



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-256

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

Appearances:

The Law Offices of Steven L. Goldstein, attorneys for petitioner, by Steven L. Goldstein, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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 the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered her son an appropriate educational program and denied her request to be reimbursed for her son's tuition costs at the Aaron School 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]-[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 facts and procedural history of the case and the IHO's decision will not be recited in detail here. The student has received diagnoses of autism and attention deficit hyperactivity disorder (ADHD) and since kindergarten, the CSE has found the student eligible for special education services as a student with autism and he attended a district class where he received integrated co-teaching (ICT) services (Dist. Exs. 2 at p. 1; 4 at p. 1; 6 at pp. 1, 3, 8).¹ The CSE convened on November 22, 2022 for

¹ The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

the purpose of an annual review to formulate the student's IEP for the remainder of the 2022-23 school year (third grade) (see generally Dist. Ex. 2). In a letter dated December 9, 2022, the parent informed the district that she disagreed with the CSE process and recommendations contained in the November 2022 IEP, including but not limited to: the failure to conduct updated assessments, the recommendation for integrated co-teaching (ICT) services, failure to allow the parent meaningful participation, failure to develop appropriate annual goals to address the student's deficits, and recommendation for an inappropriate assigned school, and as a result, notified the district that unless the district provided the student a free appropriate public education (FAPE), she would unilaterally place the student at the Aaron School for the remainder of the 2022-23 school year and seek reimbursement of the costs from the district (see Parent Ex. K).²

At the request of the parent, the CSE reconvened on December 16, 2022 and reviewed a private neuropsychological evaluation of the student that was conducted in August 2022 with a report dated November 10, 2022 (see Dist. Exs. 4; 6).³ On December 23, 2022, the parent, in an email to the district school psychologist, expressed her disagreement with the December 2022 IEP for similar reasons to those expressed in her prior letter, and further stated that the CSE should place the student in a small, private school setting, as recommended by the private neuropsychologist (see Parent Ex. N). In response, the district acknowledged the parent's disagreement with the December 2022 IEP and that the parent was "exercising" her "due process" (Parent Ex. O at p. 1). In another letter dated December 30, 2022, the district acknowledged receipt of the parent's earlier December 9, 2022 email regarding her intent to unilaterally place the student at the Aaron School at district expense and notified the parent she was required to file a due process complaint notice if she was still interested in pursuing a unilateral placement (Parent Ex. P). On December 16, 2022, the parent executed an enrollment contract for the student's attendance at the Aaron School from January 2023 through June 2023 and the student began attending the Aaron School in January 2023 (Parent Exs. W; DD ¶¶ 3, 23).

In a due process complaint notice, dated January 10, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year for the following reasons including but not limited to: failing to provide the parent with adequate prior written notice with respect to the November and December 2022 CSE meetings and IEPs; recommending an inappropriate program of ICT services in a district community school; failing to adequately describe the student's present levels of performance; failing to consider the information provided by the private neuropsychologist; developing vague and unmeasurable annual goals; failing to recommend transition support services; failing to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP); predetermining the CSEs recommendations; and denying the parent meaningful participation in

² The Commissioner of Education has not approved the Aaron School as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

³ The pediatric neuropsychologist who conducted the August 2022 neuropsychological evaluation participated in the December 2022 CSE meeting (Dist. Ex. 4 at p. 27; see Dist. Ex 6).

the CSE process (see Dist. Ex. 1).⁴ The district submitted two responses to the parent's due process complaint notice generally denying the allegations contained in the due process complaint notice.

On February 24, 2023, the IHO held a prehearing conference (Tr. pp. 1-8); then six additional status conferences were held on March 3, 2023, March 24, 2023, April 14, 2023, April 20, 2023, May 2, 2023, and May 15, 2023 (Tr. pp. 9-52). An impartial hearing convened on June 1, 2023 and concluded on August 31, 2023 after five days of proceedings (Tr. pp. 53-208). In a decision dated October 15, 2023, the IHO determined that the district offered the student a FAPE for the 2022-23 school year and denied the parent's request for tuition reimbursement at the Aaron School (IHO Decision at pp. 10-11).⁵

