



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-273

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Irvington Union Free School District

Appearances:

Law Offices of Regina Skyer & Assoc., LLP, attorneys for petitioners, by Kerry McGrath, Esq.

Ingerman Smith, LLP, attorneys for respondent, by Thomas Scapoli, 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 denied their request to be reimbursed for the costs of their son's tuition at the Quad Preparatory School (Quad Prep) for the 2021-22 and 2022-23 school years. 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[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student in this case began attending a district elementary school for first grade during the 2019-20 school year after transferring into the district (see Dist. Exs. 3 at p. 1; 5 at p. 1). Prior to attending the district public school, the student had attended a nonpublic school for a portion of preschool and for kindergarten (2018-19 school year), and based on the evidence in the hearing record, had received both preschool and school-age special education services including speech-language therapy, occupational therapy (OT), physical therapy (PT), and special education itinerant teacher (SEIT) services (see Dist. Exs. 3 at pp. 3-4; 5 at pp. 1-2). According to the evidence, when the student transferred into the district, the parents reported that, two years prior, the student had been diagnosed as having an attention deficit hyperactivity disorder (ADHD), a "high functioning" autism spectrum disorder, and a "fine motor/sensory disorder" (Dist. Ex. 5 at

p. 1). In addition, the parents reported that the student had difficulty, at times, conversing with peers when he was "not controlling the topic"; and he had difficulty maintaining "eye contact" and engaging in "sustained play" and "meaningful dialogues" (as opposed to "silly gibberish or monologue performance") (*id.* at p. 2). Socially, the parents described the student at that time as "friendly [and] extroverted" (*id.*). Behaviorally, the parents noted that the student was "[s]ometimes great, but oftentimes difficult to get anywhere" due to distractibility and forgetfulness; the student could be "hard to play with"; and he was "inflexible in thought or plans" (*id.*). Additionally, the parents indicated that the "most important thing to know" about the student was that "his challenges c[ould] be difficult to see when meeting him for the first time" for two reasons (*id.* at p. 3). First, as reported by the parents, when the student lost attention or became dysregulated, "he d[id] not have disruptive behaviors that take the teacher's focus away from the class" and careful attention must be paid to the student to make sure he was "tracking/comprehending" in a group (*id.*). Second, the parents noted that the student's strengths, such as a "big smile and [an] agreeable nature," could "mask that he[wa]s only talking about what he want[ed] to discuss, that he[wa]s not looking at or listening to the person he[wa]s smiling at, and that he d[id]n't know what he[wa]s agreeing to (b[ecause] he wasn't paying attention), respectively" (*id.* [emphasis in original]).

During first grade in the 2019-20 school year, the student began attending a general education placement with integrated co-teaching (ICT) services, OT, and speech-language services (*see* Dist. Exs. 6 at p. 1; 7 at p. 1).¹ The district completed a reevaluation of the student, which consisted of a September 2019 social history update, an October/November 2019 OT evaluation, an October 2019 psychological evaluation, an October 2019 educational evaluation; and a November 2019 classroom observation (*see* Dist. Exs. 5 at p. 1; 6 at p. 1; 7 at p. 1; 8 at p. 1; 9 at p. 1). A CSE convened on November 25, 2019 for a reevaluation review and developed an IEP for the student for the remainder of the 2019-20 school year (*see* Dist. Ex. 10 at p. 1). Finding that the student remained eligible for special education as a student with an other health-impairment, the November 2019 CSE recommended a general education placement with ICT services for instruction in English language arts (ELA) and mathematics, speech-language therapy in a small group, and OT in a small group (*id.*).² At that time, the November 2019 CSE removed a previously recommended OT consult service but added accommodations and modifications to the IEP to address the student's "inattention" and his tendency to "rush[] through work" (*id.* at pp. 1-2, 9-10). In addition, the CSE noted that, socially, the student could "misread social cues and ha[d] deficits

¹ Consistent with State regulation, a CSE initially convened on July 11, 2019 to conduct a "transfer meeting" for the student (Dist. Ex. 4 at p. 1; *see* 8 NYCRR 200.4[e][8][i]). Relying on the student's IEP developed by his previously attended school district, as well as input from the student's providers from his previous nonpublic school, the July 2019 CSE recommended that the student attend a general education placement with ICT services, speech-language therapy (small group), OT (small group), and an OT consult for "sensory items and self-regulation in the classroom" (Dist. Ex. 4 at pp. 1, 3, 8-9). The July 2019 IEP indicated that the student would be reevaluated in the fall to "determine if the supports [we]re appropriate" (Dist. Ex. 4 at p. 2). As reflected in the July 2019 IEP, the CSE denoted that the student did not "need strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" and similarly, the student did not require a behavioral intervention plan (BIP) (*id.* at p. 7).

² The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute (*see* 34 CFR 300.8[a][9]; 8 NYCRR 200.1[zz][10]).

with pragmatic language," and the student had "difficulty taking the perspective of others and d[id] not stay on topic in conversation" (*id.* at p. 1). The November 2019 CSE further indicated in the IEP that the student was friendly and got along "well with peers and adults" (*id.* at p. 7). Additionally, the CSE denoted that the student did not "need strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" and similarly, the student did not require a BIP (*id.* at p. 8).

Due to the mandated school closures in March 2020 as a result of the COVID-19 pandemic, the student's annual review for the 2020-21 school year (second grade) took place remotely on April 29, 2020 (*see* Dist. Ex. 11 at p. 1). Finding that the student remained eligible for special education, the April 2020 CSE recommended a general education placement with ICT services for instruction in ELA, speech-language therapy (individual and small group), and counseling services (small group) (*id.* at pp. 1, 8). The CSE indicated in the IEP that the student required counseling services in order to "address problem solving and conflict resolution skills during social situations" and that he needed "support taking the perspective of others and compromising when he [wa]s not in agreement" (*id.* at p. 6). The CSE also indicated that the student required "coping strategies when presented with non-preferred tasks" (*id.*). In addition to the foregoing services, the CSE recommended supplementary aids and services, program modifications and accommodations, as well as an OT consultation (one 30-minute session per month with the student or his teachers) (*id.* at p. 9). Annual goals developed at the April 2020 CSE meeting targeted the student's needs in the areas of reading, writing, speech-language skills, and social/emotional and behavioral skills (*id.* at pp. 7-8). More specifically, the student's annual goals for his speech-language and social/emotional and behavioral skills focused, in part, on his ability to demonstrate problem-solving skills in a social conflict and identifying possible consequences of response options, as well as identifying the option with the most favorable outcome (*id.*). Finally, the CSE denoted that, at that time, although the student "need[ed] strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others," the student did not require a BIP (*id.* at p. 7).

