



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-117

Application of a STUDENT WITH A DISABILITY, by her 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:

Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioner, by William M. Meyer, 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. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which found that the district offered the student a free and appropriate public education (FAPE) for the 2021-22 school year and dismissed the parent's due process complaint notice with prejudice.¹ The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B];

¹ The student's aunt acted in the capacity of a parent within the meaning of IDEA and its implementing regulations; therefore, she will be referred to as the "parent" throughout this decision (see Parent Ex. E at p. 1; see also 34 CFR 300.519[a][3-4]).

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 parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here.² In September 2021, the parent sought a private neuropsychological evaluation (Parent Ex. G at p. 10; see Parent Ex. B). She subsequently shared the results of the evaluation with the district in October 2021 and requested a more supportive program for the student (Parent Ex. G at p. 10).³ The district determined that further evaluative information was needed, specifically with regard to the student's mathematical abilities, and therefore conducted achievement testing of the student as part of an updated psychoeducational evaluation (see Dist. Ex. 6). The CSE convened on December 1, 2021, to formulate the student's IEP for the remainder of the 2021-22 school year (see generally Dist. Ex. 1). The CSE found the student remained eligible for special education as a student with a learning disability (Dist. Ex. 1 at p. 1). The parent disagreed with the recommendations contained in the December 2021 IEP and stated her concern that the student "'need[ed] more support during the school day in all of her classes'" (Dist. Ex. 1 at p. 17; see generally Parent Ex. A at pp. 1-4). The parent desired an educational placement for the student in a state-approved non-public school, but the district participants at the CSE believed that a placement in a general education classroom with integrated co-teaching (ICT) services, in addition to counseling services, was appropriate to meet the student's unique needs (see Apr. 25, 2023 Tr. p. 38; Parent Ex. A at pp. 1-4; Dist. Ex. 1 at pp. 9-10). As a result of the parties' disagreement, the parent unilaterally placed the student at the Ryken Educational Center at Xaverian High School for the remainder of the 2021-22 school year (see Parent Ex. C). In a due process complaint notice, dated February 27, 2023, the parent alleged that the district failed to offer the student a FAPE for the 2021-22 school year (see Parent Ex. A).

An impartial hearing convened before the Office of Administrative Hearings and Trials (OATH) on April 19, 2023 and concluded on April 25, 2023, after two days of proceedings (Apr. 19, 2023 Tr. pp. 1-12; Apr. 25, 2023 Tr. pp. 1-70). In a decision dated May 11, 2023, the IHO discussed the assessment data, weighed the conflicting viewpoints of the district's personnel and private evaluators and did not find any substantive deficiency in the IEP and, therefore, he determined that the district offered the student a free appropriate public education (FAPE) for the 2021-22 school year (IHO Decision at p. 6). As a result, the IHO dismissed the parent's February 2023 due process complaint notice with prejudice (id.).

² Discussion of additional facts related to the disposition of the parties' disputes are set forth below as necessary.

³ The parent stated that she was a special education teacher and had worked for the district for 14 years (April 25, 2023 Tr. p. 50; Parent Ex. G at p. 1). She indicated that she worked in 12:1 and 12:1+1 special classes and also in ICT settings (April 25, 2023 Tr. pp. 50-51). The parent reported that following a meeting with the school psychologist in May 2021 she became "very concerned for [the student's] educational path (Parent Ex. G at p. 9). She indicated that she asked for access to the student's prior IEPs and upon review was "shocked at the inconsistencies" in the student's records (id.). The parent explained that she sought a private neuropsychological evaluation to get a better understanding of the student as a learner (id.).

IV. Appeal for State-Level Review

The following issues presented on appeal must be resolved:⁴

1. whether the IHO erred in determining that the student's placement in a general education classroom with ICT services, augmented by counseling services, as recommended in the December 2021 IEP, was appropriate to address the student's needs; and
2. whether the IHO erred in determining that the annual goals and management needs listed in the December 2021 IEP were appropriate to address the student's needs.