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The main issue presented on appeal is that the IHO erred in finding that the district met its burden of proof to show that the recommendation for ICT services was appropriate for the student and that the district offered the student a FAPE for the 2022-23 school year. The parent asserts that the IHO's decision relies solely on the testimony of the student's special education teacher whose testimony was not supported by the evidence in the hearing record and was further based on evidence that was not in the hearing record. More specifically, the parent claims that the IHO improperly relied on the testimony of the student's special education teacher that the recommendation for ICT services was appropriate for the student and that he made progress in her class from September through December 2022, progress the parent attributes to the after school services she provided at home. According to the parent, the IHO also erred in relying on testimony that the student benefitted from being with general education peers, asserting the private neuropsychologist's report indicated the student would have been dysregulated in such a setting. The parent also argues that the IHO incorrectly found that the annual goals included in the November and December 2022 IEPs were appropriate to address the student's needs. Next, the parent argues that the IHO failed to address whether the recommendation for ICT services would have addressed the student's "academic, social-emotional, and communicative needs," whether the district's failure to conduct or consider "updated and sufficient evaluations" resulted in a denial of FAPE, and whether the parent was denied the right to meaningfully participate in the CSE process resulting in a denial of FAPE. Lastly, the parent asserts that the IHO failed to consider whether the Aaron School was an appropriate unilateral placement and if equitable considerations weigh in favor of the parent's claim for tuition

⁴ The hearing record contains multiple duplicative exhibits. For purposes of this decision, only district exhibits were cited in instances where both a parent and district exhibit were identical. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

⁵ Starting at page 12, only the exhibit list and one page noting the right to appeal attached to the IHO's decision were paginated; for the purposes of this decision, the pages will be cited by referencing the 20-page document including all attachments and addenda starting with the cover page as page one (see generally IHO Decision at pp. 1-20).

reimbursement. As relief, the parent requests an award of tuition reimbursement for the Aaron School for the 2022-23 school year.

In its answer the district generally denies the material allegations contained in the request for review. The district alleges that it offered the student a FAPE for the 2022-23 school year as the November and December 2022 CSEs had sufficient evaluative information to identify the student's needs and the December 2022 CSE considered the private neuropsychological evaluation and incorporated some of the recommendations into the December 2022 IEP.

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]).⁶

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

⁶ 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).

F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. CSE Process

1. Parent Participation

The parent asserts that the IHO failed to address her claim that she was denied the right to meaningfully participate in the CSE process which contributed to a denial of FAPE to the student for the 2022-23 school year. The parent claims that she provided the CSEs with documentation regarding the student's needs and information that ICT services were not appropriate for the student. However, the parent asserts that the CSEs failed to respond to or address her concerns that the student's weaknesses could only be addressed in a "smaller more supportive learning environment."

With regard to participation, the IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545 at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that "[a] professional disagreement is not an IDEA violation"]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir.

2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

Here, in addition to the parent attending both the November and December 2022 CSE meetings and actively participating in both meetings, the private neuropsychologist attended and participated in the December 2022 CSE meeting (Parent Ex. FF ¶¶ 14, 20-21, 29; Dist. Exs. 2 at pp. 5, 24; 4 at pp. 1-2, 6-7, 9-10, 25-27). The December 2022 CSE also incorporated "many" of the private neuropsychologist's recommendations in the December 2022 IEP including management needs, testing accommodations, and annual goals (Dist. Ex. 7 ¶ 20). For example, based on test results from the private neuropsychologist, the December 2022 CSE recommended an additional speech-language therapy session and modification of the student's annual goals to address social and pragmatic skills, further noting these skills were also addressed in counseling sessions (compare Dist. Ex. 6 at pp. 9-10, with Dist. Ex. 4 at pp. 6-7, 10, 18, 25). The district's special education teacher testified that the main disagreement with the private neuropsychologist's recommendations was for a 12:1 special class as the student was making progress with ICT services (Dist. Ex. 7 ¶ 20). Additionally, the parent communicated with various district staff about her concerns regarding the student's program (Parent Ex. FF ¶¶ 7, 9, 11-12; see Dist. Exs. D-J, M-O). The parent also provided the district's special education teacher with information pertaining to the student's after-school tutor and program (see Parent Ex. AA).

The hearing record and the parent's own testimony reflect that the district provided her the opportunity to participate in both the November and December 2022 CSE meetings. The district's special education teacher testified that she reviewed the private neuropsychological evaluation report provided by the parent and the parent's concerns were discussed and incorporated into the December 2022 IEP. Although the hearing record reflects parental disagreement with the school district's proposed IEP and placement recommendation that does not amount to a denial of the parent's meaningful participation in the development of the program (see E.H. v. Bd. of Educ. of the Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F., 2013 WL 4495676, at *17; DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18-*20 [S.D.N.Y. Jan. 2, 2013]; P.K., 569 F. Supp. 2d at 383; Sch. for Language & Commc'n Dev., 2006 WL 2792754 at *7). The district did not significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE the student and the parent's claim to the contrary must be rejected (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii])

B. November 22, 2022 and December 16, 2022 IEPs

The IHO found that the district offered the student a FAPE for the 2022-23 school year.⁷ The parent alleges on appeal that the IHO "failed to apply the appropriate legal standard in