During the 2020-21 school year, the district transitioned from the fully-remote instructional format used in spring 2020 to a hybrid instructional format—meaning that students attended school both in-person and remotely throughout the week for a portion of the school year—and then in or around February 2021, the district allowed special education students to return to the district for an in-person instructional format for approximately four days per week and remote instruction once a week (*see* Tr. pp. 382-85; *see generally* Parent Exs. GG; NN-PP). In November 2020, the district issued the student's first marking period report card, which reflected that the student consistently earned a rating of "3"—indicating that he was meeting the curriculum and behavioral expectations—on a majority of the areas assessed, and in some areas, earned a rating of "4"—indicating that the student was consistently meeting and often exceeded the curriculum and behavioral expectations (Dist. Ex. 15 at pp. 1-4). More specifically, a "3" rating indicated that the student was meeting the requirements for quality work; he demonstrated knowledge, understanding, and critical thinking skills; and he applied learning to other subject areas and life situations (*id.* at p. 2). A "4" rating indicated that the student consistently met and often exceeded the requirements for exceptional quality work; the student demonstrated a high level of knowledge, understanding, and creative and attentive ways of thinking; and he consistently applied learning to other subject areas and life situations (*id.*). Teacher comments for November 2020 described the

student as a bright and focused student who worked diligently on classroom tasks and who was friendly with both teachers and peers (id. at p. 1). According to the teacher comments, the student read accurately and did a stellar job using expression and inflection, and he had become interested in reading longer texts of interest and was truly engaged and invested (id.). In writing, the student continued to work at that time on building comprehension strategies, such as identifying the main idea by utilizing supporting details, retelling a story, understanding story elements, and building the student's "beyond the text" understanding (id.). In addition, the teachers noted that the student welcomed visual aids to help guide his work and benefited greatly from expectations being read, reread, and broken down as necessary (id.). The student's teachers also noted that he could use different types of craft in his writing (id.). In mathematics, the student demonstrated strong fact fluency and could solve a variety of problems accurately; additionally, his understanding of place value allowed him to show his thinking when adding and subtracting multiple digit numbers (id.). Overall, his teachers indicated that the student was an "absolute pleasure to have in class" (id.).

In November 2020, the parents provided the district school psychologist who delivered the student's school-based counseling with consent to speak with the student's private psychologist (see Parent Ex. RR). In early December 2020, the parents provided the district school psychologist, together with the student's classroom teachers for the 2020-21 school year and his speech-language provider, with consent to speak with the psychologist who would be completing a privately obtained neuropsychological evaluation of the student later in December 2020 (compare Parent Ex. SS, with Dist. Ex. 16 at p. 1, and Dist. Ex. 18 at p. 1). Subsequently, the neuropsychological evaluation was completed over the course of three days in December 2020 (December 2020 neuropsychological evaluation) (see Dist. Ex. 16 at p. 1).

In March 2021, the district issued the student's second marking period report card (see Dist. Ex. 15 at pp. 1-4). At that time, the student continued to earn ratings of "3" and "4" in all areas assessed, and in some areas, improved from a rating of "3" to a rating of "4" from the first to second marking period (id.). Teacher comments described the student as friendly and driven, who worked diligently every day, and who continued to excel in all curricular areas (see Dist. Ex. 15 at p. 1). In addition, the teachers indicated that the student remained a "strong leader" and had learned to reread to increase his understanding of the text (id.). The student continuously asked for chapter series books from the classroom library, and he often used inflection, tone, and made text-to-self connections, which helped build the student's inferential thinking (id.). At that time, his teachers indicated that they would continue to work on plots, as well as deeper thinking strategies, with the student (id.). The teachers noted the student's "strong sense of self," and commented that it had been fun to see that come alive through an opinion and persuasive unit, in addition to class discussions (id.). In writing, the teachers noted that the student kept his audience in mind (id.). In mathematics, the student continued to have a strong understanding of place value and could demonstrate his thinking when adding and subtracting multiple digit numbers (id.). In addition, the student could successfully use feedback from adults to improve his work (id.).

On May 10, 2021, a CSE convened to conduct the student's annual review and to develop an IEP for the 2021-22 school year (see Dist. Ex. 18 at p. 1). As part of the annual review, the May 2021 CSE reviewed the student's December 2020 neuropsychological evaluation report, which, as reported in the IEP, "showed consistently Average index scores on measure of visual spatial skills, fluid reasoning, working memory, and processing speed"; "verbal comprehension was a significant strength in the High (Superior) range"; "memory tasks were inconsistent and

ranged from Very Low to Superior"; and it was hypothesized that the student's "[w]orking memory as executive functioning weaknesses . . . negatively impacted" his performance (id.). With regard to academics, the student "demonstrated High (Superior) and Very High (Very Superior) scores on measures consistent with his crystallized knowledge" (id.). In writing, the student "was affected by motor planning weaknesses although he earned High Average and Average scores" (id.). In mathematics, the student's performance "yielded scores consistently in the Average range" (id.). At that time, the student was reading at a "level M, according to the Fountas & Pinnell benchmarking system," with "stronger" decoding skills compared to his comprehension skills, "especially when inferential thinking" was required (id.). As noted in the IEP, the student's mathematics skills were "at or above grade level" (id. at pp. 1-2).

As reflected in the May 2021 IEP, after the CSE discussed draft goals in the areas of "reading comprehension, speech, and social/emotional/behavioral functioning," the parents "suggested the revision and addition of [annual] goals including the need to support [the student's] coping skills" (Dist. Ex. 18 at p. 2). According to the IEP, while the student demonstrated academic skills that were "largely on grade level," the CSE continued to recommend that the student receive ICT services to "support his reading comprehension as well as the modifications needed for writing and to support his attention deficit and behaviors related to an autism spectrum diagnosis" (id.). In addition, the parents "highlighted the importance of challenging [the student] intellectually and academically and asked for enrichment opportunities" (id.). As further support, the May 2021 CSE recommended weekly counseling support (group), as well as a "counseling consultation to support [the student's] teachers and [the] ICT aide" (id.). As noted in the IEP, the "consultation should include monitoring the need for additional 1:1 check-ins with the school psychologist"; the student's speech-language therapy would "include an individual session to focus on articulation"; the CSE discussed the student's need for a "group;" and the student's "social communication [annual] goal developed w[ould] be supported instead through counseling" (id.). In addition, the CSE recommended a speech-language consultation to "support the generalization of skills" (id.). It was further noted that a fall meeting would be held, including the parents, teachers, and related service providers, and that at that time, the parents had agreed with the updates, proposed programs, services, and goals (id.).

Finding that the student remained eligible for special education and based upon the foregoing, the May 2021 CSE recommended that the student attend a general education placement with ICT services for instruction in ELA; individual speech-language therapy; counseling in a small group; and various supplementary aids and services, program modifications, and accommodations (editing checklists for writing, refocusing and redirection, checking for understanding, preferential seating, breaking down tasks, and providing clear behavioral expectations) (see Dist. Ex. 18 at pp. 1, 9-10).³ In addition, the CSE developed annual goals targeting the student's needs in reading, speech-language skills, and his social/emotional and behavioral skills (improving his empathetic listening, improving his social inferencing and generalization of social skills and awareness, and supporting his emotional regulation at school)

³ The district school psychologist testified that the recommended placement for the student included the "support of an aide" (Tr. p. 266).

(id. at pp. 8-9).⁴ Finally, the May 2021 IEP included strategies to address the student's management needs, including preferential seating and refocusing or redirection to limit distractions; providing visuals to support abstract concepts or deeper level classroom conversations; breaking down tasks and checking for understanding; and providing graphic organizers and checklists to help him plan, organize, and check his written work (id. at p. 7).