⁴ The IHO also determined that the evaluative information regarding the student that was before the December 2021 CSE was sufficient to develop an appropriate IEP (IHO Decision at pp. 7-9). In his decision, the IHO highlighted the evaluative information used by the December 2021 CSE to develop an IEP for the 2020-21 school year, as well as the testimony of the school psychologist who explained how the December 2021 CSE utilized the evaluative information available to it to create the student's IEP (*id.*). The IHO determined that the December 2021 CSE relied on a September 2021 neuropsychological evaluation and a November 2021 psychological update which included a vocational interview, a classroom observation, and a review of the student's records and teacher reports (*id.* at pp. 6-7). The parent's argument that the evaluations demonstrated that the student needed more support than what was provided for in the December 2021 IEP is rejected. In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). A CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight or adopt their recommendations (*Mr. P. v. W. Hartford Bd. of Educ.*, 885 F.3d 735, 753 [2d Cir. 2018], citing *T.S. v. Ridgefield Bd. of Educ.*, 10 F.3d 87, 89-90 [2d Cir. 1993]; *Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], *aff'd*, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see *Michael P. v. Dep't of Educ., State of Hawaii*, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 805-06 [8th Cir. 2011]; *Evans v. Dist. No. 17*, 841 F.2d 824, 830 [8th Cir. 1988]; *James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102*, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). A comparison of the September 2021 neuropsychological evaluation to the district's November 2021 psychological update show that both evaluators agreed that the student had a deficit in her math skills (*compare* Parent Ex. B at pp. 1, 8, 10, 12, *with* Dist. Ex. 6 at pp. 2-3). The district school psychologist explained that she performed updated testing of the student after she received a copy of the September 2021 neuropsychological evaluation because it did not provide a full scale IQ score and she wanted to do additional math testing (Apr. 25, 2023 Tr. pp. 11, 21-23). The December 2021 CSE did not adopt the recommendations from the September 2021 neuropsychological evaluation, but the CSE did review the evaluation and included the results in the December 2021 IEP (see Dist. Exs. 1 at pp. 1-5; 7 at ¶ 8). On my independent review, I find that that the evidence in the hearing record supports the IHO's thorough and carefully reasoned finding that the CSE had sufficient evaluative information to develop an IEP for the student (see *generally* Apr. 19, 2023 Tr. pp. 1-12; Apr. 25, 2023 Tr. pp. 1-70; Parent Exs. A-G; Dist. Exs. 1-7), and, accordingly, will adopt the IHO's finding on this issue and will not address it herein (see *generally* IHO Decision at pp. 6-10).

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]).⁵

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

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

⁵ 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).

VI. Discussion

A. Student's Needs

Although the student's needs are not in dispute, a discussion thereof provides context for the substantive issues to be resolved on this appeal. According to the September 2021 neuropsychological evaluation, the student was described as bright, with strengths in her verbal and reading comprehension skills, and deficits in her visual-spatial skills, attention, and executive functioning skills (Parent Ex. B at p. 11). The evaluating neuropsychologist offered the following diagnoses: attention deficit hyperactivity disorder (ADHD), specific learning disorder with impairment in written expression, and specific learning disorder with impairment in mathematics (id.).⁶

Administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) yielded a verbal comprehension score of 108 (70th percentile) which fell within the higher end of the average range, and a visual spatial skills score of 81 (10th percentile), a fluid reasoning skills score of 76 (5th percentile), an auditory working memory skills score of 81 (10th percentile), and a visual processing speed score of 77 (6th percentile), all of which were within the below average range (Parent Ex. B at p. 7).^{7, 8}

With respect to executive functioning abilities, the evaluating neuropsychologist noted that the student had difficulties sustaining attention to and completing challenging academic tasks (Parent Ex. B at pp. 6, 8-9, 11).

In terms of academics, the September 2021 neuropsychological evaluation indicated that the student's reading rate was average and her reading comprehension and reading fluency were in the high average range (Parent Ex. B at pp. 8, 17). In addition, the student's spelling skills were in the "higher end" of the average range (id.). The neuropsychologist reported that on a writing task the student produced a narrative that was not related to the given topic and her "ideas were

⁶ The student had previously received a diagnosis of ADHD in November 2014, (Parent Ex. B at p. 1).

⁷ According to the evaluating neuropsychologist, due to the significant discrepancies between domains, a full scale IQ was not a reliable indicator of the overall cognitive ability of the student (Parent Ex. B at p. 7).

⁸ The neuropsychologist included the results of May 2015 intelligence testing as part of the background history for the September 2021 neuropsychological evaluation (Parent Ex. B at p. 3). She indicated that according to a May 2015 psychoeducational evaluation, administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ of 89 (23rd percentile) within the low average range; a verbal comprehension score of 104 (61st percentile) and perceptual reasoning score of 96 (39th percentile), both within the average range; a working memory score of 88 (21st percentile) within the low average range; and a processing speed score of 70 (2nd percentile) within the below average range (Parent Ex. B at p. 3). The neuropsychologist also included the results of May 2015 achievement testing, in which administration of the Woodcock Johnson III Tests of Achievement Test (WJ III ACH) indicated the student's overall academic skills were in the average range (Parent Ex. B at p. 3). However, with respect to mathematics, the neuropsychologist reported that the student was visibly frustrated during the math calculation subtest and told the evaluator that she "hate[d] math" (Parent Ex. B at p. 3). The student scored in the "below-average" range on the math fluency subtest (Parent Ex. B at p. 3). The neuropsychologist indicated that according to a report by the student's teacher at the time, the student "usually completed class assignments" and "[s]he was motivated to learn and generalized learning to new situations" (Parent Ex. B at p. 3).

tangential and her analysis was not clear or cohesive" (id.). The neuropsychologist reported that the student's computation skills were in the "well below average range" and the student had difficulty retrieving basic math facts such as borrowing and one-digit multiplication and division (id.). With regard to the student's psychological functioning, the neuropsychologist indicated that the student was happy but also very sensitive and could be prone to experiencing anxiety (id. at p. 11).

