



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

## **The State Education Department**

**State Review Officer**

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**No. 23-250**

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

### **Appearances:**

Law Offices of Regina Skyer and Assoc., LLP, attorneys for petitioners, by Jaime Chlupsa, Esq. and Linda A. Goldman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Michael Gindi, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their daughter for the 2022-23 school year was appropriate and denied their request to be reimbursed for their daughter's tuition costs at the Windward School (Windward) for the 2022-23 school year. The appeal must be dismissed.

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

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[j]).

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. Briefly, the student has received diagnoses of attention deficit hyperactivity disorder (ADHD), specific learning disorder with impairment in both reading and mathematics, a language disorder, and a speech sound disorder (see District Exs. 8 at p. 1; 9 at p. 14). According to the parents, the student began receiving speech-language therapy through the Early Intervention Program, began attending a general education parochial school in kindergarten, and was found eligible for special education

services consisting of speech-language therapy and special education teacher support services (SETSS) beginning in first grade (2018-19 school year) (Parent Ex. J ¶¶ 3, 4). An updated abbreviated private psychoeducational evaluation was conducted in March 2021, which confirmed the student's previous diagnoses and found the student had "overall superior/high average cognitive abilities [that were] contrasted by her significant and persistent learning difficulties that [were] consistent with reading, math and attention deficit/hyperactivity disorders that reflect[ed] persistent challenges in her academic achievement" (Dist. Ex. 8 at p. 7). The student began attending Windward in September 2021 for fourth grade (2021-22 school year) (Parent Ex. J ¶ 9).<sup>1</sup>

The CSE convened on May 23, 2022; finding the student eligible for special education as a student with a speech or language impairment, the CSE developed an IEP for the student for the 2022-23 school year (see generally Dist. Ex. 4).<sup>2</sup> In a letter dated August 22, 2022, the parents notified the district that they disagreed with the recommendations contained in the May 2022 IEP and of their intent to unilaterally place the student at Windward for the 2022-23 school year and to seek funding for the cost of Windward from the district (see Parent Ex. B). The student attended Windward for the 2022-23 school year (fifth grade) (see Parent Exs. E; F).

In a due process complaint notice, dated March 22, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). The parents raised allegations related to the composition of the May 2022 CSE; the parent's participation in the development of the student's IEP; the lack of district evaluations or a mandated triennial evaluation; the May 2022 IEP present levels of performance; the recommended management needs; the annual goals; the recommendation for a general education setting with supports; consideration of the continuum of services and the failure to recommend a full-time special education program; and issues related to the school the district assigned for the student to attend for the 2022-23 school year (id. at pp. 2-3). The parents alleged that Windward was an appropriate unilateral placement and addressed the student's academic and social/emotional needs to enable her to receive educational benefits (id. at p. 4). Further, the parents alleged that equitable considerations favored an award of tuition reimbursement (id.). As relief, the parents sought reimbursement of tuition at Windward for the 2022-23 school year (id.). In a response to the due process complaint notice, the district generally denied the allegations contained therein (see Apr. 21, 2023 Due Process Response).

On March 24, 2023, the IHO denied consolidation of a previously filed due process complaint notice challenging a May 25, 2021 IEP and requesting tuition at Windward for the 2021-22 school year with the present matter (see IHO Ex. II). On May 5, 2023, a prehearing conference was held between the parties and two status conferences were held on June 13, 2023 and August

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<sup>1</sup> Windward has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>2</sup> The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

1, 2023 (Tr. pp. 1-14). An impartial hearing convened and concluded on September 20, 2023 (Tr. pp. 15-82).