⁷ The following issues were raised in the due process complaint notice: the district failed to provide adequate prior written notice of the November or December 2022 CSE meetings; neither the November nor December 2022 IEP contained transition support services for a student with autism; the district failed to conduct an FBA and if applicable, develop a BIP; the CSEs predetermined the student's recommendations; the November and December 2022 CSEs were improperly composed; and the CSEs failed to provide information to the parent regarding remote instruction; however, these issues were not addressed by the IHO in the decision (Dist. Ex. 1 at pp. 3, 5, 8-13). The parent did not appeal the IHO's failure to make findings on each of these issues and therefore, "any issue not

determining that the [district] met its' burden of proof regarding the provision of a FAPE." In particular, the parent contends that the IHO erroneously relied on the testimony of the district's special education teacher in finding that the district offered the student a FAPE.⁸ Further, the parent argues that the IHO's conclusion that the evidence in the hearing record supported a finding that the district offered the student a FAPE was wrong and was based on documents not contained within the hearing record. Lastly, the parent contends that there was "nothing" in the hearing record to demonstrate that ICT services would have enabled the student to make "progress in light of his unique needs." Review of the IHO's decision shows that the IHO undertook an analysis using the proper legal standard and, as discussed below, the IHO correctly reached the conclusion that the district offered the student a FAPE for the 2022-23 school year (see IHO Decision at pp. 4-11).

1. Sufficiency of Evaluative Information and Student Needs

The parent contends that the IHO erred in failing to address whether the district's "failure to conduct and consider updated and sufficient evaluations contributed to or resulted in a denial of a FAPE to the student. The parent expands on this argument in her memorandum of law arguing that the CSE "dismissed" the recommendations in the private neuropsychological evaluation and made recommendations "without any evaluative materials to support its conclusions" (Parent Mem. of Law at p. 23). The parent asserts that it was "incumbent upon the [district] to conduct its own updated assessments, evaluations, and observations upon which to engage in thoughtful analysis and upon which to base its decision that [the student] would be able to access his education and make meaningful progress in a larger, less supportive environment classroom and school building" (id. at p. 24). The district argues that the CSEs had "sufficient information" to identify the student's needs which were incorporated within the student's present levels of performance.

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

identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]).

⁸ 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).

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]).

A review of the hearing record indicates that the November 2022 CSE had before it and considered a January 2020 social history, a February 2020 classroom observation, a February 2020 speech and language assessment, a February 2020 OT assessment, a March 2020 psychoeducational evaluation, review of the student's portfolio, and input from the student's then-current teachers and related services providers and parent (Dist. Exs. 2 at pp. 1-6; 3 at pp. 1-2; 7 ¶¶ 6-8).⁹

The November 2022 IEP present levels of performance indicated that the student was able to follow classroom routines and transitions; however, he could become easily distracted by peers engaging in conversations that prevented him from completing the routine or transition (Dist. Ex. 2 at p. 1). Additionally, the November 2022 IEP indicated that the student "benefited greatly from working in a small group of no more than 12 students with a teacher" and noted that during whole and small group lessons he could be easily distracted by his environment and benefited from close proximity to the teacher (*id.*). Furthermore, the November 2022 IEP indicated that the student benefited from a preview of the lesson, adequate thinking and processing time, and repetition of questions and key words at least three times throughout the lesson (*id.*). During independent work, the November 2022 IEP indicated that the student required teacher support for set up for the day, and after planning and set up with the teacher he was able to independently complete the day's work (*id.* at p. 2). The November 2022 IEP indicated that the student worked best in a quiet area with minimal distraction from peers and required a daily visual schedule to help him complete independent tasks (*id.*). Furthermore, the student benefited from scheduled check-ins with a teacher to ensure he was on task, as well as a scheduled break during independent work time to allow an opportunity to refocus (*id.*). Finally, the IEP indicated that the student benefited from repeated guided practice of new skills, from seeing written examples and visual representations of work, and that repeated exposure allowed him to process new skills and apply them to his independent work (*id.*).

With regard to reading, the November 2022 IEP indicated that the student was independently reading at level L, which was considered below the benchmark of level M for November of third grade (Dist. Ex. 2 at p. 2).¹⁰ Additionally, the November 2022 IEP indicated

⁹ The documents referenced in the hearing record as having been reviewed by the November 2022 CSE are not contained in the hearing record (see Parent Exs. A-FF; Dist. Exs. 1-8).

