hearing the district did not introduce any testimony or evidence and stated that it would be "using the documents submitted by the parent" to argue it offered a FAPE to the student for the 2022-23 school year (Mar. 23, 2023 Tr. p. 5). The parent submitted seventeen documents into the hearing record and presented two witnesses to testify during the impartial hearing (Mar. 23, 2023 Tr. pp. 7-8, 16-39).<sup>7</sup>

In a decision dated April 26, 2023, the IHO laid out her findings regarding the facts of the case and determined that the district did not offer the student a FAPE for the 2022-23 school year; that the parent did not show that 1:1 health paraprofessional services were an "appropriate component" of the student's educational program; and that the equitable considerations did not support the parent's requested relief (IHO Decision at pp. 4-7).

More specifically, the IHO found that the district failed to meet its burden because it did not introduce evidence or testimony during the impartial hearing to explain the CSE's decisions and recommendations in the October 2022 and December 2022 IEPs (IHO Decision at p. 8). The IHO also found that the appropriateness of the district's program for the student could not be assumed from the evidence entered into the hearing record (*id.*).

Regarding the parent's request for 1:1 health paraprofessional services, the IHO found that the parent did not show the student's need for that service or that 1:1 health paraprofessional services would "be in accord with the required independent nature of the students in the selected public school" (IHO Decision at p. 8). The IHO found that although ADHD was a medical condition, in this case it was not shown that such a medical condition required monitoring by a health professional and the existence of the diagnosis alone was not sufficient to justify the implementation of 1:1 health paraprofessional services for the student (*id.* at pp. 8, 10). The IHO reviewed the district's "Standard Operating Procedures Manual" (SOPM) regarding health

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<sup>5</sup> The parent also alleged that the school psychologist offered no reasoning for the more restrictive 12:1 classroom placement other than there would be reduction in the number of students compared to the student's current placement (Parent Ex. A at p. 2).

<sup>6</sup> During the March 6, 2023 prehearing conference, the parent clarified that she believed the student's IEPs were substantially inadequate to meet the student's needs without the recommendation of a "[1:1] paraprofessional" (Mar. 6, 2023 Tr. p. 6).

<sup>7</sup> Both parties submitted written closing summations to the IHO for consideration on April 13, 2023 (see IHO Exs. I at p. 10; II at p. 12).

paraprofessional services and found that the function of health paraprofessional services did not include redirection or assistance with schoolwork (*id.* at p. 9). The IHO noted that the student did not require help with feeding, walking safely, administration of medication, or balance and that he has healed from his prior surgery, thus, the IHO ultimately determined that the parent did not provide sufficient evidence to show that the student needed 1:1 health paraprofessional services (*id.* at p. 10).

Next, the IHO found that equitable considerations did not favor the parent because there was evidence in the hearing record showing that the parent refused to consent to updated cognitive and academic assessments of the student and, in the past, did not accept compensatory services; further, the IHO found that as of the December 2022 CSE meeting, the student was absent from school for a significant portion of the school year (IHO Decision at pp. 8, 10). The IHO also noted that "at several junctures the Parent was less than cooperative and reasonable in her interactions with the [district]" and that the district was "compliant with the Parent's wishes[]" rather than remaining firm on the recommendations of a 12:1:1 program for the Student" (*id.*).

In response to the parent's requested relief, the IHO distinguished that an award of prospective relief in the form of prospective placement of a student in a particular type of program has the effect of circumventing the statutory CSE process (IHO Decision at p. 10). To avoid this, the IHO ordered the parent to make the student timely available for updated cognitive and academic testing so that the CSE has appropriate information to evaluate the student and best determine his educational program for the 2023-24 school year, giving due consideration to the student's medical diagnoses and conditions, including ambulation, autism, and ADHD (*id.* at p. 11). Further, the IHO ordered the CSE to make its recommendation on the updated evaluations, progress reports and other assessments, giving due consideration to the parent's concerns, but to not substitute its professional opinion for that of the parent (*id.*).

Ultimately, the IHO found that the district did not offer a FAPE to the student for the 2022-23 school year but denied the parent's request for 1:1 health paraprofessional services (IHO Decision at pp. 11-12).

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

The parent appeals and asserts that: the IHO erred in denying her request for 1:1 health paraprofessional services; the IHO's decision was based on conjecture; the IHO mischaracterized the parent's witness credentials and testimony; the IHO shifted the burden of proof to the parent; the IHO failed to review the parent's evidence when rendering her ruling; and the IHO was not impartial and showed bias against the parent by requesting written summations and then excluding the arguments alleged in the parent's written summation from her decision.

More specifically, the parent alleges that the IHO improperly used the district's description of the student's NEST educational program taken from the district January 2023 prior written notice and did not consider the parent's description of the program as taken from the district's website as indicated in her April 2023 written summation, to determine that 1:1 health paraprofessional services would not have been appropriate given the student's then-current placement in the NEST program.



Further, the parent argues that a 12:1 special class placement was recommended and rejected by her, not a 12:1+1 as indicated in the IHO's decision. Additionally, the parent alleges that the district's attorney was not familiar with the special education continuum because she stated that a paraprofessional was a more restrictive environment than a 12:1 class placement and the parent further argues that a 12:1 class placement would remove any access the student had to his non-disabled peers thus rendering the 12:1 class placement a more restrictive setting.<sup>8</sup>

Regarding the IHO's finding that the parent refused updated academic testing, the parent alleges that there is no evidence in the hearing record that supports this finding. Further, the parent alleges that the evidence in the hearing record shows that she was not opposed to the CSE conducting evaluations and that the CSE chose to conduct only a classroom observation in response to her request for 1:1 paraprofessional services in October 2022. Also, the parent alleges that she requested an OT evaluation and a speech-language evaluation on December 21, 2022 and such evaluations were still in progress at the time of the impartial hearing.

Regarding the IHO's finding that the parent declined academic recovery services for OT and speech-language therapy during the 2021-22 school year, the parent alleges that the 2021-22 school year is outside the scope of the parent's December 2022 due process complaint notice. As for the IHO's finding that the parent declined compensatory services, the parent alleges that she testified that she never denied compensatory services as indicated in the student's IEPs, to which the district's attorney acknowledged that it was her "fault for not bringing someone" to dispute the parent's claim. The parent argues that the district did not produce any evidence or witness to defend how removing the student from the least restrictive environment (LRE) without first exhausting every supplementary service and support in the continuum that may help manage the student's symptoms relating to his diagnosis of ADHD was appropriate.

Regarding the IHO's finding that the parent failed to show how 1:1 health paraprofessional services were necessary based on the student's needs, the parent alleges that there is ample documentary evidence and witness testimony to show that the student needed constant redirection and also that the student's developmental pediatrician affirmed that the paraprofessional was needed and appropriate to meet the student's needs.<sup>9</sup>

The parent alleges that the IHO was "extremely" biased in her decision which "clearly tip[ped] the equitable considerations in favor of the district" because the IHO was formerly an employee of the district and submits additional evidence in support of her argument.

As relief the parent requests that the IHO's March 2023 decision be "voided completely" due to the fact that the IHO did not meet the requirement of maintaining impartiality and was ineligible to preside over this case. The parent requests that if an SRO finds that the IHO was

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<sup>8</sup> The parent also alleges that the CSE had the right to place the student in a 12:1 special education class and thereby compel the parent to assert pendency in the last mutually agreed upon placement, but it did not (Req. for Rev. at p. 3).

<sup>9</sup> The parent cited to six exhibits that were admitted during the impartial hearing to support her argument that based on the student's needs 1:1 health paraprofessional services were warranted (Req. for Rev. at p. 6).



ineligible to preside over this case, the SRO should issue a judgment in favor of the parent's sole request for relief: 1:1 health paraprofessional services.<sup>10</sup> The parent also requests that the portion of the IHO's decision ordering the parent to make the student available for updated cognitive and academic testing be reversed. Further, the parent requests that if additional evaluations are required in order to determine if the "supplementary 1:1 aide is warranted," that an order be made directing that the student receive a "1:1 aide" in the interim.

In an answer with cross-appeal, the district responds to the parent's allegations and argues that the IHO correctly determined that the student's level of functioning did not warrant the support of a health paraprofessional. The district argues that if the undersigned interprets the parent's request for the support of a 1:1 health paraprofessional as a request for a paraprofessional more broadly, such support is still inappropriate for the student, and further asserts that a behavior paraprofessional cannot meet the student's needs. The district also alleges that the IHO correctly determined that equitable considerations do not favor the parent and that the IHO did not demonstrate bias towards the parent. Additionally, the district alleges that the parent raised issues for appeal that were not raised in her due process complaint notice. As for its cross-appeal, the district alleges that the IHO erred in finding that the district failed to provide the student with a FAPE for the 2022-23 school year. The district argues that contrary to the IHO's determination, the evidence in the hearing record supports the CSE's recommendations. Additionally, the district alleges that since the parent's sole issue with the student's IEP was the lack of a recommendation for 1:1 health paraprofessional services and the IHO found that the evidence in the hearing record did not support such a recommendation, the district established it provided a FAPE to the student. Further, the district alleges that an IHO could have determined that the district met its burden that it provided a FAPE based on the documentary evidence in the hearing record.<sup>11</sup>

In a reply and answer to the district's cross-appeal, the parent generally responds to the district's allegations with admissions, denials, or various combinations of the same and argues in favor of the IHO's determination that the district did not meet its burden to show it provided the student a FAPE for the 2022-23 school year.<sup>12</sup>

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<sup>10</sup> As an alternative to the request for 1:1 health paraprofessional services, the parent also indicated that she would accept as relief 1:1 paraprofessional services without the "health" designation (Req. for Relief at pp. 8-9).

<sup>11</sup> Additionally, the district alleges in its answer with cross-appeal that the parent was not in compliance with practice regulations because her request for review lacked the proper verification. The Office of State Review sent a letter to the parent to inform her of this discrepancy and requested that she send a proper verification, which the parent complied with by sending in a proper verification. As such, the parent has remedied the deficiency of her pleadings and there is nothing further to discuss regarding this claim.

<sup>12</sup> Additionally, in the parent's reply and answer to the district's cross-appeal in support of her argument that she never declined updated testing for the student as indicated in the December 2022 IEP, the parent alleges that if such statement were true then the district should have produced documentary evidence during the hearing in this matter, which it did not.

## V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist.,

873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>13</sup>

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof

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<sup>13</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. IHO Bias and Impartiality**

The parent claims that the IHO was biased against her. Specifically, the parent argues that the IHO's findings regarding equitable considerations show that she was biased in favor of the district and asserts that this bias was due to the IHO being a former employee of the district. The parent further contends that the IHO exhibited bias by adopting the description of paraprofessional services from the district's closing statement rather than the parent's closing statement.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). Further, no individual employed by a district, school, or program serving students with disabilities placed there by a CSE may serve as an impartial hearing officer for two years following the termination of such employment (see 8 NYCRR 200.1[x]).

The parent submitted two documents as additional evidence to be considered as part of her appeal, a copy of an "OPENGOVNY" website page, which was accessed May 5, 2023, indicating that the IHO registered with the Office of Court Administration as an employee of the New York City Department of Education in 2020 and what appears to be a printout of a document published on the OATH website titled "Rules in Plan Language – OATH" (Req. for Rev. Exs. A; B). The first document generally indicates the IHO's biennial registration information with the Office of Court Administration, including information regarding the IHO's employer at the time of registration, and thus is necessary to address the parent's claim (Req. for Rev. Ex. A). Regarding the copy of the "Rules in Plan Language – OATH," presented by the parent, this document appears to contain policies implemented by OATH and do not also reference any federal or State law governing the conduct of impartial hearings; accordingly, any claims related to this document are generally more akin to an assertion that there is a defect in the hearing if the local policy is applied. Local policies standing alone, however, as opposed to State or federal laws, regulation and policy, do not govern IDEA due process proceedings and the violation of such local policy, even if proven, would generally not be sufficient to constitute a

deprivation of a FAPE (see, e.g., M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*9-\*10 [S.D.N.Y. Aug. 27, 2010]). Therefore, this document is not necessary to address the issue of IHO bias as presented and will not be accepted into the hearing record or discussed further. It should be noted that if the parent has concerns with IHO conduct as it relates to the rules established by OATH, the parent is free to contact OATH with her concerns.

Turning to the accepted additional evidence and the parent's allegation that the IHO's prior employment with the district establishes her partiality, according to the parent's exhibit, the IHO registered with the Office of Court Administration as an employee of the New York City Department of Education in 2020 (Req. for Rev. Ex. A at p. 3). In 2022, the IHO was employed by the New York City Department of Transportation before being employed by OATH sometime in 2022 (id. at pp. 2-3). According to this timeline, there is insufficient evidence to show that the IHO was employed by the district within two years prior to when she began employment with OATH, or more relevant to this matter, within two years from when she was appointed to preside over this hearing (see generally SRO Ex. A). The parent has not presented any evidence that shows the IHO was not in compliance with State regulations.

Regarding the parent's assertion that the IHO was biased because she did not use any of the parent's arguments from the parent's closing summation in her decision and that the IHO improperly used the district's description of the student's NEST educational program to determine that the support of a 1:1 health paraprofessional was not an appropriate service, such claims are unfounded. A review of the hearing record shows that the IHO requested closing summations from the parties to brief her on the differences between a health paraprofessional and a paraprofessional not designated specifically as a health paraprofessional, which the parties submitted on April 13, 2023 (Tr. p. 41; IHO Exs. I-II). The IHO noted that the parent's argument was that the student's diagnosis of ADHD warranted the implementation of a health paraprofessional (IHO Decision at p. 8). The IHO placed a description of the student's NEST program at the beginning of the decision to assist in describing the facts of the case (id. at p. 4). The IHO did not use the description of the NEST program in her finding that the student did not require 1:1 health paraprofessional services in order to receive a FAPE (id. at pp. 8-10). Instead, the IHO cited to the definition of a health paraprofessional as used in the district's SOPM, which was also cited by the parent in her post hearing brief (id. at p. 9; see IHO Ex. II at pp. 4-5). Based on the above, it appears that the parent's argument largely amounts to a disagreement with the weight the IHO afforded to the evidence relied on and the various legal arguments presented by the parties in the closing briefs. To the extent that the parent disagreed with the conclusions reached by the IHO—or with the weight afforded to evidence presented at the impartial hearing or relied on in the parties' closing briefs—such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see, e.g., Application of a Student with a Disability, Appeal No. 15-101; Application of a Student with a Disability, Appeal No. 15-033; Application of a Student with a Disability, Appeal No. 13-083).

Overall, a review of the IHO's decision and the hearing record supports a finding that the IHO's decision was not biased against the parent and, additionally, as previously discussed, the IHO's past employment with the district more than two years before she presided over the proceeding at issue did not violate the relevant State regulations concerning IHO impartiality. . Rather, the IHO conducted the hearing within the bounds of standard legal practice and the hearing record does not support a finding of bias. Moreover, an independent review of the

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

## **2. Burden of Proof**

The parent argues that the IHO improperly shifted the burden of proof. In particular, the parent alleges that the district did not have anyone testify regarding why the district recommended a 12:1 special class for the student or how such a class would have benefitted the student or provided him with the individual support he needed.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see *Schaffer*, 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).

A review of the hearing record shows that the district never actually recommended a 12:1 special class program for the student in either the October 2022 or the December 2022 IEP, nor is there any evidence indicating that the district ever implemented such a program for the student (see generally Parent Exs. I; L). Accordingly, the district was not required to present evidence that a 12:1 special class recommendation would have been appropriate for the student in order to meet its burden. Contrary to the parent's allegation, both the October 2022 and December 2022 IEP recommended that the student remain in his current NEST program and receive ICT services, related services, and SETSS (Parent Exs. I at pp. 15-16; L at pp. 17-18). The October 2022 and December 2022 IEPs did note under the "Other Options Considered" section that the CSE considered and rejected placing the student in a 12:1 special class (Parent Exs. I at pp. 25; L at p. 26).

As the district did not recommend a 12:1 special class and the parent has not alleged any other issues regarding the IHO shifting the burden of proof, this issue is moot and will not be addressed further (see Req. for Rev.). Moreover, the IHO, in her decision, specifically stated that the burden was on the district to show that it provided a FAPE to the student and, further, the IHO provided a brief discussion as to why she determined that the district failed to meet its burden at the impartial hearing (IHO Decision at pp. 7-8).

In any event, I have conducted an impartial and independent review of the entire hearing record and applied the correct burden of proof, which is on the district (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]; see Educ. Law § 4404[1][c]). Additionally, as discussed further below, based on a review of the hearing record I do not agree with the IHO, as there is sufficient information in the hearing record to support finding that the district offered the student a FAPE for the 2022-23 school year.

However, prior to reaching the merits of the district's offer of a FAPE to the student, I would like to quickly address the parent's argument that the IHO erred by ordering the parent to have the student made timely available for updated cognitive and academic testing. After a review of the hearing record, I concur with the parent that such an order was not warranted. Rather, the district is directed to comply with federal and State regulations and conduct an evaluation of the student if the student's needs so warrant, if the parent or the student's teacher requests a reevaluation, or if it has been three years or more since the last evaluation of the student (see 34 CFR 300.303[a]-[b]; 8 NYCRR 200.4[b][4]). Further, given the fact that I am overturning the IHO's FAPE denial determination, there is no need to order additional evaluations of the student as the CSE had sufficient evaluative information to support its recommendation in the December 2022 IEP and, moreover, the district is statutorily obligated to comply with federal and State regulations as they relate to evaluating and reevaluating the student.

## **B. 2022-23 School Year**

I turn now to the district's cross-appeal of the IHO's decision that it failed to offer the student a FAPE for the 2022-23 school year, which includes discussion of the parent's appeal of the IHO's denial of her request for 1:1 health paraprofessional services in the student's IEP.<sup>14</sup>

The IHO determined that the district failed to meet its burden of proof because it did not present any evidence or testimony during the impartial hearing to explain the CSE's decisions or recommendations in the December 2022 IEP.<sup>15</sup> The district alleges that the documents in the hearing record prove that the CSE "carefully considered" the available evaluations to develop the student's program. Further, the district alleges that the parent's only claim regarding the December 2022 IEP was the lack of a recommendation for 1:1 health paraprofessional services and further alleges that because the IHO found 1:1 health paraprofessional services were not needed, the IHO should have found that the December 2022 IEP offered the student a FAPE.<sup>16</sup>

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<sup>14</sup> Although the parties and the IHO used the term paraprofessional throughout this proceeding, the term "paraprofessional" was replaced in State regulation with the term "supplementary school personnel" (see "Supplementary School Personnel Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," VESID Mem. [Aug. 2004], available at <http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf>). Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1[hh]). A teaching assistant may provide "direct instructional services to students" while under the supervision of a certified teacher (8 NYCRR 80-5.6[b], [c]; see also 34 CFR 200.58[a][2][i] [defining paraprofessional as "an individual who provides instructional support"]). Teaching assistants must meet certain licensure and certification requirements (8 NYCRR 80-5.6[c][2]). A "teacher aide" is defined as an individual assigned to "assist teachers" in nonteaching duties, including but not limited to "supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6[b]).

<sup>15</sup> As the December 2022 IEP was the most recent IEP in effect for the 2022-23 school year, this discussion will focus on the December 2022 IEP and not the October 2022 IEP.

<sup>16</sup> The district also asserts that the parent "makes ambiguous arguments about the suitability of the Nest program" in her request for review, which was not an issue raised in her December 2022 due process complaint notice. In the parent's December 2022 due process complaint notice, generally, the parent alleged that the



At the outset I must note that contrary to the IHO's determination, while the district may have rested on the parent's documents and this bare presentation of its case is not encouraged and, in many instances, may result in a finding that the district failed to meet its burden of proof, under the specific circumstances of this case and given the nature of the claims pursued by the parent on appeal, the evidence in the hearing record is sufficient to establish the appropriateness of the December 2022 IEP, as set forth below.<sup>17</sup>

## **1. Student Needs**

In order to determine whether the December 20, 2022 IEP offered the student a FAPE for the 2022-23 school year without a recommendation for 1:1 health paraprofessional services, a discussion of the student's present levels of performance and needs is necessary. According to the December 2022 IEP, more recent testing results of the student's intellectual functioning were not available as the parent did not consent to updated cognitive and academic testing; the most recent testing was from a January 2019 neuropsychological evaluation which indicated that the student's overall cognitive skills were within the low average range (Parent Ex. L at p. 2). Specifically, the student demonstrated average abilities in verbal reasoning and fluid reasoning while his visual spatial, working memory and processing speed skills were assessed to be in the low average range (id.). Further, the IEP indicated that according to the 2019 neuropsychological evaluation, the student's diagnoses included ASD, ADHD-combined presentation, and specific learning disorder with impairment in reading comprehension and written expression (id.).

Regarding academic skills, the December 2022 IEP noted that according to the neuropsychological evaluation, the student's academic skills in reading comprehension, mathematical reasoning and writing were underdeveloped (Parent Ex. L at p. 2). The IEP noted that the fall 2022 MAP reading growth assessment indicated that the student was performing in the sixth percentile (third-grade level) (id. at p. 1). The student's October 2022 iReady math diagnostic assessment indicated that the student was performing on a third-grade level (id.). The student achieved a 2022-23 school year term 1 ELA grade of 80, and a math grade of 70 (id. at p. 2). In addition, the IEP reflected the student's attendance as of December 2022 and noted that

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district failed to offer a FAPE to the student because of its failure to recommend 1:1 health paraprofessional services on the student's October 2022 and December 2022 IEPs (see Parent Ex. A). However, as discussed below, in order to resolve the parties' dispute regarding whether the district offered the student a FAPE, an analysis of the student's programming recommended by the December 2022 CSE and contained in the December 2022 IEP must be conducted to determine if it was appropriate to meet his special education needs absent a recommendation for 1:1 paraprofessional services.

<sup>17</sup> Ideally, if a district intends to rest its case on documentary evidence alone, the district should offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]). Such documentation is present in this case and the evidence is sufficient to identify the student's needs and whether the recommended program and services in the December 2022 IEP appropriately addressed those needs.

the student had 24 absences for the current school year with a 60 percent attendance rate (id. at p. 1).

With respect to ELA, the IEP stated that the student was very respectful and followed class rules and routines, was very quiet and did not really participate unless directed to with a partner or when called on, and he often required prompts to focus and to redirect him to his work if he seemed to be looking around the room (Parent Ex. L at p. 3). According to the IEP, with respect to literacy-based weaknesses, the student struggled with selecting details from a text that portrayed emotions that a character revealed in a story and did not state something in his answer if the question did not specifically ask him to state it (id.). The IEP stated that according to a January 2023 SETSS progress report, the student presented with language processing difficulties which impacted his literacy development as well as his comprehension and that although his decoding skills had greatly improved, he exhibited deficits with synthesizing information, understanding, and applying new vocabulary words, as well as presented with difficulty regarding working memory (id. at p. 4). Further, the IEP noted that the student's attention deficits hindered his ability to comprehend and process reading material, specifically when reading longer texts, and that he did not demonstrate the stamina to attend and focus with ease (id. at pp. 4-5). With regard to writing, the IEP indicated that the student needed to work on revising his written work to make it more engaging and improving organizational structure to include transitional words and phrases (id. at p. 3). The IEP stated that although the student had made improvements in his reading and writing abilities, he continued to present with a significant achievement gap, thus qualifying his continued need for remediation (id. at p. 5).

Regarding math, the December 2022 IEP indicated that the student struggled with word problems and determining what the problem was asking, worked better with straight computational problems, and worked at a slower pace (Parent Ex. L at p. 3). The IEP noted that the student benefited from rule sheets and repetition to help him reinforce the material, the use of a calculator on all assignments that did not measure basic computation, his notes printed for him for math class, preferential seating close to the teacher for redirection and focusing prompts, and having all tests and directions read to him to help him better understand the problems, as well as extended time (id.). The IEP stated that the student would benefit from intensive intervention focused on skills and concepts related to quantitative reasoning and representation, and that instruction that connected understanding of algebraic representation computation and problem-solving skills would strengthen the student's math abilities across domains (id. at p. 4). In addition, the IEP indicated that based on the student's below grade level test results in numbers and operations, algebra and algebraic thinking, measurement and data and geometry, the student would benefit from developing a deeper understanding of the relationship between multiplication and division and applying these concepts to solve word problems, as well as additional practice with measurement and data skills related to time, money, units of length, and bar graphs, and review of comparing attributes (id.). The IEP noted that although the results of the student's math diagnostic exam showed that he was on a third-grade level, with the supports from his teachers he was performing on a fifth-grade level (id.). The IEP stated that even though the student had made improvements in his math abilities, he continued to present with a significant achievement gap, thus qualifying his continued need for remediation (id. at p. 5).

The IEP reflected information from the December 15, 2022 classroom observation, which indicated that the student was observed during science and social studies classes on two separate

days and, overall, the student was quiet and reserved (Parent Ex. L at p. 2). The IEP noted that when instructed as a whole group, the student did not volunteer to answer questions or participate in discussions, that he demonstrated the ability to access classroom material independently, and understood directives and instructions given by the teacher (id.). Further, the December 2022 classroom observation indicated that the student appeared to become relatively fidgety and restless towards the end of the period and, when learning a new topic, the student required additional support from the teacher in a small group to demonstrate understanding (id.).

With respect to social development, the IEP indicated that the student was very respectful, followed class rules and routines, was very quiet and did not tend to participate in class, or talk with other students during group discussions or "turn and talks" (Parent Ex. L at p. 6). Further, the IEP stated that unless called on or directed by the teacher, the student did not independently participate, that he typically did not ask for help when he needed it and benefited from check-ins from the teacher to ensure understanding of a topic as well as to answer any questions he might have had (id.). The IEP noted that the student exhibited off-task and inattentive behavior at times where he would seemingly be looking around the room or fidgeting with items on his desk, and that during these times he benefitted from prompts from the teacher to re-direct him or check-ins to ensure he understood the work presented (id.).

The IEP indicated that with respect to speech-language therapy, the student recently began to share thoughts and ideas more readily within a small group, and with "mild prompting" he expressed when he needed clarification (Parent Ex. L at p. 6). The IEP stated that the student continued to benefit from finding solutions to problems and initiating and maintaining conversations with peers, and that the student initiated and maintained conversations with highly preferred peers more readily (id.). Further, the IEP noted that the student continued to require support in episodic memory for recalling experiences and for applying past experiences to current situations (id.).

The December 2022 IEP indicated that regarding physical development, prior to the student's September 2022 surgery, he was independent in navigating the school building and followed his class schedule (Parent Ex. L at p. 7). During OT, the student worked on improving executive functioning skills and was described as very hard-working when motivated and an active participant when it was a subject of interest (id. at p. 6). The IEP noted that the student required verbal prompts for redirection during class work especially when following multi-step directions and the classwork was unstructured, and that he continued to make improvements regarding attending to non-preferred tasks, initiating tasks in a timely manner consistent with his class, and completing tasks in a timeframe comparable to his peers (id.). The student demonstrated difficulty with organization skills and benefited from verbal prompts to place materials away properly in his folders/binder without ripping and/or folding them (id. at pp. 6-7). The IEP noted that although the student was able to communicate his needs, he required assistance at times to initiate a task and follow tasks through to completion; verbal and visual support was helpful to provide the guidance and reference needed, which included using graphic organizers, checklists, color coding, and modeling (id. at p. 7). The student required continued executive functioning skill development including organization, time management, planning and prioritizing to enable him to initiate and follow through on a posted assignment to completion (id.). In addition, the IEP stated that the student would benefit from developing self-assessment and self-advocacy skills, and the ability to self-reflect to identify his needs and appropriately

self-advocate for assistance in the classroom setting, demonstrated by his ability to indicate to the teacher or other adult by raising his hand or verbalizing his needs (id.).

The December 2022 CSE developed annual goals that targeted the student's ELA and math, speech-language, self-regulation, and academic task completion needs (Parent Ex. L at pp. 10-16).<sup>18</sup> For example, one annual goal targeted reading and determining how a character evolves, and another goal targeted writing and the structuring and organization of a multi-paragraph essay (id. at pp. 10-11). The December 2022 IEP provided math annual goals that targeted solving linear equations, applying the Pythagorean theorem to determine unknown side lengths in right triangles, and solving mathematical and real-world problems given the formulas for volume of cones, cylinders, and spheres (id. at pp. 4, 15-16). The IEP reflected that a speech-language annual goal targeted developing the student's preferred method of using language to formulate connection with peers and advocating for time to problem solve within a small group, while another targeted developing the use of self-advocacy skills during peer interactions (id. at pp. 11-13). The IEP indicated that the OT annual goals targeted the student's self-assessment of needs and appropriate self-advocacy for assistance in the classroom setting; initiation, sequencing, and completion of multi-step academic tasks; and use of previously taught self-regulation strategies and self-monitoring checklists (id. at pp. 13-15).<sup>19</sup>

## **2. December 2022 IEP Supports and Services**

Review of the December 2022 IEP shows that the CSE identified various supports that were beneficial to the student including providing peer support, color coding, breaking tasks down into smaller parts, repeating newly taught concepts, and teaching new topics explicitly in a small group (Parent Ex. L at p. 5). As supports for the student's management needs, the December 2022 CSE recommended repetition of items and information, rephrasing of directions, visuals to guide the student (including checklists, prompts, graphic organizers, rule sheets, rubrics, and teacher models) with understanding and carrying out directives and tasks (id. at p. 7). According to the IEP additional supports for the student included printed classroom notes, preferential seating close to the teacher in the front of the room, small group and 1:1 conferencing when needed, on-task focusing prompts to help maintain attention, movement

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<sup>18</sup> Each annual goal identified criteria (measure to determine if the goal has been achieved), method (how progress will be measured), and a schedule (when progress will be measured) (Parent Ex. L at pp. 10-16). The IEP indicated that reporting progress toward meeting the annual goals to the parent would occur four times per year with report cards (id. at p. 17).

<sup>19</sup> At the time of the December 2022 CSE meeting, the parent expressed concerns about the student's executive functioning delays related to his organization of materials and task completion and that the student's inattention was not being addressed as an annual goal for OT on the IEP (Parent Ex. L at p. 7). The IEP stated that in response to the parent's concerns related to an inattention goal, the CSE explained that the student's inattention in the classroom impacted his planning, task initiation, and completion of multi-step tasks, which were being addressed as an annual goal to improve these areas (id.). According to the IEP, the student's inattention specifically related to his ability to sustain attention and focus did not present as a significant area of concern in the classroom that was not able to be addressed with some redirection and refocusing at times (id.). Additionally, the IEP noted that the student's OT provider could work on developing self-regulation strategies to assist him in sustaining focus and attention and address this as a goal to increase his attention independently (id.).

breaks, and extra time to process information and formulate responses when completing tasks (*id.* at pp. 7-8). The IEP noted that the student was able to function and succeed within his academic environment with his current ICT services in a general education classroom setting, along with speech-language therapy, social development instruction, OT, and SETSS (*id.* at p. 8).<sup>20</sup>

The December 2022 CSE recommended for the student a non-specialized school program that included a general education placement with eight periods per week of ICT services in math, eight periods per week of ICT services in ELA, five periods per week of ICT services in social studies, five periods per week of ICT services in science, two periods per week of SETSS in math, and three periods per week of SETSS in ELA (Parent Ex. L at pp. 17-19). In addition, the CSE recommended that the student receive related services including two 30-minute sessions per week of OT in a group of five, two 30-minute sessions per week of speech-language therapy in a group of six, and one 30-minute session per week of speech-language therapy in a group of three (*id.* at p. 18). The IEP stated that due to the student's difficulty retaining information and demonstrating regression of skills when not reviewed frequently, and demonstrating limited progress in reading and math, the CSE recommended 12-month services consisting of five periods per week of SETSS for math and five periods per week of ELA to reduce substantial regression of new skills (*id.* at pp. 5, 19).<sup>21</sup>

Turning to the parent's request for 1:1 paraprofessional services, the December 2022 IEP noted that the parent requested a reevaluation to include 1:1 paraprofessional services in the student's IEP due to concerns regarding the student's inattention and that the student had recently had foot surgery and received services from a health paraprofessional as part of a section 504 plan to assist him in transitioning throughout the building (Parent Ex. L at p. 2). The parent expressed that this support had been beneficial to the student, and she felt he needed this support to assist him in sustaining focus, attention, and to ensure that he was on task (*id.*).

According to the IEP, the parent expressed concerns regarding the student's lack of progress and felt it was largely attributable to his difficulty sustaining attention and focus within the classroom, and she explained that teacher reports indicated that the student demonstrated difficulty sustaining attention and focus in class and required redirection and refocusing (Parent Ex. L at pp. 5, 6, 26). The IEP indicated that the parent felt that with the support of 1:1 paraprofessional services, the student "would stay on task, complete assignments and have a better understanding because the 1:1 [paraprofessional] would ensure he is focused and attentive" (*id.* at pp. 5, 26).

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<sup>20</sup> According to the December 2022 IEP, the CSE recommended testing accommodations including extended time, on-task focusing prompts, use of calculator, separate location/room, tests read, directions read, breaks, and method of response indicated as "bubbling" or "scantron" (Parent Ex. L at pp. 8, 20-21). The IEP noted that the student required door to door special transportation from the closest safe curb location to school in a minibus because the student needed help with his ability to understand and safely respond to situations and interactions that may arise while travelling (*id.* at p. 23).

<sup>21</sup> The IEP noted that the CSE discussed and offered compensatory services for the student, which the parent declined (Parent Ex. L at pp. 3, 20). In addition, the IEP indicated that the parent accepted small group instruction services for the student in math through the Academic Recovery Service program (*id.* at p. 3).

In response to the parent's concerns, the IEP noted that school staff expressed that although the student required redirection and refocusing at times, his focus and inattention were manageable with the support of two teachers in the classroom (Parent Ex. L at p. 5). According to the IEP, the December 2022 CSE considered other options for the student including a 12:1 special class in a community school as well as 1:1 paraprofessional services (Parent Ex. L at p. 26). The IEP noted that the CSE considered the parent's request for 1:1 health paraprofessional services to assist him in sustaining focus and attention as related to his diagnosis of ADHD, however this support was rejected (*id.*). Further, the IEP indicated that in response to the parent's concerns, the CSE expressed that, although the student did require redirection and refocusing at times, his focus and inattention were manageable with the support of two teachers in the classroom (*id.* at pp. 5, 26). The IEP stated that the CSE felt that the support of 1:1 paraprofessional services would not sufficiently address the concerns of the parent, and instead would hinder the student's independence and isolate him from his peers (*id.*). Additionally, the team brought up concerns related to the student's attendance during the school year and how these absences interfered with his performance, understanding, participation and progress in the classroom (*id.*). Further, the IEP noted that due to the student's slow academic progress with ICT services together with the support of SETSS and related services, a 12:1 special classroom setting was discussed, and the teachers felt that the student's challenges within the classroom were attributed to difficulty understanding material presented when in a large group setting, as they often needed to review material within a smaller group setting or 1:1 with the student (*id.* at p. 26). According to the IEP, the CSE felt that although the student's program offered social supports, those goals could be continued to be addressed through speech-language services (*id.*). The IEP stated that despite the suggestions of the CSE, the parent was not in agreement with school staff and the CSE agreed to continue with the student's current program for the remainder of his eighth grade year with the hopes of more consistent attendance in school and to re-convene once a progress report was received from the SETSS provider to discuss a potential change in program as the student transitioned to high school (*id.*).

When taken in its totality, the December 2022 IEP included supports for the student's management needs, annual goals, SETSS and ICT services, OT, speech-language therapy, and testing accommodations, which addressed the student's identified needs and offered a FAPE for the student for the 2022-23 school year without 1:1 health paraprofessional services. Further, a review of the student's December 2022 IEP shows that the CSE discussed the parent's concerns, which were countered by reports from the student's teachers who indicated that the student's attention and focusing needs were being met in his then-current program (*see* Parent Ex. L at pp. 5, 6, 26).

It appears that the IHO would have preferred that the district defend its IEP in part through "testimony to explain the CSE's decisions and recommendations at the two IEP meetings conducted in 2022" (IHO Decision at p. 8). Additionally, I sympathize with the IHO's concerns that the mere existence of documents in the record related to the IEP process cannot just be "assumed" to demonstrate that an IEP is appropriate (*id.*). However, there is no requirement that the district must meet its burden through its submission of specific categories of evidence and, in this instance, indicated that it would rely on the documents submitted into evidence by the parent. Under the circumstances presented by the underlying due process proceeding and contents of the hearing record, the thoroughness of the December 2022 IEP, including statements of the parent's concerns and the CSE's response, supported by additional evidence utilized by the

December 2022 CSE during its IEP development process, provided sufficient evidentiary support and an adequately detailed explanation of the CSE's decisions and recommendations to find that the district met its burden in proving that it offered the student a FAPE for the 2022-23 school year. Accordingly, since I have determined that the district offered the student a FAPE for the 2022-23 school year, it is unnecessary to address the remaining issues.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the conclusion that the district offered the student a FAPE for the 2022-23 school year, the IHO's determination must be reversed, and the cross-appeal must be sustained. Additionally, having determined that the IHO erred by ordering the parent to make the student available for updated cognitive and academic testing, such order must be reversed, and the appeal sustained to the extent indicated herein.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations above.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO decision, dated April 26, 2023, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2022-23 school year; and

**IT IS FURTHER ORDERED** that the IHO decision, dated April 26, 2023, is modified by reversing that portion of the decision that directed the parent to make the student available for updated cognitive and academic testing.

**Dated:**            **Albany, New York**  
                      **June 21, 2023**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**