Shortly after the May 2021 CSE meeting, the parents sent an email, dated May 27, 2021, to the district school psychologist who provided counseling services to the student, to inform her about an incident involving the student earlier in the week (see Parent Ex. HH at pp. 1-3). According to the email, and based primarily upon information the parents obtained from a district interim administrator who had spoken with the student the previous day about the incident, the student had been involved in a verbal exchange with another peer on the school bus on the way home from school, which upset the student (id. at p. 2). Notwithstanding the parents' attempts to support and comfort the student emotionally at home that day, the situation decompensated to the point that the student wrote a note expressing an intention to harm himself, which he slid under his door to his parents at home (id.; see Parent Ex. MM). At the time the parents wrote their email to the school psychologist, they were scheduled to take the student to his psychiatrist the next day (May 28th) (see Parent Ex. HH at p. 2).

Later on the same day, the district elementary school principal (principal) sent an email to the parents, and based on the contents of that email, it appears that she had spoken with the parents together with the district school psychologist and with another district staff member (social worker) (see Parent Ex. II at pp. 5-6). The principal indicated that it might be best if the student was evaluated that day and attached a "safety plan" for the parents until the student's appointment on the next day (id.; see Parent Ex. QQ). In response, the parents notified the principal that the student's appointment with his psychiatrist was actually on May 27, 2021, that afternoon (see Parent Ex. HH at p. 5). After the student's appointment, the parents emailed the principal and informed her that the student had a "good session" with his psychiatrist and that the student was "safe" (id.). Within a few days of the appointment, the parents emailed the principal and summarized in detail the information from the student's visit with his psychiatrist, noting specifically that the psychiatrist did not believe that the student had a "true intention to hurt himself" (id. at pp. 3-5). However, the parents indicated that the student had revealed to his psychiatrist that, during unstructured times such as recess, lunch, and bus rides, he felt "alone, disconnected, misunderstood and different than his peers"—which left him feeling "badly about himself" (id. at pp. 3-4). The parents noted that, as expressed at the student's IEP meeting, they

⁴ In the May 2021 IEP, the CSE described the student's social development within the present levels of performance (see Dist. Ex. 18 at pp. 6-7). As needs in this area, the CSE indicated that the student continued to require support for his social skills through counseling sessions (id. at p. 7). In addition, the CSE noted that the student needed to improve his intentional, active listening skills in social situations as part of his developing empathic concern for others and to foster prosocial behaviors (id.). The student also needed to practice showing interest in others by actively using supportive statements or gestures that reflected his social awareness (id.). Next, the IEP included the parents' concern regarding the student's emotional regulation at home, and their desire for the student to form deeper social connections with his peers (id.). In addition, the IEP reflected the parents' concern with the student's ability to name coping strategies that he could use when emotionally dysregulated (id.). While the student had made progress in his social awareness, the CSE noted the student's need to generalize that skill persisted, including his ability to make social inferences in the academic milieu (id.).

had "growing concerns that [the student's] social and emotional well-being require[d] additional support during these times," and the student's psychiatrist had "agreed with this need for support" (id. at p. 4).

The district school psychologist responded to the parents' email, and, among other things, noted that she understood the "disconnect between the outward presentation versus [the student's] inner thoughts and feelings," and described it as a "challenging and complicated aspect of having an autism spectrum disorder" (Parent Ex. II at p. 3). In addition, the school psychologist indicated that it was not "unusual for [the student] to want to 'compartmentalize' some thoughts and feelings too, as he expressed his desire to keep things that happen[ed] outside of school 'in the family'" (id.).

In June 2021, the district issued the student's third marking period (final) report card for the 2020-21 school year (see Dist. Ex. 15 at pp. 1-4). Overall, the student either maintained or improved his ratings earned from the second to the third marking period, and consistently received ratings of a "3" or a "4" in all areas assessed (id.). Teacher comments described the student as motivated and as a student who worked hard on all academic tasks (id. at p. 1). According to the teachers, the student was driven and continued to excel in all curricular areas (id.). At that time, the student used reading strategies to support stopping and thinking as a reader to monitor his understanding of more sophisticated passages (id.). The student had written various nonfiction pieces during the spring, and in mathematics, he demonstrated success with the last modules, which encompassed addition and subtraction within 1000, the beginning concepts of multiplication, and the concepts of money and time (id.). Overall, the teachers expressed that it was a pleasure being his teachers, and they encouraged the student to read over the summer (id.).

In a letter dated July 6, 2021, the parents notified the district of their intentions to unilaterally place the student at Quad Prep for the 2021-22 school year and to seek reimbursement for the costs of the student's tuition from the district (see Parent Ex. C).⁵ The parents indicated in the letter that they did not believe that the program recommended in the student's May 2021 IEP was appropriate to meet his "significant educational needs" (id.).

On or about July 22 and August 3, 2021, the parents individually executed an enrollment contract with Quad Prep for the student's attendance during the 2021-22 school year beginning on September 14, 2021 (see Parent Ex. I at pp. 2, 5-6). The student attended Quad Prep for the 2021-22 school year (see generally Parent Exs. S-T).

⁵ The Commissioner of Education has not approved Quad Prep as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). Evidence in the hearing record describes Quad Prep as an "independent school for 'twice-exceptional' students, i.e., gifted students with learning differences and/or learning disabilities" in kindergarten through 12th grade (Parent Ex. V ¶ 7; see Parent Ex. F at pp. 9, 11). Evidence also reflects that students at Quad Prep "typically have cognitive abilities that are in the average range or higher and demonstrate academic skills that may be on or above grade level but are uneven, with areas of deficits (Parent Ex. V ¶ 8).

On or about February 7, 2022, the parents executed an enrollment contract with Quad Prep for the student's attendance during the 2022-23 school year beginning on September 12, 2022 (see Parent Ex. J at pp. 1, 3, 10).

On June 13, 2022, a CSE convened to conduct the student's annual review and to develop an IEP for the 2022-23 school year (see Dist. Ex. 25 at p. 1).⁶ Finding that the student remained eligible for special education as a student with an other health-impairment, the June 2022 CSE recommended a general education placement with ICT services for instruction in ELA, mathematics, social studies and sciences; individual and small group speech-language therapy, individual and small group counseling, and individual OT services; and the same supplementary aids and services, program modifications, and accommodations as recommended in the May 2021 IEP, with the addition of providing access to a visual schedule, sensory strategies, pacing, models and examples, and breaks (compare Dist. Ex. 25 at pp. 12-13, with Dist. Ex. 18 at pp. 9-10). As supports for school personnel on behalf of the student, the June 2022 CSE recommended a behavioral intervention consultation for the student's teachers and ICT aide; a speech-language consultation to support the generalization of skills; and an inclusion consultation to support differentiation as it related to "acceleration and addressing student strengths in the classroom setting and grouping" (Dist. Ex. 25 at p. 14). Annual goals (approximately 14 in total) developed by the June 2022 CSE targeted the student's needs in the areas of reading, writing, mathematics, speech-language skills, and social/emotional and behavioral skills (id. at pp. 10-12). With respect to management needs, the June 2022 CSE recommended the same strategies as in the May 2021 IEP, together with the following additional strategies: breaks to self-regulate, integrated small group instruction, counseling support for his social/emotional needs, speech-language therapy for pragmatic language development, and direct support for executive functioning within the classroom setting (compare Dist. Ex. 25 at p. 9, with Dist. Ex. 18 at p. 7).

In a letter dated August 23, 2022, the parents notified the district of their intentions to unilaterally place the student at Quad Prep for the 2022-23 school year and to seek reimbursement for the costs of the student's tuition from the district (see Parent Ex. D at pp. 1, 4). The parents detailed their concerns about the student's June 2022 IEP and the CSE process therein, as well as their concerns about the assigned public school site (id. at pp. 1-3). In addition to requesting tuition reimbursement, the parents also requested that the district provide the student with round-trip transportation (id. at p. 4).

On August 26, 2022, a CSE convened to address the concerns raised in the parents' 10-day notice of unilateral placement and to review information submitted by the parents following the

⁶ Since the student had attended Quad Prep during the 2021-22 school year, the June 2022 CSE relied primarily upon evaluative information from Quad Prep progress reports, as well as verbal input from Quad Prep attendees and the parents (see Dist. Ex. 25 at pp. 1-3). However, it was noted in the IEP that the Quad Prep progress reports only provided information about the student's performance through mid-April 2022, that "[f]ourth quarter reports were not provided," and "[c]urrent progress reports for both speech[-]language therapy and [OT] were not provided," thus, the CSE's recommendations were "limited to the written report and verbal accounts provided" (id. at p. 1). Additionally, the district conducted a classroom observation of the student at Quad Prep on May 25, 2022, which the June 2022 CSE also considered (see Dist. Ex. 24).

June 2022 CSE meeting (see Parent Exs. E at p. 1; AA at p. 3; Dist. Exs. 26 at p. 1; 27 at p. 1).⁷ Based on the evidence in the hearing record, information submitted to the CSE for consideration included two letters written respectively by the student's psychologist (dated August 2, 2022) and by his psychiatrist (dated July 30, 2022), and an updated progress report from Quad Prep (dated June 21, 2022) (see Dist. Ex. 27 at p. 4; see generally Parent Ex. E; Dist. Ex. 26). Finding that the student remained eligible for special education as a student with an other health-impairment, the August 2022 CSE modified the June 2022 IEP to include updated information concerning the student's social development within the present levels of performance, which included adding information provided by the parents (compare Dist. Ex. 27 at pp. 9-10, with Dist. Ex. 25 at pp. 7-8). In addition, the CSE added strategies to address the student's management needs, which indicated that the student required "goals to support learning strategies to identify and cope with emotions within the academic setting" and he required "continued and consistent intervention throughout the school day" (compare Dist. Ex. 27 at p. 11, with Dist. Ex. 25 at p. 9). With regard to the program recommendations, the August 2022 CSE continued to recommend the placement and services in the June 2022 IEP, but added recommendations for a resource room program (four 42-minute sessions per week) and parent counseling and training services (four 45-minute sessions per year) (compare Dist. Ex. 27 at p. 14, with Dist. Ex. 25 at p. 12). In addition, the August 2022 CSE added supplementary aids and services, program modifications, and accommodations to the IEP, including the provision of a 1:1 teaching assistant to support the implementation of the student's accommodations and modifications, as well as to allow access to personalized differentiated instructional activities, to support the student during transitions, and to support his behavioral needs in consult with a behaviorist and a psychologist (compare Dist. Ex. 27 at p. 16, with Dist. Ex. 25 at pp. 12-13). The August 2022 CSE also recommended audio and visual reinforcement (i.e., process charts, photographs) and support for organizational skills (i.e., access to a working clock and timers to support time management) (compare Dist. Ex. 27 at p. 16, with Dist. Ex. 25 at pp. 12-13). Finally, the August 2022 CSE carried over the annual goals from the June 2022 IEP, but added one more annual goal targeting the student's social/emotional and behavioral needs (compare Dist. Ex. 27 at pp. 12-16, with Dist. Ex. 25 at pp. 10-12).

A. Due Process Complaint Notice

By due process complaint notice dated December 12, 2022 (December 2022 due process complaint notice), 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 at p. 1).⁸ Subsequently, the parents amended the December 2022 due process complaint notice on March 27, 2023 (amended due process complaint notice) to include an allegation that the district failed to offer the student a FAPE for the 2021-22 school year (see Parent Ex. B at p. 1). In the amended due process complaint notice, the parents alleged the following procedural and substantive violations with

⁷ The August 2022 CSE meeting was recorded and then later transcribed; the hearing record includes a copy of the transcript from the August 2022 CSE meeting (see generally Parent Ex. AA).

⁸ Based on the IHO's decision, the IHO was appointed to this matter on December 15, 2022, and on December 19, 2022, the IHO conducted a prehearing conference (see IHO Decision at p. 4). The hearing record does not, however, include either a transcript or a summary of the prehearing conference held in December 2022, as required by State regulation (see 8 NYCRR 200.5[j][3][xi]; see generally Tr. pp. 1-1403; Parent Exs. A-Z; AA-UU; Dist. Exs. 1-28).

respect to the 2021-22 school year: the CSE failed to sufficiently evaluate the student, and specifically failed to conduct a functional behavioral assessment (FBA); the present levels of performance did not adequately describe the student's strengths, weaknesses, unique abilities, or the severity of the student's social/emotional needs; the parents were deprived of the opportunity to participate in the IEP process by failing to review all of the student's individual needs; the IEP failed to include an individual safety or behavior intervention plan (BIP) to inform those working with him about the student's "previous suicidal ideation and complex social/emotional presentation"; the annual goals and objectives did not address all of the student's deficits and were unmeasurable; the recommended program was not consistent with the weight of the information provided or available to the CSE; the program did not provide a setting suitably structured and supportive to meet the student's needs; the program failed to include sufficient supports to address the student's management needs or "challenge hi[m] academically"; and the CSE recommended a program available in the district, rather than tailored to the student's needs (id. at p. 4).

With respect to the 2022-23 school year, the parents generally alleged the same procedural and substantive violations in the amended due process complaint notice as had been alleged with regard to the 2021-22 school year as grounds upon which to conclude that the district failed to offer the student a FAPE (compare Parent Ex. B at pp. 6-8, with Parent Ex. B at p. 4). In addition, however, the parents alleged that the CSE failed to consider the private providers' recommendations for a "small, specialized program"; and the recommended "placement was too loud, crowded and overwhelming" for the student (i.e., assigned public school site) (see Parent Ex. B at p. 7).

As relief, the parents requested funding for the costs of the student's unilateral placement at Quad Prep for the 2021-22 and 2022-23 school year, as well as the provision of round-trip transportation to Quad Prep (see Parent Ex. B at p. 8).⁹

B. Impartial Hearing Officer Decision

On June 5, 2023, the parties proceeded to an impartial hearing, which concluded on June 30, 2023, after six days of proceedings (see Tr. pp. 1-1403). In a decision dated October 26, 2023, the IHO found that the district offered the student a FAPE for the 2021-22 and 2022-23 school years (see IHO Decision at pp. 22-28). In support of these findings, the IHO initially determined that, based on the law, the district was "responsible only for the impact of a child's disability on his or her educational performance, and not what (sic) the behavior that [wa]s happening at home" (id. at pp. 24-25). In this case, the IHO found that the evidence in the hearing record demonstrated that the student "behaved appropriately while in school" and "purportedly melted down at home," and that both of these facts were "undisputed" in the hearing record (id. at p. 25). The IHO also found that while district staff "were advised" that the student "decompensated at home and that he masked his emotions while in school," the evidence further revealed that the "teachers, therapists, and counselors" were not "experiencing" the student in that way at school and that both parties

⁹ Following the submission of the amended due process complaint notice, the IHO conducted a "conference call" with the parties on April 10, 2023 to schedule dates for the impartial hearing (IHO Decision at p. 4). In addition, the district prepared a response to the amended due process complaint notice, dated April 25, 2023 (see Dist. Ex. 2 at p. 1).

elicited testimony at the impartial hearing indicating that the student "masked his upset," but that he did not "meltdown or otherwise misbehave at school" (id.).

