



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-084

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

Appearances:

The Harel Law Firm, P.C., attorneys for petitioner, by Mordechai Buls, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, Esq. and Brian J. Reimels, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Big N Little: Stars of Israel Program (Stars of Israel) for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate it had offered to provide an appropriate educational program to the student for that year. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be fully recited here. According to the parent, the student received a diagnosis of attention deficit hyperactivity disorder (ADHD) when he was living outside of the United States (Dist. Exs. 5 at p. 1; 9 at p. 1). The student attended school outside of the United States for approximately five years from the age of five until the 2021-22 school year, when he moved into the district and began attending Stars of Israel (Dist. Ex. 9 at p. 1).

The student attended Stars of Israel for the 2021-22 and 2022-23 school years (see generally Dist. Ex. 4).¹ In the fall 2022, the parent initiated a referral to the CSE due to concerns regarding the student's "academic achievement, attention, and behavior" (see generally Dist. Ex. 5).² After a psychoeducational evaluation by the district, the CSE convened on January 19, 2023 and found the student eligible for special education services as a student with an other health impairment (OHI) (see generally Parent Ex. H).³ The January 2023 CSE recommended a program of integrated coteaching (ICT) services for math, English language arts (ELA), social studies, and science, together with related services of one 30-minute session per week of individual counseling, and one 30-minute session per week of group counseling (Parent Ex. H at p. 17).⁴ In a letter dated June 19, 2023, the parent disagreed with the recommendations made for the student for the 2023-24 school year and, as a result, notified the district of her intent to unilaterally place the student at Stars of Israel for the 2023-24 school year at district expense (Parent Ex. B at p. 2).⁵

On June 21, 2023, the parent entered into a contract with Stars of Israel for the student's attendance for the 2023-24 school year beginning on July 3, 2023 through June 19, 2024 (Parent Exs. C at pp. 1-3; D at p. 1).⁶

In a due process complaint notice, dated November 1, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the extended 12-month 2023-24 school year (see Parent Ex. A). According to the parent, the student needed placement in a full-time 12-month special class of up to 12 students with one teacher and one assistant, as well as the development and implementation of a behavioral plan (Parent Ex. A at pp. 1-2). As relief, the parent sought direct funding of the tuition at Stars of Israel for the 2023-24 school year (id. at p. 2).

After a prehearing conference on December 4, 2023, an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) convened on January 5, 2024, at which time the district presented documentary evidence and rested on the documentary evidence

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

² According to the parent, she is seeking funding for the student's placement at Stars of Israel for the 2021-22 school year in a separate due process proceeding (see Parent Ex. A at p. 1).

³ The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

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

⁵ The hearing record refers to the student attending both seventh grade and eighth grade during the 2023-24 school year (compare Dist. Exs. 5 at p. 1; 6 at p. 1, with Parent Exs. C at p. 4; D at p. 1; Dist. Ex. 4 at pp. 1, 22).

⁶ The contract for Stars of Israel sets forth the tuition in the amount of \$12,000 per month, and for the period of July 2023 through June 2024 (12 months) totaled the amount of \$144,000 (Parent Exs. C at p. 1; D at pp. 1-2).

(Tr. pp. 1-22).⁷ The hearing then proceeded with the presentation of the parent's evidence on January 8, 2024 and January 10, 2024, followed by closing arguments on January 25, 2024 after four days of proceedings (Tr. pp. 23-129).

In a decision dated February 6, 2024, the IHO determined that the district failed to meet its burden of proving that it offered the student a FAPE for the 2023-24 school year, but also that the parent did not meet her burden of demonstrating that Stars of Israel was an appropriate unilateral placement for the student (IHO Decision at pp. 2, 10-11, 17). The IHO found that she was unable to assess the appropriateness of the January 2023 IEP without evidence in the hearing record of all of the evaluative information relied on by the January 2023 CSE and that witness testimony was required to explain why it was appropriate for the CSE to rely on those documents and why the IEP was appropriate (*id.* at pp. 10-11). In connection with the appropriateness of Stars of Israel, the IHO found that the testimony of the Stars of Israel supervisor "failed to provide convincing and meaningful detail" about how the program addressed the student's needs (*id.* at p. 13). The IHO also found that the Stars of Israel supervisor failed to offer any detail as to the content of the related services the student received and that the reports from the related service providers lacked information about the services (*id.* at pp. 14-16). In particular, the IHO noted that speech was the student's "critical area of need," but the speech progress report provided no information as to methodologies implemented or how the student's particular needs were being addressed (*id.* at p. 15). The IHO addressed the Stars of Israel behavior intervention plan (BIP), finding that the interventions provided were "ineffective" and the student's communication deficits were not being addressed (*id.* at p. 16). Further, the IHO found that there was a lack of data in the hearing record to demonstrate that the student required 12-month services (*id.* at pp. 16-17). Lastly, as the IHO found that the parent did not meet her burden to establish the appropriateness of Stars of Israel, she was not required to make a finding on equitable considerations; however, she noted that the parent did provide notice of her disagreement with the district's recommended program and of her intent to unilaterally place the student at Stars of Israel for the 2023-24 school year (*id.* at p. 18). The IHO denied the parent's requested relief and dismissed the due process complaint notice with prejudice (*id.* at p. 19).