¹⁰ The referenced levels were derived using the Teachers College Running Record (Dist. Exs. 2 at p. 1; 4 at pp. 1, 3).

that the student did not consistently monitor for meaning to make sure what he read made sense and was approximating visual information focusing on the initial consonants and consonant blends, and not consistently the medial or final parts of a word (id.). The November 2022 IEP indicated that the student was a fluent reader "who ha[d] begun to read like a storyteller, making his voice match the punctuation in his books"; however, he occasionally skipped or inserted words that did not belong (id.). The student relied heavily on the detailed pictures to help fill in the blanks of his comprehension and had good recall of literal information provided in the text (id.). The IEP indicated that he was able to describe details stated in the text, a list of information given, and answer specific "wh" questions asked explicitly from the text (id.). The student had difficulty retelling events from a story in sequential order and benefited from the use of a graphic organizer (id. at p. 3).

In writing, the November 2022 IEP indicated that the student was able to write nonfiction pieces independently because of his fund of knowledge regarding nonfiction topics; however, he had difficulty organizing his thoughts and in sequential order and benefited from the use of a graphic organizer (Dist. Ex. 2 at p. 3). Additionally, the student required teacher support to help with the planning phase of the writing process, as well as the use of a writing process chart and mini charts to help him with editing, punctuation, lower case letters, and encoding (id.). The November 2022 IEP indicated that the student was fairly elaborate in the planning phase of writing, but only wrote one to two sentences per page or paragraph about his topic or chapter (id.).

With regard to math, the November 2022 IEP indicated that the student received "intervention math support in the classroom in a small group" five times per week, he was most engaged when playing games or working with manipulatives within a small group, and he benefited from explicitly taught math skills using a visual or tactile component (Dist. Ex. 2 at p. 4). Additionally, the student required repeated practice of content and skills across a period of time (id.). According to the November 2022 IEP, the student was working on building automaticity with basic math facts of addition and subtraction (zero to 20), which would help him more fluently solve addition and subtraction of 3-digit numbers and basic multiplication facts (id.). The November 2022 IEP indicated that the student required support to show his thinking in an equation to help him understand word problems and he was working to improve the organization of his mathematical thinking and processes (id.).

The November 2022 IEP indicated that speech-language therapy sessions focused on receptive, expressive and pragmatic language, and articulation skills (Dist. Ex. 2 at p. 4). Additionally, the student was described as a "friendly and active" boy who appeared to enjoy social interactions with peers and adults and enjoyed sharing his interests and events from his life (id.). The November 2022 IEP indicated that the student's attention waned during group discussion if the topic was not of interest to him, and that he benefited from verbal cues to maintain the topic of conversation and turn taking (id.). The November 2022 IEP reported that the student learned best with previewing of lessons especially related to the vocabulary, repetition of new skills, visuals, graphic organizers; his listening skills were best when tasks and information were broken down into clear, concise, and organized information and directions; and he benefited from consistent reinforcement and practice to hold onto information learned (id.). Receptively, the November 2022 IEP indicated that the student had developed his retention of story grammar elements in order to identify and recall characters and settings and he had started to "target the problem and solution of text or a reading passage he ha[d] read independently" (id.). Expressively, the student worked

to increase his writing stamina, he benefited from using a check list to edit his work, for capitalization and punctuation, and to reread his writing to make sure his message was cohesive and could be understood by his audience (id.). Pragmatically, the student had been working on maintaining conversational topics, turn taking, maintaining appropriate eye contact, and increasing attention to the tasks at hand (id.). In articulation, the student was working towards producing specific speech sounds and sound combinations (id. at pp. 4-5).

The November 2022 IEP indicated that the student was a "kind, talkative and energetic child" who showed interest in peers and was able to initiate topics of conversation that were of his interest (Dist. Ex. 2 at p. 5). It was noted that he had difficulty participating in conversational topics that were of others' choices (id.). The November 2022 IEP further indicated that the student required explicit instruction for navigating reciprocal social conversations and understanding social cues and, due to presumed attentional issues, he had difficulty maintaining a conversation for more than five minutes (id.). Additionally, the student required support in partnerships during structured classroom work time and unstructured times during the day, as well as frequent repetition of new and reviewed skills (id.). According to the IEP the student did not exhibit concerns regarding physical development (id. at p. 6).

The November 2022 CSE recommended the following management needs for the student: small group support when introducing new concepts across all content areas; sitting in close proximity to teachers during whole and small group lessons; refocusing breaks during independent work times when needed; modeling and prompting of new skills and strategies; teacher check-ins when completing classroom assignments; verbal and visual reminders; checklists for assignments and routines; directions repeated and rephrased and presented with visual component; access to math manipulatives and charts for math tasks and assessments; use of keywords in lessons, repeated often; access to audiobooks, as needed; access to word wall or personalized sight word chart, throughout academic lessons; and access to graphic organizers and editing checklists with visual cues for writing tasks (Dist. Ex. 2 at p. 6).

The November 2022 IEP indicated that the effect of student needs of involvement and progress in the general education curriculum, which encompassed academic, social, and speech delays, prevented him from accessing the general education curriculum without changes to content, delivery, and methodology of instruction "via an ICT classroom" (Dist. Ex. 2 at p. 6). The November 2022 IEP further indicated that the student demonstrated difficulty with synthesizing information from longer texts and making inferences; required planning and elaboration support while writing to craft legible, purposeful and focused writing pieces; required additional support in math to establish stronger confidence in his skills; benefited from small group support in the classroom in order to receive explicit modeling and practice with reading comprehension strategies, writing supports, and math skills; and needed small group counseling to work on building his social skills (id. at pp. 6-7).

The CSE reconvened on December 16, 2022 at parent request and reviewed a November 2022 private neuropsychological evaluation report and a December 2022 OT screening (Dist. Ex.

4 at pp. 1-2, 6-10; 5 at pp. 1-2; 7 ¶¶ 9-10).¹¹ The December 2022 IEP noted that the private neuropsychologist participated in the December 2022 CSE meeting, and the CSE discussion of the results and recommendations of the November 2022 neuropsychological evaluation were reflected in the December 2022 IEP (Dist. Ex. 4 at pp. 1-2, 6-9, 27).

The December 2022 IEP reflected some of the scores from the November 2022 administration of the Wechsler Intelligence Scale for Children – V (WISC-V) to the student as part of the private neuropsychological evaluation, including a full scale IQ of 87 (compare Dist. Ex. 4 at p. 1, with Dist. Ex. 6 at pp. 5, 12).¹² Additional WISC-V scores indicated that the student performed within the low average to above average ranges with the exception of the working memory index and the processing speed index which were both considered to be in the exceptionally low range (Dist. Ex. 4 at p. 1). The December 2022 IEP reported the results from an administration of the Wechsler Individual Achievement Test – Fourth Edition (WIAT-4), which indicated that the student's standard scores were within the average range for word reading (98), alphabet writing fluency (108), math problem solving (93), receptive vocabulary (90), and expressive vocabulary (106); in the above average range for math fluency addition (128); in the high average range for spelling (110) and numerical operations (112); in the low average range for reading comprehension (81); and in the exceptionally low range for oral discourse comprehension (66) (id. at pp. 1-2). The December 2022 IEP reflected an administration of the Clinical Evaluation of Language Fundamentals-5 (CELF-5), which indicated the student's following directions score was within the average range (id. at p. 2). Results of the NEPSY-2 showed the student was performing in the average to high average ranges in his visuomotor perception, and in the average range on the Beery-Buktenica Developmental Test of Visual-Motor Integration (id.). The administration of the Rey Osterreith Complex Figure Test yielded a below average score, and the Grooved Pegboard Test showed a high average score with the student's dominant hand (id.).

¹¹ 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]).

¹² The November 2022 private neuropsychological report indicated that a WISC-V full scale IQ of 87 was in the average range, and the December 2022 IEP indicated that score was in the low average range of cognitive functioning (compare Dist. Ex. 4 at p. 1, with Dist. Ex. 6 at p. 12). Additionally, descriptions of the student's scores for the working memory index and processing speed index (described as exceptionally low versus average and low average) were internally inconsistent within the November 2022 private neuropsychological report, as was the student's cognitive proficiencies index score (scored as 67, exceptionally low, versus 85, low average) (Dist. Ex. 6 at pp. 5, 12).

Additionally, the December 2022 IEP reflected, from the November 2022 neuropsychological evaluation, that the student's performance on standardized reading comprehension tasks was impacted by challenges with working memory and inferential comprehension (compare Dist. Ex. 4 at p. 6, with Dist. Ex. 6 at p. 8). Further, the IEP reflected, from the evaluation, that, based on an informal writing sample, the student struggled to write grammatically correct sentences with proper mechanics (compare Dist. Ex. 4 at p. 6, with Dist. Ex. 6 at p. 8). The student performed in the average to high average ranges in word reading, spelling, math problem solving, and numerical and operations; however, attentional difficulties during the testing process impacted his oral comprehension (compare Dist. Ex. 4 at p. 6, with Dist. Ex. 6 at p. 8). The IEP included the private evaluator's description of the student's social communication and pragmatic language as areas of challenge, based on observation during testing, and responses on standardized questionnaires (compare Dist. Ex. 4 at p. 6, with Dist. Ex. 6 at p. 8). The December 2022 IEP noted that, at the time of the November 2022 private neuropsychological evaluation report, the neuropsychologist had not observed the student in his classroom (Dist. Ex. 4 at pp. 6-7).

The December 2022 IEP reflected that during the December 2022 CSE meeting, the parent reported similar concerns that the private neuropsychologist noted, as well as concerns about the student's below grade level performance and that the current program of ICT services with supports was insufficient (Dist. Ex. 4 at p. 7). She further expressed that the student was not making progress "fast enough" due to the current class size and the student's distractibility, and that the progress he had made thus far was in large part due to his outside tutoring (id.). Additionally, the December 2022 IEP reported that the CSE discussed adding an additional speech-language therapy session to which the parent responded that "the cumulative time spent in speech [wa]s not substantially aiding [the student's] progress" and stated that he required a smaller class size with greater 1:1 support (id. at pp. 7, 25). The December 2022 CSE reported, from the November 2022 private neuropsychological evaluation, that the parent had endorsed concerns in the areas of social awareness, social cognition, and social motivation (id.). The December 2022 IEP indicated that the CSE discussed adding a third session of speech-language therapy and adjusting the annual goals to address: understanding the importance of eye contact, identifying the thoughts and perspectives of others, identifying social or behavioral expectations not overtly stated, and improving cognitive flexibility as related to planning, problem solving, or interactive play (id.). Additionally, the CSE discussed how the group counseling session incorporated these skills including components of Michelle Garcia Winner's "Social Thinking" curriculum (id.).

The December 2022 IEP reflected, from the November 2022 private neuropsychological evaluation, that the student met the diagnostic criteria for ADHD and noted that his attentional difficulties impacted his ability to fully comprehend complex verbal information and noted that his executive functioning weakness such as working memory impacted his reading comprehension skills (Dist. Ex. 4 at p. 9). The IEP reflected the parent's concerns, consistent with the neuropsychological evaluation, that the student's distractibility was not always obvious, his inconsistent focus lead him to miss critical instructional information, he required constant redirection even in small groups, and that the neuropsychologist's conclusions were based on observations during two unstructured school events, play dates, home, and reports from the student's tutor (id.). The CSE reiterated that the student was "consistently in small groups of three, four or at most, 11 students during instructional activities, and with minimal to moderate teacher

support (e.g., verbal prompts, etc.) he [wa]s able to effectively follow instructions and participate" (id.).

With regard to the OT screening results reported in the December 2022 IEP, a full OT evaluation was not recommended because the student demonstrated functional fine motor, visual motor, perceptual, and graphomotor skills for writing tasks; his delays in writing did not appear to be related to deficits in fine motor or visual motor integration; and he demonstrated adequate strength and stamina for school-based activities, was independent with activities of daily living (ADLs), was able to keep pace with peers during writing activities and transitions, and was independently able to assume an upright sitting position in his chair and on the rug for lessons (Dist. Ex. 4 at p. 9).

Based on the student's areas of need, the December 2022 CSE developed annual goals to address the student's identified needs in the following areas: reading, writing, math, focus and attention, speech-language, and pragmatic/social skills (Dist. Ex. 4 at pp. 12-17). In connection with the annual goals, the parent asserts that the IHO erred in finding that the annual goals addressed the student's needs and deficits (Req. for Rev. at p. 5).¹³ However, I find that the IHO conducted a thorough and well-reasoned analysis of the relevant evidence pertaining to the annual goals which upon careful review of the hearing record, addressed the student's main areas of need as identified in the December 2022 IEP present levels of performance and there is no reason to depart from it (see IHO Decision at p. 10; Dist. Ex. 4 at pp. 1-10; 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]).

The November 2022 CSE recommended the student attend a general education classroom and receive 10 periods of ICT services per week for ELA, and five periods per week for both math and social studies, along with related services consisting of one 30-minute session of group counseling per week and two 30-minute sessions of individual speech-language therapy per week (Dist. Ex. 2 at pp. 16-17). Additionally, the CSE recommended the student receive the following testing accommodations: extended time, breaks, separate location, on task focusing prompts, test read, mask and markers, and additional paper for math calculations (id. at pp. 18-19). The December 2022 CSE continued the recommendations contained in the November 2022 IEP, with the exception of speech-language therapy, which was increased to one 30-minute session individually and two 30-minute sessions in a group of three, and the CSE added monthly parent counseling and training (compare Dist. Ex. 2 at pp. 16-17, with Dist. Ex. 4 at p. 18).