Next, the IHO determined that the hearing record was devoid of evidence demonstrating that the student's behavior interfered with his educational performance (see IHO Decision at p. 25). For example, the IHO noted that evidence reflected that during the 2020-21 school year in second grade, the student was "performing at or above expectations" (id.). In addition, the IHO noted that the teacher comments in the student's report card and, as elicited during testimony, "were all positive with no comments about negative behaviors" (id.). The IHO further indicated that, with respect to the student's social/emotional needs, district staff testified that the student was "well liked and had friends in school"; in addition, the evidence reflected that the student excelled "'in all curricular areas,'" which had been documented on the student's report card in teacher comments (id.). Accordingly, the IHO determined that the student's "issues at home were not negatively impacting his educational performance in school" (id.). Overall, the IHO concluded that, "[b]ecause the [s]tudent's behavior at home did not impact his educational performance in school, there was no denial of FAPE" (id.).

In addition to the foregoing, the IHO examined the student's 2020-21 IEP, and noted that it had been "prepared based on what the [district] school staff was seeing and their experience with the [s]tudent, a student who was on grade level and did not present behavioral issues" (IHO Decision at p. 26). The IHO indicated that, based on what district staff observed and experienced, the "IEPs it offered to the [s]tudent would have provided a [FAPE] to the [s]tudent" (id.). As determined by the IHO, the hearing record included an "abundance of evidence as to how well the [s]tudent performed, and no evidence to contradict the testimony that the [s]tudent was performing at least on grade level, had friends and was not a behavioral problem" (id.). The IHO found that although the testimony of the student's psychiatrist and psychologist "suggest[ed] that the [s]tudent was experiencing social rejection or poor self-esteem," this information was based on what the parents "told the therapists and was not consistent with the testimony of the [district] personnel, who worked with the [s]tudent regularly and consistently testified that the [s]tudent was happy and that he had friends" (id.). With regard to the student's "suicidal ideation . . . evidenced in May 2021," the IHO opined that, "while troubling," it had happened, "like everything else, at home" (id.). Moreover, the IHO noted that the parents "waited a least a day and possibly two days before sharing the incident" with district staff, which the IHO found to be a "troubling fact given the emphasis placed on the episode during the [impartial] hearing" (id.). Additionally, the IHO indicated that the student's psychiatrist "cleared [him] to return to school on the day the [district] schools learned of it" (id.).

Turning to the IEPs at issue, the IHO determined that district staff provided "cogent reasons" for the recommended ICT services (IHO Decision at p. 26). With respect to the May 2021 IEP, the IHO found that it included additional recommendations of speech-language therapy and counseling in a small group; the annual goals appeared appropriate in light of the student's identified deficits; and that within the IEP, itself, it was noted that the parents agreed with the "'updates, proposed programs, services, and goals'" (id.). In addition, the IHO pointed out that the May 2021 IEP included an explanation for the recommended ICT services, which indicated that a "special education teacher [wa]s warranted because of the [s]tudent's distractibility and executive functioning weaknesses" (id.). With respect to the August 2022 IEP, the IHO indicated that it, too, included a recommendation for ICT services to support the student (id.). The IHO further indicated

that the August 2022 IEP had been developed primarily based on the "input of the parents and the representatives of [Quad Prep] only because the [s]tudent had, by then, been out of [the district] for a full school year" (id.). Additionally, the IHO found that the district staff "relied on the supports, services and accommodations that [Quad Prep] intended to use with the [s]tudent, although in some instances, in somewhat different forms" (id.). The IHO also found that the August 2022 IEP included a recommendation for resource room services (5:1 student-to-teacher ratio) that would "allow the [s]tudent to accelerate where appropriate," as well as an individual aide that would "allow the [s]tudent someone with whom he could check as needed" (id.). The IHO indicated that the August 2022 IEP included recommendations for speech-language therapy, both individually and in a group, which was "intended to work on social skills in a milieu where the [s]tudent could practice those skills with other students, a skill made important given the [s]tudent's inability to generalize the skills he was learning individually in both counseling and speech[-language] therapy" (id.). As a final point, the IHO noted that the August 2022 IEP included a recommendation for individual OT services (id. at pp. 26-27). Overall, the IHO concluded that, "[w]hile a closer call," the August 2022 IEP offered the student a FAPE (id. at p. 27).

Next, the IHO indicated that the August 2022 IEP included a statement documenting the parents' observations of the student's "'positive behavioral changes once [the Student] was removed to a private setting'" (IHO Decision at p. 27). Here, the IHO noted that, based on the testimony of the student's psychologist, the students "who applied to [Quad Prep] had the same interests in computers and coding" as this student and that this was an "'important component of [Quad Prep]'s programming'" (id.). The IHO found, however, that the hearing record did not include any evidence that the student "was behavioral while in school" (id.).

The IHO then turned to the testimony from the student's psychologist describing the "environment in which she thought the [s]tudent would do better than he would in the [district] schools" (IHO Decision at p. 27). According to the student's psychologist, the student required an environment that provided him with peers with similar interests and with a similar intellectual capacity, and she also described "how the teachers should teach for the [s]tudent," notwithstanding the fact that, as noted by the IHO, the psychologist was "not a teacher" (id.). The IHO opined that the parents had "clearly . . . compared what [the district] offered for the 2022-2023 school year to what Quad [Prep] offered and found [the district]'s program to come up short"; however, as found by the IHO, this did not "equate to a denial of FAPE" (id.).

With respect to the testimonial evidence presented by the parents, the IHO found that "none" of the witnesses testified that the "IEPs offered by [the district] schools were inappropriate," but that the student's psychologist had testified that the student was not "'benefitting' from his placement with neurotypical peers" (IHO Decision at p. 27). The IHO noted that, while the parents' witnesses testified that Quad Prep was "better" for the student, the IHO found that "better [wa]s not synonymous with inappropriate" when assessing the district's recommended educational program for the student (id.).

Next, the IHO addressed the evidence presented at the impartial hearing that attempted to establish that the student was "bored in the [district] schools because of his giftedness" (IHO Decision at p. 27). Here the IHO found that, even if this was true, the district was not obligated to "teach just for the particular [s]tudent" (id.). According to the IHO, even if Quad Prep was a

"better placement" in this respect, an alleged lack of academic rigorousness at the district did not mean that the district did not offer the student a FAPE (*id.*). Relatedly, the IHO noted that the parents had "made much of the argument that the [s]tudent needed special instruction because he [wa]s gifted in certain respects" and that the parents' concern about the student having an "appropriate intellectual cohort" had been noted as a concern within the August 2022 IEP (*id.*). In addition, the IHO noted the testimony from the student's psychologist about the recommended ICT class: in particular, that it was not a "gifted and talented class" and it would not provide the student with "students who [we]re advanced in their intellectual or academic abilities"—but rather, that "as a whole the class contained a fairly typical population, like some students ha[d] advanced skills but not to [the student's] degree" (*id.* at pp. 27-28). Nevertheless, the IHO determined that—unlike Quad Prep—the district did not have the "luxury of selecting the students they w[ould] educate" (*id.* at p. 28). Moreover, the IHO noted that the district, as a public school, was "required to educate those students who reside[d] within the district, come as they [we]re" and although the student "might have preferred smarter classmates or that smarter classmate[s] would be 'better' for the [s]tudent [we]re things that [we]re not within the control of a public school system and the population it [wa]s required to serve" (*id.*). Overall, the IHO found that "[w]hether or not the students in the [district] schools [we]re the [s]tudent's intellectual equals d[id] not present a cognizable dispute, nor [wa]s it a denial of FAPE" (*id.*).

As a final point, the IHO noted that the parents' case boiled down to their finding that the district public school was not "sufficiently challenging" for the student, as he was "both gifted and in need of special education" (IHO Decision at p. 28). However, the IHO noted that the law did not "guarantee children with disabilities—or, for that matter, gifted or normally-talented children—the best education that money c[ould] buy"; rather, the law "guarantees children with disabilities" receive a FAPE (*id.*, citing *T.C. v. New York City Dep't of Educ.*, 2016 WL 1261137, at *1 [S.D.N.Y. Mar. 30, 2016]). In light of the foregoing, the IHO concluded that the district offered the student a FAPE for the 2021-22 and 2022-23 school years (*see* IHO Decision at p. 28).

IV. Appeal for State-Level Review

The parents appeal, arguing initially that the IHO ignored or mischaracterized evidence elicited from the student's psychiatrist and the student's psychologist with respect to their respective recommendations to change the student's placement. The parents also argue that the IHO ignored testimonial evidence concerning a classroom observation of the student at Quad Prep, which indicated that the student needed redirection, prompting, and support to navigate a social situation and which contradicted the district's position that the student did not present with behavioral or social challenges. The parents further assert that the IHO inaccurately stated that it was undisputed that the student did not present with behavioral issues in school and erred by finding that the student's behavior did not interfere with or impair his educational performance. The parents also assert that the IHO erred by finding that there was a distinction between the student's needs at home and at school. With respect to the 2021-22 school year, the parents contend that the IHO erred by finding that the district offered the student a FAPE because the IEP did not include recommendations for "individual counseling, OT, appropriate [speech-language therapy], or a small, supportive class." With respect to the 2022-23 school year, the parents contend that the IEP was "diametrically opposed" to the recommendations made by the student's psychiatrist and the student's psychologist, and that such placement would be "detrimental to [the student's] health and would cause him to regress." In addition, the parents assert that the district failed to

demonstrate how ICT services for three hours per day, "without data from an FBA, substantially met the [s]tudent's needs." Here, the parents argue that the IHO erred by finding that an FBA was not "important" as the student did not exhibit overt behaviors.

Next, the parents argue that the IHO failed to address whether the student's unilateral placement at Quad Prep was appropriate and whether equitable considerations weighed in favor of their requested relief. As relief, the parents seek to reverse the IHO's findings that the district offered the student a FAPE for the 2021-22 and 2022-23 school years. In addition, the parents seek findings that Quad Prep was an appropriate unilateral placement and that equitable considerations weigh in favor of their requested relief, and seek an order directing the district to reimburse them for the costs of the student's tuition at Quad Prep for the 2021-22 and 2022-23 school years.

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision in its entirety. The district contends that, in the request for review, the parents do not challenge the IHO's decision as contrary to the law, but instead, argue that the IHO should have agreed with the stated positions of the student's psychiatrist and the student's psychologist as "experts," which, according to the district, does not alter the deference owed to the district's own trained educators. The district also contends that the IHO's findings were amply supported by the evidence in the hearing record, and at least one of the parents' witnesses—the student's psychologist—denied testifying that the student was not making academic progress at the district. With respect to the 2021-22 school year, the district avers that, contrary to the parents' argument, the CSE recommended both individual and group speech-language therapy sessions, with a speech consult, and numerous modifications and accommodations targeting the student's speech-language skills. The district argues that the parents' bald assertions, without support in the hearing record from either a speech-language provider or an occupational therapist, are not sufficient to overturn the IHO's findings. Moreover, the district asserts that the parents do not point to any evidence in the hearing record to support their claims that the recommended speech-language or OT supports were inadequate to meet the student's needs, and the parents did not raise any issues concerning OT and sensory processing within the due process complaint notice. However, the district asserts that the CSE included both OT and sensory strategies in the IEP developed for the 2022-23 school year. Furthermore, the district contends that its witnesses discussed individual counseling, and the parents' claim that the student experienced social isolation was without support in the hearing record. Next, the district argues that the IHO did not rely on retrospective evidence to reach her conclusions, and contrary to the parents' argument, the IHO did not rely on any improper legal authority to reach her conclusions. Finally, the district contends that the IHO properly determined that the absence of an FBA did not result in the failure to offer the student a FAPE.

In addition to the foregoing, the district argues that, in light of finding that the district offered the student a FAPE for the school years at issue, the IHO properly declined to consider whether Quad Prep was an appropriate unilateral placement and whether equitable considerations weighed in favor of the parents' requested relief. The district seeks to uphold the IHO's decision in its entirety.

The parents, in a reply to the district's answer, respond to the district's arguments and generally argue to grant the relief sought in the request for review.¹⁰

V. Applicable Standards

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

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

¹⁰ Although the parents prepared, served, and filed a reply to the district's answer in this case, State regulation limits the scope of the parents' reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent that would trigger the parents' right to compose a reply. As such, the parents' reply fails to comply with the practice regulations and will not be considered.

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]).¹¹

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

¹¹ 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).

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).

VI. Discussion

The crux of the parents' appeal focuses on whether the district—in the development of the student's IEPs for the 2021-22 and 2022-23 school years and in making the specific program and related services' recommendations therein—adequately understood and addressed his social/emotional and behavioral needs. With respect to the 2021-22 school year, the parents argue that the IHO erred by finding the district offered a FAPE because the May 2021 IEP failed to include individual counseling, OT, appropriate speech-language therapy, and a small supportive class. With respect to the 2022-23 school year, the parents assert that the IHO erred by finding that the district offered a FAPE because the August 2022 IEP recommendation of ICT services, absent an FBA, would be detrimental to the student's health and would cause regression, and because the recommendation for ICT services was not what the student's psychiatrist and therapist recommended for the student.

Turning first to the parents' allegations concerning the alleged failure to recommend sufficient related services in the May 2021 IEP for the 2021-22 school year, it does not appear that the parents raised any issues with regard to the related services in the amended due process complaint notice (see Parent Ex. B at p. 4). Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Beyond vaguely alleging that the district failed to recommend an appropriate program for the student based on his individual needs, the parents' amended due process complaint notice cannot be reasonably read to include any allegations that the May 2021 IEP was deficient due to inadequate frequencies or durations of counseling, speech-language therapy, or OT services (see Parent Ex. B at p. 4). Moreover, the district argues in its answer that the May 2021 CSE recommended both speech-language therapy and counseling services in a group, together with a speech-language consult and numerous modifications and accommodations to meet the student's needs in speech. In addition, the district

argues that although the parents did not raise any claims concerning OT or the student's sensory processing needs in the amended due process complaint notice, the May 2021 IEP included strategies to address these needs.¹²

After independently reviewing the hearing record and upon consideration of the parties' respective arguments on appeal, I find that the evidence does not support the parents' arguments to reverse the IHO's determination that the district offered the student a FAPE in the LRE for the 2021-22 and 2022-23 school years or that the IHO's ultimate conclusion was inconsistent with the evidence in the hearing record with respect to the student's social/emotional and behavioral needs (see IHO Decision at pp. 22-28). Instead, the evidence in the hearing record demonstrates that the IHO carefully and accurately recounted the issues to be resolved at the impartial hearing, the positions of the parties, as well as the procedural and factual background of the case (*id.* at pp. 1-22). In addition, the hearing record reflects that the IHO accurately identified and analyzed the crux of the parents' arguments and concerns related to the student's social/emotional and behavioral related needs, as well as the student's need for challenging academics, and whether any of the parents' alleged procedural or substantive violations in the amended due process complaint notice constituted a failure to offer the student a FAPE in the LRE for the 2021-22 or 2022-23 school years by relying on the relevant facts and proper legal standards in order to reach her conclusions of law on these issues (*id.*).

With respect to the IHO's finding that the district offered the student a FAPE for the 2021-22 school year, it is well settled that a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x

¹² The Second Circuit, however, has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]). However, the parents do not argue, nor point to evidence in the hearing record, indicating that the district opened the door to such issues at the impartial hearing (see generally Req. for Rev.).

80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year, courts have been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]; N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at *9 [D.D.C. July 30, 2021]; James D. v. Bd. of Educ. of Aptakisis-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

With this as backdrop and as briefly explained below, the evidence in the hearing record reveals that the student made progress during the 2020-21 school year, and, thus, the district's recommendation for a similar program for the 2021-22 school year, with modifications responsive to the student's needs, was reasonably calculated to enable the student to make appropriate progress in light of his circumstances and offered the student a FAPE in the LRE.

Testimony by the student's regular education teacher during the 2020-21 school year indicated he was familiar with the student and reviewed his IEP along with the special education teacher assigned to the same classroom (Tr. pp. 380-82). According to the teacher's testimony, the student did very well over the course of the 2020-21 school year and he had no academic concerns concerning the student (Tr. pp. 386, 398). He noted that he and the special education teacher discussed who within the class needed a smaller group setting, and the special education teacher would "pull small groups" (Tr. p. 386).¹³ The student spent most of his time in the whole group setting "because he could handle it," and while in the large group he learned "Foundations," math,, reading workshop, and writing workshop (Tr. pp. 386, 390-91; Dist. Ex. 13). When looking at the student's written "personal narrative" writing samples over the course of grade two, the teacher testified that the student was a passionate writer and that he was "able to really take what was in his head and put it on paper" (Tr. pp. 394- 95). The teacher indicated that the student was probably higher in writing than where he would want other students to end the (school) year (Tr. p. 395). The teacher noted the student produced very good writing and he did a good job with finding his writer's voice (Tr. p. 395).

Testimony by the same teacher indicated that when in the classroom, with regard to attention, the student was like other students in that he needed redirection in class once in a while (Tr. p. 399). He indicated that he and the student had a good relationship and that when he redirected the student, the student understood that he was not coming from a place of "gotcha" (Tr. p. 399). Socially, the teacher described the student as being a consistently active participant in class and "a very charismatic kid" (Tr. p. 404). The teacher indicated the other students enjoyed hearing from the student and that the student took pride in his classroom (Tr. p. 404). The teacher testified that over the course of the 2020-21 school year he never saw the student become dysregulated (Tr. p. 405). In addition, he indicated that he never saw the student engage in screaming, yelling, or crying, and never heard reports from any other teachers that the student

¹³ The student's regular education teacher testified that, on a day-to-day basis, the student spent more time with him, but the special education teacher in the classroom conducted the Fountas & Pinnell assessments and entered the information on the student's report card (see Tr. pp. 391, 416). Both teachers subsequently reviewed the information together (see Tr. pp. 416, 456).

engaged in that type of behavior in school (Tr. p. 405). The teacher reported the student did not exhibit any social-emotional difficulties that were different than anyone else during the 2020-21 pandemic school year (Tr. pp. 410-11). The teacher testified that he did not see the student engage in social isolation, self-esteem concerns, or peer rejection at school, and that no students reported they did not like the student, the student did not shut down in school, and the student did not present as struggling or unable to learn in school (Tr. pp. 411-12).

The district school psychologist who provided services to the student during the 2020-21 school year testified that she worked on the student's social skills including flexible thinking, conflict resolution, and coping strategies to resolve social problems (Tr. pp. 237-38; see Tr. p. 284). She reported that the student's teachers described the student to her as very happy, energetic, and talkative (Tr. pp. 238-39). She noted that nothing stood out as far as levels of concern regarding the student's social-emotional functioning (Tr. p. 239). In particular, the student seemed to enjoy attention from adults (Tr. p. 239). The school psychologist testified that during an initial conversation with the parents early in the school year when she reached out and introduced herself, the parents expressed their concern about people not understanding the student and how he would present himself to school staff, and school staff not understanding him and truly getting to know him (Tr. p. 239). With regards to the student's socialization during unstructured times, such as recess, the school psychologist observed that at the beginning of the school year, there were requirements for social distancing and limitations on material and equipment (Tr. p. 251). Children were actively encouraged to distance themselves from one another (Tr. p. 251). However, she noted that in the spring, restrictions loosened up and she remembered seeing the student outside and noted that he appeared like a typical second grader, running, chasing, and going on playground equipment (Tr. p. 251). She indicated that nothing stood out as anything of concern (Tr. p. 251). The school psychologist stated that the student was observed interacting, playing, and making connections with other students in school (Tr. p. 278).

Additional testimony by the school psychologist indicated that in counseling, the student did nicely as he was actively and "pretty consistently" engaged, showed his sense of humor, and seemed to like having the attention of a small group and sharing his thoughts (Tr. p. 252). She indicated that the parents did not appeal to her throughout the (2020-21) school year for more social-emotional support for the student, although the parent did share with her that by March 2021, the student was displaying behaviors at home that were not seen in school (Tr. pp. 273-74, 309-314). She also reported that she never saw the student shut down in school, nor was that ever reported to her (Tr. p. 277). She stated that based on his report card and progress monitoring, or on teacher assessments, the student was learning (Tr. pp 277-78). The school psychologist indicated she communicated with the student's private psychologist between five and ten times during the school year about the social skills the private psychologist was working on with the student, that were "very much in line with some of the things" the school psychologist worked on with the student (Tr. pp. 291-93). According to the school psychologist, the private psychologist did not focus on the student's social-emotional state with her when they communicated (Tr. p. 300). Instead, the private psychologist expressed concerns about the student's dysregulation behaviors at home (Tr. pp. 299-300). The school psychologist stated that in school, the student did not demonstrate a level of dysfunction reported to occur at home (Tr. p. 303).

As reflected in the student's May 2021 IEP the student interacted with his peers in his classroom and enjoyed making them laugh (Dist. Ex. 18 at p. 6). The IEP noted that the student

was consistently an active participant in his counseling sessions (id.). According to the IEP, the student was receptive to learning about his social development and often mastered related concepts easily and yet had greater difficulty applying them in the milieu, which was consistent with his autism spectrum diagnosis (id.). In addition, while the student had demonstrated a level of cognitive empathy, he had greater difficulty showing emotional empathy for others (id.). The IEP noted that although the student had improved his ability to attend and interpret social cues accurately from an intellectual perspective, (he had a tendency to interpret social rules literally and had some difficulty when flexibility and nuances that are inherent in social interactions between and among people occurred (id. at pp. 6-7). The student had a somewhat restricted range of interests, with a particular focus on anything technologically-related (id. at p. 7). According to the IEP, the student often demonstrated a strong need for understanding the reasoning, or rationale, behind concepts when they were introduced and would ask many questions to satisfy that need before moving on to the application of the concepts (id.). The student's social discourse was not always spontaneously reciprocal but marked improvements had been observed - especially with his readiness to initiate conversations with others and inquire about them, albeit somewhat scripted at times (id.). The student had become notably more flexible in his thinking during the school year and was working on seeing social situations from multiple perspectives and identifying more than one way to resolve social problems with success (id.). The IEP stated that the parents had reported that at home the student could become emotionally upset and dysregulated, which was not observed in school at that time (id.). With regard to the student's social strengths, the May 2021 IEP indicated that he was an engaging, charismatic student who enjoyed conversing with others (id.). His intellect, verbal abilities, and extroverted nature facilitated his social interactions, especially with adults (id.). The student's ability to express his thoughts and feelings was also noted to be a strength (id.).

With regard to the effect of the student's needs on involvement and progress in the general education curriculum, the May 2021 IEP further noted that the student had difficulty maintaining his attention and demonstrating self-regulation at times (Dist. Ex. 18 at p. 7). His distractibility could negatively affect his ability to remain on task and resist external distractions (id.). The IEP indicated that concomitant executive functioning weaknesses included difficulties with organization, planning, and executing asks (id.). These difficulties hindered the student's ability to maintain focus in a general education setting and highlighted the student's need for a special education teacher (id.).

Testimony by the student's ICT classroom teacher for the 2020-21 school year indicated he attended the May 2021 CSE meeting, where the May 2021 IEP was created, and that he agreed with the CSE recommendations made for the student (Tr. p. 406). He liked the ICT model and felt it provided students with an additional set of ears for sounding boards and chances to be met in smaller group settings (Tr. p. 406). He believed the logic behind the ICT recommendation for the student for third grade was consistent with the student's success in second grade, where the student would have two teachers, two different teaching styles, and a chance to be in groups a bit smaller than the whole group if there was a lesson or concept that warranted it (Tr. p. 407). He noted that having a co-teacher allowed for one teacher to lead the class while the other teacher listened for real time social issues that might occur (Tr. p. 407).

Turning to the 2022-23 school year, and more specifically the parents' contention that the recommendations in the August 2022 IEP were "diametrically opposed" to the recommendations

made by the student's psychologist and his psychiatrist, this claim generally boils down to an assertion that the August 2022 CSE failed to consider the parents' privately obtained information and recommendations for a small, specialized classroom with trained therapeutic supports in the classroom. In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). A CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight or adopt their recommendations (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

In this instance, the evidence reflects that the August 2022 CSE did consider the information within the two letters submitted by the parents at the meeting.¹⁴ At the impartial hearing, the district director of pupil personnel services (director)—who acted as chairperson at both the June and August 2022 CSE meetings—testified (see Tr. pp. 37-38). The director described the June 2022 CSE process, which included "solicit[ing] input from the family"; discussing the student's progress at Quad Prep during the 2021-22 school year; and discussing the student's management needs, strengths, weaknesses, and "areas for growth" prior to developing the IEP (Tr. pp. 63-64). The director testified that the present levels of performance in the June 2022 IEP were developed solely based off of the information provided by the parents and Quad Prep staff, as well as documents provided by Quad Prep (see Tr. pp. 70-71; Dist. Exs. 23 at pp. 1-25; 25 at pp. 3, 5-9). After developing the present levels of performance, the June 2022 CSE discussed the student's needs "as it related to accessing the curriculum," and then determined the annual goals, what accommodations and modifications were needed, and what if any additional assessments might be needed (Tr. pp. 70-71). In addition to Quad Prep documents, the June 2022 CSE also reviewed a classroom observation of the student completed in May 2022, when the student was attending Quad Prep (see Tr. pp. 71-71; see generally Dist. Ex. 24). According to the director, the June 2022 CSE developed the student's annual goals in the IEP based directly off of

¹⁴ To be clear, the letters penned by the student's psychologist and his psychiatrist did not include any evaluation results obtained from administering any type of assessments to the student, but instead, included summaries of each professional's respective interactions with the student over the course of treating him, as well as making educational recommendations for the student (see generally Parent Ex. E; Dist. Ex. 26).

the information in the Quad Prep documents and with consideration given to the "areas for growth as reported by Quad Prep" (Tr. pp. 73-78; Dist. Ex. 25 at pp. 10-16). Next, the June 2022 CSE reviewed the "special factors" and the "need for behavioral supports," and then made the program recommendation for ICT services (Tr. pp. 78-79).

The director also testified about the August 2022 CSE meeting, noting that the CSE "addressed the parents' additional psychologist's report that had been submitted, some of the additional data from Quad Prep, and [the CSE] addressed the concerns within the [10]-day letter" (Tr. p. 104). The director explained that the August 2022 CSE sought to "refine the IEP" and to "fine-tune the [annual] goals and the programming and address any perceived gaps that the parents believed existed within the existing program" (id.). As a result, the CSE added the resource room service in small group (5:1 ratio) to "support additional small-group instruction," which, according to the director, was in direct response to the parents' "concern that he was not engaged in enough structured small-group instruction" and their concern about the student attending a "loud and chaotic classroom" (Tr. p. 105). The director also explained that the August 2022 CSE added the services of a full-time, individual teacher assistant, whose role was described in the IEP (see Tr. pp. 106-07; Dist. Ex. 27 at p. 16). According to the director's testimony, the teaching assistant would be trained by the district behaviorist and would have "access to all of the consults that were available to the staff, as well as access for training from the psychologist" (Tr. p. 107). The teaching assistant—as opposed to the "general classroom aide providing the support"—offered the student a "certified individual that could provide that 1:1 check-in if [the student] needed a separate, quiet place for learning, could provide that flexible []pacing, could provide prompting and could support the varying needs" (id.). The director testified that the certified teaching assistant would be trained to meet his needs (see Tr. pp. 107-08).

With regard to the parents' argument that the student's IEP for the 2022-23 school year was not informed by an FBA, the director testified that it was originally recommended in light of the "behaviors that were outlined in the present levels [of performance] and supported through [annual] goals and accommodations, modifications" (Tr. pp. 108-09). The director also noted that, had the student returned to the district public school, it had been a while since the district "had eyes on him" and, thus, they "didn't know how he would be responding to the supports and services" (Tr. p. 109). Additionally, the director testified that it was a "common practice to reconvene after six to eight weeks or so of a student returning to the [d]istrict to fine-tune supports and services as needed" (id.).

In light of the foregoing evidence and my independent review of the hearing record, I find that the IHO relied on the proper legal standards to conclude that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2021-22 and 2022-23 school years (see IHO Decision at pp. 22-28). The IHO's decision also shows that the IHO carefully recited and considered the testimonial and documentary evidence presented by both parties, and furthermore, that she carefully marshaled and weighed the evidence in support of her conclusions (id.). Consequently, there is no reason to disturb the IHO's findings and conclusions, and the parents' arguments must be dismissed.

VII. Conclusion

Having found that the evidence in the hearing record supports the IHO's findings that the district offered the student a FAPE in the LRE for the 2021-22 and 2022-23 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether Quad Prep was an appropriate unilateral placement for the student (Burlington, 471 U.S. at 370).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
January 4, 2024**

**CAROL H. HAUGE
STATE REVIEW OFFICER**