IV. Appeal for State-Level Review

The parent appeals and the district cross-appeals. The parties' familiarity with the particular issues included in the parent's request for review, the district's answer and cross-appeal, the parent's reply to the district's answer and cross-appeal, and the district's reply thereto is also presumed and, therefore, the specific allegations and arguments will not be repeated in detail here. The district cross-appeals arguing that the IHO erred in finding that it denied the student a FAPE for the 2023-24 school year, asserting it complied with both the procedural and substantive requirements in developing the student's January 2023 IEP, that the recommendation for ICT services was "ideal" for the student as it offered direct instruction with "positive behavior intervention" with typically developing peers, and that although witness testimony was not presented, the documentary evidence provided "a cogent and responsive argument" that the district offered the student a FAPE. The parent alleges that the IHO erred in finding that she failed to meet her burden of proving that Stars of Israel was an appropriate unilateral placement for the

⁷ Neither the parent nor an attorney for the parent appeared at the January 5, 2024 hearing date (Tr. pp. 11-22).

student for the 2023-24 school year. The parent argues that the documentary and testimonial evidence demonstrated how Stars of Israel addressed the student's academic and behavioral challenges and shows the progress the student made. Additionally, the parent claims that the testimonial evidence of the Stars of Israel supervisor detailed how the program addressed the student's needs and the progress made by the student during the 2023-24 school year. The parent also asserts that the testimony of the Stars of Israel supervisor regarding the student's regression was based on information contained in the student's file. Lastly, the district cross-appeals from the IHO's findings as to equitable considerations, and the parent asserts that there are no equitable considerations that would bar an award of full tuition funding and reimbursement.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427

⁸ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

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

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

VI. Discussion

A. January 19, 2023 IEP

I will first address the district's cross-appeal of the IHO's finding that the district did not meet its burden of proving that it offered the student a FAPE for the 2023-24 school year. Although the IHO found that the district submitted exhibits into the hearing record, the IHO stated that the district failed to offer any witness testimony (IHO Decision at pp. 9-10). The IHO acknowledged that "documents alone may be sufficient to prove the appropriateness of the CSE's recommendations" but found that the evidence needed to include the reports the CSE relied on in making its recommendations (id. at p. 10). The IHO found that, in this instance, the district placed the student's January 2023 IEP and prior written notice dated January 31, 2023 into evidence and that the prior written notice included a list of evaluations, assessments, records, and reports the CSE used to develop the student's IEP (id.; see Parent Ex. H; Dist. Ex. 3). However, the IHO noted that not all of the evaluative information relied on by the January 2023 CSE was entered into the hearing record (IHO Decision at p. 10). The IHO held that without witness testimony it was "impossible" to determine the appropriateness of the January 2023 IEP recommendations (id.). Finally, the IHO found that this was not one of the "rare" cases in which documentary evidence alone could satisfy the district's burden of proof and, therefore, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year (id. at pp. 10-11). The district asserts on appeal that the parties entered sufficient evidence into the hearing record "to conclude that the CSE made educated decisions and recommendations in composing" the student's IEP.

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

Here, the district has the burden of proof to demonstrate that the IEP it created was appropriate to meet the student's special education needs. While that burden does not require the district to call witnesses, it does require the district to defend its recommendations and provide evidence that explains such recommendations.

The Supreme Court held in Endrew F., the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" and the "nature of the IEP process [] ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue; thus, by the time any dispute reaches court, school authorities will have had the chance to bring their expertise and judgment to bear on areas of disagreement" (Endrew F., 580 U.S. at p. 404). Lastly, the Supreme Court held that the "reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances" (id.).

The student's January 2023 IEP indicated that the CSE reviewed a November 10, 2022 psychoeducational evaluation report, a teacher progress report dated January 1, 2023, and information from the Stars of Israel principal and the parent (Parent Ex. H at pp. 1-6; see Dist. Exs. 4 at pp. 22-25; 5). In addition to the psychoeducational evaluation report and the teacher progress report, the January 31, 2023 prior written notice indicated that the CSE reviewed a social history dated November 10, 2022, a classroom observation report dated January 24, 2023,⁹ and a physical examination dated November 23, 2022 (Dist. Exs. 3 at pp. 1-2; 5 at p. 1; 6).¹⁰

Although the IHO determined that the district failed to meet its burden to show that it recommended an appropriate program because not all of the documents the January 2023 CSE relied on were entered into the hearing record, it appears that only the November 10, 2022 social history update and the November 23, 2022 physical examination were absent (see Parent Exs. A-H; Dist. Exs. 1-9). Regarding the missing social history update, the November 2022 psychoeducational report provided background information about the student including that English was his first and native language, he was enrolled in the United States for daycare, preschool, and first grade, he relocated to another country and repeated first grade to develop his skills in Hebrew, and reportedly had difficulty staying seated in school (Dist. Ex. 5 at p. 1). The student had received a diagnosis of ADHD and was administered medication, which the parent reported improved the student's overall functioning (id.). As for the lack of the student's physical examination, the January 2023 IEP reflected reports that the student was in good health, he did not have any allergies, or history of asthma, surgeries, hospitalizations, or seizures (id. at p. 6). The January 2023 IEP indicated that the student's vision and hearing were within normal limits, he had a healthy appetite, and his sleep pattern was normal (id.). Additionally, the IEP reflected reports that the student's physical development was "age appropriate" and there were "no physical development needs" reported at that time (id.). As such, it is unclear what critical additional information the IHO believed the social history update and physical examination documents would

⁹ The classroom observation of the student was conducted on January 9, 2023, and the report was dated January 24, 2023, after the January 19, 2023 CSE meeting (Parent Ex. H at p. 24; Dist. Ex. 6 at pp. 1-2).

¹⁰ The January 2023 prior written notice referred to the psychoeducational evaluation conducted on November 10, 2022 by the report date of January 6, 2023 (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 5 at p. 1).

have provided that was not already available to the CSE that would have altered the CSE's recommendations, especially as the student's physical attributes are not in dispute in this proceeding and there was no allegation that the January 2023 IEP insufficiently described the student's needs in those areas (see Parent Ex. A). There was ample evidence for the IHO to conduct a substantive analysis of the specific educational issues in the due process complaint notice, and erred in failing to do so.

The present levels of performance in the January 2023 IEP, the accuracy of which were not disputed, included results of the administration of the Stanford-Binet Intelligence Scales, Fifth Edition to the student during the November 2022 psychoeducational evaluation (Parent Ex. H at p. 1). The results showed that the student's full-scale IQ was in the low average range (standard score 80), his verbal IQ was in the borderline impaired range (standard score 75), and his non-verbal IQ was in the low average range (standard score 87) (compare Parent Ex. H at p. 1, with Dist. Ex. 5 at pp. 1, 6). The January 2023 IEP stated that the student's scores were in the low average range on the fluid reasoning, knowledge, quantitative reasoning, visual spatial, and working memory indices (id.).

Academically, the January 2023 IEP reflected the results of administration of the Kaufman Test of Educational Achievement – Second Edition to the student, who achieved scores in the average range for nonsense word decoding, letter and word recognition, and silent reading fluency, in the below average range for reading comprehension, spelling, and math concepts and applications, and in the low range for reading vocabulary (Parent Ex. H at pp. 1-2). According to the January 2023 IEP, the student's teacher estimated that the student was at the fifth-grade level in reading comprehension, fluency, listening comprehension, and written organization, and at the sixth-grade level in decoding, spelling, grammar and punctuation, math computation, and math problem solving (id. at p. 2).

With respect to language, the January 2023 IEP noted that the student was in seventh grade and exposed to Hebrew and English at both Stars of Israel and at home (Parent Ex. H at p. 2). According to the January 2023 IEP, the student was parentally placed in a "specialized program of 9:2 in a mixed class of 7th and 8th grade students" and the Stars of Israel principal stated that the student was not proficient for his age in Hebrew, and English was reported to be his dominant language (id.). The January 2023 IEP stated that it was noteworthy that the student received instruction in Hebrew while living in a country outside of the United States from first through fifth grade (id.).

Regarding the student's reading ability, the January 2023 IEP stated that he read more basic words correctly such as "swap and gigantic," but could not read words such as "kerosene or alibi," and his ability to pronounce nonsense or "nonwords" was in the average range (Parent Ex. H at p. 3). The January 2023 IEP indicated that the student performed in the average range in silent reading fluency as seen in his ability to read through sentence strips and respond to concrete, yes/no questions based on what he read (id.). The student appeared to have some difficulty with reading comprehension, as his score was in the below average range, when he was asked to read passages under untimed conditions and answer open-ended questions about each one (id.). According to the January 2023 IEP, within the reading comprehension subtest, the student preferred to read aloud, and showed a grasp of concrete information from the texts but failed to answer inferential-based questions (id.). The student struggled with reading vocabulary and abstract analysis when

responding to questions and, overall, while he had "appropriate phonological processing skills," he appeared to lack grade level vocabulary required for higher order comprehension (id.). In addition, the January 2023 IEP reflected teacher progress reports that indicated the student read at a fifth grade level, demonstrated difficulty comprehending readings with eight sentences in a paragraph, that this "inability to read" affected him "across the board," and that his lack of reading comprehension ensured that the student would "struggle in any given subject" (id. at p. 4). The January 2023 IEP noted that the student had trouble pronouncing words, required extended periods of time with his readings, and read through his sentences without pausing (id.). The January 2023 IEP indicated that, after the student read a grade level passage, he successfully recalled details and distinguished the main idea; however, he required assistance with rephrasing, and needed verbal prompting to make inferences and answer text dependent questions (id.). The student needed to improve his background knowledge and academic vocabulary which, according to the IEP, would help with his comprehension (id.).

The January 2023 IEP reflected results of the psychoeducational assessment of the student's writing skills, indicating that his spelling skills fell within the below average range in comparison to grade level peers (Parent Ex. H at p. 3; see Dist. Ex. 5 at p. 4). The student misspelled words like "wrongly, knocked and hungrier," wrote his words on the line with legible letter formation, and spacing between letters was observed to be appropriate (Parent Ex. H at p. 3).¹¹ The January 2023 IEP reported from the January 2023 psychoeducational evaluation that an informal writing sample was used to further assess the student's written language skills, and the student chose to write about his favorite video game (Parent Ex. H at pp. 3-4; see Dist. Ex. 5 at pp. 4-5). The student started with an organizational outline where he wrote three reasons for liking this game; however, he was not able to apply the outline to compose an essay (id.). The January 2023 IEP stated that instead of writing an essay, the student composed one run on sentence that combined all of his ideas, which reflected an underdeveloped thesis statement, body, and conclusion (id.). Even though the student demonstrated adequate content and spelling, his writing was judged to be poor in organization, mechanics, grammar, and punctuation for his grade, he was unable to combine his ideas using transitional words and phrasing, and his writing was "estimated to fall between the second and third grade level" (id.).

In contrast to the student's performance during the psychoeducational evaluation, the January 2023 IEP reflected teacher reports that the student was on a sixth grade level in writing, that he struggled to complete writing assignments that were longer than one paragraph, that his expressive vocabulary skills were limited which was apparent in his writing, and that the student demonstrated difficulty organizing his writing assignments (Parent Ex. H at pp. 3-4; see Dist. Ex. 4 at p. 23). According to the January 2023 IEP, the student struggled to write a full composition, failed to use proper punctuation, and benefited from small group instruction to help him organize his thoughts and add details in his writing (Parent Ex. H at p. 4).

In math, the January 2023 IEP indicated that the student was able to complete one step problems involving addition, multiplication, and measurement, and that he could add, subtract, multiply, and divide numbers with decimals (Parent Ex. H at p. 3). Further, the January 2023 IEP

¹¹ The teacher reported that the student's handwriting was illegible and very difficult to read (Parent Ex. H at p. 4; Dist. Ex. 4 at p. 23).

reflected that the student performed in the below average range on a measure of his ability to apply mathematical principles to real life situations, noted that the student had difficulty identifying coins, counting change, interpreting graphs, and that he lacked skills in probability and fractions, indicating that the student's math skills were developing below grade level expectations (id.). The January 2023 IEP also stated that the student was performing at least one grade level below his current grade level, that he had an inability to focus, as well as had trouble converting decimals to fractions, evaluating exponents with negative bases, estimating products and quotients of mixed numbers, adding and subtracting fractions, and comparing and ordering fractions (id. at p. 4). The student struggled to find percentages, had difficulty rounding decimals, could not solve a basic "X,Y" equation, and his comprehension difficulties impeded his success in solving word-problem questions (id.).

The January 2023 IEP stated that the parent expressed concerns with the student's academic achievement in reading comprehension and writing, and that the parent stated that it was hard for the student to sit still, initiate homework assignments, and sustain his attention for an expected amount of time (Parent Ex. H at p. 5). The parent stated that the student received extra support in his previous school outside of the country, and she further noted that in his previous school, the student avoided school participation and would skip classes (id.). The January 2023 IEP stated that the parent felt that the student had matured since returning to the United States, that he displayed difficulty with attention which had a significant impact on his comprehension, and that he performed better with one to one or small group support (id.). The January 2023 IEP noted the parent's comment that the student needed repeated review and repeated practice with newly learned concepts (id.). In addition, the January 2023 IEP stated that the student forgot to bring his iPad to school, and it was recommended that he keep his iPad in school (id.).

Socially, according to the January 2023 IEP, the student had difficulty complying with school rules, such as handing his phone in when entering the school building, but, to the contrary, it was noted that the student did "not present with any social issues" (Parent Ex. H at p. 6). The January 2023 IEP noted that, according to the psychoeducational evaluation, the student "shared his negative perceptions about his current school," that he stated he felt confused about his placement at his current school, noting that the private school was "too easy for him," and that the student reported he wished to transfer into a different school (id.). The January 2023 IEP stated that the student appeared to be cooperative, polite, and socially relatable in a 1:1 testing environment (id.). The parent's concerns included that the student struggled to manage his frustration tolerance appropriately, was very sensitive, and tended to withdraw when he felt hurt (id.). The January 2023 IEP noted that socially and emotionally, the student benefitted from reassurance and encouragement throughout the day as well as positive behavior intervention supports, and that he would receive educational benefit from related services in counseling to target his skills in self-regulation, attention, and frustration tolerance (id.).

As supports for the student's management needs, the January 2023 CSE recommended graphic organizers, differential instructions, tasks broken into discrete parts, scaffolding and modeling, redirections and refocusing, and positive reinforcement and encouragement (Parent Ex. H at p. 7). In addition, the January 2023 CSE recommended pre-teaching vocabulary, paraphrasing, demonstrating, using visuals, and providing multiple exposures (id.). The January 2023 IEP noted that additional recommended supports for the student's comprehension included focusing on vocabulary building, using different levels of questions when discussing text, using

think aloud supports, relating new information to acquired knowledge, providing specific vocabulary instruction such as the meaning of common prefixes, suffixes, and root words (*id.*). To further address the student's management needs, the CSE recommended keeping oral directions short and simple, ensuring directions were understood, having the student paraphrase directions, and repeated practice and repeated review (*id.*). According to the January 2023 IEP, the student needed individual support for writing, small group instruction, organizational support, copies of class notes, graphic organizers, rubrics, checklists, a consistent routine to maintain organization, extra time, preferential seating, explicit instruction in math key terms and phrases, and highlighting key words and phrases during math (*id.*).

Furthermore, the Stars of Israel supervisor testified that he was familiar with the January 2023 CSE's recommendations and that he "believe[d] that a lot of the descriptions regarding [the student] [were] very accurate, both in his capacity to learn and . . . the domains that really [were] challenging for him [were] very accurate" (Tr. pp. 36, 45). He continued that "[t]he management needs and techniques that were put into the IEP [were] extensive, really displaying a very strong understanding of [the student's] behavioral needs in the classroom" (Tr. p. 45). Accordingly, the IHO's finding that it was impossible to determine the appropriateness of the proposed IEP without witness testimony is belied by the evidence.

To address the student's needs, as identified in the January 2023 IEP, the January 2023 CSE developed approximately nine annual goals (Parent Ex. H at pp. 9-15). The annual goals for reading were designed to improve the student's ability to read sight words at a seventh grade level, and answer both literal and inferential questions from sixth grade reading level passages (*id.* at pp. 9-10). For math, the annual goals were designed to improve the student's ability to add and subtract with unlike denominators and to select the appropriate operation methods to solve math word problems (*id.* at pp. 11-12). In writing, the annual goals were to improve the student's skills to write a well-organized paragraph essay with correct mechanics, spelling, punctuation, and grammar (*id.* at p. 12). To address executive functioning and attention needs, the CSE developed annual goals to improve the student's organization skills for classwork and homework via use of a planner, reminders, and teacher/counselor check-ins; improve his ability to organize a task on paper, including the materials needed, steps to accomplish the task, and timeframe for completion; and improve use of learned self-regulation strategies and self-monitoring checklists, to remain focused on an independent task without adult prompts (*id.* at pp. 13-15). Further, one annual goal was designed to improve the student's ability to manage his feelings of frustration by recognizing and labeling his emotions, using appropriate coping strategies such as faded prompts, opportunities for role-play, and social stories (*id.* at p. 15).