In a final decision dated October 10, 2023, and later corrected on October 19, 2023 to clarify a ministerial matter, the IHO determined that the district offered the student a FAPE for the 2022-23 school year, and denied the parents' request for tuition reimbursement for the 2022-23 school year (IHO Decision at p. 16).<sup>3</sup> The IHO specifically noted a procedural error in the district failing to conduct evaluations of the student, but determined the May 2022 CSE had sufficient evaluative information to develop an IEP for the student (*id.* at pp. 12-13). The IHO also determined that the lack of a general education teacher at the CSE meeting did not result in a denial of FAPE as the district representative was familiar with the recommended program (*id.* at pp. 13-14). Further the IHO determined that annual goals included on the IEP addressed the student's deficit areas (*id.* at p. 14). With respect to substantive challenges, the IHO found that the recommended program, including ICT services and SETSS, as well as speech-language therapy, was reasonably calculated to enable the student to make progress (*id.* at p. 15). Finally, the IHO addressed the parents' allegations related to the assigned public school site and found that the parents were able to obtain the information they sought and there was no basis provided as to the parents' belief that the assigned school could not implement the student's IEP (*id.* at pp. 15-16). Accordingly, the IHO denied the parents' request for funding of the student's tuition at Windward (*id.* at p. 16).

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

The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here in detail. The main issue presented by the parents is whether the IHO erred in finding that the May 2022 IEP was reasonably calculated for the student to make progress. In particular, the parents argue that the failure of the district to conduct a triennial evaluation and the failure to have a regular education teacher at the May 2022 CSE meeting deprived them of the right to meaningfully participate in the CSE process and deprived the student of educational benefits. The parents further assert that the district failed to demonstrate that the student could benefit from ICT services and SETSS in light of her "academic, attentional, executive functioning and self-modulation challenges."

The district filed an answer generally denying the material allegations contained in the request for review and asserts that the IHO correctly found that it offered the student a FAPE for the 2022-23 school year. More specifically, the district claims that the absence of a regular education teacher at the May 2022 CSE meeting did not "rise to a level of [a] FAPE deprivation" because the parents' ability to participate was not impeded and there was no loss of educational benefits to the student. In addition, the district argues that the recommendation for ICT services was appropriate and was based on sufficient evaluative information that the CSE had available to it (*id.* ¶ 11). The district seeks to affirm the decision of the IHO that it offered the student a FAPE for the 2022-23 school year.

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<sup>3</sup> The correction to the findings of fact was issued to add IHO Exhibit III to the IHO's listing of documentation entered into the administrative record. The parent timely appealed from the original October 10, 2023.

## 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>4</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 regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

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<sup>4</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).

## **VI. Discussion**

### **A. May 23, 2022 CSE Process and IEP**

#### **1. CSE Composition**

Before resolving the disputes over whether the programming proposed by the district was substantively appropriate, I must address the parents' alleged procedural violation that the May 2022 CSE's failure to include a regular education teacher at the meeting. Specifically, the parents contend that, because the May 2022 CSE recommended ICT services for the student, a regular education teacher was required to be present at the CSE meeting to determine whether the student would be able to access her education in an "ICT classroom."

The IDEA requires a CSE to include the following members: the parents; one regular education teacher of the student (if the student was, or may be, participating in the regular education environment); one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a district representative;<sup>5</sup> an individual capable of interpreting instructional implications of evaluation results; at the discretion of the parent or district, other persons having knowledge or special expertise regarding the student, "including related services personnel as appropriate"; and if appropriate, the student (20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]).

The school psychologist testified that she participated in the May 2022 CSE meeting as both the school psychologist and district representative (Dist. Ex. 14 ¶ 5; see Dist. Ex. 4 at p. 26). She testified that the district's special education teacher also participated and opined that the May 2022 CSE "was duly constituted" (Dist. Ex. 14 ¶ 7; see Dist. Ex. 4 at p. 26). It is undisputed that no regular education teacher participated in the May 2022 CSE meeting, although the school psychologist testified that she was unsure if the liaison from Windward was also certified as a special education or a general education teacher (Tr. pp. 45-46; Dist. Ex. 4 at p. 26). The school psychologist further testified to her knowledge of classrooms in which ICT services are delivered, which have "a general education and a special education teacher and 40 percent of the students - - only up to 40 percent of the student in that class can have an IEP" (Tr. p. 46). According to the school psychologist, the May 2022 CSE had "sufficient information and documentation" to make the recommendation for the student to receive ICT services with SETSS and speech-language therapy (Tr. pp. 50-51; Dist. Ex. 14 ¶¶ 6, 8, 10).

In their letter brief before the IHO, the parents asserted that the district's Standard Operating Procedures Manual "indicate[d] that a [regular] education teacher must be a member of the IEP team if the student may be participating in an ICT classroom" (IHO Ex. III at p. 2). The parents argue that there was no regular education teacher present to determine if the student "would be able to keep pace with general education peers both academically and socially/emotionally" (Req. for Rev. at pp. 8-9). However, the school psychologist testified that in addition to herself and the district's special education teacher, the parents, the representative from Windward, and information contained in the student's March 2021 private psychological report were used in the development

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<sup>5</sup> State regulation provides that the district representative shall serve as the chairperson of the committee (8 NYCRR 200.3[a][1][v]).

of the May 2022 IEP (Dist. Ex. 14 ¶ 6). More specifically, she testified that there was a "collaborative effort" of everyone present at the meeting to discuss the student's present levels of performance and management needs (Tr. p. 47; Dist. Ex. 14 ¶¶ 9, 13). Review of the hearing record shows that the Windward liaison provided information regarding the student's functioning in ELA and math classes at Windward and that he and the parent expressed concerns about a general education class with the support of ICT services and SETSS, including the class size, content, and pace of the class (Parent Ex. I at ¶¶86-88; J at ¶11; Dist. Ex. 14 at ¶5).<sup>6</sup>

Although the purpose of an ICT setting is to coteach disabled students alongside their nondisabled peers in the same classroom, some courts have held that a regular education teacher is not required on the IEP team at all when an ICT setting is being considered, and thus is not a procedural violation (Y.A. v. New York City Dep't of Educ., 2016 WL 5811843, at \*18 [S.D.N.Y. Sept. 21, 2016]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*9 [S.D.N.Y. Nov. 9, 2011]). The debate on who can permissibly serve in the role of a regular education teacher during a CSE meeting in which a blended, co-taught class is considered—a class which often has special education teachers who commonly have a general education certification as well—is increasingly an endless circle, and it is less than certain that a regular education teacher is required at all. Candidly, I am hard pressed to find that a classroom with nondisabled students and students with IEPs blended together and co-taught is a special class setting rather than a general education setting. But that does not resolve who can serve in the role of a regular education teacher if one is required.

In this instance, there is no indication in the hearing record that either the Windward liaison or the district special education teacher were certified regular education teachers, accordingly, the I find district's failure to include a regular education teacher at the May 2022 CSE meeting was a procedural violation. However, upon review of the parents' arguments and the hearing record as a whole, there is insufficient reason to disturb the IHO's determination that this violation did not significantly impede the student's right to a FAPE, impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause 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]). In fact, the parents' arguments as to the lack of a classroom teacher, appear to be that the CSE did not follow the recommendations of the parent or the Windward liaison who both indicated the student would not be able to keep pace with instruction in a general education class, even with the support of ICT services and SETSS. This type of argument goes to the substantive appropriateness of the program offered and is addressed in more detail below.

## **2. Sufficiency of Evaluative Information**

Turning to the parents' allegations regarding the sufficiency of the evaluative information before the May 2022 CSE, the parents assert that they were deprived of the right to meaningfully participate in the CSE process by the district's failure to conduct triennial evaluations including a speech-language evaluation and a social/emotional evaluation.

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<sup>6</sup> The Windward liaison who testified did not attend the CSE meeting, instead, another Windward liaison attended the CSE meeting and the liaison who testified reported what the Windward liaison who attended the CSE meeting told her (Parent Ex. I ¶¶ 86-88).



A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services' needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

At the outset, the parents correctly state that the evidence in the hearing record demonstrates that the district had not conducted a full battery of assessments in its own reevaluation of the student since 2018 (Tr. pp. 39-40; Dist. Ex. 2 at pp. 1-2). However, it appears that the CSE considered other evaluative information as well. According to the August 2022 prior written notice, the May 2022 CSE considered a January 2018 social history, a January 2018 classroom observation, a February 2018 speech-language assessment, and a February 2018 psychoeducational assessment (Dist. Ex. 2 at pp. 1-2). However, the prior written notice and resulting IEP also reflect that the May 2022 CSE considered more recent evaluative information about the student, including the May 2021 IEP, a May 2022 teacher report, and a May 2022 "[t]est [g]rid" (id. at p. 2). Consistent with the prior written notice, the school psychologist testified that she reviewed a 2018 social history and 2018 classroom observation, and the May 2022 CSE reviewed the March 2021 private neuropsychological evaluation update, 2022 teacher reports and test grid from Windward, a 2018 speech-language assessment, a 2018 psychoeducational assessment, and the May 2021 IEP (Tr. p. 35; Dist. Exs. 2 at pp. 1-2; 14 ¶ 6). Additionally, the May 2022 IEP referred to test scores and information obtained during the January 2019 psychoeducational and neuropsychological evaluation and the March 2021 updated psychoeducational evaluation, as well as reflecting information from the 2022 Windward progress reports in the IEP present levels of performance (Dist. Ex. 4 at pp. 1-6). Specifically, the IEP included test scores from a 2019 administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), together with results from the following evaluations administered in 2021 by the private neuropsychologist: Woodcock-Johnson Tests of Achievement-IV (WJ IV), Jordan Left-Right Reversal Test, Third Edition (Jordan-3), Gray Oral Reading Tests-Fifth Edition (GORT-5), Gray Silent Reading Test (GSRT), Test of Early Written Language-Third Edition (TEWL-3), Conners' Continuous Performance Test 3rd Edition (CPT-3), in addition to 2021 test scores from the Iowa Language Arts and Mathematic Achievement tests (see Dist. Exs. 4 at pp. 1-

4; 6; 8 at p. 1). Also present at the May 2022 CSE meeting was the Windward school liaison who reported on the student's academic functioning in reading, writing, and mathematics and overall executive functioning at school (Dist. Ex. 4 at pp. 5-6). The May 2022 CSE also took into consideration information and verbal reports from the parent, which were reflected in the IEP (Dist. Ex. 14 ¶ 6; see Dist. Ex. 4 at pp. 6, 25).

In her direct testimony by affidavit, the Windward liaison stated that related services were not provided to students at Windward as "all our teachers [were] trained to address language needs as a part of the classroom instructional program," and they had a speech language pathologist on staff in each building (Parent Ex. I ¶ 38). Regarding the student's language development, the May 2022 IEP reflected that the student could have "difficulty formulating effective responses to questions" and that she benefited from wait time (Dist. Ex. 4 at p. 6). Although at the time of the May 2022 CSE meeting, the student was not receiving speech-language therapy at Windward, the CSE included a proposed annual speech-language goal and a recommendation for the student to receive two individual 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 4 at pp. 17, 19).

With respect to the student's social/emotional functioning, the May 2022 IEP reported that the student was described as a "happy-go-lucky student" and that she "show[ed] empathy and sensitivity to others," and indicated that although the student had been ridiculed by other students at a previous school "due to her academic needs," this issue was no longer a concern and counseling was not needed (Dist. Ex. 4 at p. 6). Further, the school psychologist testified that the CSE had not recommended counseling for the student and had recommended SETSS by which the student would "have access to a trusted person if she did need the support" and included this in the management needs listed in the IEP (Tr. pp. 54-55; Dist. Ex. 4 at p. 7). Regarding the student's physical development, the May 2022 IEP reflected that she had received a diagnosis of ADHD, her vision and hearing were within normal limits, and that she was "physically healthy" and enjoyed tennis, swimming, Irish dance, and bicycle riding (Dist. Ex. 4 at pp. 5-7). Many of the student's management needs and testing accommodations identified in the IEP were reflective of information included in the 2019 and 2021 psychoeducational and neuropsychological reports and/or presented at the CSE meeting by the Windward liaison (compare Dist. Ex. 4 pp. 7, 20 with Dist. Exs. 4 at pp. 5-6; 8 at p. 7; 9 pp. 17-29). In addition, the May 2022 IEP included the parents' concerns and comments shared at the CSE meeting (Dist. Exs. 2 at p. 2; 4 at pp. 5-6, 25). The school psychologist testified that based on the information about the student reviewed prior to the CSE meeting, including cognitive assessment results and information from Windward, the CSE had "sufficient information and documentation" to make a recommendation for the student (Tr. pp. 50-51; Dist. Ex. 14 ¶¶ 6, 8).

### **3. ICT Services**

The student's needs are not in dispute on appeal; however, a brief discussion is necessary to frame the issue to be determined, namely the appropriateness of the recommended program, which included ICT services.

The May 2022 IEP reflected the student's 2019 WISC-V scores which were in the average to high average range (Dist. Ex. 4 at p. 2). With respect to reading, the May 2022 IEP indicated that the student's decoding, fluency, and comprehension functioning level according to the WJ-IV Tests of Achievement, GORT-5 and GSRT all fell within the low to high average range, and the May 2022 CSE estimated her reading skills to be at a third grade level when she was at the end of her fourth grade school year (id. at pp. 1-2, 23). The student's identified reading weaknesses included her reading rate and fluency, symbol stability, "underdeveloped comprehension skills (particularly when demands for inferential thinking [were] heightened)," and her stamina when reading lengthy passages (id. at pp. 3-5). Regarding writing, the IEP indicated that the student's spelling, sentence writing fluency, and contextual writing test scores were in the average range (id. at pp. 3-4). According to the May 2022 IEP, the student used "special paper" to write on, had difficulty fitting everything on a page, used sentence starters and "quick outlines" to organize information, and needed "teacher support to write effective paragraphs" (id. at p. 5). In math, the May 2022 IEP described the student as "becoming an increasingly confident math student" and that she "routinely applie[d] strategies to her work successfully" (id.). The May 2022 IEP reflected the student's scores from the WJ-IV math calculations and math fact fluency subtests, which were in the average range, and her low average score on the applied problems subtest (id. at p. 4). Also, the May 2022 IEP indicated that the student continued to benefit from daily math practice for multiplication facts, she required support for "complex word problems," and her math skills were estimated to be at a mid-third grade level (id. at pp. 1, 6, 23). Further, the May 2022 IEP indicated that a measure of the student's attention reflected "mild inattention and vigilance limitations," and noted that the student was attentive and engaged in class, sometimes had "difficulty formulating effective responses to questions" and benefited from wait time (id. at pp. 4, 6).

Review of the May 2022 IEP shows that the CSE developed eleven annual goals to address the student's reading, writing, math, and speech-language needs (Dist. Ex. 4 at pp. 9-17). The reading, writing, and math annual goals addressed academic needs identified in the student's present levels of performance taken from the Windward second quarter progress note, and information provided by the Windward liaison during the May 2022 CSE meeting (compare Dist. Exs. 4 at pp. 4-6; 7 at pp. 3, 5, with Dist. Ex. 4 at pp. 9-17). The May 2022 IEP contained management needs, many of which were consistent with the private neuropsychologist's 2021 report whose recommendations included preferential seating, extended time, repetition of instructions, breaks, small group instruction, one to one teacher support, prompting, previewing of concepts, multisensory instruction, graphic organizers, and several others (compare Dist. Ex. 9 at pp. 17-29, with Dist. Ex. 4 at p. 7). In addition, the recommendations for testing accommodations from the private neuropsychologist of extended time for all assessments, separate location with minimal distractions, timed breaks, and directions read and reread by instructor were contained in the May 2022 IEP (compare Dist. Ex. 9 at pp. 16-17, with Dist. Ex. 4 at pp. 16-17).

To address the student's needs identified in the annual goals and management needs described above, the May 2022 CSE recommended that the student receive five periods per week each of ICT services in English language arts (ELA), math, science, and social studies (Dist. Ex. 4 at p. 18). State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class

shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students and that the school personnel assigned to each class shall minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]).

Additionally, the May 2022 CSE recommended that the student receive three periods per week each of direct group SETSS in ELA and math (Dist. Ex. 4 at p. 18). According to the school psychologist, in addition to the special education teacher support the student would receive in the "ICT class," the SETSS would provide the student with "extra support and encouragement and small group and one-on-one attention" (Tr. pp. 53-54). The May CSE also recommended for the student two 30-minute sessions of individual speech-language therapy (*id.* at p. 19). The school psychologist testified that in recommending those services for the student, the CSE "considered the student's strengths, weaknesses, present levels of performance and her academic needs" (Dist. Ex. 14 ¶ 9). In her affidavit, she testified that the ICT services "together with the SETSS and the speech-language therapy, as well as the management needs and goals contained in the May 2022 IEP were appropriate and reasonably calculated to enable [the student] to meet her goals and make educational progress" as the student was "a highly motivated student academically and socially" (*id.* ¶ 10). The school psychologist opined that the recommendation for ICT services was appropriate for the student as she was "a very capable student, and with the supports in place, especially the SETSS and the support of ICT class with the two teachers and the preferential seating up in the front, she, again, could certainly receive educational benefit" (Tr. p. 50; *see* Dist. Ex. 14 ¶ 10). The school psychologist further testified that ICT services were delivered in a class "with neurotypical peers offer[ing] the LRE" for the student (Tr. p. 36; Dist. Ex. 14 ¶ 10). The May 2022 IEP indicated that the CSE considered more restrictive placements, including 12:1 and 12:1+1 special classes, and a nonpublic day school, which were rejected as the student did "not need such intensive specialized instruction to address her educational needs," and a program of only related services was deemed not intensive enough to address her educational needs (Dist. Ex. 4 at p. 25).

In contrast to the May 2022 CSE's determinations, the March 2021 updated abbreviated psychoeducational evaluation, conducted by the same neuropsychologist who conducted a January 2019 neuropsychological evaluation of the student, recommended that the student "be placed in a small, structured full-time special education setting for bright students with learning disabilities who do not have behavioral problems" (Dist. Ex. 8 at pp. 1, 7; *see* Dist. Ex. 9). The neuropsychologist indicated that a special class setting would employ instructional methods for the student, such as "individualized; multi-sensory; multimodal; scaffolding; prompting; reiteration" (Dist. Ex. 8 at p. 7). These same strategies were included for the student in the May 2022 IEP, which identified 1:1 teacher instruction; small group instruction; multi-modal instruction, including visual, auditory, and tactile/kinesthetic; prompting; and repetition, previewing, and reviewing of directions and concepts—as well as a number of other strategies (Dist. Ex. 4 at p. 7). In review of the neuropsychologist's recommendations, it is unclear why the identified teaching strategies could not have been employed by a special education teacher as part of the delivery of ICT services for the student. Instead, according to the neuropsychologist, a special education school was required for the student "to develop essential processing and cognitive proficiency skills and overall attention and endurance skills" and would "minimize the likelihood of [the student] suffering from persistent difficulties in these noted areas and the associated consequences of having a need for ongoing, intensive supplemental support services

and special education placement in the future" (Dist. Ex. 8 at p. 7). However, notwithstanding the neuropsychologist's view that the student required a private school, generally, district staff responsible for formulating the student's IEP in compliance with the requirements of the IDEA may be afforded some deference over the views of private experts (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at \*16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at \*6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]). Moreover, in addition to considering what supports and services the student needed in order to receive educational benefits, the district was mandated to consider placing the student with his nondisabled peers in light of the IDEA's LRE requirements, but the private neuropsychologist was not bound to adhere to the same mandates as the district personnel on the CSE in formulating recommendations for the student, and her evaluation report reveals little to no consideration of the benefits of access to nondisabled peers during her assessment when she recommended continued full-time placement in a special class and/or private school. The student's skillsets and level of functioning convince me that the student would have been able to receive meaningful educational benefits while placed with nondisabled peers with the support of a full-time special education teacher and that removal from the general education setting altogether to a special class in a private school would not have been consistent with LRE aspects of the IDEA. I am also not convinced that the participation of a regular education teacher at the May 2022 CSE meeting would have led the CSE to place the student in a different, more restrictive program or altered the parents' views that the student should continue in a private specialized school like Winward, and as noted below their viewpoints were considered by the CSE.

While the parents disagreed with the CSE's recommendation for ICT services, they had the opportunity to present their concerns to the CSE and participate in the development of the student's program during the May 2022 CSE meeting. The May 2022 IEP indicated that the parents stated the student "require[d] a small class with direct, skill-based instruction" and she needed to be "grouped with peers with similar needs and learning profiles" (Dist. Ex. 4 at p. 25). In her direct testimony by affidavit, the student's mother indicated that she was present at the May 2022 CSE meeting and the Windward liaison "expressed his concerns about the large class size, content and pacing of an ICT class" with which she agreed (Parent Ex. J ¶ 11). Further, she indicated that in the 2021 private psychoeducational report, the neuropsychologist "recommended that [the student] be placed in a small, structured, full-time special education setting for bright students with learning disabilities" (id. ¶ 7). The parents' concerns and the 2021 private neuropsychological evaluation were considered and used in the development of the student's May 2022 IEP. Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 Fed. App'x 38, 40 [2d Cir. Aug. 24, 2018] [noting that "[a] professional disagreement is not an IDEA violation"], quoting P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; T.F. v. New York City Dep't of Educ., 2015 WL

5610769, at \*5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at \*8, \*10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"].

In this matter, although the district did not comply with the requirement to include a regular education teacher at the CSE, review of the hearing record shows that the May 2022 CSE had ample evaluative information about the student's cognitive, academic, social/emotional, and physical development in order to develop an IEP for the student and the violation did not affect the substantive appropriateness of the May 2022 IEP or deprive the student of an educational benefit and did not significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, there is no basis for finding that the violations would have cumulatively resulted in a denial of FAPE to the student (see A.M., 845 F.3d at 541).

Moreover, based upon the foregoing, and contrary to the parents' argument, the IHO did not shift the burden of proof, and the district met its burden to demonstrate that ICT services with SETSS and speech-language therapy was appropriate and offered the student a FAPE in the LRE.<sup>7</sup> While the private neuropsychologist and Windward staff were not obligated to consider the student's LRE in recommending a possible placement for the student and the parents' desire for the student to be placed in a smaller setting with more individualized attention is understandable, the CSE was required to take into consideration the restrictiveness of the recommended placement and its place on the continuum of services when recommending an educational program for the student. While the parent's desire for the student to meet his potential is entirely understandable, the IDEA guarantees something more modest. The Court in Rowley explicitly rejected the idea that a FAPE required a district to ensure that a student's full potential be realized (Rowley, 458 U.S. at 198-99). Based upon the foregoing, the evidence in the hearing record supports the IHO's determination that the May 2022 IEP offered the student a FAPE for the 2022-23 school year.

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<sup>7</sup> Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). Ordinarily, however, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 225 n.3 [2d Cir. 2012]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]). In this matter, the IHO correctly identified the legal standards applicable to the burdens of proof with respect to the parties (IHO Decision at pp. 11-12). The IHO discussed both the procedural and substantive challenges raised by the parents to the IEP and found in both instances that the district met its burden of proof (id. at p. 15).

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2022-23 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Windward was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' 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  
January 5, 2024**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**