The district psychological evaluation, conducted in November 2021, included the administration of mathematics subtests of the Wechsler Individual Achievement Test – Fourth Edition (WIAT-IV). The student's performance on the test yielded scores in the below average range on the problems solving (standard score 84) and numerical operations (standard score 74) subtests as well as the mathematics composite (standard score 77) (Dist. Ex. 6 at p. 2). As part of the psychological evaluation, the evaluator conducted an observation of the student in her "ICT Algebra class" (id.). She noted that the student copied from the white board and completed required tasks, similar to her classmates (id.). The evaluator reported that the student did not raise her hand to answer questions or share her answers, which was similar to several peers (id.). The student did not engage in disruptive or idiosyncratic behaviors but at times had her head on her hand (id. at pp. 2-3). The evaluator noted that the teachers appeared to check in with the student more than other students and further noted that according to the student's teachers she needed attention from them because she did not ask for help (id. at p. 3). The evaluator gleaned additional information from the teachers with regard to the student's strengths and weaknesses (id.). With regard to strengths the teachers reported that the student was "very sweet and respectful," got along with her classmates, asked questions when she had them, and provided "great insight in conversation" (id.). With regard to concerns, the teachers reported that the student needed prompting to write responses that were thorough, and her writing lacked clarity, and she "sometimes seem[ed] a bit bored or distracted" and was slow to complete assignments (id.). According to the evaluator, the student's teachers rated the student's preparation for class, ability to follow directions, ability to work in a group, ability to follow class rules, participation in class discussions, and cooperation with peers as average (id.). The teachers rated the student's attendance, ability to complete tasks, ability to work independently, and ability to concentrate and stay on task as average and below average (id.). The evaluator concluded that the student's math skills were within the "below average" range as compared to her peers (id.).

The December 2021 IEP reflected the results of the September 2021 private neuropsychological evaluation and November 2021 district psychoeducational evaluation, as well as provided additional information regarding the student's needs (see Dist. Ex. 1 at pp. 1-5).⁹ With respect to reading, the IEP indicated that "as determined by a review of records, teacher reports, observations and anecdotal information" the student's reading abilities were "proficient in meeting grade level standards" (Dist. Ex. 1 at p. 2). The IEP noted the concerns of the student's teachers in terms of her ability to write an argumentative essay with a clear claim and relevant textual evidence and her ability to solve a system of equations graphically and algebraically (id. at pp. 2-

⁹ The December 2021 IEP reflected the scores from intelligence testing conducted by the private neuropsychologist but cites to a different edition of the test than the one administered by the neuropsychologist and reflects different qualitative descriptors of the student's scores (compare Parent Ex. B at p. 7, with Dist. Ex. 1 at pp. 1, 2).

3). The December 2021 IEP indicated that the student's instructional/functional level for both reading and math was eighth grade (*id.* at pp. 15-16).

Regarding social/emotional development, the IEP noted that the student had difficulty with low self-esteem and, according to the parent, she demonstrated withdrawal behavior (Dist. Ex. 1 at p. 4; see Parent Ex. B at pp. 5, 9).¹⁰

B. ICT Services

Turning to the first issue on appeal, the parent argues that the IHO erred by finding that the December 2021 CSE's recommendation of ICT services provided in a general education classroom was appropriate and offered the student a FAPE for the 2021-22 school year. With respect to development of the December 2021 IEP, the hearing record reflects that a CSE convened on December 1, 2021, to conduct a reevaluation and annual review and to develop the student's IEP for the 10-month 2021-22 school year, with a projected implementation date of December 2, 2021 (Dist. Exs. 1, 3). Finding the student eligible for special education and related services as a student with a learning disability, the CSE recommended integrated coteaching (ICT) services in each of the following subjects: English language arts, math, social studies, and science and one 30-minute session of counseling services per week in a group (5:1) (Dist. Ex. 1 at pp. 1, 9-11, 14).

The district school psychologist testified that the neuropsychological evaluation did not provide a full scale IQ score for the student and stated that while one index score would reveal an area of difficulty for the student, it would not "necessarily necessitate a student to be in a smaller class...you have to look at the whole picture and the other places where she had strengths and weaknesses" (Apr. 25, 2023 Tr. p. 21).¹¹ In addition, the district school psychologist testified that

¹⁰ In her September 2021 report, the neuropsychologist indicated that the student would benefit from consultation with a psychiatrist for medication management of her attentional symptoms and individual therapy to address her social/emotional needs (Parent Ex. B at p. 15).

¹¹ In reaching his decision, the IHO found the district school psychologist's testimony to be credible and gave it considerable weight throughout his decision (see IHO Decision at pp. 7-9, 11). According to the IHO, the district school psychologist credibly testified that in her clinical opinion the ICT services with counseling as a related service in addition to the annual goals recommended for the student in her December 2021 IEP were appropriate and reasonably calculated to enable the student to meet her educational goals (IHO Decision at p. 11). The parent argues that the district school psychologist's affidavit testimony that the student's learning difficulties began during the COVID-19 pandemic and remote learning is not credible and that non-testimonial evidence in the record shows the student's struggles began approximately in May 2015 when the student received her first IEP (Req. for. Rev. at pp. 5-6; see generally Parent Ex. B at p. 1; Dist. Ex. 7 at ¶ 9). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). A review of the district school psychologist's affidavit indicates that the school psychologist was reiterating facts she gleaned from her independent review of the evaluative data of the student to prepare for the December 2021 CSE meeting (see Dist. Ex. 7 ¶¶ 8-9). According to the September 2021 neuropsychological evaluation, "[the student] started high school in September 2020 remotely due to the COVID-19 pandemic...[i]n high school, [the student]'s struggles increased significantly." (Parent Ex. B at p. 1). However, other non-testimonial evidence in the hearing record also shows

although the student received a visual spatial index score of 81, reflecting the 10th percentile rank, such a score was "still only one standard deviation below the mean, so that's not really a very significant cognitive deficit" in comparison to same age peers but she acknowledged that it was in the below average range (Apr. 25, 2023 Tr. pp. 21-22). The parent indicated her direct testimony by affidavit that she understood the neuropsychologist's statement that the student "require[d] placement in a small (i.e., student-to-teacher-ratio), structured and supportive classroom within a small school environment" to mean that the student needed a smaller class size to address her needs (Parent Ex. G at p. 10). The testified that she advised the CSE that socially the student was regressing and avoiding social interactions, whereas she used to be carefree (*id.* at pp. 11, 13).

With regard to the student's math needs, the district school psychologist testified that student's WIAT-IV assessment score was comparable to a placement in an ICT setting and even though the scores were low, the scores were not significant enough to require a smaller class setting (Apr. 25, 2023 Tr. pp. 24-25). The district school psychologist opined that the student's math scores regarding calculations and numerical operations obtained during the psychological update did not "by themselves" indicate that the student "might [have] need[ed] a more supportive setting" (Apr. 25, 2023 Tr. p. 30). According to the district school psychologist, during her classroom observation of the student in her ICT math class, she noted that the teacher had observed that the student "sometimes didn't ask for help" during math class, but since the student had been attending school again, "she had done pretty well on a more recent quiz given" in her math class (Apr. 25, 2023, Tr. p. 26). In addition, the district school psychologist stated that the student's teacher noted that math was something that was difficult for her, and that the teacher would check with the student for understanding during class (Apr. 25, 2023, Tr. pp. 26-28). In addition, the district school psychologist testified that the student's special education math teacher present at the December 2021 CSE meeting stated during the meeting that "he also felt that the ICT setting was appropriate for her" and that she recalled that none of the student's teachers that she received reports from raised concerns to her that the ICT setting was inappropriate for the student or that she needed a more restrictive setting, and that the teacher reports were included in the student's IEP (Apr. 25, 2023 Tr. 29). The district school psychologist further opined that although the student was sometimes hesitant to attempt math tasks, she still felt that the recommendation for ICT services for the student's main subjects was appropriate (Apr. 25, 2023 Tr. p. 38).

The district school psychologist testified that the student's family members were not in agreement with the recommendation for ICT services during the December 2021 CSE meeting (Apr. 25, 2023 Tr. p. 29; *see* Dist. Ex. 1 at pp. 4, 18). The parent testified that she explained to the

that while the student had increased educational struggles while attending a remote program during the COVID-19 pandemic, she started to make progress again once she began in-person learnings (*see generally* Dist. Ex. 6 at p. 2). According to the November 2021 psychoeducational update, the student self-reported that in-person school was "way better" and that she was "doing well" (Dist. Ex. 6 at p. 2). As such, contrary to the parent's argument, the non-testimonial evidence in the hearing record does not justify a contrary conclusion from the one drawn by the IHO. To the extent that the parent argues that the student was not faring well in the district long before the onset of the pandemic, the parent does not point to any evidence in the hearing record to support this viewpoint. If anything, the evidence in the hearing record shows that the student made some progress in her math and reading skills during her time in a district program, albeit, not at the rate that the parent desired (*see generally* Parent Exs. B at pp. 3-4; G at pp. 4-5). Moreover, it was reported in the student's December 2021 IEP that she had earned approximately 10 credits towards graduation (Dist. Exs. 1 at pp. 1-2, 6; 6 at p. 1). Based on the foregoing, there is no reason to disturb the IHO's credibility findings.

CSE that the student's educational needs were not being met in her then-current setting (April 25, 2023 Tr. pp. 51-53; Parent Ex. G at p. 11). The parent reported that the student's English teacher agreed with her but the district school psychologist/representative disagreed (April 25, 2023 Tr. p. 50; Parent Ex. G. at p. 12; see Dist. Ex. 7 at p. 1). According to the parent's direct testimony by affidavit, she asked the district to consider tabling the student's CSE meeting and reconvening the meeting to speak with the evaluator who had performed the student's testing but that her request was declined (Parent Ex. G at p. 12). The district school psychologist testified the December 2021 CSE considered a special class, among other placements, for the student but felt that it would be too restrictive for the student at that time (Apr. 25, 2023 Tr. p. 28; see Dist. Ex. 1 at p. 17). Specifically, in her testimony by affidavit, the district school psychologist reported that the student "did not demonstrate cognitive or academic or social/emotional deficits that were significant enough/far enough below expectations for a student her age and grade to require a small, structured instructional setting such as [a] Special Class" (Dist. Ex. 7 ¶ 11).

Further, the district school psychologist opined that any difficulties the student encountered in remote learning may have impacted her standardized testing scores on the November 2021 psychological update evaluation and the September 2021 neuropsychological evaluation but any difficulties she encountered in math would have been addressed in the ICT setting (Apr. 25, 2023 Tr. p. 32).¹² The district school psychologist stated that, during the 2021-22 school year, the district offered parents additional supports and services to help students who may have had, "some academic deficits due to remote learning," but she did not recall if that was in place yet at the time of the December 2021 CSE (Apr. 25, 2023 Tr. pp. 31-32).

According to the district school psychologist's testimony and the other options considered section of the IEP, with respect to the student's social emotional needs, the CSE considered the neuropsychological evaluation, the parent's concerns for the student's withdrawal behavior, and a self-report by the student (Apr. 25, 2023 Tr. pp. 36-37). In addition, the IEP indicated, and the district school psychologist stated that the student had been mandated for counseling at the time of the CSE meeting even though the student had indicated she no longer wanted counseling (Apr. 25, 2023 Tr. p. 37; Dist. Ex. 1 at p. 17). However, district staff and the parent felt that the student would benefit from counseling as she was returning to in-person school (Apr. 25, 2023 Tr. p. 37). The district school psychologist opined that the ICT services recommendation in addition to counseling were appropriate to address the student's needs (Apr. 25, 2023 Tr. pp. 37-38).

The district school psychologist clarified that reconvening the CSE to include the parent's advocate was an option made available to the parent if desired, but the CSE did not reconvene as the parent never contacted the district about a possible reconvene of the CSE (Apr. 25, 2023 Tr. pp. 38-39). Consistent with the IEP, the district school psychologist testified that the student's family members at the December 2021 CSE made her aware for the first time that they were looking to possibly defer to the central based support team (CBST) for a non-public school placement for the student; further, that notion was considered during the CSE but rejected at that time (Apr. 25, 2023 Tr. p. 34; see Dist. Ex. 1 at p. 18). The district school psychologist testified that the CSE generally recommend a deferment to the CBST for a student with significant

¹² A level one vocational interview, conducted on November 23, 2021, indicated that according to the student math was her "go to" for the subject she liked the least but that she had been "enjoying Math because [she was] actually learning stuff" (Dist. Ex. 4 at p. 1).

emotional difficulties and that at the time of the December 2021 CSE, the student's emotional needs did not support a recommendation for a therapeutic setting (Apr. 25, 2023 Tr. pp. 34-35).

The IEP indicated that other options considered regarding the student's placement for the 2021-22 school year included general education, a 15:1 special class, a New York State Education Department approved nonpublic school, and a possibility to reconvene the CSE to include an advocate (if requested by the parent as the advocate was unavailable at the time of the CSE meeting) (Dist. Ex. 1 at p. 17; Apr. 25, 2023 Tr. p. 39). Specifically, within the reasons for rejection section of the IEP, the IEP stated that the CSE determined that the student's academic needs could be met in an ICT class placement (Dist. Ex. 1 at p. 17). The district school psychologist testified that the student's scores in math were higher than a student who would be recommended for a 15:1 special class in math (Apr. 25, 2023 Tr. pp. 33-34). Additionally, the district school psychologist testified that special education teacher support services (SETSS) were not considered by the CSE because at the student's assigned public school location SETSS and ICT services provided a similar level of additional support to a student and the CSE determined that the student needed the additional support in the classroom in the form of ICT services, rather than outside the classroom in the form of SETSS (Apr. 25, 2023 Tr. pp. 32-33).

Within the academic achievement, functional performance, and learning characteristics section of the IEP, the parent's concerns were stated including her request for a reevaluation and concerns regarding the student's "class size, classification and goals" (Dist. Ex. 1 at p. 2). According to the IEP, at the December 2021 CSE meeting, the CSE found that the student remained eligible for special education programs and/or services and no changes were made to her mandated programs and/or services (*id.*).

Based upon the foregoing, the hearing record supports the IHO's finding that the recommended ICT services along with counseling were reasonably calculated to enable the student to receive educational benefits in the least restrictive environment and afford her the opportunity to make appropriate progress in light of her circumstances for the 2021-22 school year.

C. Annual Goals and Management Needs

Turning to the parent's claim that the IHO erroneously found the annual goals and management needs recommended by the December 2021 CSE to be appropriate for the student, , it is well settled that an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; *see* 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

However, even where deficiencies are identified in the annual goals contained in an IEP, inadequate goals in and of themselves are often unlikely to rise to the level of a denial of FAPE. Courts have explained that an IEP need not identify annual goals as the only vehicle for addressing

each and every need in order to conclude that the IEP offered the student a FAPE (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]). In addition, courts generally have been reluctant to find a denial of a FAPE on the basis of an IEP failing to sufficiently specify how a student's progress toward his or her annual goals will be measured when the goals address the student's areas of need (D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *10-*11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], *aff'd*, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). Relatedly, the carryover of annual goals from a student's IEP in the prior school year to the next school year's IEP has been found to be appropriate "[w]here a student's needs and objectives remain substantially the same; '[i]t is especially sensible that [an IEP] would reflect continuity with [a student's] needs and objectives as of [previous years,]'" (P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 413-15 [S.D.N.Y. 2017], quoting L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *11 [S.D.N.Y. Sept. 27, 2016]; see M.B. v. City Sch. Dist. of New Rochelle, 2018 WL 1609266, at *15 [S.D.N.Y. Mar. 29, 2018] [finding that, despite "some carry-over" between goals for the years at issue, "each of the disputed IEPs contained a number of new goals and objectives that appropriately reflected [the student's] progress and updated evaluative information"]).

In this matter, the IHO cited to the affidavit testimony of the district school psychologist in determining that the December 2021 CSE discussed the student's various strengths and weaknesses and that it used sufficient evaluative data to construct the student's annual goals (IHO Decision at p. 8; see generally Dist. Ex. 7 at ¶ 16). Additionally, the IHO determined that the CSE recommended specific measurable annual goals that were designed to meet to the student's needs and enable her to make progress in the general education program with ICT services (IHO Decision at p. 10).

The December 2021 IEP includes three annual goals designed to address the student's identified needs in the areas of math, English language arts (ELA), and social/emotional skills (Dist. Ex. 1 at pp. 7-9).^{13, 14} Specifically, in math, the student's annual goal targeted her ability to

¹³ To create the ELA, math, and social/emotional goals, the December 2021 CSE considered: a June 2, 2015 psychoeducational assessment; September 14, 2021 neuropsychological assessment obtained by the parent; a November 5, 2021 classroom observation; a November 23, 2021 psychological update; and a November 23, 2021 level one vocational assessment (Dist. Exs. 3 at pp. 1-2; 7 at ¶ 16). The hearing record did not contain progress reports from the district or previous IEPs; however, the teacher reports were memorialized in the present levels of performance in the December 2021 IEP (see Parent Exs. A-G; Dist. Exs. 1-7; Apr. 19, 2023 Tr. pp. 1-12; Apr. 25, 2023 Tr. pp. 1-70).

¹⁴ In September 2021, the parent privately obtained a neuropsychological evaluation of the student (Parent Ex. B). Following administration of a variety of cognitive, language, visual motor, academic, and social/emotional assessments, the evaluator concluded that the student met criteria for diagnoses of a specific learning disorder with impairment in mathematics and written expression, and attention deficit hyperactivity disorder, inattentive presentation (ADHD) (see Parent Ex. B at p. 11). Review of the September 2021 neuropsychological evaluation revealed that the neuropsychologist noted that a 2015 psychoeducational evaluation indicated that the student received some higher scores than on the September 2021 neuropsychological evaluation; however, the neuropsychologist stated "[i]t is important to highlight that the current lower normatively based scores [did] not reflect a true decline from [the student's] prior level of functioning... [and] [r]ather they represent[ed] a downward drift in standardized scores as her skills [were] developing along a shallower trajectory in comparison to her age-

solve a system of equations both graphically and algebraically (Dist. Ex. 1 at p. 8). The IEP reflected an annual ELA goal for writing which focused on composing an argumentative essay with a clear claim and relevant textual evidence with the support of a graphic organizer and annotating techniques (Dist. Ex. 1 at p. 8).¹⁵ To address the student's social/emotional needs, the IEP revealed an annual goal which stated that the student would "demonstrate increased positive feelings of self-esteem by naming three positive personal characteristics about h[er]self and listing three positive accomplishments within the past week" (Dist. Ex. 1 at p. 7). The student's IEP additionally reflected that the student was working on a transitional goal regarding her interest in zoology (see Dist. Ex. 1 at pp. 12-13). A review of the annual goals reveals that they included the required evaluative criteria, evaluations procedures, and schedules to be used to measure progress (see Dist. Ex. 1 at pp. 7-9).

The parent's argument that the IHO should have found that the annual goals were inappropriate is focused primarily on the student's math annual goal. The parent contends it is insufficient because the CSE did not consider that the student was found to be at the first percentile in math calculations and the district found her to be below average in numerical operations, math problem solving, and in mathematics composite, with a standard score of 77 (see Req. for Rev. at p. 9; Dist. Ex. 6 at p. 2). There is scant documentary evidence in the hearing record to support the parent's argument. Additionally, the parent has not cited to evidence to support her argument that the goals were copied from an IEP of a male student (Req. for Rev. at p. 9). Although one may agree with the parent that the math goal was broad, when considered in combination with the supports recommended for the student including math ICT services, the math annual goal generally addressed the student's math needs as described in her present levels of performance. Specifically, the annual goal created in math was for the student to be able to solve a system of equations both graphically and algebraically (Dist. Ex. 1 at p. 8). The IEP reflected that the student's special education teacher reported his concern with the student's ability to solve a system of mathematical equations both graphically and algebraically (Dist. Ex. 1 at p. 3). According to the district school psychologist, the student's special education math teacher, who was a participant in the December 2021 CSE, agreed that the general education classroom with ICT services was appropriate to meet the student's math needs (Apr. 25, 2023 Tr. p. 29; see Dist. Ex. 2). As self-reported by the student in her November 2021 vocational interview, since her return to in-person schooling in mid-October 2021, the student had been enjoying math class because she was "actual[ly] learning stuff" (Dist. Exs. 4 at p. 1; 6 at p. 2). Accordingly, while the CSE could have written a more detailed and particularized math goal, I decline to find that any flaw would alter the outcome of this case because when assessed within the context of the overall supports and services recommended for the student in the December 2021 IEP, the substance of the math goal alone is insufficient to render the IEP inappropriate for the student.

matched peers" (Parent Ex. B at p. 9). The evaluator opined that with appropriate support, services, and accommodations, the student, "ha[d] been able to make academic progress and work through her deficits" (id. at p. 11).

¹⁵ While the IEP and annual goals did not reflect the neuropsychologist's recommendations that the student type, access prior knowledge of a topic and plan her thoughts on paper or make an outline that organized her ideas, the writing goal included the use of graphic organizers and annotating techniques (compare Parent Ex. B at p. 13, with Dist. Ex. 1 at p. 8).

The parent also argues that the IHO erred by finding the management needs included in the December 2021 IEP were appropriate for the student. Specifically, the parent argues that the IEP lacked management needs addressing the student's "processing speed and working memory deficits; her struggles with executive functioning; her difficulties with visual-spatial processing; memory overload; her need for pre-teaching, review, repetition, and practice; her need for visual, auditory, and organizational tools and many of the other management needs identified in the neuropsychological report" (Req. for Rev. at p. 9).

Management needs are defined by State regulations as "the nature of and degree to which environmental modifications and human material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social and physical development (8 NYCRR 200.1[ww][3][i][d]).

Here, the management needs in the December 2021 IEP consisted of "[p]referential seating; [o]n task focusing prompts; [and] [t]he related service of [c]ounseling" (Dist. Ex. 1 at p. 5). The IEP also recommended testing accommodations for the student consisting of extended time, on task focusing prompts and preferential seating (*id.* at p. 10). While the parent may have preferred an additional suite of management needs which she believed were indicated by the neuropsychological report, the hearing record, including the student's undisputed needs as reflected in the IEP, does not support a finding that the management needs recommended by the CSE were so inadequate as to deny the student a FAPE.

As a final note, a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year courts have been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]; N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at *9 [D.D.C. July 30, 2021]; James D. v. Bd. of Educ. of Aptakisis-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

In this case, as it relates to the student's progress, and the parent's claims regarding the inappropriateness of the ICT services, goals and management needs recommended for the student by the December 2021 CSE, the parent reported that the student "regressed so much and was lost in high school" and that "she did not want to go to school, had no friends, and was full of self-doubt" (Parent Ex. G at p. 13). According to the neuropsychologist, the parent reported that the student had mild difficulty with withdrawal, but the student herself "did not endorse any scale on the BASC- 3"(Parent Ex. B at p. 9). The school psychologist who evaluated the student indicated that during testing the student's confidence appeared to wane as math tasks increased in difficulty (Dist. Ex. 6 at p 2).

While the student's teacher reported that the student did not ask for help, there is no evidence that the student withdrew from teachers, classmates or activities (Dist. Ex. 6 at p. 3). The student's teachers reported that she got along well with her classmates and rated her as average with regard to ability to work in a group, participate in class discussions and cooperative with peers (Dist. Ex. 6 at p. 3.). In addition, the classroom observation report indicated that the student acted much the same as her peers (Dist. Ex. 6 at pp. 2-3).

The evidence does not support the parent's statement that the student experienced regression. The neuropsychologist reported in his September 2021 neuropsychological evaluation that the student had been able to make academic progress and work through her deficits with the support, services and accommodations that have been provided to her in a general education classroom with ICT services (Parent Ex. B at p. 11). Moreover, it was reported in the student's December 2021 IEP that she had earned approximately 10 credits towards graduation (Dist. Exs. 1 at pp. 1-2, 6; 6 at p. 1).¹⁶ There is no evidence in the hearing record to contradict that the student had made progress in a general education classroom with ICT services (see Parent Exs. A-G; Dist. Exs. 1-7; Apr. 19, 2023 Tr. pp. 1-12; Apr. 25, 2023 Tr. pp. 1-70). Moreover, even if the undersigned was persuaded by the parent's argument that the math annual goal was lacking in specificity or the management needs were similarly limited, those aspects of the IEP in and of themselves would not rise to the level of a denial of FAPE for the 2021-22 school year when the IEP for the student is viewed as a whole (Karl v. Bd. of Educ. of Geneseo Cent. Sch. Dist., 736 F.2d 873, 877 [2d Cir. 1984]). I can understand the parent's desire that the student make even more educational gains than she has, particularly in light of her relative weaknesses in math, and

¹⁶ The evidence in the hearing record contains some inconsistency with respect to whether the student met the standard promotional criteria to advance to the next grade from her ninth-grade year (2020-21) to her tenth grade year (2021-22). According to the parent, the district recommended a modified criteria for promotion for the student up and until her eighth-grade year (2019-20) (Parent Ex. G at pp. 5-6). For the student's ninth grade year (2020-21) she was held to the standard promotional criteria (id. at p. 7). The parent asserted that the student did not earn enough credits to pass the ninth grade and that she was going to repeat ninth grade during the 2021-22 school year (see Parent Ex. G at p. 8), however, the district reported that the student earned approximately ten credits toward graduation during the 2020-21 school year and according to the September 2021 neuropsychological evaluation the student earned approximately five credits towards graduation during the 2020-21 school year (Parent Ex. B at p. 5; Dist. Ex. 1 at pp. 1-2, 6). According to the affidavit testimony of the private school psychologist, in January 2022 the student transferred to the Ryken Educational Center as a freshman because she was "left back" (Parent Ex. F at p. 4). The IHO did not resolve these inconsistencies during the impartial hearing or within his decision (see generally Apr. 19, 2023 Tr. pp. 1-12; Apr. 25, 2023 Tr. pp. 1-70; IHO Decision at pp. 1-15). Despite these inconsistencies, I find no adequate basis to overturn the IHO's findings that the annual goals and management needs listed in the student's December 2021 IEP were appropriate to address the student's current needs at the time the IEP was formulated.

that a more restrictive or intensive private setting could potentially provide that experience. However, the IDEA requires special education programming that aims for something more modest and only provides for an appropriate education in the least restrictive environment and I am not convinced that the district failed to offer that here.

Accordingly, the parent has not presented a sufficient basis for departing from the IHO's determinations in this matter and based on the evidence in the hearing record, the December 2021 CSE recommended appropriate annual goals and management needs sufficient to meet the student's needs within the context of the ICT services and counseling also recommended within the December 2021 IEP.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's conclusion that the district offered the student a FAPE for the 2021-22 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Xaverian was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parent's request for relief.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
July 19, 2023**

**JUSTYN P. BATES
STATE REVIEW OFFICER**