The January 2023 CSE recommended that the student receive five periods per week each of ICT services in ELA, math, social studies, and sciences (Parent Ex. H at p. 17). State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities receiving ICT services within a class may not exceed 12 (8 NYCRR 200.6[g][1]). In addition, State regulations require that the class in which students receive ICT services must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]).

The January 2023 IEP, as well as the prior written notice, indicated that the CSE considered other options for the student including special education teacher support services (SETSS) and a 12:1+1 special class in a community school; however, the CSE rejected SETSS because it was "insufficient" to address the student's needs and the 12:1+1 special class because it was too restrictive for the student (Parent Ex. H at p. 23; Dist. Ex. 3 at p. 2). The January 2023 IEP stated that the student would "receive educational benefit from an ICT program as it would provide systematic and specialized direct instructional strategies in vocabulary building, reading comprehension, written expression and math," areas of need identified in the present levels of performance (Parent Ex. H at pp. 3-5). The January 2023 IEP further reasoned that ICT services would allow the student "to be educated alongside typically developing peers with the full-time support of a special education teacher throughout the day to assist in adapting and modifying the curriculum to meet his needs" (*id.* at p. 5). Additionally, the CSE recommended that the student receive group and individual counseling together with positive behavioral supports throughout the school day (*id.* at pp. 5, 7).

During the hearing the Stars of Israel supervisor opined that the ICT services recommendations did not align with the intensity of the student's needs and challenges, and that the student had difficulty focusing and exhibited behavioral challenges in a class of up to 12 students, all of whom have disabilities (Tr. pp. 36, 38, 45-46). He further opined that the student would have been unable to make progress in a general education classroom with "just [the] educational support of an additional special education teacher" and without a behavioral intervention plan (Tr. p. 46). I note that the supervisor did not attend the January 2023 CSE meeting, and as such, his opinion regarding the student's program was not available to the CSE (*see* Parent Ex. H at p. 24). Notwithstanding the supervisor's view that the student required a special class setting, generally, district staff responsible for formulating the student's IEP in compliance with the requirements of the IDEA may be afforded some deference over the views of private experts (*see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; *J.E. & C.E. v. Chappaqua Cent. Sch. Dist.*, 2016 WL 3636677, at *16 [S.D.N.Y. June 28, 2016], *aff'd*, 2017 WL 2569701 [2d Cir. June 14, 2017], citing *E.S. v. Katonah-Lewisboro Sch. Dist.*, 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], *aff'd*, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; *Z.D. v. Niskayuna Cent. Sch. Dist.*, 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]). Moreover, in addition to considering what supports and services the student needed in order to receive educational benefits, the CSE was mandated to consider placing the student with his nondisabled peers in light of the IDEA's LRE requirements, but the supervisor was not bound to adhere to the same mandates as the district personnel on the CSE in formulating recommendations for the student, and his testimony reveals little consideration of the benefits of access to nondisabled peers when he recommended continued full-time placement in a special class and/or private school (*see T.M.*, 752 F.3d at 161-67; *Newington*, 546 F.3d at 119-20).

Accordingly, the evidence in the hearing record shows that the January 2023 CSE offered the student programming consisting of placement in a general education class with the support of a full-time special education teacher, substantial management strategies, and annual goals and counseling services designed to meet his academic, executive functioning, and social/emotional

needs in the LRE (see Parent Ex. H; compare Dist. Ex. 5 at p. 6, with Dist. Ex. 4 at pp. 22-24). Therefore, contrary to the IHO's finding, the hearing record includes sufficient explanation as to the evaluative information relied on by the January 2023 CSE, as well as a sufficient explanation as to how the recommendations for ICT services and counseling services were appropriate to meet the student's identified needs.

VII. Conclusion

Having determined that the evidence in the hearing record supports a finding that the January 2023 CSE's recommendations for the student were appropriate, the IHO's determination that the district failed to offer the student a FAPE for the 2023-24 school year must be overturned, and I need not address whether the student's unilateral placement at Stars of Israel was appropriate or whether equitable considerations support the requested relief.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated February 6, 2024, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2023-24 school year.

Dated: Albany, New York
May 3, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER