



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

## **The State Education Department**

**State Review Officer**

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**No. 24-465**

**Application of the BOARD OF EDUCATION OF THE WEST  
SENECA CENTRAL SCHOOL DISTRICT for review of a  
determination of a hearing officer relating to the provision of  
educational services to a student with a disability**

**Appearances:**

Bond, Schoeneck & King PLLC, attorneys for petitioner, by Jeffrey J. Weiss, Esq., and Andrew R. Mark, Esq.

The Law Offices of H. Jeffrey Marcus, PC, attorneys for respondents, by Lisa M. Gibertoni, 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 district) appeals from a decision of an impartial hearing officer (IHO) which found that it violated its child find obligations with respect to respondents' (the parents') son and ordered it to reimburse the parents for their unilaterally obtained private tutoring services for the period of March 1, 2022 through June 30, 2022. The parents cross-appeal that portion of the IHO's decision which denied their request to be reimbursed for their son's tuition at The Gow School (Gow) for the 2022-23 and 2023-24 school years. 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 student has received a diagnosis of attention deficit hyperactivity disorder (ADHD) and was found to "fit[] the profile of [a student] with dyslexia" and show signs of dysgraphia (Dist. Exs. 15 at pp. 6-8, 13; 16 at p. 1).<sup>1</sup>

Beginning in December 2015 (kindergarten), pursuant to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (section 504), the district developed a section 504 accommodation plan (504 plan) for the student (Dist. Exs. 4 at p. 1; 14 at p. 1). On May 23, 2017, June 12, 2019, April 14, 2021, and May 23, 2022, the 504 committee met and developed 504 plans for the student for subsequent school years (see Parent Ex. E; Dist. Exs. 4; 6; 11; 14 at p. 1).

On May 25, 2022, the parents made an initial referral to the CSE to determine whether the student was eligible for special education services (Dist. Ex. 12). Upon receiving consent, the district conducted a psychoeducational evaluation of the student in June 2022 (see Dist. Ex. 14). Thereafter, on August 10, 2022, a CSE convened for an initial eligibility meeting and found the student eligible for special education services as a student with a learning disability (see Dist. Ex. 16). The August 2022 CSE recommended integrated co-teaching (ICT) services in the areas of English language arts (ELA), math, science, and social studies (id. at pp. 1, 7). Additionally, the August 2022 CSE recommended supplementary aids and services of special seating, directions repeated and clarified, refocusing and redirection, checks for understanding, use of positive reinforcement, monitoring of homework completion, use of a word processor, the provision of class notes, development of a home/school communication system, and the provision of audio books (id. at pp. 8-9). In terms of assistive technology, the student was recommended for access to adaptive equipment with speech-to-text and text-to-speech software (id. at p. 9). The August 2022 CSE also recommended supports for school personnel on behalf of the student in the form of a yearly team meeting with the student's teachers and parents (id.).

On August 15, 2022, the parents entered into a 2022-23 enrollment reservation contract with Gow (Parent Ex. S at p. 2). In a letter dated August 19, 2022, the parents notified the district of their disagreement with the program recommended for the 2022-23 school year and their intent to unilaterally place the student at Gow for the 2022-23 school year (see Parent Ex. R).<sup>2</sup> The parents also informed the district that the student had been receiving private tutoring from Western New York Dyslexia Specialists (WNYDS) since 2017 (id.).

On September 2, 2022, a CSE convened for a review of the student's academic performance as well as the program recommendations made for the student by the August 2022 CSE (see Dist. Exs. 19; 21 at p. 3). Based on its discussion, the September 2022 CSE modified the recommendations for the student for the 2022-23 school year to include attendance in a 15:1 special class for ELA once daily; a 15:1 special class for academic support once daily; a general education class with ICT services for math, science, and social studies; and a 1:1 special class for

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<sup>1</sup> The student does not have an official diagnosis of dyslexia by an individual qualified to make such diagnosis (see Tr. p. 707).

<sup>2</sup> Gow 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).

specialized reading daily (compare Dist. Ex. 16 at pp. 1, 7, with Dist. Ex. 19 at pp. 1, 9). The September 2022 CSE recommended the same supplementary aids and services, assistive technology, and supports for school personnel as in the August 2022 IEP (compare Dist. Ex. 16 at pp. 8-9, with Dist. Ex. 19 at pp. 10-11).

On March 3, 2023, the parents signed a 2023-24 enrollment reservation contract with Gow for the student's attendance for the 2023-24 school year (Parent Ex. W). In a letter dated August 25, 2023, the parents notified the district that its failure to develop an IEP for the 2023-24 school year resulted in their decision to again unilaterally place the student at Gow for the 2023-24 school year (see Parent Ex. V). According to the parents, the district informed the student's father on June 2, 2023 that it did not have the obligation to convene a CSE in response to the parents' request for a CSE meeting and advised the parents to instead contact the public school district where Gow was located (id.).

On September 1, 2023, a CSE convened to conduct an annual review and recommended for the 2023-24 school year that the student attend a 15:1 special class for ELA once daily; a 15:1 special class for academic support once daily; a general education class with ICT services for math, science, and social studies; and a 1:1 special class for specialized reading daily (Dist. Ex. 27 at pp. 1, 10). The September 2023 CSE continued to recommend the same supplementary aids and services, assistive technology, and supports for school personnel as in the August and September 2022 IEPs (compare Dist. Ex. 16 at pp. 8-9, and Dist. Ex. 19 at pp. 10-11, with Dist. Ex. 27 at pp. 10-12).

#### **A. Due Process Complaint Notice**

In a due process complaint notice dated March 1, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, and 2023-24 school years (see generally Dist. Ex. 1). In connection with the three school years in dispute, the parents alleged that the district failed to evaluate and consider the student's eligibility for special education under its child find obligations; failed to evaluate the student in all areas of suspected disability; developed inappropriate IEPs; predetermined the recommended programs; and failed to identify the student as a student with a disability beginning in at least August 2021 (id. at pp. 6-9).

The parents also claimed that each of the IEPs developed by the CSEs were not appropriate to meet the student's needs with respect to his dyslexia, dysgraphia, and ADHD (Dist. Ex. 1 at p. 7). Regarding the August 2022 IEP, the parents alleged that the ICT services would not address the student's below grade level academic functioning (id.). The parents argued that the August 2022 IEP only had three annual goals which were "patently insufficient in number, scope, and criteria" (id.). Additionally, the parents argued that the August 2022 CSE failed to recommend related services or "any other special support or service" to address the student's needs (id.).

In connection with the September 2023 IEP, the parents alleged that the present levels of performance were inaccurate and incomplete and failed to address the student's dyslexia and dysgraphia (Dist. Ex. 1 at p. 7). They asserted that neither the 15:1 special class nor the ICT services were appropriate to address the student's reading and writing needs, and that the 1:1 specialized reading instruction was too restrictive (id.). In addition, the parents claimed that the

September 2023 IEP failed to recommend related services including occupational therapy (OT) to address the student's executive functioning delays and fine motor needs (id. at p. 8). Further, the parents contended that the annual goals in the September 2023 IEP were not designed to elicit meaningful progress from the student (id.).

As relief, the parents sought findings that the district denied the student a FAPE, denied the parents the "opportunity to participate meaningfully in the decision-making process," and caused the student a deprivation of educational benefits (Dist. Ex. 1 at p. 9). The parents sought an award of reimbursement for the costs of the student's tuition at Gow for the 2022-23 and 2023-24 school years and reimbursement of the parents' transportation costs for the same school years in which the student attended Gow (id. at pp. 9-10). Lastly, the parents sought reimbursement of the costs "of all other education and services obtained privately over the years at issue" and compensatory education services for the student to remedy the district's "long term denial of a FAPE" (id. at p. 10).

In response to the due process complaint notice, the district generally denied the material allegations contained therein (see Dist. Ex. 3). The district asserted that it offered the student a FAPE for the years in dispute and that any claims that "accrued more than two years" before the March 1, 2024 due process complaint notice were barred by the statute of limitations (see id.). Finally, the district asserted that the parents' requested relief should be denied in its entirety (id. at p. 5).

## **B. Impartial Hearing Officer Decision**

After a prehearing conference on April 11, 2024, an impartial hearing convened on June 4, 2024 and concluded on July 2, 2024, after four days of proceedings (Tr. pp. 1-880).<sup>3</sup> In a decision dated September 12, 2024, the IHO found that the district violated its child find obligations for the period between March 1, 2022 and June 30, 2022, but offered the student a FAPE for the 2022-23 and 2023-24 school years (IHO Decision at pp. 14-21, 24-27).

Regarding the parents' allegation that the district denied the student a FAPE for the 2021-22 school year, the IHO found that the parents' claims for the period of time prior to March 1, 2022 were barred by the statute of limitations (IHO Decision at p. 24). The IHO found that the parents knew or should have known of their claims "long before March 1, 2022" and cited evidence in the hearing record that the parents were aware of the student's dyslexia diagnosis in September 2017 (id. at p. 25). The IHO further stated that there was no evidence in the hearing record that either exception to the statute of limitations was applicable to the present matter (id. at pp. 25-27).

However, the IHO found that the district failed to offer the student a FAPE from March 1, 2022 through June 30, 2022 and that, therefore, the parents were entitled to reimbursement for the private tutoring the student received during that period of time (IHO Decision at pp. 27-30). The IHO found that, prior to the parents' referral, the district had reason to suspect that the student had a disability because of the student's diagnoses of ADHD and dyslexia, and that the student was "receiving after-school tutoring services focused on his dyslexia" (id. at p. 28). The IHO found

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<sup>3</sup> Contrary to State regulations, the hearing record does not include a transcript or a written summary of the prehearing conference (see 8 NYCRR 200.5 [j][3][xi]).

that the district was obligated to evaluate the student "long before" the parents' referral and that "[t]his failure began in the 2017-18 school year and continued each year thereafter" (*id.* at p. 29). In determining whether the parents were entitled to reimbursement for the private tutoring, the IHO undertook a Burlington/Carter analysis and found that the private tutoring was appropriate and equitable considerations favored the parents (*id.* at pp. 29-30).

In connection with the 2022-23 school year, the IHO found that the September 2022 IEP "fulfill[ed] all the elements required for a FAPE" (IHO Decision at p. 16). The IHO found that the September 2022 IEP adequately described the student's present levels of performance and recommended a program to meet the student's needs (*id.* at pp. 16-17). The IHO found that the district was responsive to the parents' concerns by modifying the August 2022 IEP to recommend additional services in the September 2022 IEP (*id.* at p. 16). The IHO found that the September 2022 IEP noted the parents' concerns with the student's dyslexia and further found no evidence in the hearing record that a specific methodology was required to instruct the student (*id.* at pp. 17-18). Additionally, the IHO found that the September 2022 IEP explained the reasons for its recommendation for ICT services through the present levels of performance (*id.* at pp. 18-19). The IHO found the parents' argument that for the 2022-23 school year the student would not have been placed with students with needs similar to his was speculative (*id.* at p. 19). Further, the IHO found that, contrary to the parents' argument that the September 2022 CSE simply increased the number of minutes of reading instruction, review of September 2022 IEP explained how the program was tailored to the student's needs (*id.* at pp. 19-20).

Next, the IHO addressed the 2023-24 school year and stated that the parents' substantive arguments with respect to the September 2023 IEP were "essentially the same" and "identical" as the arguments with respect to the September 2022 IEP and, therefore, the IHO concluded that the district offered the student a FAPE for the 2023-24 school year (IHO Decision at pp. 20-21).

As an alternative finding, the IHO stated that, if the appropriateness of the private school was decided, the hearing record was "clear" that Gow was an appropriate unilateral placement (IHO Decision at p. 22). However, the IHO found that "[t]he flaw in [p]arents' case [wa]s not that [Gow] was an inappropriate placement, but that [p]arents had no good reason to reject the educational program offered by the [d]istrict" (*id.*). In addition, the IHO found that, if it was found that the district denied the student a FAPE for the school years in dispute, equitable considerations would have weighed in favor of the parents because they cooperated with the district and provided timely notice of their intent to unilaterally place the student at Gow (*id.* at p. 23). The IHO further stated that, if the parents were entitled to tuition reimbursement, they would also have been eligible for transportation reimbursement, but the issue of transportation did not need to be decided based upon his previous findings that the district offered the student a FAPE for the 2022-23 and 2023-24 school years (*id.* at p. 24).

As relief, the IHO found that the parents should be reimbursed for the private tutoring costs for the period of March 1, 2022 through the end of the 2022-23 school year (IHO Decision at pp. 29-30). The IHO denied the parents other requested relief (*id.* at p. 30).

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

The district appeals, alleging that the IHO erred in finding that the district violated its child find obligations, that Gow was an appropriate unilateral placement for the student, that equitable considerations supported the parents' claim for tuition reimbursement, and that the parents were entitled to reimbursement for the private tutoring. In particular, with respect to the private tutoring reimbursement, the district first argues that the IHO erred in finding that the district violated its child find obligations and ignored evidence in the hearing record that the student was making progress in reading during spring 2022 as a result of the academic intervention services (AIS) he received. Also, the district contends that the IHO erred in failing to consider the effects of COVID-19 on the student when the district did not make a referral in spring 2022. Additionally, the district claims that the IHO's findings that the district "overlooked clear signs of disability" and was negligent in not evaluating the student was not supported by the hearing record. Lastly, the district asserts that the IHO incorrectly found that the parents met their burden that the private tutoring was appropriate and that equitable considerations supported the parents' claim for reimbursement.

With respect to the 2022-23 and 2023-24 school year, the district argues that the evidence in the hearing record demonstrated that the student failed to make appropriate progress and regressed while at Gow. The district also argues that the IHO erred in making a finding with respect to equitable considerations. The district asserts that the IHO failed to assess the reasonableness of the parents' actions in unilaterally placing the student in a more restrictive program.

In an answer and cross-appeal, the parents generally deny the material allegations contained in the request for review.<sup>4</sup> The parents contend that the IHO erred in finding that they did not allege any procedural violations with respect to the IEPs at issue in this appeal. In addition, the parents claim that the IHO erroneously found that the IEPs for the 2022-23 and 2023-24 school years were appropriate to meet the student's needs. The parents claim that the IHO shifted the burden to the parents to identify a program that would have been better suited for the student than the district's program and that the IHO improperly shifted the burden to the parents regarding updated evaluative data. Lastly, the parents argue that the IHO failed to determine whether the parents were entitled to reimbursement for the transportation expenses they incurred while transporting the student to Gow for the two school years in question.

In an answer to the cross-appeal, the district generally denies the material allegations contained therein. The district asserts that it met its burden of proof that the IEPs for the 2022-23 and 2023-24 school years offered the student a FAPE and there were no alleged procedural deficiencies that impeded the student's right to a FAPE, impeded the parents' opportunity to participate in the decision-making process, or deprived the student of educational benefits. The parents replied to the district's answer to the cross-appeal.

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<sup>4</sup> The parents do not appeal the IHO's decision that any claims prior to March 1, 2022 were barred by the statute of limitations. Accordingly, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Bd. of Educ. of the Harrison Cent. Sch. Dist. v. C.S., 2024 WL 4252499, at \*12-\*15 [S.D.N.Y. Sept. 20, 2024]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

## V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations



omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>5</sup>

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

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

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<sup>5</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

## VI. Discussion

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusions that the district failed to meet its child find obligation for the period of March through June 2022, and that the district offered the student a FAPE for both the 2022-23 and 2023-24 school years (IHO Decision at pp. 14-21, 27-30). The IHO accurately recounted the facts of the case (*id.* at pp. 3-14), identified the issues to be resolved (*id.* at pp. 2-3), set forth the proper legal standards to determine whether the district violated its child find obligation during the period of March through June 2022 and whether the district offered the student a FAPE for the 2022-23 and 2023-24 school years (*id.* at pp. 14-17) and applied those standards to the facts at hand (*id.* at pp. 3-21, 27-30). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that he weighed the evidence and properly supported his conclusions. Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is not a sufficient basis presented on appeal to modify the determinations of the IHO (*see* 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, as explained below, the conclusions of the IHO that the district failed to meet its child find obligation for the period of March through June 2022 and that the district offered the student a FAPE for the 2022-23 and 2023-24 school year are hereby adopted with additional discussion of the parties' respective allegations on appeal noted below. With that said, review of the hearing record does not support the IHO's determination that the parents met their burden to prove the appropriateness of unilaterally obtained reading services from WNYDS for the period of March through June 2022.

### A. Child Find

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (*see Handberry v. Thompson*, 446 F.3d 335, 347-48 [2d Cir. 2006]; *E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist.*, 2012 WL 5936537, at \*11 [S.D.N.Y. Nov. 26, 2012]; *A.P. v. Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221, 225 [D. Conn. 2008], *aff'd*, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; *see also* 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an ongoing, affirmative duty on State and local educational agencies to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; *Forest Grove*, 557 U.S. at 245; *K.B. v. Katonah Lewisboro Union Free Sch. Dist.*, 2019 WL 5553292, at \*7 [S.D.N.Y. Oct. 28, 2019], *aff'd*, 2021 WL 745890 [2d Cir. Feb. 26, 2021]; *E.T.*, 2012 WL 5936537, at \*11; *see* 20 U.S.C. § 1412[a][10][A][ii]; *see also* 8 NYCRR 200.2[a][1], [7]; *New Paltz Cent. Sch. Dist. v. St. Pierre*, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; *see* 8 NYCRR 200.2[a][1], [7]; *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 [3d Cir. 2012]; *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent in failing to order testing, or have no rational justification for deciding not to evaluate the student (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 [2d Cir. 2018], quoting Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]).

Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention (RtI) program (8 NYCRR 200.4[a]; see 34 CFR 300.309[c]; see also 8 NYCRR 100.2[ii]).

## **1. Response to Intervention**

The district asserts that the evidence in the hearing record demonstrates that the district "had a rational justification" in not referring the student to the CSE in spring 2022 as the student was "progressing in reading" because of the AIS services he was receiving. As the student was participating in the district's AIS / RtI process for the time period leading up to and during the 2021-22 school year in question, a discussion of RtI requirements is warranted.

According to the United States Department of Education's Office of Special Education Programs (OSEP), "[a] multi-tiered instructional framework such as RTI is a schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors. OSEP supports State and local implementation of RTI strategies to ensure that children who are struggling academically and behaviorally are identified early and provided needed interventions in a timely and effective manner" (Letter to Zirkel, 62 IDELR 151 [OSEP 2013]). Although leaving the details of particular RtI models to the individual states, according to OSEP, the essential components of an RtI framework are:

1. High-quality, evidence-based instruction in general education settings;
2. Screening of all students for academic and behavioral problems;

3. Two or more levels of instruction that are progressively more intense and based on the student's response to instruction; and
4. Progress monitoring of student performance. In evaluating a particular intervention process, OSEP observed, an individual should assess whether all four of those ingredients are present.

(id.). RtI timelines and adequate progress issues are left to States or local school districts to establish in accordance with their models because "[t]hese decisions are best left to State and local professionals who have knowledge of the instructional methods used in their schools" (Determining the Existence of a Specific Learning Disability, 71 Fed. Reg. 46,658 [2006]).

The State Education Department has established a regulatory policy framework for RtI that requires school-wide screenings, minimum components of RtI programs, parent notification, and use of RtI in the identification of students with learning disabilities (8 NYCRR 100.2[ii]). State regulation provides that a school district's process to determine if a student responds to scientific, research-based instruction shall include the application of information about the student's response to intervention to make educational decisions about changes in the student's goals, instruction, services, and the decision to make a referral for special education programs or services (8 NYCRR 100.2[ii][1][v]). State regulation further mandates that "[a] school district shall select and define the specific structure and components of the [RtI] program, including, but not limited to, the criteria for determining the levels and types of intervention to be provided to students, the amount and nature of student performance data to be collected and the manner and frequency for progress monitoring" and to set forth the implementation of its RtI process in a written policy (8 NYCRR 100.2[ii][2]; see 8 NYCRR 200.2[b][7]).

The district did not offer its RtI policy as evidence during the impartial hearing. However, testimony by the district's director of special education (director) indicated that the district's RtI is a tiered approach to learning used to support students based on their needs, and it is a best practice in the district (Tr. pp. 66, 70-71). The RtI process involved three tiers, with Tier 1 being general education support, Tier 2 offering more direct support, and Tier 3 being the most intensive support (Tr. p. 67). The director reported the district's policy required students to go through the RtI tiers before being referred to special education at the elementary school level (see Tr. pp. 72, 74-75).

## **2. Period Leading Up to and including the 2020-21 School Year**

Although, based on the application of the statute of limitations, the IHO found a child find violation only for the period of March 1, 2022 through June 30, 2022, the record contains evidence that the student was receiving support through a 504 plan beginning in 2015 and through RtI services beginning in 2020.

The student underwent a speech-language evaluation on November 23, 2015 and a 504 plan was developed and implemented on December 15, 2015 due to the student's "impairments in expressive language, language content, and language structure" which impaired the student's ability to learn (Dist. Ex. 14 at p. 1). The December 2015 504 committee recommended six 30-minute sessions per month of group speech-language therapy (id.).

In March 2017, during the student's first grade school year, an RtI team recommended testing of the student due to concerns regarding his reading progress and "stamina in the classroom" (Parent Ex. B at pp. 1-2). The student was administered the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V), the results of which revealed that the student's overall cognitive abilities were in the average range with a "possible weakness" in the area of working memory (id. at p. 2). The school psychologist who conducted the psychoeducational evaluation observed that the student's stamina may impact his performance on tasks and suggested the student might benefit from "brain breaks" and movement during the day (id.). The school psychologist recommended that the RtI team continue to monitor the student's progress (id.).

On May 23, 2017, the 504 committee met and developed a 504 plan that recommended the student receive three 30-minute sessions per month of individual speech-language therapy and three 30-minute sessions per month of group speech-language therapy together with supplementary aids of special seating arrangements, directions repeated and clarified, checks for understanding, and refocusing and redirection (Parent Ex. E at pp. 1-2). The testing accommodations of flexible setting with minimal distractions was also added to the May 2017 504 plan (id. at p. 3).

On June 12, 2019, the 504 committee met and determined that the student no longer exhibited impairments in expressive language, language content, or language structure but that the student's ADHD impacted his learning; the speech-language therapy the student had been receiving was discontinued (Dist. Ex. 14 at p. 2). The June 2019 504 plan remained the same as the May 2017 504 plan with respect to supplementary aids and services and testing accommodations (compare Parent Ex. E at p. 3, with Dist. Exs. 4 at p. 2; 14 at p. 2).

During the 2020-21 school year, the student received academic intervention services (AIS) in the areas of reading and math (also referred to as Tier 2 RtI services) (see Dist. Ex. 5). According to a district summary of RtI services for the 2020-21 school year, the services were initiated because "[t]he student had not demonstrated proficiency on reading readiness skill acquisition" and the student was "at risk for not achieving grade appropriate proficiency levels" in the area of math (id. at pp. 1-2). In September 2020, the student began receiving reading services in a large group of 10-15 students every other day for 40-minutes; and in January 2021, the student began receiving math services in a large group of 10-15 students every other day for 40 minutes (id.).

Testimony by the district reading specialist who attended the September 2022 CSE meeting, indicated she was familiar with the student because she worked with him in the district middle school in September 2020 during the 2020-21 school year when he was in fifth grade, as well as during the 2021-22 school year when he was in sixth grade (Tr. pp. 277, 279-80, 282-83). She testified that during the 2020-21 school year the district offered remote instruction during the first half of the school year between September 2020 through January 2021 (Tr. pp. 283-84). From February 2021 to June 2021, there was a phased hybrid return for students to the middle school (Tr. pp. 284-85). The reading specialist indicated she provided AIS ELA instruction to the student both school years (Tr. pp. 293-94).

With regard to the 2020-21 school year, the district reading specialist indicated that, during the first half of the school year during remote instruction, she instructed the student in weekly assignments via Google Classroom (Tr. p. 294). She reported that reading activities addressed

comprehension skills (*id.*). According to the district reading specialist, at that time the student was in RtI Tier 2, meaning he performance on a Level 2 on the New York State Testing Program (NYSTP) as opposed to Tier 1 which was regular classroom instruction, and Tier 3 (the highest need tier group) which was for students who performance on a Level 1 on the NYSTP (Tr. p. 295). During that time, there were ten to fifteen students in Tier 2 that, depending on data (i.e., 504 plans, measure of academic progress [MAP] scores, State assessments, attendance), she configured into three subgroups of students based on student performance and need (Tr. pp. 296-97). The district reading specialist testified that the student in the instant case was in the subgroup with the highest need (Tr. pp. 297-98). With regard to the type of instruction and AIS progress monitoring she used with the student, the reading specialist testified that she used a Leveled Literacy Intervention (LLI) kit, authentic work from the student's content areas (i.e., science assignment for a written response), and a running record called a Diagnostic Reading Assessment (DRA) from the LLI kit to provide a balance of reading intervention and school assistance for success as part of a real-life application (Tr. pp. 300-01). The reading specialist reported the DRA is a tool she used to assess reading comprehension at multiple layers, and that the DRA gave an oral piece to address fluency and decoding (Tr. p. 301).

The district's summary of the student's RtI services for the 2020-21 school year included a February 2, 2021 progress note that stated the student needed to complete assignments consistently and be more actively engaged in them in reading and a February 3, 2021 progress note that stated the student needed to practice his math facts outside of school (Parent Ex. 5 at p. 2). A student profile for math for winter 2021 indicated that the student was showing low growth (4th percentile) and low achievement (27th percentile) (Dist. Ex. 8). During this same time, a student profile for reading indicated that the student was showing high growth (99th percentile) and low achievement (42nd percentile) (Dist. Ex. 9).

On April 14, 2021, the 504 committee again met and developed a 504 plan for the student for the 2021-22 school year (see Dist. Ex. 6). Based upon the student's diagnosis of ADHD that limited his learning, the April 2021 504 committee continued to recommend the same supplementary aids and services as well as testing accommodations as in the June 2019 504 plan (compare Dist. Ex. 4 at p. 2, with Dist. Ex. 6 at p. 2). In addition, the 504 committee recommended the student continue to receive AIS (i.e., Tier 2 RtI) in both reading and math each, every other day in a large group for 40 minutes during the 2021-22 school year (see Dist. Ex. 7).

In terms of the student's RtI, a June 24, 2021 progress note for math indicated that the student needed to be prepared for class and to use his time more productively (Parent Ex. G). For spring 2021, the student performed on Level 2 of the NYSTP ELA assessment and Level 2 of the NYSTP mathematics assessment (Parent Ex. H).<sup>6</sup>

Although, according to testimony by the parent the student struggled with remote instruction because he was easily distracted or would just shut down and testimony by the reading specialist that the student had difficulty with organization and completion of assignments upon his return to in person instruction, the reading specialist testified that by the end of the 2020-21 school

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<sup>6</sup> The reading specialist indicated that the student's score in spring 2021 was "an outlier" and that, generally, a decreased score could result if a student had "an off day" or other factors (Tr. pp. 334-35).

year the student was not performing at such a low level that she would refer him to Tier 3 because of insufficient progress (Tr. pp. 305, 333, 466-67; see Tr. pp. 357-59).<sup>7</sup> The reading specialist indicated that "[a]t that moment," she did not "ha[ve] enough information because the year was so disjointed" and that she felt she "would have a better overview the following year" (Tr. pp. 302-04). She also noted that the student's "reading DRA was headed in the right direction, it increased" and that the student's "MAP score was going back up" (Tr. p. 307). The reading specialist also indicated it "would have been inappropriate" to place the student in "such a small environment" given that he was "making friendships" and "getting into that routine" (Tr. p. 334).<sup>8</sup> Generally, with respect to assessing whether a student should move to a different tier or be referred for special education at the point of transition between the 2020-21 school when schools had been providing remote and/or hybrid instruction and the 2021-22 school year when schools returned to full-time in-person instruction, the reading specialist indicated that it was best to allow students to "return to the school day" and the regular routine to ensure findings were appropriate (Tr. p. 326).

### **3. 2021-22 School Year**

For the 2021-22 school year, the student again received Tier 2 RtI services in the areas of reading and math (see Dist. Ex. 7). According to a district summary of RtI services for the 2021-22 school year, the reason for the services was that "[t]he student's teacher ha[d] indicated that the student [wa]s at risk for not achieving proficiency levels" based upon classroom performance, report card grades, and/or current levels of academic achievement and, specific to math, because "[t]he student ha[d] not demonstrated a proficiency level above 2 on the New York State Mathematics Assessment" (id. at pp. 1-2). Beginning in September 2021, the student continued with large group reading services every other day and large group math services every other day (id.).

The reading specialist testified that, for the 2021-22 school year, the student, again, was in the highest need grouping of students receiving Tier 2 services (Tr. p. 317). She indicated that she used the same type of instruction and AIS progress monitoring she used with the student during the 2020-21 school year, such as an LLI kit, DRA, Bookshare and self-selected books for reading, and application of the tools to "skill-based activities" (Tr. p. 319). The reading specialist also described that, given the student's tendency towards crying or avoidance behaviors, which in her view was related to frustration with school expectations, she provided more support through "proximity," "feedback checks," and "extra time to complete assignments" (Tr. pp. 320-23).

A MAP growth report indicated that, in winter 2022, the student showed low average achievement (30th percentile) and high average growth (70th percentile) in math and low average

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<sup>7</sup> The student's final academic grades for the 2020-21 school year (fifth grade) were as follows: 79 in ELA, 84 in math, 76 in reading, 74 in science, and 92 in social studies (Parent Ex. G; Dist. Ex. 10). With regard to the student's reading class, the report card stated that "[i]t ha[d] been a challenging year," and that the student's effort had been inconsistent (Parent Ex. G). The report card indicated that the student's effort in social studies had also been inconsistent (id.).

<sup>8</sup> By a small environment, it is unclear if the reading specialist was referring to the size of a reading group or a class size.

achievement (27th percentile) and high growth (98th percentile) in reading at that time (Parent Ex. M at p. 1).

The district reading specialist testified that, as of winter 2022, the student did not require a more intensive level of services (Tr. pp. 347, 354). Ultimately, the reading specialist stated her view that, going into the 2022-23 school year (seventh grade), it would be appropriate for the student to continue to receive Tier 2 services with the group of students with the highest level of need and that she would not have recommended referral to the CSE (Tr. pp. 354-56). She felt the student had made progress with the Tier 2 services as demonstrated by the DRA scores and her observations that the student was more engaged and demonstrated greater stamina (Tr. pp. 354-55).

The student's third quarter report card indicated that the student attained the following grades in his core academic classes: English 57, math 68, science 87, and social studies 87 (Parent Ex. L).<sup>9</sup>

As noted above, State regulation provides that a school district must initiate a referral to determine if a student needs special education services and programs if that student "has not made adequate progress after an appropriate period of time when provided instruction" in a school district's RtI program (8 NYCRR 200.4[a] [emphasis added]; see also 34 CFR 300.309[c]). Districts may not use RTI as a reason to delay or deny an initial evaluation for IDEA eligibility (see Memorandum to: State Directors of Special Education, 56 IDELR 50 [OSEP 2011]; see also Letter to Ferrara, 60 IDELR 46 [OSEP 2012]). With respect to child find and RtI practices at the state and local level, the United States Department of Education has acknowledged that federal regulation does not specify a timeline for using RtI or define "adequate progress" (Determining the Existence of a Specific Learning Disability, 71 Fed. Reg. 46,658 [Aug. 14, 2006]). Nevertheless, the United States Department of Education's Office of Special Education and Rehabilitative Services (OSERS) has indicated that "it generally would not be acceptable for [a local educational agency] to wait several months to conduct an evaluation or to seek parental consent for an evaluation if the public agency suspects the child to be a child with a disability" (Questions and Answers on Response to Intervention (RTI) and Early Intervening Servs. (EIS), 47 IDELR 196 [OSERS 2007]). The courts have adopted a similar view of not waiting too long before referring the student for special education evaluation while the RtI approach is used, even if the student is advancing from grade to grade (see Avaras v. Clarkstown Cent. Sch. Dist., 2018 WL 4964230, at \*10 [S.D.N.Y. Oct. 15, 2018] [noting that a school district violated child find and denied a FAPE to a student by providing RtI services for seven months in kindergarten as well as nine months in first grade but not following the district policy of 8-week RtI cycles that should have triggered an evaluation of the student for IDEA services], reconsideration denied, 2019 WL 2171140 [S.D.N.Y. May 20, 2019]; see also Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W., 961 F.3d 781, 794 [5th Cir. 2020] [finding a district's "failure to pursue evaluation, even while

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<sup>9</sup> A subsequent 504 plan was developed for the student on May 23, 2022 for the 2022-23 school year (see Dist. Ex. 11). In addition to the previously recommended supplementary aids and services, the 504 committee recommended providing the student with positive reinforcement, monitoring his homework completion, and providing the student with the use of a word processor, together with access to a computer with speech-to-text and text-to-speech services (id. at p. 2). In addition, the 504 committee added use of a word processor to the student's testing accommodations (id.).



concurrently implementing intermediate accommodations," including RtI services and 504 accommodations, amounted to an unreasonable delay in referring the student]).

Here, as noted above, the district has not offered its policy or position of what might be considered "an appropriate period of time"; however, the district reading specialist indicated that she was not aware of any policy of guidance with respect to how long a student should stay in Tier 2 (Tr. p. 389). With regard to progress monitoring, guidance from the State Education Department offers an example of a policy, setting forth Tier Two progress monitoring requirements and a recommended maximum length of time that a student would spend in the second tier of intervention, indicating it would vary from approximately 9 to 30 weeks, depending on such factors as the skill set to be learned, rate of the student's progress, and whether the student is making adequate progress see "Response to Intervention, Guidance for New York State School Districts," Office of Special Educ., at pp. 13-14 [Oct. 2010]).<sup>10</sup> The guidance document indicates that, if progress monitoring of a Tier Two intervention indicates lack of adequate response, schools should consider adjusting the intervention in terms of intensity (id. at p. 14).

Here, the student was receiving Tier 2 interventions for the 2020-21 school year, and while there may be merit to the district reading specialist's explanation as to why they were continued into the 2021-22 school year—namely, due to the circumstances surrounding remote and/or hybrid learning during the 2020-21 school year—this does not explain the continuation of the services through the entire 2021-22 school year.<sup>11</sup>

While use of an RtI process is certainly appropriate before prematurely initiating special education for a student, the district's application of its RtI process with respect to the student in this case was extended and one cannot tell with any reasonable degree of reliability if, following the process, the student should not have been referred to determine special education eligibility during the 2021-22 school year. Accordingly, while my reasoning may differ from the IHO's, I find insufficient basis to disturb the IHO's decision which found that the district should have

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<sup>10</sup> Guidance documents have recently been reorganized on the State's web site and the RtI guidance no longer appears there; accordingly, I have added a copy of the guidance to the administrative hearing record in this matter. The State Education Department's website does have more recent guidance published in October 2023 setting forth a framework for a multi-tiered system of supports (MTSS) ("The New York State Education Department's [NYSED's] Mutli-Tiered System of Supports – Integrated [MTSS-I] Pilot Framework," NYSED [Oct. 2023], available at <https://osepartnership.org/mtssi/NYSED-MTSS-I-Pilot-Framework-October-2023.pdf>). According to the document, the MTSS-I framework was piloted in 75 New York State schools during the 2022-23 school year. I note that the MTSS-I framework was not in place at the time of the 2021-22 school year at issue in this matter.

<sup>11</sup> The United States Office of Special Education and Rehabilitative Services has indicated that, if a student has received limited instruction or made little academic progress due to educational disruptions related to the Covid-19 pandemic, the student should not necessarily be referred for an evaluation, and districts should work with families to determine appropriate general education supports and interventions that can meet the student's needs attributable to limited instruction as a result of the Covid-19 pandemic ("Return to School Roadmap: Child Find under Part B of the Individuals with Disabilities Education Act," 79 IDELR 140 [OSERS 2021]).

referred the student for special education and violated its child find obligations at least for the period of March through June 2022.<sup>12</sup>

### **B. Unilaterally-Obtained Reading Services**

The IHO correctly applied the Burlington/Carter framework to assess the appropriateness of reading services provided to the student by WNYDS during the period of March through June 2021 and to determine that equitable considerations favored the parents' requested relief (IHO Decision at pp. 27, 29-30). However, review of the hearing record does not support the IHO's determination that the parents met their burden to demonstrate the appropriateness of the private tutoring services provided to the student by WNYDS.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (*id.* at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

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<sup>12</sup> To the extent the IHO relied heavily on the student's diagnoses or receipt of private tutoring, these factors do not, on their own, establish that the district violated its child find obligation. For example, evidence that a student has a medical or DSM-V diagnosis does not necessarily mean a student meets the criteria for special education under the IDEA or State law (see Application of a Student Suspected of Having a Disability, Appeal No. 20-085).

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

The owner and chief executive officer of WNYDS testified that WNYDS was "a literacy center that provides instruction for students who live with dyslexia or fit the dyslexia profile" and, more specifically, offered specialized reading instruction, reading evaluations, and advocacy for parents navigating the special education system (Tr. pp. 622, 661-62). The owner indicated that the company provided students with "one-on-one instruction either given in-person or virtually or both" by "a teacher who is trained and directly supervised by a master certified Barton instructor" (Tr. pp. 668-69). The owner described the Barton program as "an Orton-Gillingham inspired sequential curriculum for students who are struggling with reading and spelling" that consisted of 10 levels (Tr. p. 658). WNYDS also used other programs such as Foundations and Sound and Equipped for Reading Success, which was a chronological awareness program (Tr. pp. 671, 683).

WNYDS evaluated the student in 2017 (see Dist. Ex. 15). The evaluator found that, "[b]ased upon the scores and results of these screening tools, as well as his educational history, . . . the severity of [the student's] dyslexia [wa]s severe-to-profound. . . . from a tutoring point of view" meaning that it would take the student "longer to complete a recommended intervention program, and it will be critical for the school to provide accommodations until the intervention program is completed" (id. at p. 7). The evaluator recommended, among other things, that the student receive support to address his "significant difficulty with auditory discrimination and/or auditory memory" through a program such as Foundations in Sound or Lindamood-Bell, followed by an "Orton-Gillingham-based system" (id. at pp. 7-8).

The parents engaged the services of WNYDS beginning in May 2018, which continued until May 2022 (Tr. pp. 452-54, 677; see Parent Ex. DD). WNYDS delivered two 60-minute sessions per week of "Orton-Gillingham-based tutoring" to the student, after school (Tr. pp. 453-54). The services were provided in person "until the pandemic" (Tr. pp. 684-85). The owner of WNYDS testified that the student's services followed the parameters of the Barton program (Tr. pp. 679, 683). The student had reached "Level 6, Lesson 9" by the time he left the program but did not reach "Level 10" because he enrolled at Gow (Tr. p. 685). The WNYDS owner indicated that the student made progress (Tr. pp. 685-86).

The foregoing information about the tutoring services provided by WNYDS is too general to satisfy the parents' burden to prove that the services were specially designed to meet the student's unique needs. While it appears that the student received tutoring services using the Barton approach, there is no further detail as to what that entailed or specifics as to how the student responded to the services (see L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490-91 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at \*5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom., 471 Fed. App'x 77 [2d Cir. June 18, 2012]). The WNYDS evaluation from 2017 was conducted before the company began providing services and the owner of WNYDS offered a general description of the company with very little detail regarding the services provided to the student other than the frequency and location of the services. Finally, the provider did not testify, and the hearing record includes no written plans, progress reports, or session notes to describe the services delivered.

Having found that the parents did not meet their burden to show that the unilaterally obtained services from WNYDS were appropriate for the student for the period of March through June 2022, a final note is necessary to address the parents' request that, in the alternative, the services could be awarded as compensatory education. During the impartial hearing, the parties and the IHO discussed the relief sought by the parents for the alleged child find violations and the parents' attorney clarified that the parents were seeking "compensatory reimbursement" in the form of "reimbursement for private expenditures on a tutoring program" (Tr. pp. 16-20).<sup>13</sup> In arguing for "compensatory education" as an alternative form of relief at this stage, the parents are effectively attempting to engage in an end run around bearing the burden of proof to demonstrate the appropriateness of privately obtained services. State Review Officers have many times indicated that it may not be appropriate in the administrative due process forum to continue to place the burden of proof regarding compensatory education relief on the district in an administrative due process proceeding, particularly where the parent seeks compensatory education to be provided by parentally selected private providers, and I note that no Court or other authoritative body in this jurisdiction has addressed the topic to date (see Application of a Student with a Disability, Appeal No. 24-213; Application of a Student with a Disability, Appeal No. 23-096; Application of a Student with a Disability, Appeal No. 23-050). And, to the extent the parents now seek future services to remedy the child find violations, the district did not have a reasonable opportunity to present any evidence on this matter, as the parents specifically limited the relief sought during the impartial hearing. Accordingly, the parents' request for alternative

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<sup>13</sup> The use of the phrase "compensatory reimbursement" appears to conflate two different types of relief; namely, reimbursement or direct funding of private services or tuition that the parents obtained while engaging in self-help contemporaneous with the violation and then sought to redress through a due process proceeding (i.e., the Burlington/Carter scenario), as compared to relief that is prospective in nature with the purpose to remedy a past harm (i.e., compensatory education). In the former, the parent has already made decisions unilaterally, without input from the district, and, therefore, must bear a burden of proof regarding those services.

compensatory education as relief for the child find violation during the period of March through June 2022 is denied.

### **C. 2022-23 and 2023-24 School Years**

As noted above, the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2022-23 and 2023-24 school years and those findings are adopted with the following additional discussion.

#### **1. September 2022 IEP**

For the 2022-23 school year (seventh grade), the CSE developed two separate IEPs for the student on August 10, 2022 and on September 2, 2022 (Dist. Exs. 16; 19). For purposes of discussion, the September 2022 IEP will be reviewed as the operative IEP in place as of the beginning of the 2022-23 school year (see *Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S.*, 990 F.3d 152, 173 [2d Cir. 2021]; *R.E.*, 694 F.3d at 187-88).

The parents assert that the district's failure to evaluate the student "constituted" a procedural failure that "contributed" to the substantive deficiencies in the IEP. More specifically, the parents argue that the August 2022 and September 2022 CSEs did not have "sufficient evaluative information" with respect to the student's diagnoses of dyslexia, dysgraphia, ADHD, and executive functioning weaknesses. The parents also claim that the IEP's present levels of performance failed to describe the student's needs and weaknesses or his "disability-based deficits" and failed to address the student's "frequent disruptive, impulsive, and maladaptive behaviors, withdrawing from others, difficulty attending, poor expressive and receptive language skills, several social-emotional issues, struggles with homework completion, note-taking and executive functioning skills, endurance, cooperation, engaging in tasks, memory, and frustration." The parents claim that the IEP failed to discuss the student's diagnosis of ADHD or acknowledge the student's diagnoses of dyslexia and dysgraphia. Moreover, the parents claim that without information pertaining to the student's disabilities, needs and deficits, the CSE could not have made appropriate program recommendations.

In analyzing the appropriateness of the program offered to the student for the 2022-23 school year, the IHO addressed the sufficiency of the evaluative information (IHO Decision at pp. 17-18). The IHO found that the district conducted "an extensive psycho-educational evaluation" in June 2022 and no additional testing was requested by the parents (*id.* at p. 16).<sup>14</sup> The IHO found

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<sup>14</sup> A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; *see* 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; *see Letter to Clarke*, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of

that the September 2022 IEP described the student's needs in detail and recommended services to meet those needs (*id.*). More specifically, the IHO found that the IEP recited the student's evaluative results, his outside tutoring, and academic history (*id.* at p. 17). The IHO found that the September 2022 IEP referenced the parents' concerns with the student's "dyslexic type characteristics" (*id.*). Furthermore, the IHO stated that "[t]o the extent that more detail could have been provided, such omissions had no effect on the educational program set forth in the IEP" (*id.*).

Consistent with the IHO's finding, in connection with the September 2022 meeting, the CSE reviewed the June 2022 psychoeducational evaluation conducted by the district, which included administration of the Behavior Assessment System for Children (BASC-3), the Kaufman Test of Educational Achievement-Third Edition (KTEA-3), and the Stanford-Binet Intelligence Scale-Fifth Edition (SB-5) (*see* Dist. Exs. 14; 19 at pp. 2-5). In addition to standardized testing results for reading, math, and writing, review of the September 2022 IEP shows the CSE considered benchmark data for reading and math (Dist. Ex. 19 at pp. 6-7). The student's diagnosis of ADHD was noted on the IEP as well as his "dyslexic type characteristics" (*id.* at pp. 1, 5, 7). Related to executive functioning, the management needs section of the student's September 2022 IEP indicated the student would benefit from use of a daily planner for homework assignments, strategic seating, and reteaching and reinforcement of concepts (Dist. Ex. 19 at p. 7).

Contrary to the parents' assertion on appeal that the district failed to conduct any behavioral, social/emotional, or executive functioning evaluations, the district's psychoeducational evaluation included administration of the BASC-3 to the student's mother, ELA teacher, and the student (Dist. Ex. 14 at pp. 8, 10). The school psychologist who conducted the psychoeducational evaluation reported that there was a high degree of agreement between the parent and teacher responses on the BASC-3 (*id.* at p. 10). Further, she noted that all raters, including the student, had areas of concern with student behaviors associated with attention and hyperactivity (*id.* at p. 11). In addition, the student expressed concerns related to anxiety and some depression behaviors (*id.*). The parent and teacher scales showed concerns related to the student's social skills, connectivity with his surroundings, ability to adapt to changes, ability to communicate clearly, and tendency to withdraw from others (*id.* at pp. 10, 11).

Testimony by the district's director of special education indicated the September 2022 CSE convened for a program review in response to concerns that were taken "very seriously" (Tr. pp. 53, 132; *see* Dist. Exs. 19; 21). The director reported the September 2022 CSE meeting was collaborative and had "great stakeholder input from staff who knew [the student] very well" (Tr. p. 132). A review of the September 2022 IEP shows that it included more specific information about the student's reading progress than the August 2022 IEP (*compare* Dist. Ex. 16 at p. 4, *with* Dist. Ex. 19 at p. 6).

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cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The September 2022 IEP noted that the student demonstrated the greatest difficulty in the area of ELA, and particularly in reading fluency, reading comprehension, and writing (Dist. Ex. 19 at p. 5). The student did not earn a passing grade in grade 6 English, and he attended the summer school digital recovery program (id.). The IEP indicated that, outside of school, the student participated in weekly private tutoring to address/remediate his reading difficulties (id.). In addition, the IEP reflected the results of the June 2022 psychoeducational evaluation which indicated the student's overall cognitive abilities were in the average range and his nonverbal and verbal IQ scores were commensurate with his full-scale IQ (id.). Analysis of subtest scores indicated a "personal weakness" with his verbal working memory, or his ability to recall information (id.). The September 2022 IEP indicated that the student's overall abilities may be a slight underestimate due to the student's fleeting attention during the evaluation (id. at p. 6). According to the September 2022 IEP, the BASC-3 rating scales showed concerns with attention and hyperactivity across raters (id.).

With regard to mathematics, the IEP stated that benchmark assessments indicated the student's math skills were below grade level (Dist. Ex. 19 at p. 6). His math fluency skills were at grade level and he was able to solve some grade level problems when given in small chunks (id.). However, the IEP noted that the student struggled to engage in tasks, lessons, and activities that involved the whole class (id.). The IEP reflected the results of standardized testing that showed the student demonstrated average math concept and application and computation skills but indicated that the student's performance on the math computation subtest was statistically lower than his performance on the math concepts and applications subtest (id.). Analysis of the math computation subtest revealed weaknesses with subtraction, division, fractions, decimals, and algebra (id.). The IEP indicated the student had within-item error weakness with subtraction with regrouping (id.). He had a strength "with fact or computation," but his math fluency was below average (id.).

The September 2022 IEP stated that with regard to reading, then-current benchmark data indicated the student's reading level was below grade level (Dist. Ex. 19 at p. 4). The September 2022 IEP indicated the student made growth in reading since beginning the district's middle school, specifically that his DRA had improved from a level 24 (end of Grade 4) in fall 2020 to level 40 Fiction (end of Grade 6) in spring 2022 (id. at p. 6). According to the IEP, the spring 2022 DRA fluency component showed the student's fluency rate was 120 words per minute (id.). The IEP explained that students in grades seven through 12 read between 115 and 185 words per minute (id.). The IEP noted that the student's MAP assessment showed in fall 2020 his overall reading was at the seventh percentile and by spring 2022 his overall reading was at the 32nd percentile (id.). During that time, he also had shown growth with his stamina to partake in benchmark assessments as shown from his rapid guessing decreasing from the 24th percentile in fall 2020 to the second percentile for guessing in spring 2022 (id.).

The IEP also noted that, with respect to reading, the student was motivated to read and used Bookshare and self-selected appropriately leveled books (Dist. Ex. 19 at p. 6). According to the September 2022 IEP, the student's weaknesses included decoding, reading with expression during oral reading, and recognizing punctuation when reading (id.). Standardized testing showed the student demonstrated average word recognition and word recognition fluency skills (id.). However, he had below average reading comprehension, silent reading fluency, decoding fluency, and reading vocabulary skills (id.). The IEP indicated that student read words using chunking and

whole word approaches (id.). The IEP explained that analysis of the reading comprehension subtests was completed at the fifth grade level based on the passages administered (id.). The analysis showed the student demonstrated average abilities with inferential and expository comprehension questions (id.). He had weaknesses when answering literal and narrative comprehension questions in the set of passages read (id.).

In connection with writing, the September 2022 IEP indicated the student found success with simple writing tasks (Dist. Ex. 19 at p. 6). His writing was legible, but it was larger in size, and he did not always use spacing between words (id.). According to the IEP, the student lacked the stamina required to finish longer tasks, as he was not able to follow/stay focused on the required details of tasks (id.). Writing was not a preferred activity, and the student was resistant to it (id.). The September 2022 IEP stated that standardized testing showed the student had below average spelling and written expression skills (id.). The IEP noted that analysis of the written expression subtest showed the student had average ability with structure, capitalization, and punctuation (id.). He had a weakness with task (following direction) and word form (id.). The IEP indicated that a qualitative analysis of the student's essay showed he wrote two complete sentences; however, he did not include an introductory sentence explicitly stating the setting of the story, and he did not write in a character as directed (id.). According to the IEP, the student's ideas loosely related to the story (id.). He did not receive credit for the main point, logical flow, or planning; as he did not include three ideas about or loosely related to the story (id.). The IEP indicated that in the student's writing, the evaluator needed to add punctuation as allowed by scoring criteria to create his two sentences (id.). The student's writing included a word missing a letter, which created another word (he wrote read instead of ready) (id.). It also had a wrong word form (he wrote "sended" instead of sent) (id.).

The September 2022 IEP identified the student's strengths as his willingness to accept added adult support to be more successful at school (Dist. Ex. 19 at p. 6). The September 2022 IEP indicated that the student needed to improve his decoding skills and reading comprehension, add details to his writing, use correct verb tenses, and improve his computation skills (id. at p. 7). The IEP noted that the parent wanted to establish/access a means to monitor the student's homework assignments and test dates, among other things (id.).

With regard to social development, the September 2022 IEP indicated that over the past two years, the student learned to implement tools and strategies to help him when faced with frustration (Dist. Ex. 19 at p. 7). He had decreased/limited his number of outbursts and increased his social interactions with peers and adults (id.). The IEP noted the student often required several prompts to keep engaged in lessons (id.). According to the IEP, the parents reported that the student was not always truthful about school work or missing assignments (id.).

With regard to physical development, the September 2022 IEP indicated the student had been diagnosed with ADHD and he took prescription medication at home (Dist. Ex. 19 at p. 7). The IEP noted that the ADHD "influence[d] [the student's] school performance" (id.). The IEP noted that the parents were concerned with the "dyslexic type characteristics" their son displayed and the way this impeded his ability to read and write (id.).

Based on the foregoing, I find no basis to disturb the IHO's conclusion the district conducted sufficient evaluations of the student and that the September 2022 IEP described the



student's needs in detail which led to the development of the recommended program discussed below (see IHO Decision at pp. 16-17).

With respect to the parents' claim that the student required "evidence-based [d]yslexia-specific instruction" and that the IEP should have recommended certain methodologies for the student's reading instruction, the initial dyslexia screening of the student conducted by WNYDS in 2017 mentioned several reading programs that the evaluator felt were appropriate to address the student's reading needs (see Dist. Ex. 15 at pp. 7-8).<sup>15</sup> As noted above, these included Foundations in Sounds, Lindamood-Bell LiPS, and several Orton-Gillingham based programs (id.). Although the student received tutoring from WNYDS from approximately May 2018 until May 2022 (Tr. pp. 452-54, 677; see Parent Ex. DD), the parents did not offer into evidence any documentation that outlined the content of the student's tutoring during that time or the student's progress. Testimony by the owner of WNYDS that the student was following the Barton Program and advanced from below the first level to level six, lesson nine is not enough to determine that the student required a specific methodology for reading instruction (Tr. pp. 683-86, 710-12).

The IHO made no finding with respect to the annual goals for the September 2022 IEP (see IHO Decision at pp. 14-20).<sup>16</sup> However, the September 2022 CSE developed goals for study skills, reading, and writing (Dist. Ex. 19 at pp. 8-9). Two reading goals addressed reading rate and fluency and correctly reading from a seventh-grade level vowel team/pattern word list (id. at p. 9). A third goal addressed the student's ability to identify the main idea and provide three details related to the main idea upon reading a passage at the student's independent reading level (Tr. p. 120; see Tr. pp. 130-131; Dist. Ex. 19 at p. 9). A September 2022 IEP writing goal that focused on creating a three paragraph essay that was on topic and written in a logical sequence with the assistance of a graphic organizer was developed based on input from teachers and data shared at the CSE meeting (Tr. p. 131; Dist. Ex. 19 at p. 9).

Regarding the parents' claim that the IEP goals did not identify the student's needs in "working memory, reading comprehension, hyperactivity, math skills, engaging in tasks, lessons, and whole class activities, decoding, reading orally with expression, recognizing punctuation, size and spacing between words and letters while writing, following directions, use of correct verb tenses, behavioral 'outbursts,' and frustration," the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual

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<sup>15</sup> As the IHO noted, an IEP is not required to specify the methodologies used with a student and the precise teaching methodologies to be used by a student's teacher are usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257).

<sup>16</sup> An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

goal does not necessarily rise to the level of a denial of a FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]; see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at \*20-\*21 [S.D.N.Y. Feb. 14, 2017]). Here, the annual goals aligned with the student's needs in study skills, reading, and writing (Dist. Ex. 16 at p. 7), and the IEP as a whole offered supports and strategies to address the student's academic needs, as well as his executive functioning and social/emotional needs.

With respect to the September 2022 IEP program recommendations, the parents fail to articulate the specific reasons why, other than the lack of sufficient evaluative information, the program recommended by the district was not appropriate for the student to make progress. In connection with the program recommendations, the IHO found that the "IEP did explain that [the] [s]tudent needed more intensive help in reading and needed to be placed in ICT classes for his other subjects in order to 'compensate for his reading difficulties' and to help him become proficient with audiobooks and read/write software" (IHO Decision at p. 18).

The September 2022 IEP indicated that, due to the student's daily performance, reading delays, and his ADHD diagnosis, it was necessary for him to receive the extra help and support of special education services to be successful in the general education setting (Dist. Ex. 19 at p. 7). The September 2022 IEP also indicated the student should continue to access building-based interventions and reading intervention services to address his decoding and encoding needs (id.). To address the student's management needs, the IEP stated that the student should be offered use a daily planner to record and manage homework assignments (this should be closely monitored), access to building based reading services, access to audio books, strategic seating to monitor focus and on task prompts, access to Chrome Book for extended writing tasks (read/write program), home- school communication, reteaching/reinforcement of concepts taught in class, access to leveled text, and the student's team should meet to discuss and review his reading and learning difficulties (id. at pp. 7-8). The IEP noted that the student would benefit from being in co-taught core classes to compensate for his reading difficulties and to best meet his learning style (id. at p. 8).

Additionally, the September 2022 CSE recommended a 15:1 special class for ELA once daily; 15:1 special class for academic support once daily; ICT services for math, science, and social studies; and 1:1 special class for specialized reading daily (Dist. Ex. 19 at pp. 1, 9). The September 2022 CSE recommended the following supplementary aids and services of special seating, directions repeated and clarified, refocusing and redirection, check for understanding, provide positive reinforcement, monitor homework completion, use of word processor, copy of class notes, home/school communication, and audio books (id. at pp. 10-11). In terms of assistive technology, the student was recommended for access to adaptive equipment with speech-to-text and text-to-speech software (id. at p. 11). The September 2022 IEP called for a yearly team meeting with the student's teachers and parents (id.).

Based upon the foregoing, I concur with the IHO's finding that the district satisfied its burden to prove that the September 2022 IEP was reasonably calculated to provide the student with "significant educational benefits" (IHO Decision p. 20).

## 2. September 2023 IEP

On appeal, the parents do not make separate arguments for the 2023-24 school year with respect to the district's denial of a FAPE but make the same arguments as with the 2022-23 school year. The IHO stated that the "2023-24 IEP was essentially the same as the 2022-23 IEP" (IHO Decision at p. 20).<sup>17</sup> Furthermore, the IHO stated that "[b]ecause the 2023-24 IEP was substantially identical to the 2022-23 IEP, and because the [d]istrict had no information indicating that substantial changes were indicated, [the] [p]arents' arguments for challenging the two IEP's are no more convincing with regard to the 2023-24 IEP than they were for the 2022-23 IEP" (id. at p. 21).

A review of the September 2023 IEP shows that, in addition to the information considered by the September 2022 CSE, the September 2023 CSE considered current test data, report cards, and staff observations from Gow for the 2022-23 school year (Dist. Ex. 27 at p. 2). The present levels of performance were updated to reflect the student's performance at Gow (id. at p. 6). Specifically, the September 2023 noted that the student's ability to complete history assignments on time improved over the course of the year but the student found it challenging to complete written assignments on time (id. at p. 6). The IEP indicated that in the student's math class at Gow he was learning how to calculate central tendency and use negative integers (id.). According to the IEP, the student was more consistent in showing his work and handed most of his assignments in on time (id.). The student was challenged by calculating the mean of number sets that resulted in decimal answers (id.). The IEP noted student's grade for math was in the A-/B+ range (id.). Turning to reading, the IEP indicated that the student was learning new phonics cards and roots in his reconstructive language class (id.). The IEP noted the student was engaged and respectful during lessons but turned in several assignments late (id. at p. 7). The IEP indicated the student did well on personal spelling quizzes but needed to study his cards more often outside of class (id.). The student's goals were revised in that they now targeted his ability to increase his reading rate from 130 to 160 words per minute and correctly read 20 out of 25 vowel team/pattern words from an eighth grade list (id. at p. 9).

As stated by the IHO, the evidence in the hearing record supports finding that the district offered a program that was "reasonably calculated" to provide meaningful educational benefit to the student (IHO Decision at p. 20). Taking into account the discussion above regarding the September 2022 IEP and there being no information before the September 2023 CSE which would have warranted different programming recommendations, the hearing record supports the IHO's conclusion that the district offered the student a FAPE for the 2023-24 school year.

## VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's finding that the district violated its child find obligations from March 1, 2022 through June 30, 2022, but that

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<sup>17</sup> The September 2023 CSE recommended a 15:1 special class for ELA once daily; 15:1 special class for academic support once daily; ICT services for math, science, and social studies; and 1:1 special class for specialized reading daily (Dist. Ex. 27 at pp. 1, 10). The September 2023 CSE continued to recommend the same supplementary aids and services, assistive technology, and supports to school staff as in the August and September 2022 IEPs (compare Dist. Ex. 19 at pp. 10-11, with Dist. Ex. 27 at pp. 10-12).

the parents' did not meet their burden to prove that the private services unilaterally obtained from WNYDS were specially designed to meet the student's unique needs, it is not necessary to consider whether equitable considerations would support an award of reimbursement for the private services. Further, having found that the IHO correctly determined that the district offered the student a FAPE for the 2022-23 and 2023-24 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether Gow was an appropriate unilateral placement for the student or whether equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

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

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated September 12, 2024, is modified by reversing those portions which found that the parents met their burden to prove the appropriateness of services unilaterally obtained from WNYDS during the period of March 1, 2022 through June 30, 2022, and which ordered the district to reimburse the parents for the costs of the student's private reading services provided by WNYDS during the period of March 1, 2022 through June 30, 2022.

**Dated:**            **Albany, New York**  
                      **March 5, 2025**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**