With regard to the parent's argument that the CSEs lacked sufficient evaluative information by which to design the student's IEP for the 2022-23 school year, the majority of the evaluative information utilized by the CSEs had been completed within two years of the meetings at issue in

¹³ 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]).

this proceeding and there was no indication that there had been significant changes in the student's performance that would have required the district to conduct a reevaluation of the student (Dist. Exs. 2 at pp. 1-7; 3 at pp. 1-2; 4 at pp. 1-10; 5 at pp. 1-2; 7 ¶ 7). Furthermore, the student's then-current regular education and special education teachers attended the CSE meetings and provided input regarding the student's present level of performance with the ICT services (Dist. Exs. 2 at p. 24; 4 at p. 27; 7 ¶¶ 6, 9).¹⁴ Additionally, the private neuropsychologist who completed the November 2022 neuropsychological evaluation attended the December 2022 CSE meeting, and her report and input were reflected in the December 2022 IEP (Dist. Exs. 4 at pp. 1-2, 6-9, 27; 7 ¶ 9). Since there was no requirement or need for a reevaluation of the student at the time of either CSE meeting, there is no reason to conclude that the December 2022 CSE had insufficient information about the student for purposes of developing the student's IEP.

2. ICT Services

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

The parent testified that she shared her concerns with the November and December 2022 CSEs that the student was not making adequate progress, he needed a smaller class, and a recommendation for ICT services for the 2022-23 school year would not be appropriate (Parent Ex. FF ¶¶ 10-23; Dist. Exs. 2 at p. 5; 4 at pp. 6-10). The December 2022 CSE acknowledged the parent's concerns and, as discussed above, the results from the November 2022 neuropsychological evaluation, both of which were included in the December 2022 IEP (Dist. Ex. 4 at pp. 1, 6-10). Furthermore, the December 2022 CSE memorialized the rationale for the recommendation for ICT services in the IEP, which indicated that the student's current profile of needs, encompassing academic, social, and speech-language delays, prevented him from accessing the general education curriculum without changes to content, delivery, and methodology of instruction "via an ICT setting" (*id.* at p. 10). The December 2022 IEP further indicated that the student demonstrated difficulty with synthesizing information from longer texts and making inferences; he required planning and elaboration support while writing to craft legible, purposeful, and focused writing pieces; he required additional support in math to establish stronger confidence in his skills; and he benefited from small group support in the classroom in order to receive explicit modeling and practice with reading comprehension strategies, writing supports, and math skills (*id.*). According to the IEP, the student continued to require small group counseling to work on building his social

¹⁴ Although the parent raised a claim about the adequacy of the present levels of performance in both the November and December 2022 IEPs in the due process complaint notice, the parent did not raise this issue on appeal (see generally Req. for Rev.; see Dist. Ex. 1 at p. 6). Additionally, this issue, even as raised in the due process complaint notice appears to relate more to the district's consideration of the information presented by the neuropsychologist rather than to an assertion that there was any specific inaccuracy in the description of the student contained in the November and December 2022 IEPs (Dist. Ex. 1 at p. 6).

skills, and speech-language therapy to address receptive, expressive, and pragmatic language delays (id.).

The December 2022 CSE further supported its reasoning for recommending ICT services in a prior written notice dated December 20, 2022, which indicated that a 12:1 and a 12:1+1 special class in a community school were considered but rejected because of the student's cognitive and academic strengths (Dist. Ex. 5 at p. 2). The prior written notice further indicated that the student did not have or require goals that aligned to developing functional skills, ADLs, or basic communication of wants and needs, which warranted a more specialized setting with a modified curriculum and a smaller teacher-student ratio (id.). The prior written notice explained that the CSE considered and collectively agreed that the student continued to benefit from access to two teachers, one being trained in special education, to address his academic, attentional, and other therapeutic needs, while ensuring access to typically developing peers (id.). Furthermore, the prior written notice indicated that related services, in addition to ICT services, continued to provide the student with the opportunity to learn and practice discrete skills and work towards transferring them into the classroom (id.). Additionally, the prior written notice reflected that the student's goals were aligned with the general education curriculum and supported the ICT services recommendation (id.).

Moreover, the student's then-current special education teacher testified that the CSE recommended ICT services because it allowed for small group instruction of no more than 12-14 students throughout the day (Dist. Ex. 7 ¶¶ 5, 19). She further described that the student was pulled for even smaller groups for "conferring, guidance, intervention or explicit instruction" and opined that he benefited from working with neurotypical peers because they supported his language development "around both academic and peer conversation" (id. ¶ 19). Finally, she reported that the student "was exposed to a hands-on, multi-sensory approach to instruction throughout his day, with access to individualized tools and supports to help him navigate just right tasks" (id.). The district's special education teacher further testified that the December 2022 CSE disagreed with the private neuropsychologist's recommendation for a 12:1+1 setting, because the student "was making progress academically and socially within the ICT setting" (id. ¶ 20). She further explained that the student "benefited greatly to the exposure of his neurotypical peers as well as the rigid, structured schedule of the ICT class" (id.). She testified that the "ability to collaborate and converse with his peers throughout academic times provided [the student] with the ability to receive grade-level conversation if/when he was unable to access the learning" (id.). Finally, the district's special education teacher indicated that the December 2022 CSE believed ICT services were appropriate because the student was participating and engaging within the lesson through a parallel or station teaching model which provided a smaller group size during lessons (id.).

Additionally, the student's then-current special education teacher reported that he made "some great progress" from September 2022 through December 2022 (Dist. Ex. 7 ¶ 15). Specifically, she reported that he was approaching grade level in his reading by November or December 2022 and was independently reading at a level L (id.). Additionally, she described that he "had become an excited reader by December" and thrived in the nonfiction writing unit (id.).

Based on the foregoing, the evidence in the hearing record supports the IHO's conclusion that the December 2022 CSE's recommendation for ICT services in combination with related services including counseling and speech-language therapy, and the additional supports described

in the December 2022 IEP management needs, was reasonably calculated to meet the student's identified needs. As described above, the crux of the dispute in this matter relates to the views of the parent and the private evaluators that the student was not making appropriate progress and therefore required a more supportive (and more restrictive) setting, versus the district's opinion that the student was making progress commensurate with his abilities and, therefore, could receive meaningful educational benefit while attending a general education class placement with ICT services, related services, and supports and accommodations within a district public school. Generally, district staff 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]).

With regard to the parent's argument that the IHO placed too much emphasis on the special education teacher's testimony, and that there was no evidence that the student was making progress in the district's program, I note that any lack of even more specific examples of progress is not dispositive of whether the ICT services, related services, and management needs recommendations were appropriate.¹⁵ The district's special education teacher provided a significant amount of information, discussed in detail above, regarding the student's present levels of performance, which are not in dispute on appeal, and testified as to how well he was doing in the classroom with ICT services in fall 2022 at the time of the CSE meetings in dispute. While she may not have provided specific examples of the student's progress from September to December 2022, she did explain in detail how the student was functioning successfully in the classroom with a variety of scaffolding and supports, many of which were then included by the CSEs as management needs in the student's IEPs. Thus, it was reasonable for the IHO to conclude that the special education

¹⁵ "Although past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (S.H., 2011 WL 6108523, at *10, citing Thompson R2-J Sch. Dist., 540 F.3d at 1153; see also F.L. v. Bd. of Educ. of Great Neck U.F.S.D., 274 F Supp 3d 94, [E.D.N.Y. 2017] [finding a substantially similar program appropriate in light of the student's progress in the preceding school year]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 413-15 [S.D.N.Y. 2017] [examining carryover of goals and services from a student's IEP from a previous school year and noting that, "[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,]'"], quoting L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *11 [S.D.N.Y. Sept. 27, 2016]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011] [determining that evidence of likely progress was "the fact that the [challenged IEP] was similar to a prior IEP that generated some progress"], aff'd, 506 Fed. Appx. 80 [2d Cir. Dec. 26, 2012]; J.G., 777 F. Supp. 2d at 650 [finding that when the student made some progress under a previous IEP, it was not unreasonable for the CSE to propose an IEP "virtually identical to" the previous one]; M.C., 2008 WL 4449338, at *16 [determining that when the IEP at issue mirrored a past IEP under which the student "demonstrated significant progress," the IEP at issue was reasonably calculated to afford the student educational benefit]; see generally Application of a Student with a Disability, Appeal No. 12-064; Application of the Bd. of Educ., Appeal No. 11-128).

teacher's input regarding the student's performance tipped the evidence in the district's favor and does not lead to a reason to disturb the IHO's determination.

Further, the hearing record reflects that the December 2022 CSE considered the recommendations set forth in the November 2022 neuropsychological evaluation but had information before them demonstrating that the student was advancing from grade to grade and making academic progress in the district curriculum, albeit more modest progress than desired by the parent. However, the district was not required to maximize the student's potential (Rowley, 458 U.S. at 189, 199). Further, the CSEs were not obligated to adopt the recommendations of the private evaluator in this instance (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]). This is particularly so given that the district staff who provided the content used in the IEP development had been working directly with the student and that, 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. Where, as here, the student could be educated satisfactorily in a general education classroom with supplemental aids and services, the placements recommended in the November and December 2022 IEPs represented an appropriate placement in the student's LRE (see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 119-20), and the district was not required to place the student in a special class or in a specialized school.

Accordingly, there does not appear to be any reasonable basis for overturning the IHO's decision that the recommendation for ICT services and related services "afforded the student the opportunity to make progress in the least restrictive environment" and offered the student a FAPE for the 2022-23 school year (see IHO Decision at p. 11).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations 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 the Aaron School 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
January 12, 2024**

**JUSTYN P. BATES
STATE REVIEW OFFICER**