



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-637

**Application of the BOARD OF EDUCATION OF THE PEARL
RIVER UNION FREE 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:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, by Lakshmi Singh Mergeche, Esq.

Barger & Gaines, attorneys for respondents, by Jennifer Swift, 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 failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's private services delivered during the 2022-23 and 2023-24 school years. The appeal must be sustained.

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 numerous diagnoses the most recent being intellectual disability, moderate severity; language disorder; speech sound disorder (verbal apraxia); and attention-deficit/hyperactivity disorder, combined presentation, severe (Dist. Ex. 13 at p. 21). The student has a seizure disorder and a longstanding history of language, motor, and adaptive skill delays (*id.* at p. 1).

The student has received special education since he was approximately eight months of age (Dist. Ex. 13 at pp. 3-6). Between preschool and the 2019-20 school year (fifth grade the student attended various programs that employed applied behavior analysis (ABA) methodology (*id.* at pp. 3-5).¹ For sixth grade (2020-21 school year), the student entered the Board of Cooperative Educational Services (BOCES) Kaplan social communication program (*id.* at p. 5). The BOCES Kaplan program used principles of ABA such as discrete trial and natural environment teaching, and task analysis (*see, e.g.*, Dist. Ex. 5 at p. 2). The hearing record reflects that the student had received private ABA therapy outside of school since at least August 2021 (Dist. Ex. 13 at p. 8). According to the parent, up until June 2022, in addition to private ABA, the student had also been receiving private PROMPT therapy with a speech-language provider twice per week and private Orton-Gillingham support for one hour per week (Tr. p. 854).²

On June 9, 2022, a CSE met to conduct the student's annual review to assess progress toward his then-current goals, and to plan for the 2022-23 school year (eighth grade) (Parent Ex. O at p. 1).^{3, 4} Based on its review, the CSE created an IEP for the student for the 2022-23 extended school year with a projected implementation date of July 7, 2022 (*id.* at pp. 3-21). The CSE recommended the student continue to attend a daily 8:1+2 special class at a BOCES program (*id.* at p. 18). Recommended related services consisted of two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group of three, three 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of individual physical therapy (PT) (*id.* at pp. 18-19). The CSE also recommended that the parents receive two 30-minute sessions per month of parent counseling and training (*id.* at p. 19). In addition, the CSE recommended that the student be provided with the support of a one-to-one aide for six-hours daily to assist the student in attending to classroom activities, and access to an iPad to assist the student with communication in school and at home (*id.*). The June 2022 CSE also recommended the following supports for school personnel on behalf of the student: one 30-minute monthly consultation with a reading specialist, one 30-minute monthly multidisciplinary team meeting, one 30-minute weekly speech-language

¹ The student reportedly entered a BOCES Comprehensive Application of Behavioral Analysis to Schooling (CABAS) program in first grade where he made progress (Parent Ex. Z at p. 3). For second grade the student transitioned to a social communication classroom within BOCES but experienced a "significant increase in problematic behaviors" and therefore transitioned back to the CABAS program for the remainder of elementary school (*id.*).

² The acronym PROMPT refers to Prompts for Restructuring Oral Muscular Phonetic Targets, a form of speech therapy.

³ While the IEPs reflect that meetings for the student were conducted by subcommittees of the CSE—or CSE subcommittees—for purposes of this decision, the subcommittees will be referred to simply as CSEs for ease of reference.

⁴ The hearing record contains duplicative exhibits. For purposes of this decision, except where otherwise indicated, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. The district's attorney inquired as to the IHO's practice regarding redundant exhibits to which the IHO responded, "I don't care either way" (Tr. pp. 16-17). The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

consultation, and one 30-minute monthly consultation with the school psychologist (id. at p. 17). Further, the June 2022 CSE recommended extended school year services for the student consisting daily attendance in a BOCES 8:1+2 special class and receipt of the related services of two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual OT, and one 30-minute session per week of individual PT, as well as support from a one-to-one aide for six hours per day (id. at pp. 19-20). Finally, the June 2022 CSE recommended that the student receive special transportation (id. at p. 21).

In a settlement agreement entered between the parties to resolve a prior dispute concerning the 2021-22 school year, the district agreed to fund "compensatory educational services" to be delivered to the student during the 2022-23 school year by private providers chosen by the parent including up to 10 hours per week of ABA and/or reading instruction and two 45-minute sessions per week of speech-language therapy with a PROMPT certified therapist (IHO Ex. b at pp. 35-41).⁵

On January 6, 2023, a CSE met for a program review and to discuss the student's upcoming reevaluation (Parent Ex. Q at p. 1). According to the meeting information summary attached to the January 2023 IEP, the student's mother indicated that, although the last neuropsychological evaluation that had been completed recommended a social communication class, she believed that the student may need more of an ABA approach (id. at p. 2). The student's special education teacher responded, stating that the student was in a social communication class that used ABA methodology throughout the school day (id.). According to the meeting information summary, it was "the consensus of the members of the CSE" that the BOCES Kaplan program was appropriate to meet the student's then-current needs (id.). The January 2023 CSE created an IEP with a projected implementation date of January 25, 2023 (id. at pp. 4-22). Program and related services recommendations remained the same as those in the June 2022 IEP (compare Parent Ex. O at pp. 18-21, with Parent Ex. Q at pp. 19-22).

On March 10, 2023, a CSE met for a reevaluation review (Parent Ex. BB). According to the meeting information summary attached to the March 2023 IEP, all available evaluation results were reviewed, as was the student's progress (Parent Ex. BB at pp. 1-3). The meeting concluded with the understanding that the CSE would reconvene once the results of a private neuropsychological evaluation were provided to the district (id. at p. 3). The March 2023 CSE created an IEP with a projected implementation date of March 29, 2023 (id. at pp. 6-23). No changes were made to the program placement or recommended related services at that time (compare Parent Ex. Q at pp. 19-22, with Parent Ex. BB at pp. 20-23).

During the 2022-23 school year the student initially attended the BOCES Kaplan program for the entire school day from 8:00 AM to 2:00 PM (Tr. p. 1047). The student also received between two to three private ABA sessions after school daily (Tr. p. 1049). By the second week

⁵ During the impartial hearing, the parties agreed for the IHO to review the settlement agreement "in camera" rather than entering the document into evidence (Tr. p. 12). Ultimately, however, the agreement was included in the hearing record as an attachment to the parent's response to the district's motion to limit the scope of the impartial hearing (see IHO Ex. b), and the IHO relied on it in ruling on the district's motion (see IHO Ex. c).

of May 2023, however, the student's mother unilaterally created and implemented a "hybrid schedule" (Tr. pp. 1047-48). Thereafter, the student received private ABA sessions in the morning, outside of school, and then arrived at Kaplan BOCES later in the morning, "after 10:30 am or so" (Tr. p. 1050). The parent arranged the hybrid schedule based on her belief that the student would be more receptive to ABA services in the mornings, as the student appeared tired and exhausted in the afternoons (Tr. p. 1048). The student's mother notified the district of the change (Tr. pp. 936-37). For the remainder of the 2022-23 school year the student continued to arrive at the BOCES Kaplan program at 10:30 a.m. after receiving ABA services at home for two hours in the morning (Tr. pp. 936-38).

On June 22, 2023, a CSE met to conduct the student's annual review and to develop an IEP for the 2023-24 school (Dist. Ex. 5). According to the meeting information summary attached to the IEP, the parent advocate asked if there was a particular ABA curriculum used at the BOCES Kaplan program (*id.* at p. 2). The BOCES administrator indicated that all of the classrooms utilized principles of ABA such as discrete trials, natural environment teaching, and task analysis (*id.*). The parent advocate also inquired as to how often the student received one-to-one instruction during the day, to which the teacher responded that the student received two hours in the morning and in the afternoon as well, but that since May he had missed sessions due to absences (*id.*). The student's school speech-language pathologist reported that the student's attendance for May and June was inconsistent, which impacted her ability to provide him with speech instruction (*id.*). The June 2023 CSE created an IEP with a projected implementation date of September 5, 2023 in which it recommended that a 30-minute weekly behavior intervention consultation for the team be added to the supports for school personnel (*id.* at pp. 5-24). The CSE also recommended that parent counseling and training be reduced to one 30-minute session per month (*id.*). Otherwise, the program placement and recommended related services remained the same as in the student's prior IEP (*compare* Parent Ex. BB at pp. 20-23, *with* Dist. Ex. 5 at pp. 21-24).

On September 21, 2023, a CSE convened in order to review the results of the district's reevaluation of the student (Dist. Ex. 26). The CSE chairperson mentioned that the student's attendance/lateness impeded his participation in all school activities (*id.* at p. 2). She reviewed the student's then-current IEP including related services (*id.* at p. 2). The meeting information summary stated that BOCES Kaplan continued to be an appropriate placement recommendation for the student; however, the district stated a willingness to explore other program options if the parents were interested (*id.*). The parents indicated that they were interested (*id.*).⁶ The September 2023 CSE then created an IEP to be implemented October 11, 2023 (*id.* at pp. 5-23). No changes were made to the program placement or recommended related services at that time (*compare* Dist. Ex. 5 at pp. 21-23, *with* Dist. Ex. 26 pp. 21-23).

⁶ Per the testimony of the district's director of special services, the district sent out packets to seven schools and heard back from two that were interested conducting a student in intake (Tr. pp. 67-68). The intake process was not pursued at either school because the parents were only interested in ABA programs (Tr. p. 68).

Throughout the 2023-24 school year, the student continued with the parentally-initiated "hybrid-schedule," and BOCES Kaplan adjusted the student's schedule to deliver his mandated services during the hours he was in attendance (Tr. pp. 1050-51; see Parent Ex. HH).

A. Due Process Complaint Notice

In a due process complaint notice, dated December 13, 2023, the parents alleged that the district failed to provide the student a FAPE for the 2022-23 and 2023-24 school years (Parent Ex. A). The parents asserted, in pertinent part, that the district failed to recommend appropriate services in the student's IEPs and denied the student a FAPE during each of the respective school years (id. at pp. 2, 8). The parents further maintained that the district deprived the parents of meaningful participation in the IEP process by ignoring their concerns, by failing to provide them with the student's school records, and by failing to allow them to engage with the student's BOCES providers(id. at p. 8). The parents asserted that the student required a home-based ABA program with PROMPT therapy in addition to his placement in an out-of-district program so that the student could make meaningful educational progress (id.).

As relief, the parents requested an order directing the district to reimburse the parents for the cost of "tutoring, therapeutic interventions and home instruction" provided to the student during the 2022-23 and 2023-24 school years at the parents' expense, along with any "other out-of-pocket expense[s] incurred due to the District's denial of [a] FAPE" (Parent Ex. A at pp. 8-9). The parents also requested that the district be required to provide the student a program to include "at a minimum" fifteen hours per week of home ABA instruction and two to three hours of weekly PROMPT therapy, as well as the student's continued attendance at BOCES Kaplan for purposes of socialization with peers and generalization of skills with allowance for the student to arrive three hours after commencement of the school day, along with round-trip transportation to the public school (id.). Finally, the parents requested that the district be required to provide them with the student's school records and allow them to communicate freely with the student's school and providers (id. at p. 9).

B. Impartial Hearing Officer Decision

An impartial hearing convened on March 27, 2024 and concluded on June 25, 2024 after nine days of proceedings (Tr. pp. 1-1125). In a decision dated November 16, 2024, the IHO concluded that the district failed to provide the student with a FAPE for the 2022-23 and 2023-24 school years (IHO Decision at pp. 25-28). Overall, the IHO concluded that the evidence adduced at the impartial hearing demonstrated the student's lack of progress (id. at p. 25). The IHO determined that, although the student was not achieving his goals, much less his objectives, the district kept recommending the same program year after year (id. at pp. 25-26, 28). With respect to the supports and services provided to the student in the program recommended by the district, the IHO found that despite "significant documentary evidence and testimony about the Student's need for a higher-level of individualized, intensive, and evidence-based reading, writing, and math interventions, intensive daily support for academic skills and language, a multisensory, highly structured behavioral focus, 1:1 direct instruction, daily PROMPT speech therapy with a certified PROMPT therapist, and an assistive technology assessment," as well as instruction provided using ABA methods supervised by a Board Certified Behavior Analyst (BCBA), the BOCES Kaplan

program did not sufficiently address the student's needs in those areas to provide the student with a FAPE (id. at pp. 26-27).

The IHO then proceeded to find that the ABA and PROMPT speech-language therapy services privately obtained by the parents were appropriate in view of the unique, individual needs of the student (IHO Decision at p. 27). Next, the IHO concluded that equitable considerations favored the parents as the testimony revealed that they attended all of the CSE meetings, and there was no evidence to suggest that the parents did not cooperate with the district even as they disagreed with the district's recommended program (id. at p. 28).

As relief, the IHO ordered the district to pay the costs of fifteen hours per week of ABA delivered to the student at home and up to three hours per week of PROMPT-certified therapy provided to the student during the 2022-23 and 2023-24 school years and to reimburse the parents for the costs previously incurred upon submission of appropriate documentation (IHO Decision at p. 28). The IHO further ordered that the district allow the student's late arrival to the BOCES Kaplan program attended by the student; provide the student with round-trip transportation to and from the BOCES Kaplan program and reimburse the parents for costs of transportation incurred by them during the 2022-23 and 2023-24 school years upon submission of appropriate documentation; and to provide the parents with a complete copy of the student's "school and pupil records" (id. at pp. 28-29). Finally, "to the extent it is within [her] authority," the IHO ordered the district to allow the parents to communicate with the student's school providers "in the same way that the [p]arents of neurotypical parents do" (id. at p. 29).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in finding that it failed to provide the student with a FAPE for the 2022-23 and 2023-24 school years. The district argues that the IHO erred by finding that the student did not make progress in the recommended program, and also failed to consider the various program modifications the district made in response to the parents' concerns.⁷ The district also maintains that the due process complaint notice failed to challenge with any specificity the particulars of the student's respective IEPs in place for the school years in question. Moreover, the district argues that the parents effectively conceded the appropriateness of the student's placement in light of their requested relief. In addition, the district states that the parents withdrew their request for reimbursement of the costs of special transportation incurred during the 2023-24 school year. Further, the district asserts that the IHO erred in finding that the private services obtained by the parents were appropriate to meet the student's needs. Finally, the district asserts that equitable considerations do not support reimbursement of the monetary amounts expended by the parents for private services.

⁷ In addition, the district argues that the IHO relied on documents that were not entered into evidence during the impartial hearing; review of the IHO's decision reveals that this is the case (IHO Decision at pp. 1, 16 [citing parent exhibits B, C, F]). This, on its own, would not necessarily be reversible error if the IHO relied on documents in evidence to support her determinations. Ultimately, I have reviewed the entire hearing record on appeal, which does not include those documents not entered into evidence, and have weighed the evidence as set forth below. Accordingly, I will not further discuss the IHO's reliance on documents not in evidence.

In an amended answer, the parents respond to the material allegations set forth in the district's appeal with admissions and denials and argue that the IHO's decision should be upheld in its entirety. In addition, the parents argue that the district's request for review fails to comply with State regulations governing practice before the Office of State Review. In a reply, the district responds to the parent's amended answer.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at

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

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

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

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

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

VI. Discussion

A. Scope of the Impartial Hearing and of Review

I will first address the parties' arguments regarding the scope of the impartial hearing and of review.

The district argues that parents' due process complaint notice did not identify with specificity the aspects of the student's programming challenged. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

The parents' due process complaint notice broadly alleged that the district failed to provide an appropriate program for the student with "intensive supports" for the 2022-23 and 2023-24 school years (Parent Ex. A at p. 2). The parents then set forth a lengthy statement of facts and educational history of the student before setting forth general conclusions, followed by a statement of the relief sought (id. at pp. 2-8). While the parents did not identify specific aspects of the IEPs with which they disagreed, it is clear from the complaint that the parents alleged that the student failed to make progress while attending the BOCES Kaplan program pursuant to the student's IEPs, yet the district continued similar recommendations for the 2022-23 and 2023-24 school years and did not incorporate changes proposed by the parents' experts (id. at pp. 2-3, 5-6). The parents also set forth factual allegations directed at the instructional methods used at the BOCES Kaplan program (id. at p. 3). Accordingly, review of the parents' due process complaint notice does not support the district's argument, and the IHO did not exceed the scope of the impartial hearing in ruling on the district's offer of a FAPE to the student for the 2022-23 and 2023-24 school years.⁹

⁹ With respect to relief, the district argues that the parents abandoned a claim for compensatory education during the impartial hearing and specifically withdrew a request for transportation, whereas the parents claim that the IHO awarded compensatory education and that the parents continually sought transportation. The hearing record reflects that the parents did, in fact, withdraw their request for reimbursement of transportation costs as the district had provided the service (Tr. p. 38). In any event, as I find that the district offered the student a FAPE for the

With respect to the issues presented for review on appeal, the parents argue that the district failed to specifically state the reasons for challenging the IHO's decision. State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, State regulation provides that a request for review must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]).

Here, while the district's request for review is not as precise as it could be, with respect to its provision of a FAPE to the student for the 2022-23 and 2023-24 school year it sufficiently alleges that "[t]he IHO erroneously determined that the District failed to provide the Student a FAPE" and lists the challenged determinations of the IHO including those related to "the Student's lack of progress towards his goals" and the district's alleged failure "to 'identify a program with greater amounts of individualized instruction or the ABA program his parents were looking for'" (see Req. for Rev. ¶ 8). The district also sets forth grounds for reversal or modification of the IHO's determination, alleging that the district continually modified the student's programming in response to the student's needs and the parents' requests and remained willing to find a program for the student with which the parents agreed (*id.*).

Having determined that the parties sufficiently raised issues as part of the impartial hearing and for review on appeal pertaining to the district's recommended programming in light of the student's progress, as well as the provision of certain methodologies to the student, it is to these issues that I now turn.

B. Progress and Recommended Programming

It is well settled that a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Revised Sept. 2023], available at <https://www.nysed.gov/sites/default/files/programs/special-education/guide-to-quality-iep-development-and-implementation.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530

2022-23 and 2023-24 school years, I find it unnecessary to further discuss the relief ordered by the IHO.

[3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year, courts have been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]; N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at *9 [D.D.C. July 30, 2021]; James D. v. Bd. of Educ. of Aptakisis-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

Contrary to the IHO's finding that the student failed to make progress in the BOCES Kaplan social communication program, the hearing record demonstrates otherwise. A review of the comments in the meeting information summary attached to each of the student's IEPs for the 2022-23 and 2023-24 school years, together with the BOCES Kaplan annual reports, reveals that the student made progress in the program leading up to the CSEs that engaged in educational planning for the student for the 2022-23 and 2023-24 school years (*see* Parent Exs. O at pp. 1-2; Q at pp. 1-3; BB at pp. 1-5; Dist. Exs. 5 at p. 26; 19 at pp. 7-9, 17-18).

1. Progress during the 2021-22 School Year

The student's IEPs for the 2021-22 school year are not in evidence; however, the hearing record includes an April 2022 BOCES Kaplan annual report and an April 2022 quarterly annual goal progress report (Parent Ex. M; Dist. Ex. 14).¹⁰

The April 2022 BOCES Kaplan annual report described the social communication program at BOCES Kaplan that the student attended, indicating that the program used visual schedules, workstations, centers, and group instruction (Dist. Ex. 14 at p. 1). The student's day consisted of independent seatwork activities, discrete trial 1:1 instruction based on his IEP goals, small and large group activities, daily living skills, literacy instruction, and specials (*id.*). According to the annual report, the student was intrinsically motivated to participate in structured group activities and was motivated by these activities to follow one-step directions (*id.*). In addition, he responded best with verbal praise and visual reinforcements (*id.*). The student knew where everything was in his environment and understood most of what was said to him (*id.*). The annual report indicated that, although the student would sometimes engage in non-compliant behaviors (e.g., saying no, turning his head, putting his head down) and physical aggression (e.g. pinching, hitting, kicking) when transitioning away from a preferred activity or to avoid a task, he was normally able to comply with redirection and motivation (*id.*). Next, the annual report detailed strategies implemented to prevent and interrupt the student's non-compliant behaviors including a first/then board, asking for breaks or more time, nonverbal prompts, planned ignoring, redirection, visuals and visual reinforcements, embedded schedules, daily visual schedule, and time and space (*id.*). According to the annual report, while the student engaged in non-compliant behaviors, they

¹⁰ Both the parents and the district offered into evidence copies of April 2022 BOCES Kaplan progress reports (*compare* Parent Ex. L, *with* Dist. Ex. 14). For purposes of this decision, the district's exhibit is cited because the document also includes a post-secondary evaluation completed by the student's classroom teacher on December 20, 2021, and an attendance summary from September 10, 2021 to May 9, 2022 (Dist. Ex. 14 at pp. 14-26).

occurred for short durations, and he was making progress in decreasing these behaviors due to the management strategies in place for success (id.). The student responded best to a highly structured environment with a multi-sensory approach to learning (id.). The April 2022 annual report included the student's present levels of academic and functional performance, specific to skill acquisition, including communication, activities of daily living, and ambulation/mobility; social development, including relationship to peers, relationship to adults, community, and social adjustment; and physical development, including sensory development, motor development, physical skills/limitations, and scoliosis (id. at pp. 1-6).

The April 2022 annual progress report described the student's progress on his IEP goals (see Dist. Ex. 14 at pp. 7-11). According to the annual report, the student mastered a goal that targeted his ability to read (identify numbers) and complete (fill in) number lines 1-10 with 80 percent success (id. at p. 8). In addition, he was making "nice progress" on a goal that targeted his ability to increase his use of pronouns when engaged in a communication exchange with peers and adults (id.). The annual report indicated the student was "close to achieving" a goal that required him to identify emotions from a variety of scenarios to help with self-regulation skills (id. at p. 9). The student was also making progress toward a goal related to identifying ten high frequency words with 80 percent accuracy as he was able to identify six out of ten words (the, of, and, a, to, in) prior to the end of the 2021-22 school year (id. at p. 7). Similarly, the annual report noted the student was making progress toward multiple other goals involving tracing and handwriting skills (id. at pp. 9, 10). With regard to a goal involving the location and use of core and fringe vocabulary on his AAC device to assist him in effectively communicating when his verbal exchange was not understood, the annual report indicated that the student preferred to be a verbal communicator (id. at p. 9). In addition, the annual report noted that the student's iPad and communication application had been used to model language (id.). At times, the student would access highly motivating vocabulary (i.e., vocabulary related to holidays) (id.). Some of the core words modeled with him corresponded with the phrases that had been worked on (I, do, stop, go, more, it, can, have, don't) as well as other core words (eat, drink, finish, like, play) (id.). The annual progress report further noted the student was progressing inconsistently on goals involving completing sit-to-stand exercises without assistance, lifting, carrying, and pushing heavy objects, and overhead motor coordination (id. at pp. 10-11).

The hearing record also included an April 28, 2022 quarterly progress report for goals and objectives that was addressed to the parents (Parent Ex. M). The cover letter attached to the progress report indicated that it was specifically related to the student's IEP goals and should be considered as only one assessment of his individual achievement (id. at p. 1). The remainder of the document addressed the student's progress in a different format than the BOCES Kaplan annual report, based on when the student achieved or did not achieve the benchmarks for each goal, but was consistent with or provided even more information about the student's performance as noted in the April 2022 annual progress report (compare Parent Ex. M at pp. 2-20, with Dist. Ex. 14 at pp. 7-11).

The IHO noted that the April 2022 goal progress report indicated the student had not achieved most of his goals and took issue with some blanks in the annual goal progress report (IHO Decision at p. 3). However, a review of the progress report shows the goals were not meant to be achieved by April and there were two months remaining in the school year, and although reports of progress under some of the goals in the report were left blank, the student's progress was

reported under the short-term objectives related to each annual goal (see Parent Ex. M). Further, even if the student had not "achieved" all of the goals, this would not support a finding that the student had not progressed (see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *31, *36 [N.D.N.Y. Sept. 29, 2009] [noting the student's progress despite not meeting some goals and explaining that the CSE was obligated to provide the student the opportunity to make meaningful progress in the LRE]). Rather, review of these documents reveals that, although the student might not have achieved all of his annual goals by the time of the April 2022 BOCES Kaplan annual report and the April 2022 quarterly annual goal progress report, in consideration of his complex multiple disabilities and needs, his in-school progress was slow moving but he achieved multiple benchmarks aligned to his IEP goals (Parent Ex. M pp. 2, 3, 5, 6-8, 12-17, 19, 21). In addition, the student was working towards achieving other benchmarks/goals (see id. at pp. 2-21).

Other evidence in the hearing record supports the conclusion that the student was making progress during the 2021-22 school year. The meeting information summary attached to the June 2022 IEP that was developed for the 2022-23 school year indicated that, according to the student's special education teacher, the student had a good year (Parent Ex. O at p. 1). His self-management skills improved and he participated in all classroom activities (id.). He was making progress toward his goals (id.). He had mastered 6/10 of sight words (id.). As recorded in the meeting summary, the teacher indicated that the student had demonstrated more automaticity with reading (id.). He was better able to regulate his emotions and tell staff how he felt (id.). The private BCBA who provided the student's home-based ABA reported that the student made "consistent progress when he [wa]s regulated and available to learn" and that he was "doing better with sight words" (id.). In addition, she reported that data reflected "a decrease in maladaptive behavior" (id. at p. 3). The meeting information summary indicated that the student was making progress in speech-language therapy as well (id. at p. 1). The student was able to generate a three-to-four-word sentences with prompts for jaw stability (id.). According to the meeting summary, the occupational therapist reviewed progress and indicated the student was working well with Handwriting Without Tears given the prompts provided in the program (id. at p. 2). He was doing well with the laptop with bold letters, and adapted paper assisted in proper letter formation (id.). The physical therapist reported that the student had made inconsistent progress toward goals and, therefore, the goals were carried over (id.).¹¹

¹¹ To the extent the IHO indicated that the June 2022 IEP carried over annual goals from the year prior (see IHO Decision at p. 4), while some goals were similar in nature (e.g., relating to motor coordination or speech), the specific targets, criteria, and benchmarks differ between the two documents (compare Parent Ex. M at pp. 2-21, with Parent Ex. O at pp. 13-18). Additionally, the June 2022 CSE introduced several new goals (see Parent Ex. O at pp. 13-18). Moreover, it is appropriate for a CSE to build upon a plan from a prior school year, including by carrying over aspects (see F.L. v. Bd. of Educ. of Great Neck U.F.S.D., 274 F Supp 3d 94, 120 [E.D.N.Y. 2017] [finding a substantially similar program appropriate in light of the student's progress in the preceding school year]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 413-15 [S.D.N.Y. 2017] [examining carryover of goals and services from a student's IEP from a previous school year and noting that, "[w]here a student's needs and objectives remain substantially the same, '[i]t is especially sensible that [an IEP] would reflect continuity with [a student's] needs and objectives as of [previous years,]'"], quoting L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *11 [S.D.N.Y. Sept. 27, 2016]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011] [determining that evidence of likely progress was "the fact that the [challenged IEP] was similar to a prior IEP that generated some progress"], aff'd, 506 Fed. Appx. 80 [2d Cir. Dec. 26, 2012];

The student's mother testified that, by the end of the 2021-22 school year, the student's teacher "had been reporting that there may have been some progress but it was very inconsistent" and that, therefore, the parents were going into the June 2022 CSE meeting with "cautious[] optimis[m]" (Tr. p. 852). Similarly, the private BCBA testified that, although she had some concerns about the student's progress towards achieving annual goals, going into the 2022-23 school year, she was "very encouraged because [the student] had gotten to a place where he was able to learn and [was] available for learning" and his interfering behaviors had "really decreased" (Tr. pp. 561-62). Further, the BOCES assistant director testified that, at the June 2022 CSE meeting, "everyone seemed to be in agreement that he was making progress" (Tr. p. 455).

Based on the foregoing, the evidence in the hearing record does not support the IHO's finding that the student failed to make progress in the period of time leading up to the June 2022 CSE meeting.

2. June 2022, January 2023, and March 2023 IEPs

The June 2022 CSE convened to review the student's progress and listed an annual report dated May 9, 2022 as among the evaluations/reports reviewed (Parent Ex. O at p. 1).¹² The June 2022 CSE determined that the "[p]rogram, [r]elated services and [a]ccommodations" received by the student for the 2021-22 school year would be "carried over for the [20]22-23 school year" (*id.* at p. 2). The CSE declined to discuss the continuation of services from private providers, as "the agreement" pursuant to which those services were available was "outside of the CSE['s]' purview (*id.*).

Both the district school psychologist and the BOCES assistant director testified that no member of the committee raised any concern with continuing the recommendation for the student to attend the BOCES Kaplan program (Tr. pp. 225, 455). The district school psychologist and the student's BOCES speech-language pathologist stated their view that the IEP was appropriate to meet the student's needs because the BOCES Kaplan social communication class focused on social communication and developing independence skills while allowing the student to participate in academic instruction and work on activities of daily living skills (Tr. pp. 225-26, 336). The BOCES assistant director testified that the BOCES Kaplan program continued to be appropriate for the student, noting that the student had "flourished socially" since entering BOCES Kaplan, did not demonstrate "aggressive behavior[s]" that interfered with instruction, and was making progress, further emphasizing social interaction was very motivating for the student (Tr. pp. 456-57, 460). Similarly, the BOCES speech-language pathologist who attended the CSE meeting testified that the BOCES Kaplan program focused "on social communication and behaviors," while

J.G., 777 F. Supp. 2d at 650 [finding that when the student made some progress under a previous IEP, it was not unreasonable for the CSE to propose an IEP "virtually identical to" the previous one]; M.C., 2008 WL 4449338, at *16 [determining that when the IEP at issue mirrored a past IEP under which the student "demonstrated significant progress," the IEP at issue was reasonably calculated to afford the student educational benefit]; see generally Application of a Student with a Disability, Appeal No. 12-064; Application of the Bd. of Educ., Appeal No. 11-128).

¹² The April 2022 BOCES Kaplan annual report summarized above included a signature page, with signatures dated May 9, 2022 (Dist. Ex. 14 at p. 12).

incorporating academics and direct instruction, and that the program continued to be appropriate for the student given that he was achieving his goals and benefited "from the socialization in the classroom" (Tr. pp. 320-22, 331). District and BOCES Kaplan members of the CSE testified that the June 2022 IEP was appropriate for the student without recommendations for outside services (see Tr. pp. 115-16, 117, 225, 456-57).

Based on the foregoing, leading into the 2022-23 school year, the information available to the CSE indicated that the student was making progress during the 2021-22 school year, such that continuation of the similar programming for the 2022-23 school year was reasonably calculated to enable the student to make progress.

Subsequently, on January 6, 2023, the CSE met for a program review and to discuss the student's upcoming reevaluation and his progress (Parent Ex. Q at p. 1).¹³ The meeting information summary attached to the January 2023 IEP indicated that the student was making some progress (id.). In particular, the student's teacher indicated that, recently, the student's behavior had improved (id.). However, the teacher noted the student had been struggling with his reading goals and that the teacher, in consultation with the home provider, had "decreased reading targets" (id.). The BOCES Kaplan speech-language pathologist indicated that the student could be non-compliant, particularly noting that, when uninterested in a task, he would put his head down and not respond verbally, but also indicated that he responded well to positive reinforcements (id. at p. 2). She further shared that the student had seemed to be rushing through articulation tasks, causing words and sounds to be more jumbled (id.). She reported that the student had been making slow progress rounding his lips (id.). The BOCES speech-language pathologist shared that the student's ability to relay information had recently increased (id.). She noted she was typically able to engage the student by using social language, in response to the parent's comment that she saw inconsistencies between the school and home program (id.). The private speech-language pathologist opined that the student seemed to make more progress the year prior and, since September, had "shut[] down" and shown "a decrease in some of his skills"; however, she also indicated that "[s]low progress ha[d] been seen" (id.).

Program and related services recommendations remained the same as in the June 2022 IEP (compare Parent Ex. O at pp. 1, 16-19, with Parent Ex. Q at pp. 16-19). Before determining the recommendations, the CSE engaged in a discussion of other program options for the student (see Parent Ex. Q at p. 2). The parent indicated that, although the last neuropsychological evaluation recommended the student attend a social communication class, she believed the student might need more of an ABA approach (id.). The private BCBA also shared her view that the student "would benefit from more intensive 1:1 fast paced instruction where meticulous data is taken" (id.). However, the district school psychologist noted that "social interaction and social language [wa]s

¹³ According to the meeting information summary, the CSE discussed and agreed that there was no need to update the student's PT and OT testing at that time (Parent Ex. Q at p. 2). Per the parent's request for a neuropsychological assessment, the district agreed to use a specific outside provider that the team agreed upon (id.). In the area of speech-language development, the CSE determined the BOCES speech-language pathologist and the student's private speech-language provider would complete the evaluation together, with each completing specific parts of the evaluation (id.). The consensus of the CSE was that the student did not need a feeding evaluation based on his then-current feeding needs (id.). The district agreed to the private BCBA conducting observations of the student in school (id.).

very important to [the student] and seem[ed] to motivate his overall learning," noting further that he was motivated in his group speech-language therapy sessions (id. at p. 2). The BOCES Kaplan school psychologist opined that 45 minutes of after-school instruction could be difficult for the student (id.). She further noted that the school-based program used ABA methodology throughout the school day and that the approach was "data driven" and staff "provide[d] error correction when teaching" (id.). The second district school psychologist, who was present at the meeting, suggested "pulling back from outside services" to allow the student to "participat[e] in a leisure or social activity of his choice"; however, the parent shared that the student tended to engage in behaviors on the weekends when he did not have outside services (id.). Ultimately, the meeting information summary reflected that the "consensus of members of the CSE" was that continuation of the BOCES Kaplan program was appropriate to meet the student's needs (id.). The CSE agreed to reconvene the meeting after the private BCBA conducted classroom observations of the student (id.).

District witnesses who attended the January 2023 CSE meeting and the private BCBA all testified that, at the January 2023 CSE meeting, it was discussed that committee members from BOCES Kaplan reported that the student's behaviors had improved in the school program, whereas the private providers and parents indicated that the student "was demonstrating those behaviors at home during the home program" (Tr. pp. 173-74, 228-30, 1078-79). The district director noted discussion from the meeting that the student was motivated by the social setting and ability to participate in social language, as opposed to individualized instruction alone with a teacher (Tr. pp. 229-30).

The IHO indicated that no changes were made at the January 2023 CSE meeting despite the recommendations of the private BCBA (see IHO Decision at p. 9); however, as demonstrated by the discussion memorialized in the meeting information summary, the recommendations of the private BCBA were discussed but it was determined that a change in programming was not warranted at the time (see Parent Ex. Q at p. 2). The CSE was not obligated to adopt the recommendations of the private provider (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"])). Further, while the CSE discussed the student's progress and concerns about behaviors at home and in his speech-language therapy sessions, the reports made to the CSE did not demonstrate the school-based program was not meeting the student's needs. Based on the foregoing, the hearing record does not support a finding that the January 2023 CSE should have recommended a change in programming.

Turning to the March 2023 CSE review that took place during the 2022-23 school year and evidence of the student's progress along the way, the evidence in the hearing record demonstrates that the information available to the committee did not warrant a change in programming for the remainder of the 2022-23 school year. According to the IEP, the March 2023 CSE had before it a January 2023 report from the private BCBA regarding classroom observations she completed, a February 2023 speech-language triennial evaluation, a February 2023 speech-language reevaluation update from the private speech-language pathologist, and a March 2023 private

neuropsychological evaluation summary (see Parent Ex. BB at p. 6; Dist. Ex. 8; see also Parent Exs. S; W; Y; Z).

Following the January 2023 CSE meeting, over three days between January 19, 2023 and January 30, 2023, the student's home-based BCBA at the time observed the student in his classroom environment (see Parent Ex. S). The BCBA's observation report indicated that prior to the initial observation she was notified by the school principal that for confidentiality reasons the class would be empty of other students (id. at p. 2).¹⁴ Debriefing meetings with school staff occurred after each meeting (id. at pp. 2-6). One debriefing in particular reflected debate about the ability of BOCES Kaplan to gain instructional control as opposed to the ability of the outside providers to do so (see id. at pp. 5-6). Specific to her first observation of the student, the private BCBA noted in her observation report that the student was focused and attended to his teacher nicely at first (id. at p. 2). His teacher worked hard to maintain his attention by prompting him "look here" and by tapping the flash cards (id.). The teacher reinforced the student with a check system, which provided that ten checks earned him a small toy (id.). The teacher ran three programs during the 35-minute session that the BCBA observed: CVC words, sight words receptive/expressive, and letter sounds (id.). The report indicated the student "performed similarly to sessions that [the BCBA] facilitate[d] in the evenings at home" and that "[h]e exhibited inconsistent responding and struggled to maintain attention" (id.). During the second observation, the BCBA observed a speech-language therapy session and noted the student was engaged in the novel activity presented by the therapist (id. at p. 4). According to the BCBA's observation report, the third observation was conducted in "very much the same manner as day one," as the student participated in one-to-one discrete trial teaching with his teacher (id. at p. 5). Overall, the BCBA observation report identified multiple faults with the student's program at BOCES Kaplan and she advocated for strict ABA methods such as precision teaching before any further conclusions could be made about the student's capacity to learn (id. at pp. 7-8). Among other things, the home-based BCBA indicated the student required 30 hours per week of ABA methodology (id. at p. 8).

With respect to the private BCBA's observations of the student, both a district school psychologist and the BOCES assistant director testified regarding their concerns (see Tr. pp. 132-39, 464-68). The district school psychologist noted that, although her understanding was that the purpose of the observation was to observe the student "in a 1:1 setting due to the discrepancy in his behavior between home and school," the observation report listed three purposes, broadened

¹⁴ Testimony by the BOCES assistant director indicated that, although it was outside of standard practice to allow an outside provider to conduct an observation at BOCES Kaplan, the school allowed for the observations to occur because it wanted to "really continue and foster the collaborative relationship [it] had with the family" (Tr. p. 463). The school also made accommodations of setting up environments where the outside provider could observe the student working with the classroom teacher and the speech-language therapist, as they had to ensure there were no other learners around because BOCES Kaplan wanted to protect those students' confidentiality (Tr. p. 464). With respect to the district's stance, the United States Office of Special Education Programs (OSEP) has indicated that the IDEA does not provide a general entitlement for parents or their professional representatives to observe their child in a classroom placement but that districts and parents should work together in ways that meet the needs of both the parents and the school (Letter to Mamas, 41 IDELR 10 [OSEP 2004]). There may be circumstances where access must be required such as where the observation is part of an independent educational evaluation (Letter to Mamas, 41 IDELR 10; see also Letter to Wessels, 16 IDELR 735 [OSEP 1990]). Here, the private BCBA's observation was not conducted as part of an IEE, and, under the circumstances, the district made sufficient accommodations to allow for the observation to take place.

to include reconciling discrepancies in instructional control and teaching methodologies between school and home, and then went on to recite the private BCBA's views regarding the use of error correction and supervision in the BOCES program (Tr. p. 132; see Parent Ex. S at p. 1). The school psychologist indicated that the private BCBA "had an agenda" in conducting her observation (Tr. p. 134). She also disputed the accuracy of the private BCBA's characterizations of statements made by district and BOCES staff (Tr. pp. 134-36).

The BOCES assistant director testified that when he read the outside provider's report it seemed the observer made a lot of assumptions/broad strokes regarding the student's progress (Tr. p. 464). The assistant director noted that the private BCBA conducted one observation for 30 minutes and another one for 10 minutes after she left the room because she was upset about not being permitted to observe the student with other students, despite being told the school was protecting the other students' confidentiality (Tr. pp. 464, 466). The assistant director indicated he did not know how she was able to determine meaningful progress during that time, particularly without more data (Tr. pp. 439, 464-65). He reported the outside observer focused heavily on error correction procedure, but indicated there are lots of different error correction procedures (Tr. p. 465). He noted there was lots of research in the field of ABA that focused on different kinds of techniques, different strategies (Tr. pp. 465, 467-68). He questioned the possibility that the outside provider was familiar with a different error correction than what BOCES Kaplan used but indicated that what was used at BOCES Kaplan was research based as well, in collaboration with behaviorists with whom BOCES Kaplan partnered (Tr. p. 465). The assistant director was also concerned that the private provider did not consider BOCES Kaplan to be an ABA program (T. p. 465). He indicated BOCES Kaplan used ABA as a research-based strategy to work with its learners, and that was how the program was always shared with their families (Tr. p. 465). The assistant director also took exception to the private provider's comments about modifications because the school program was working in tandem with the provider regarding modifications and the provider was aware of those changes and when the program was making changes in trying to support the student in his progress (Tr. p. 465).

Over several dates in February and March 2023, the independent neuropsychological evaluation was conducted, and a preliminary summary report was provided to the district but not in time for all of the CSE members to review (see Parent Ex. Z).¹⁵ The neuropsychological summary report indicated, in part, that the student required placement in a small, highly structured, special education classroom within a small and specialized school where he could receive educational programming that emphasized an ABA model or similar behaviorally focused instruction and provided high levels of 1:1 instruction and support, regular opportunities for social

¹⁵ The hearing record included a preliminary neuropsychological assessment summary report that included results that the evaluator discussed at the March 2023 CSE meeting, as well as a longer, more complete neuropsychological assessment report that was completed after the March 2023 CSE meeting (see Parent Exs. Z; BB at p. 3; Dist. Exs. 10; 12; 13). The parents sent a copy of the summary report to the district after business hours on March 8, 2023, and on March 9, 2023, the district notified the parent that the committee members would be unable to review the assessment prior to the March 10, 2023 CSE meeting but indicated that the evaluator could review the findings at the meeting and the committee "w[ould] likely need to reconvene" after having time to review the summary report and receive the full report (Dist. Ex. 10).

engagement with peers, and access to all related services structured into his educational programming within his school day (id. at pp. 12-13).

The meeting information summary attached to the March 2023 IEP reflects that the CSE discussed the student's progress (Parent Ex. BB at pp. 1-3).¹⁶ When asked about the student's day-to-day progress, the BOCES speech-language pathologist indicated the student had been making slow progress (id. at p. 2).¹⁷ At the beginning of the school year, he was giving one-word responses (id.). At the time of the March 2023 meeting, the student gave two-to-three-word responses in retelling information (id.). The speech-language pathologist reported that the student's output was more than it was in September and, at the time of the meeting, included verbs, and she noted that he was able to provide details about what he did when asked questions (id.). In contrast, with respect to his ability to tell a story, the private speech-language pathologist described the student's responses as "chaotic" and highly dependent on prompts, noting the student was socially motivated to tell the story and that the goal for the student should be to tell the story without prompts and that icons should be used (id.). She indicated that the student was "starting to get verbs," but noted in her sessions with the student she focused on PROMPT, "so there [was]n't a lot of time for narrative instruction" (id.). The private speech-language pathologist reported about the student's motor speech evaluation, noting that the student had maintained lingual control, an area of difficulty for the student, and increased his sequence movement skills and intelligibility (id.).

Next, the student's teacher reported on the student's progress (Parent Ex. BB at p. 2). The teacher indicated the student was doing better with eating (id.). He enjoyed interacting with peers (id.). He received 100 percent recently with visuals and with decoding CVC words whereas prior to using visuals the student's success rate was 35 to 60 percent (id.). The teacher also noted the student was working on identifying the sounds "s, m, a d" in a field of three and could count in a larger set up to three (id.).

The BOCES physical therapist reported the student was making progress toward all his goals (Parent Ex. BB at p. 2). He continued to do squats, used visual cues and a token board, moved heavy items, and worked with a large therapy ball (id.). The meeting information summary indicated that, in OT, the student's overall hand strength and coordination had gotten better (id.). At the time of the meeting, he could do medium size buttons and could manage a cup (id.).

The meeting information summary indicates that the student's private BCBA reviewed her classroom observation of the student during the meeting (Parent Ex. BB at p. 2). The BCBA indicated that her observation was not conducted in the student's natural environment as there were no other students in the classroom at the time of the observation and that, therefore, the student's

¹⁶ While not listed among the evaluations or reports before the March 2023 CSE, the hearing record includes an annual goal progress report dated February 16, 2023 (Parent Ex. X). Within the progress report, several benchmarks had been met by the January 2023 marking period, and, for those that had not been, met as anticipated, the student's teachers or providers included comments describing what the student had thus far achieved at the time of the report (see id.).

¹⁷ In response to the parents' questions about the results of the speech-language evaluation compared to the evaluation conducted in 2019, the BOCES speech-language pathologist explained that the evaluations used different standardized measures (Parent Ex. BB at p. 2).

performance may not have been the same as in a typical classroom (id.).¹⁸ The student's teacher indicated the student was very compliant even when other students were present (id.). The BCBA noted that the error correction procedure that she witnessed was "not what you typically see in a[n] ABA discrete trial session" and expressed concern that there was no BCBA supervising the student's program and that his program wasn't being modified based on his errors (id.). She opined that the student's behavior had improved because task demands were not high (id. at pp. 2-3). The neuropsychologist who conducted the independent neuropsychological evaluation expressed concern regarding the student's academic development which she reported seemed to have halted (id. at p. 3). She suggested that the student should be able to learn functional reading skills (id.).

The March 2023 IEP reflects that no changes were made to the student's program placement or recommended related services at that time (see Parent Ex. BB at pp. 1-2, 17-20). The meeting was concluded with the intent to reconvene once the updated neuropsychological evaluation was provided (id. at p. 2).

The second district school psychologist testified that, while the June 2022 CSE meeting was a "positive collaborative collegial meeting and very productive," by the March 2023 CSE meeting "the relationship and the collaboration had eroded and it was not as positive and productive, and it became much more problematic [with] disagreements between the BOCES Kaplan staff, the district and the family" (Tr. p. 140). The district school psychologist noted the recommendation in the independent neuropsychological evaluation report for additional individualized instruction and indicated that this "was something that would be considered moving forward" and that the CSE was awaiting the complete independent neuropsychological evaluation report "to gain a better understanding of the results" (Tr. p. 144).

Given the foregoing, the new information available to the CSE and the CSE's plan to gather additional information, together, supports a finding that March 2023 IEP, which continued prior programming recommendations for the student for the remainder of the 2022-23 school year, did not deny the student a FAPE. Although the private BCBA's classroom observation highlighted the tension occurring between the school-based and home-based providers, the BOCES and district members of the committee did not agree with the private BCBA's characterization of the programming. Further, while the reports indicated that the student's progress was slow, it was also evident that the student was receiving educational benefit from the school-based programming.

3. June 2023 and September 2023 IEPs

Turning to the student's June 2023 annual review in anticipation of the 2023-24 school year, new information considered by the June 2023 CSE included a March 2023 BOCES Kaplan annual report and the student's March 2023 attendance record (Dist. Ex. 5 at p. 5).

The March 2023 BOCES Kaplan annual report included an extensive list regarding the student's present levels of academic and functional performance specific to skill acquisition, communication, activities of daily living, and ambulation/mobility, social development, and

¹⁸ At this point, the district director shared that she conducted a classroom observation of the student with other students present and that she would write up a report of her observations (Parent Ex. BB at p. 2). The district director's classroom observation report is included in the hearing record (Dist. Ex. 18).

physical development, motor development, musculoskeletal assessment, and sensory development (Dist. Ex. 19 at pp. 1-6). The March 2023 annual report also addressed the student's progress on his IEP annual goals (see id. at pp. 7-11, 17-18). Although the report indicated that the student's progress was slow, it also noted that the student demonstrated improvement on gross motor goals (see id. at p. 9). The speech-language addendum highlighted "slow and steady" progress in storytelling, conversation participation, and intelligibility of words (id. at p. 17-18). The annual report indicated the student benefited from visual cues, and an iPad to aide communication, and that he showed some independence but often needing prompts (id.). He preferred verbal communication over using the iPad, though he began using it more in group settings (id.).

The meeting information summary attached to the student's June 2023 IEP for the 2023-24 school year indicated that the student was able to cooperate and participate throughout the day and was an active participant (Dist. Ex. 5 at p. 1). He was eager to complete tasks and wanted to do them by himself (id.). According to the meeting information summary, the student was social and he made verbalizations when playing with his peers (id.). He was able to decode CVC words and he was able to decode six words at that time (id.). He could identify parts of compound words and vowel and consonant sounds (id.).

The meeting information summary indicates that the parents' advocate inquired about the reading instruction provided by the district including the student's reading level, the types of intervention used to teach the student decoding, and whether there was a particular ABA curriculum being employed and requested data from the district (Dist. Ex. 5 at pp. 1-2). The BOCES Kaplan team noted that the student had 32 absences and 27 tardies for the year, that he missed one-to-one instruction due to his absences, that "absences generally impact progress" and that the student's inconsistent attendance impacted the district speech-language pathologist's ability to provide instruction (id. at p. 2). The meeting summary indicated that, in response to the parent advocate's questions about generalization, the student's teacher indicated the student was able to generalize most of the skills he had learned to morning work and group (id.). The district school psychologist suggested that functional reading goals proposed for the 2023-24 school year might be easier to generalize as, for example, community signs would appear in the student's natural environment (id. at p. 3).

As recorded in the meeting summary, the BOCES speech-language pathologist reported that the student could respond to and ask questions, using picture and facial prompts effectively (Dist. Ex. 5 at p. 2). The student's speech-language pathologist reported that, although his speech was sometimes hard to understand, he was increasingly using his AAC devise, which included phrases like "That's not what I mean" (id.). The student preferred verbal communication but was more willing to use the device (id.). The speech-language pathologist indicated that use of visuals improved the student's ability to retell a story and stay on topic (id.). The meeting information summary indicated that the student's private home-based speech-language pathologist believed topic maintenance was too high of a skill for the student as he was dependent on someone asking him questions rather than speaking on his own (id.).

The student's home-based BCBA indicated that she saw the student for nine hours a week on a fairly consistent basis and, had been working with the student on learning readiness as he had trouble attending to stimuli during fast-paced instruction (Parent Ex. 5 at p. 3). The BCBA

indicated that the student had been unable to recite colors but could now recite colors and shapes within 15 seconds with 95 percent accuracy (id.). She indicated she wanted the student to match upper- and lower-case letters, label vowel and consonant sounds, and match CVC words given segments and blends (id.). The parent advocate indicated the BCBA was working on the fundamentals of reading and asked that this be incorporated into the student's IEP (id.). According to the meeting information summary, BOCES Kaplan staff indicated that they planned to continue to work with the student on identifying community signs, telling time, numbers 1-12, functional living skills, and specific reading goals (id.).

The meeting information summary indicated the student's private home-based speech-language pathologist reported that she saw the student for two 45-minute sessions per week after school and worked on rounding and retracting and that the student was more intelligible with broad prompts rather than surface prompts (Dist. Ex. 5 at p. 3). The private speech-language pathologist expressed concern that the student was becoming prompt dependent (id.). The district requested data from the student's home-based providers (id. at p. 2).

The student's BOCES speech-language pathologist indicated that, between May and June 2023, the student had many absences or came to school late due to his receipt of private ABA in the morning, which affected his progress (Tr. pp. 369-70; see Dist. Ex. 19 at pp. 19-21). Testimony by the second district school psychologist indicated that, by the June 2023 CSE meeting, the student's attendance had become a concern to the BOCES Kaplan staff (Tr. pp. 145, 148-49). The school psychologist indicated the student had been absent approximately 32 days (Tr. p. 149). He was late 27 times and was leaving early two times per week which affected his access to one-to-one instruction in the classroom as well as speech-language therapy and other related services (id.).

The June 22, 2023 CSE continued to recommend that the student attend a BOCES 8:1+2 special class for the 2023-24 school year and receive related service of individual speech-language therapy two times per week, group speech-language therapy one time per week, individual OT three times per week, individual PT two times per week, and the support of a one-to-one aide for six hours daily (compare Dist. Exs. 5 at pp. 1, 21-22, with Parent Ex. BB at pp. 20-23). In addition, the June 2023 CSE recommended the student have access to an iPad at school and at home (Dist. Ex. 5 at p. 22). The CSE reduced parent counseling and training from two times per month to one time per month at the request of the parents (compare Dist. Ex. 5 at p. 23, with Parent Ex. BB at pp. 23). To support school personnel on behalf of the student, the CSE recommended a one time per week speech-language consultation, monthly consultation with the school psychologist, and one time per month team meeting, all sessions recommended for 30 minutes (Dist. Ex. 5 at p. 22). Lastly, the CSE replaced a monthly consultation with a reading specialist with a recommendation for a one time per week ABA consultation with a BCBA to consult with the team (compare Dist. Ex. 5 at p. 22, with Parent Ex. BB at p. 23). The June 2023 recommended that the student receive the same extended school year services as in the prior school year with the addition of a weekly speech-language therapy consultation to occur in the classroom (compare Dist. Ex. 5 at pp. 22-23, with Parent Ex. BB at pp. 23-24). The June 2023 CSE modified the student's annual goals including those for reading and math (compare Dist. Ex. 5 at pp. 15-21, with Parent Ex. BB at pp. 17-22).

The BOCES Kaplan assistant director testified that the program continued to be appropriate for the student for the 2023-24 school year given his "progress socially," his "progress towards his goals, his ability to be social in the classroom, [and] his independence" (Tr. p. 483). The student's mother testified that, although she liked aspects of the BOCES Kaplan program, such as the interactive classroom environment, the staff, the access to peers, and the benefit the student received from being part of a school setting, she thought the social communication program "as a program" was not appropriate for the student (Tr. pp. 1039, 1052-53). She indicated the parents were willing to work with the CSE on a hybrid program with the participation of BOCES Kaplan (Tr. p. 1039).

Based on the evidence above, the district met its burden to prove that the continuation of the BOCES Kaplan program for the 2023-24 school year was reasonably calculated to enable the student to make educational program in light of his circumstances. The March 2023 BOCES Kaplan annual report demonstrates that, at that point, the student was making progress, albeit at a slow rate, in the BOCES Kaplan program. Thereafter, the evidence points to the parent's implementation of the hybrid program as an obstacle to the student's ability to achieve the same progress in the BOCES Kaplan program at the end of the 2022-23 school year. Given the information available to the CSE, it was reasonably calculated for the district to continue the recommendation for the BOCES Kaplan program with all of the supports and services recited above. Although the parents felt that a hybrid program was more appropriate, 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).

The student remained at BOCES Kaplan for the 2023-24 school year for part of the school day, in the hybrid program the parent created around the provision of private ABA services in the morning (Tr. pp. 1047-048, 1050).¹⁹ Specific to the 2023-24 school year, the BOCES Kaplan assistant director reported the student's program at Kaplan needed "to be modified pretty extensively" in order to ensure that the program could meet the student's IEP mandates given the short amount of time he was in school, and that all of the student's related services and one-to-one instruction had to be provided in the afternoon (Tr. p. 485). He noted that the student's schedule looked different than his peers and limited the student's access to unstructured time (Tr. p. 485). The assistant director testified that he "personally observed [the student] asking to be with his peers," noting that it was "difficult for [the student] to understand why he[had] to stay back and participate in speech, OT and PT and then work on his IEP goals " (Tr. p. 485). The BOCES Kaplan assistant director reported that there had been a change in the student's behavior since his attendance was modified, specifically that he had observed more noncompliance in the student in the sense that it was "more challenging to motivate the student to want to work because now you ha[d] to compete with his desire to be with his peers" which was "super reinforcing for the student" (Tr. p. 486). The BOCES Kaplan assistant director, who was also a BCBA, testified that he did not believe the student required a strict ABA program in order to be successful (Tr. p. 487). He

¹⁹ For the 2023-24 school year, according to the parent's testimony, the "only thing" the parents had in mind was to create a collaboration between the home and school providers (Tr. pp. 1044-045). Her testimony specified that she wanted the school speech-language pathologist to align with what the home speech-language provider was providing (Tr. p. 1045).

opined that the student was successful in the environment he was in because it allowed for " little bit more" flexibility and autonomy but still employed ABA principles when necessary (Tr. p. 487).

The CSE convened on September 21, 2023 for a reevaluation review (Dist. Ex. 26). New information considered by the September 2023 CSE included a psychoeducational evaluation of the student conducted by the district school psychologist on August 8, 2023 that culminated in a report dated August 24, 2023, as well as the director's classroom observation of the student (Dist. Ex. 26 at pp. 1-2, 5; see Parent Ex. JJ; Dist. Ex. 18).

With respect to the observation, the district school psychologist observed the student for 60 minutes on March 9, 2023 during a one-on-one session (Dist. Ex. 18 at pp. 1, 4). The psychologist reported that the student successfully completed a reading activity but struggled with word identification (id. at p. at p. 4). She also indicated that the student transitioned well, participated eagerly in the morning meeting, and expressed happiness (id.). The observation report indicated that student was attentive with redirection, responded well to instructions, and required moderate assistance (id. at pp. 1-2, 4). In addition, the report indicated the student interacted appropriately with peers and adults but showed a short attention span that was moderate in severity (id. at p. 3).

In her psychoeducational evaluation report, the district school psychologist reported that, in general, the student presented as a cooperative and friendly young man but noted that at times, he required a lot of verbal reminders to attend to tasks, especially with items involving letters and numbers (Parent Ex. JJ at p. 3). She noted the student demonstrated an increased attention span and significant task perseverance with tasks involving manipulatives (id.). She further noted that the student seemed to enjoy social communication (id.).

Administration of the Stanford-Binet Intelligence Scales- Fifth Edition (SB-5) yielded a full-scale IQ of 40 which the school psychologist reported was "classified as [m]oderately [d]elayed" (Parent Ex. JJ at p. 7). The school psychologist noted that the student's nonverbal IQ was commensurate with his verbal IQ and, although the student scored similarly on the factor indices, examination of his responses indicated a relative strength in the area of verbal knowledge (id.). The school psychologist reported that the student's performance on the SB-5 was consistent with previous assessments of his overall cognitive ability (id.). According to the school psychologist, overall, there was no change in standard scores when comparing her administration of the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) to the administration of a different form of the test in February 2023 by the private evaluator as part of the independent neuropsychological evaluation (id.; see Parent Ex. JJ at pp. 4-5, 9; see also Parent Ex. Z at pp. 11, 21-22). However, the school psychologist reported that the growth scale values (GSV) noted in the summary of scores, were useful for purposes of comparing a student's performance to previous performance (Parent Ex. JJ at p.7). She indicated that comparing the student's current GSV to previous testing conducted in February 2023, yielded some positive growth in the areas of letter and word recognition, and math concepts and applications (id. at pp. 7, 9). In contrast, the student's GSV scores also indicated a decrease in the areas of math computation and written expression (id.). The district school psychologist noted that the student received a raw score of zero on these

two subtests during her administration of the KTEA-3 as he did not write legible letters or numbers within the confines of the standardized assessment (id. at p. 7). Lastly, the school psychologist reported that a comparison was not done for the reading comprehension subtest as the GSV of 295 reported on the February 2023 evaluation was not listed in the KTEA-3 manual (id.).²⁰ The school psychologist concluded that clinical observations and review of records, as well as results from the current evaluation indicated the student might have difficulty maintaining academic skills over time, especially when asked to demonstrate them within a standardized testing environment (id.).

According to the September 2023 CSE meeting information summary, the student's classroom teacher reported that the student was adjusting nicely to some new staff and students (Dist. Ex. 26 at p. 1). She further reported that the student was becoming acclimated and came into school as an enthusiastic learner (id.). The meeting information summary also indicated the district school psychologist reviewed the classroom observation she conducted in March 2023, and the results of the psychoeducational evaluation of the student that she conducted in August 2023 (id. at pp. 1-2). The meeting summary indicated the parents were given the opportunity to provide input and had no updates regarding the student's progress or questions or concerns (id. at pp. 1, 2). The CSE chairperson mentioned that the student's attendance and lateness impeded his participation in all school activities (id.). He reviewed the student's then-current IEP including related services (id.). The meeting information summary indicates that the CSE determined that the BOCES Kaplan program "continued to be an appropriate placement recommendation" (id.). However, the meeting summary also indicated the CSE was willing to explore other program options if the parents were interested, and that the parents indicated they were (id.).²¹

Given the foregoing, although the September 2023 CSE considered different options to try to respond to the parent's preferences, ultimately there was nothing before the committee which would have warranted the CSE modifying the recommendations for the student. Accordingly, as

²⁰ Testimony by the district school psychologist who performed the August 2023 psychoeducational evaluation indicated that GSVs compare a student's performance to their performance on the last evaluation, thereby helping to look at growth or lack of growth from test raw scores since the previous evaluation (Tr. pp. 244-45). She reported that she discovered an error in the reporting of GSVs on the KTEA-3 in the complete version of the independent neuropsychological evaluation report (see Tr. pp. 246-48; Parent Ex. JJ at p. 7; Dist. Ex. 13). The scoring error resulted in the neuropsychological evaluation indicating a negative change in the student's reading comprehension when the change would actually have been a positive change for him in that area (Tr. p. 248). The district school psychologist indicated that the student's scores in the overall independent neuropsychological evaluation report were consistent with what the district understood of the student's overall profile (Tr. pp. 249-50). The district school psychologist agreed with many of the recommendations included in the IEE neuropsychological evaluation report and indicated many were a part of the student's program at BOCES Kaplan (Tr. pp. 250-52). She did not agree with the recommendation that the student needed "strict ABA" (Tr. p. 252).

²¹ The hearing record reflects that, subsequent to the September 2023 CSE meeting, the student's mother provided the district with signed consent for the release of the student's special education records to various school districts and BOCES programs in neighboring counties for the purpose of a placement search for the student (Dist. Ex. 23 at p. 1). Some schools responded with interest in conducting intake interviews whereas others responded that they did not have a space for the student (Tr. pp. 67-68; Dist. Ex. 23 at pp. 2-3). According to the CSE chairperson, he was informed by schools who had attempted to scheduled intakes that the parents were only interested in an ABA program (Tr. p. 68).

with the June 2023 IEP, the September 2023 IEP was also reasonably calculated to enable the student to make progress in light of his circumstances.

4. Methodology

As summarized above, the appropriate methodology for the student has increasingly become an area of disagreement, so a separate discussion is warranted.

Generally, 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). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94). Indeed, a CSE should take care to avoid restricting school district teachers and providers to using only the specific methodologies listed in a student's IEP unless the CSE believes such a restriction is necessary in order to provide the student a FAPE. However, when the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).

Here, there is no material dispute between the parties that the student required ABA to some extent in order to receive educational benefit. In addition, the parties agree that the student benefited from speech-language therapy using PROMPT. The parents "admit that Kaplan attempts to incorporate ABA methods" and PROMPT therapy but argue that the issue is the program's "failure to implement an ABA program [and the PROMPT approach] with fidelity" (Answer ¶ 10).

As discussed above, while the BOCES Kaplan social communication program was not strictly an ABA program, it incorporated principles of ABA (i.e., reinforcement, discrete trials, and charting) (Tr. pp. 494-95). The BOCES Kaplan assistant director testified that all programs at BOCES Kaplan used ABA to help their learners (Tr. p. 442). He reported that the difference between BOCES Kaplan social communication program and a traditional ABA program was that

learners in the social communication program were able to learn more in the natural environment and may not need intensive learning units or intensive trials (Tr. pp. 443-44). Other differences were that the students in the social communication program thrived on social interaction, and therefore being part of a large group was important (Tr. p. 444). Teaching students skills such as sharing and turn taking, as well as self-management of their own behaviors and finding tools to help self-regulate were part of the social communication program (*id.*). According to the BOCES Kaplan assistant director, students in the social communication program required less active supervision as they were able to make choices and engage in unstructured time (*id.*). The assistant director testified that the use of ABA was not mutually exclusive from the use of other methodologies or programs (Tr. p. 446). He indicated that ABA could be paired with other methodologies (*id.*). He also noted that ABA techniques (e.g., error corrections) used at BOCES Kaplan were research-based and developed in collaboration with behaviorists with whom the program partnered (Tr. p. 465).

The private BCBA's classroom observation report summarized above exemplifies the parents' position in its advocacy for strict ABA methods such as precision teaching and specific use of error correction and supervision (Parent Ex. S at pp. 7-8). Similarly, the private speech-language pathologist testified that PROMPT needed to be done in a way that cognitive-linguistic and social/emotional domains were integrated rather than just addressing "speech sounds in isolation" (Tr. pp. 760-61). The private speech-language pathologist testified that the student had a "motor speech difficulty" which could not be treated with "traditional speech therapy" (Tr. p. 762).

While the parents' preference for strict adherence to their preferred methodologies is understandable, the IEPs developed for the student did not have to require the use of the parents' preferred methodology "with fidelity" where the IEP provides for a balanced program to meet the student's needs (*see A.G. v. Bd. of Educ. of Arlington Cent. Sch. Dist.*, 2017 WL 1200906, at *9 [S.D.N.Y. Mar. 29, 2017] [rejecting the parents' arguments that Wilson Reading System had to be used "with fidelity" or exclusively in order to provide a FAPE]).

5. Summary

As reflected above, the disputes in this matter relate to different views held by the parents and their experts and private home-based providers compared to the district and the staff from the BOCES Kaplan program. The differing views relate to the student's progress and the degree to which the student needed to focus on functional skills versus academic skills and needed ABA methodology incorporated into his programming, as well as the degree to which individual providers delivered such methodology with fidelity, with the parents' providers expressing criticism of the individual approaches used by the BOCES staff (*see, e.g.*, Tr. p. 73, 139-40, 339-40, 471-75, 559-70, 580-81, 585-88, 604-06, 799, 807-08, 839-42, 998-99; Parent Ex. S at p. 7).

Despite the differing views about the student's progress, the hearing record as a whole, including both objective and subjective descriptors of the student's progress, as summarized above, reveals that the student achieved or made progress towards achieving annual goals, and, overall, demonstrated meaningful progress during the 2021-22 school and 2022-23 school years such that the continuation of a similar program for the 2022-23 and 2023-24 school years, respectively, was appropriate for the student (*see E.S. v. Katonah-Lewisboro Sch. Dist.* 487 Fed. App'x 619, 622 [2d

Cir. July 6, 2012] [holding that, in determining whether a student made progress, the SRO must examine the record for objective evidence]). While the student may have benefited from more 1:1 instruction and the teaching approaches preferred by parents, the district was not required to maximize the student's potential (Rowley, 458 U.S. at 189, 199). Further, the CSEs were not obligated to adopt the recommendations of the private providers and evaluators in this instance (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"])).

This is particularly so given that the district and BOCES staff who contributed to the IEP development had been working directly with the student. Further, as a general matter, district staff may be afforded some deference over the views of private experts (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]).

In summary, the preponderance of the evidence does not support the IHO's finding that the IEPs developed for the student for the 2022-23 and 2023-24 school year were not reasonably calculated to enable the student to make progress appropriate in light of his circumstances.

VII. Conclusion

In consideration of all of the above and contrary to the IHO 's determination, I find the district offered the student a FAPE for the 2022-23 and 2023-24 school years

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated November 16, 2024 is reversed, and the relief directed therein vacated.

Dated: **Albany, New York**
 April 21, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER