



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

## **The State Education Department**

**State Review Officer**

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**No. 24-644**

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

#### **Appearances:**

Jaspan Schlesinger Narendran, LLP, attorneys for petitioner, by Carol A. Melnick, Esq.

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

### **III. Facts and Procedural History**

The student in this case was initially found eligible to receive special education as a student with an other health impairment in November 2018, while attending third grade at a district public school (see Parent Ex. A ¶¶ 30, 50; see Parent Ex. B at p. 1).<sup>1</sup> As a result of his eligibility

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<sup>1</sup> Evidence in the hearing record reveals that, in second grade, the student began receiving privately-obtained counseling services in "September 2017 for a few months to work on reducing problem behaviors at home" (Parent Ex. B at p. 3). The evidence further reveals that the parents were concerned about the student's "behavior at home," although the student reportedly "conduct[ed] himself appropriately at school," and therefore, they privately obtained a psychological evaluation of the student in September 2018 to "assess neurobehavioral and psychiatric symptoms that [we]re currently disrupting [the student's] functioning at home and school" (*id.* at pp.

determination, the student began receiving a special education program that included integrated co-teaching (ICT) services in a general education placement for instruction in English language arts (ELA), individual occupational therapy (OT) services, and accommodations and modifications during the 2018-19 school year (Parent Ex. A, ¶ 51).<sup>2, 3</sup> During the 2019-20 school year (fourth grade), the evidence reflects that the student continued to receive ICT services in a general education placement for instruction in ELA, and in addition, received resource room services (three 30-minute sessions per week in a 5:1 group), individual OT (one session per week), program modifications and accommodations, and testing accommodations (id. ¶¶ 53-54).<sup>4</sup>

Evidence in the hearing record reflects that, as a result of the COVID-19 pandemic during the 2019-20 school year, the district closed its school buildings and implemented remote instruction in or around March 2020, which "caused interrupted schooling and a shift in delivery of related services" (Dist. Ex. 3 at p. 1). Near the conclusion of the school year, in May 2020, a CSE convened to conduct the student's annual review and developed an IEP for the 2020-21 school year (fifth grade) (see Parent Ex. A ¶ 56).

Consistent with the recommendations in the May 2020 IEP, during the 2020-21 school year, the student attended fifth grade at a district public school and continued to receive a special

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1, 2). As a result of this evaluation, the student received diagnoses of an "Adjustment Disorder with mixed disturbance and conduct and mood," and "Other Specified Attention-Deficit/Hyperactivity Disorder" (due to insufficient setting), and a "rule-out" diagnosis of an "Attention-Deficit/Hyperactivity Disorder" (ADHD) (predominantly inattentive type) (id. at p. 11). The evaluator noted that the student also presented with "some traits consistent with Oppositional Defiant Disorder such as being argumentative, easily irritated, and refusing to comply with requests by authority figures at home" (id. at p. 10). Prior to the psychological evaluation of the student in September 2018, the parents had referred the student to the CSE for an initial evaluation, which resulted in a determination in April 2018 that the student was not eligible to receive special education services (id. at p. 3; see also Parent Ex. A ¶¶ 11-13, 29-31). Evidence reflects that, in or around May 2018, after the district found the student ineligible for services, the parents privately obtained occupational therapy (OT) and physical therapy (PT) services for the student (see Tr. pp. 1482-83).

<sup>2</sup> The hearing record did not include copies of the student's IEPs from the 2018-19, 2019-20, or 2020-21 school years. Therefore, information regarding the student's programs for these three school years has been drawn primarily from the parents' due process complaint notice.

<sup>3</sup> State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students and that the school personnel assigned to each class shall minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]). At the impartial hearing, the district special education teacher who was a co-teacher in the student's third grade ICT setting testified that she worked on writing with the student during ELA instruction (see Tr. pp. 693, 695-96, 701-02).

<sup>4</sup> Evidence in the hearing record reflects that the same district special education who co-taught in the student's third grade ICT setting for instruction in ELA fulfilled the same role during fourth grade, that is, as the co-teacher in the student's ICT setting for instruction in ELA (see Tr. pp. 701-02, 705). At the impartial hearing, she testified that, during ELA instruction in fourth grade, she continued to work on the student's writing; she also worked on the student's reading in the classroom in a direct consultant teacher model (see Tr. pp. 705, 776-77). The same special education teacher testified that she worked on reading with the student in resource room during fourth grade (see Tr. p. 785).

education program consisting of ICT services for instruction in ELA (90 minutes per week), resource room services (three 30-minute sessions per week in a 5:1 group), OT (one 30-minute session per week individually), indirect consultant teacher services (one 90-minute session per week), program modifications and accommodations, and testing accommodations (see Dist. Ex. 5 at p. 1; see also Parent Exs. A ¶¶ 56, 58; C at p. 9).<sup>5</sup> The evidence further reflects that the student received academic intervention services (AIS) in the form of one 30-minute session per week of speech-language therapy during fifth grade, as well as AIS for mathematics as a result of the student's performance on his State examination (see Tr. p. 614; Dist. Ex. 5 at p. 1). However, the evidence reflects that, although the student "exited AIS" mathematics during fifth grade and no longer qualified to receive those services because he was "meeting grade level expectations inside the classroom," the district nonetheless continued to deliver AIS for mathematics to the student (Tr. pp. 613-14).<sup>6</sup>

In December 2020 through April 2021, the district completed the student's mandatory three-year reevaluation. More specifically, the reevaluation included a December 2020 social history update, a December 2020 classroom observation, an April 2021 psychoeducational evaluation, an April 2021 OT evaluation, an April 2021 speech-language evaluation, and an April 2021 psychoeducational evaluation addendum (see generally Dist. Exs. 1-6).

On May 18, 2021, the parents privately obtained an audiological and auditory processing evaluation of the student (May 2021 auditory processing evaluation) (see Dist. Ex. 7 at pp. 1, 3). As noted in the evaluation report, the parents indicated that a "formal neuropsychological evaluation [wa]s scheduled for next month to confirm" diagnoses of "dyslexia, dysgraphia and dyscalculia," as suggested by the student's recent district testing (id. at p. 3). The parents also noted that the student had been receiving "private reading support services utilizing the Barton method twice per week," and he had made "significant gains in his reading" with this support (id.). Results of the evaluation were "consistent with the presence of an auditory processing disorder" (id. at p. 9).

On June 8, 2021, a CSE convened to conduct the student's annual review and developed an IEP for the 2021-22 school year (sixth grade) (see Dist. Ex. 10 at p. 1).<sup>7</sup> Finding that the student remained eligible to receive special education as a student with a learning disability, the June 2021 CSE recommended 12-month programming, which, for July and August 2021, consisted of two hours per week of reading instruction in a small group (3:1 ratio) (to address reading and writing

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<sup>5</sup> Evidence in the hearing record reflects that the district special education teacher the student had in third and fourth grade in his ICT settings for instruction in ELA continued to serve as the student's resource room special education teacher in fifth grade (2020-21 school year) (see Tr. pp. 703-09).

<sup>6</sup> Based on the evidence in the hearing record, the district began the 2020-21 school year by delivering remote instruction, and in or around November 2020, the district moved to a hybrid method of delivering instruction to students; eventually, students returned to the district to receive instruction on a full-time, in-person basis (see Tr. pp. 603-04). The student's special education teacher during the 2020-21 school year testified that the student began receiving in-person instruction on a full-time basis shortly after the district moved to hybrid instruction (see Tr. p. 604).

<sup>7</sup> The June 2021 CSE meeting minutes, while not included in the copy of the IEP admitted into evidence, were part of the meeting minutes within the student's November 2021 IEP (see Dist. Ex. 13 at pp. 2-3).

goals); for the remainder of the school year from September 2021 through June 2022, the CSE recommended a general education placement with ICT services for instruction in ELA, mathematics, science, and social studies; a 12:1 special class placement for study skills (once every other day); related services consisting of one 30-minute session per week of individual OT (for attention needs); and a specialized reading program in a small group (three times per six-day cycle) (id. at pp. 1, 17-19).<sup>8, 9</sup> In addition, the CSE recommended strategies to address the student's management needs, noting specifically that the student required the "support of a small student to teacher ratio to support his reading and writing skills development" (id. at p. 15). The CSE also noted that the student required "reteaching, refocus[ing] and redirection, graphic organizers, and preferential seating" (id.). The CSE further noted that the student required a "[s]pecialized multisensory reading program in order to academically progress," access to "audio textbooks" through the use of "Learning Ally," and the use of "Snap & Read to aid in decoding needs" (id.).

When describing how the student's needs affected his involvement in and participation in the general education curriculum, the June 2021 CSE indicated in the IEP that the student's needs made it "difficult for him to complete tasks independently" (Dist. Ex. 10 at p. 15). The CSE also indicated that the student "struggle[d] with having consistency demonstrating what he kn[ew] verbally and what he c[ould] physically produce in written form" (id.). The IEP reflected that the student required "more time to complete assignments due to motor fatigue" (id.). According to the June 2021 IEP, the student demonstrated a "significant delay in reading decoding, written expression, writing mechanics, spelling, motor skills, [and] organizational skills, which inhibit[ed] progress in the general education curriculum" (id.).

In addition to the above, the June 2021 CSE developed annual goals targeting the student's needs in the areas of study skills, reading, writing, and motor skills (see Dist. Ex. 10 at pp. 16-17). The CSE also recommended the following supplementary aids and services, program modifications, and accommodations: checking for understanding, preferential seating, providing him with a copy of class notes, refocusing and redirection, additional time to complete assignments, support for organizational skills, use of a graphic organizer, reteaching of materials, and use of a calculator (id. at p. 18). As assistive technology and devices, the June 2021 CSE recommended that the student have access to a computer with speech-to-text software (id.). In addition, the June 2021 CSE recommended supports for school personnel on behalf of the student, including one 15-minute OT consultation per month (support to regular education teacher to generalize skills) and one 30-minute OT consultation per week (between therapist and teacher or support staff) (id. at pp. 18-19). Finally, as testing accommodations, the CSE recommended providing the student with a flexible setting, a scribe, answers recorded in a test booklet, extended time (1.5), reducing visual stimulation (method of presentation), and tests read (id. at pp. 19-20).

In a prior written notice to the parents dated June 8, 2021, the district indicated that a "Middle School representative reviewed the sixth grade program options, detailing what

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<sup>8</sup> The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

<sup>9</sup> Notwithstanding the June 2021 CSE's recommendation for 12-month programming to address the student's reading during summer 2021, evidence in the hearing record demonstrates that the parents declined these services and the student did not participate in the recommended summer services (see Tr. p. 6; Dist. Ex. 11 at p. 2).

interventions and support levels [we]re involved with each respective program" (Dist. Ex. 11 at p. 1). The district also noted that, at the CSE meeting, the student's "potential schedule was outlined with different academic program options," and the "parent indicated that she would like to research the programs further" (id.). According to the prior written notice, the "special education team explained the benefits of participating in the Wilson reading program" (id.). Next, the district briefly summarized the student's present levels of performance in reading, writing, and mathematics (id.). In reading, the district noted that the student was "able to master syllabication in insolation," but had "difficulty generalizing this skill in the classroom"; he was a "motivated reader"; and he was then-currently "reading at both an independent and instructional level U" (id.).<sup>10</sup> The district indicated that the student had been receiving reading services through his participation in ICT services and resource room, and he had "respond[ed] positively to implicit instruction" (id.). The district described the student as having a "relative strength" in comprehension (id.).

With respect to writing, the district indicated in the June 2021 prior written notice that "spelling [wa]s an area of weakness" and the student required "re-teaching in order to retain" (Dist. Ex. 11 at p. 1). Additionally, the district noted that the student was "able to generate ideas independently prior to writing," but without support, the student generated "simple sentences" and therefore, written expression remained an "area of continued need" (id.). It was also reported that the student responded "to small group intervention and look[ed] forward to the additional support"; the student also responded to a "multi-sensory approach to retain spelling and decoding-based interventions" (id.).

In mathematics, the district reported in the prior written notice that the student "continue[d] to build his understanding of dividing fractions," and at that time, he could "add and multiply fractions" (Dist. Ex. 11 at p. 1). The prior written notice included a description of the student's mathematics performance on the "most recent STAR report" and on his report card, and noted that a mathematics specialist had "explained the student's past STAR scores and [had] suggested that it [wa]s not an accurate depiction of his true levels of performance" (id.). It was further noted that the student's "STAR data, AIS work and classroom work d[id] not align" and the student had made "progress with conceptual understanding" but continued to "struggle with full fact fluency" (id.). The prior written notice also reflected that, based on the student's classroom teacher, he was a "hard worker and compensate[d] in the classroom" (id.). The classroom teacher reported that the student required "remediation and re-teaching in core academic subjects"; he responded to "verbal prompts and reminders" in mathematics; and he accessed a "multiplication table" (id.). She also noted that although the student had the "skills, [he did] not necessarily [have] the facts memorized," and he had received "3s and 4s on his report card namely because of his compensation level" (id.).

The June 2021 prior written notice included the parents' concerns about the student's "fluency, phonological awareness and written expression weaknesses" from his "recent reevaluation," as well as the parents questioning the "decrease in FSIQ scores since the prior

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<sup>10</sup> At the impartial hearing, the district special education teacher who delivered resource room services to the student during fourth and fifth grades—and who attended the June 2021 CSE meeting—testified that an "independent and instructional level U" corresponded to the "mid-fifth grade level" (Tr. pp. 696-97, 700-01, 705, 708-09, 715-17, 785; Dist. Ex. 10 at p. 1).

evaluation" (Dist. Ex. 11 at p. 2). As noted, the CSE had recommended summer services, but the parents had a "scheduling conflict and requested tutoring from the school in lieu of the projected [summer] program" (*id.*). The parents also shared that the student was "demonstrating frustration and his confidence levels [we]re impacted by his academic struggle" (*id.*).

On June 21, 2021, the parents privately obtained a psychoeducational evaluation of the student (June 2021 psychoeducational evaluation) (*see* Parent Ex. C at p. 1). As noted in the evaluation report, the parents sought "additional testing to supplement the psychoeducational evaluation conducted by the district" (*id.*). Based on the testing results, the evaluator noted that the student's "overall intellectual and learning capabilities reach[ed] at least the average range," and he demonstrated "age-appropriate verbal and nonverbal reasoning skills which [we]re consistent with collateral reports and his district testing from a few years ago" (*id.* at pp. 1-2). The evaluator also noted that the student demonstrated "strong language comprehension skills" (*id.* at p. 2). According to the evaluator, in light of the current findings, the student's "last IQ assessment (2020) should be considered an outlier," and she explained that the "lower than expected scores [we]re likely associated with factors other than his actual intellectual skills" (*id.*). She also noted that the student's "pattern of past and current academic performances [wa]s largely consistent, particularly with respect to his literacy skills, and show[ed] continuing struggles and deficits" (*id.*). As a result of testing results, the evaluator diagnosed the student as having a specific learning disorder with impairment in reading (accuracy and rate), and a specific learning disorder with impairment in written expression (spelling and organization) (*id.* at pp. 2-3). The evaluator also recommended that diagnoses of an attention deficit/hyperactivity disorder, a specific learning disorder with impairment in mathematics, and an unspecified anxiety disorder be ruled out/monitored (*id.* at p. 3). The report included a number of recommendations regarding the student's educational placement, accommodations, modifications, supports, and services (*id.* at pp. 3-8).

On June 22 and 23, 2021, the parents executed an "Enrollment Agreement" for the student's attendance at Eagle Hill for the 2021-22 school year (Parent Ex. LL at pp. 1, 3).

The hearing record included a copy of the student's progress report on his annual goals for the 2020-21 school year (*see generally* Dist. Ex. 24). As reflected in the progress report, the student achieved all of his annual goals in reading and writing, and progressed gradually or satisfactorily on his annual goals for motor skills (*id.* at pp. 4-6). With respect to the student's study skills, which targeted his ability to bring homework assignments home and to turn in homework assignments on time, these skills could not be formally assessed due to the implementation of hybrid instruction during the 2020-21 school year (*id.* at p. 3).

In addition to the progress report on his annual goals, the hearing record also included a copy of the student's report card from the 2020-21 school year (*see generally* Dist. Ex. 9). According to the report card key, a score of 4 indicated that the student was meeting learning standards with distinction, a score of 3 indicated that the student was meeting learning standards, a score of 2 indicated that the student was partially meeting learning standards, and a score of 1 indicated that the student was not meeting learning standards (*id.* at p. 1). In ELA, the student consistently received scores of 2s and 3s throughout the school year, except for receiving scores of 1s with regard to the student's ability to apply grade level conventions, such as capitalization, punctuation, and spelling, when writing (*id.*). In the areas of mathematics, social studies, and

science, the student predominantly and consistently received scores of 3s throughout the school year (*id.*). In the areas of art, physical education, library media, and music, the student consistently received scores of 3s and 4s throughout the school year (*id.* at p. 2). Additionally, the student earned designations of "C," indicating that he consistently demonstrated behaviors in the classroom that promoted learning (*id.* at p. 1).

By letter dated June 29, 2021, the parents notified the district of their intentions to unilaterally place the student at Eagle Hill for the 2021-22 school year and to seek public funding for the costs of the student's placement (*see* Parent Ex. AAA).<sup>11</sup> The parents expressly rejected the IEP developed at the June 2021 CSE meeting, indicating that it did not meet the student's needs (*id.*). Additionally, the parents noted that the district had failed to provide the student with an "effective program" for three years and specifically noted the student's lack of progress during that time (*id.*).

Evidence in the hearing record reflects that the student attended Eagle Hill during the 2021-22 school year from September 8, 2021 through June 17, 2022 (*see generally* Parent Exs. I; P; JJ; MM-NN). While the student was attending Eagle Hill during the 2021-22 school year, a CSE reconvened on November 10, 2021 for a meeting to review the parents' privately-obtained evaluations (*see* Dist. Ex. 13 at pp. 1-4; *see generally* Parent Ex. C; Dist. Ex. 7). Overall, the November 2021 CSE added information regarding the student's privately-obtained evaluations into the present levels of performance, and modified the supplementary aids and services, program modifications, and accommodations portions of the IEP (*see* Dist. Ex. 13 at pp. 11-12, 16, 18, 21-22). In addition, it was noted in the November 2021 IEP that the CSE offered counseling supports to help the student "learn and implement appropriate coping strategies when feeling frustrated" and to "focus on how to help improve his self-confidence"; however, the parents did not "feel [the student wa]s in need of in-school counseling support at th[at] time," but understood that counseling support could be offered (*id.* at p. 17). Additionally, the November 2021 CSE exempted the student from a language other than English as a diploma requirement (*id.* at p. 24).

In a prior written notice to the parents dated November 10, 2021, the district noted that a CSE met to review and add information to the student's IEP related to the parents' privately-obtained evaluations (*see* Dist. Ex. 14 at p. 1). In addition, the CSE "corrected [or] updated" previously inputted information, which included "[two] parts found within 'Parent Input' in the Physical Strength and Need sections" (*id.*; *see* Dist. Ex. 13 at p. 1). According to the prior written notice, the district school psychologist who attended the CSE meeting reviewed the privately-obtained psychoeducational and audiological evaluations, and "summarized the findings" (Dist. Ex. 14 at p. 1). It was noted that the student was now diagnosed as having specialized learning disorders in reading and writing, and furthermore, that "areas [and] behaviors associated with ADHD-inattentive type, mathematics weaknesses and anxiety should be monitored" (*id.*). Additionally, the district indicated that the student continued to "struggle with an auditory processing disorder," and the CSE chairperson suggested at the meeting that the audiological evaluation report "should be shared with [district staff] (professionals who work[ed] with students who ha[d] audiological impairments) in case [the student] was to need an FM system or other

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<sup>11</sup> Eagle Hill has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).



device to help improve his auditory processing in his classrooms" (id.). The November 2021 CSE also reviewed the student's annual goals and it was "agreed that no changes needed to be made" (id.). Finally, the prior written notice reflected that, at the November 2021 CSE meeting, the parents expressed that the "discussed support and classes" at the district middle school would not be sufficient to "help improve" the student's reading and writing, "which [we]re currently tested at the 2 to 3 grade levels" (id. at p. 2).

On February 27 and March 3, 2022, the parents executed a "Re-Enrollment Agreement" for the student's attendance at Eagle Hill for the 2022-23 school year (Parent Ex. TT at pp. 1, 3).

On May 18, 2022, a CSE convened to conduct the student's annual review and to develop an IEP for the 2022-23 school year (seventh grade) (see Dist. Ex. 16 at p. 1). Finding that the student remained eligible to receive special education as a student with a learning disability, the May 2022 CSE recommended 12-month programming, which, for July and August 2022, consisted of one 120-minute special class per week for reading (3:1 ratio) (to address reading and writing goals); for the remainder of the school year from September 2022 through June 2023, the CSE recommended a general education placement with ICT services for instruction in science and social studies; a 15:1 special class placement for instruction in ELA (90 minutes daily) and mathematics (45 minutes daily); and related services consisting of one 30-minute session per week of individual OT (for attention needs) (id. at pp. 1, 22, 24). In addition, the CSE recommended strategies to address the student's management needs, noting specifically that the student required the "support of a small student to teacher ratio to support his reading and writing skills development" (id. at p. 19). The CSE also noted that the student required "check-ins, reteaching, reteaching of material and prompts, at times, to refocus," as well as "graphic organizers, study guides, and preferential seating" (id.). The CSE further noted that the student required a "[s]pecialized multisensory reading program in order to academically progress," access to "audio textbooks" through the use of "Learning Ally," and the use of "Snap & Read to aid in decoding needs" (id.).

When describing how the student's needs affected his involvement in and participation in the general education curriculum, the May 2022 CSE indicated in the IEP that the student's needs made it "difficult for him to complete tasks independently" (Dist. Ex. 16 at p. 19). The CSE also indicated that the student "struggle[d] with having consistency demonstrating what he kn[ew] verbally and what he c[ould] physically produce in written form" (id.). The IEP reflected that the student required "more time to complete assignments due to motor fatigue" (id.). According to the May 2022 IEP, the student demonstrated a "significant delay in reading decoding, written expression, writing mechanics, spelling, motor skills, [and] organizational skills, which inhibit[ed] progress in the general education curriculum" (id.).

In addition to the above, the May 2022 CSE developed annual goals targeting the student's needs in the areas of study skills, reading, writing, mathematics, and motor skills (see Dist. Ex. 16 at pp. 20-22). The CSE also recommended the following supplementary aids and services, program modifications, and accommodations: checking for understanding, preferential seating, providing him with a copy of class notes, refocusing and redirection, additional time to complete assignments, support for organizational skills, use of a graphic organizer, reteaching of materials, and use of a calculator (id. at p. 22-23). As assistive technology and devices, the May 2022 CSE recommended that the student have access to a computer with speech-to-text software (id. at p.

23). In addition, the May 2022 CSE recommended supports for school personnel on behalf of the student, including one 30-minute OT consultation per week (between therapist and teacher or support staff) (id. at pp. 23-24). Finally, as testing accommodations, the CSE recommended providing the student with a flexible setting, answers recorded in a test booklet, extended time (1.5), reducing visual stimulation (method of presentation), tests read, and use of a word processor for typed responses (id. at p. 24).<sup>12</sup> Following the meeting, the district provided the parents with a prior written notice, dated May 18, 2022 (see Dist. Ex. 17 at p. 1).

By letter dated June 21, 2022, the parents notified the district of their intentions to unilaterally place the student at Eagle Hill for the 2022-23 school year and to seek public funding for the costs of the student's placement (see Parent Ex. BBB). The parents noted that they had rejected the student's IEP at the May 2022 CSE meeting because the 15:1 special class placement was not appropriate to meet the student's needs (id.).

Evidence in the hearing record reflects that the student attended Eagle Hill during the 2022-23 school year from September 6, 2022 through June 16, 2023 (see generally Parent Exs. T; Y; GG; KK; UU-VV).

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

By due process complaint notice dated June 8, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years, and in support thereof, alleged both procedural and substantive violations (see Parent Ex. A ¶¶ 111-21).<sup>13</sup> With respect to both the 2021-22 and 2022-23 school years, the parents generally asserted that the district: failed to recommend an "appropriate program, placement, services, and accommodations" for the student; deprived the parents of the opportunity to meaningfully participate in the IEP process by "ignoring [their] concerns for developing an appropriate program, placement, and/or services" for the student; failed to develop appropriate annual goals to address all of the student's needs; and failed to offer "appropriate language and reading instruction" to the student (id. ¶¶ 114-17). More specifically, the parents alleged that, for the 2021-22 school year, although the June 2021 CSE recommended a specialized reading program for the student, the IEP did not "define a maximum number of students or a specific number of students in the recommended group," and the IEP did not "define the skill deficits and type of reading program used to address the deficits" (id. ¶ 77).<sup>14</sup> Relatedly, the parents indicated that even though it was unnecessary to specify a methodology in an IEP, the IEP nonetheless should "describe the reading program" to be used (id.). With respect to the 2022-23 school year, the

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<sup>12</sup> The May 2022 CSE continued to exempt the student from a language other than English as a diploma requirement (see Dist. Ex. 16 at p. 25).

<sup>13</sup> The due process complaint notice also included allegations concerning the district's child-find obligations prior to November 2018, and the district's failure to offer the student a FAPE for the 2019-20 and 2020-21 school years (see Parent Ex. A ¶¶ 111-14). However, while not explained in the hearing record, it appears that any and all claims prior to the 2021-22 and 2022-23 school years were abandoned; as a result, these claims will not be further addressed in this decision.

<sup>14</sup> The parents asserted a similar allegation with regard to the student's November 2021 IEP (see Parent Ex. A ¶ 95).

parents more specifically indicated that the May 2022 CSE failed to recommend "specialized reading and writing instruction" for the student (id. ¶ 103).

In addition to the foregoing, the parents alleged that Eagle Hill was an appropriate unilateral placement for the student for the 2021-22 and 2022-23 school years, and therefore, as relief for the alleged violations and the district's alleged failure to offer the student a FAPE for the 2021-22 and 2022-23 school years, the parents sought an order directing the district to reimburse them for the costs of the student's attendance at Eagle Hill for the same school years (see Parent Ex. A at pp. 13-14, ¶¶ 1, 3). In addition, the parents sought an order directing the district to reimburse them for the costs of the student's June 2021 psychoeducational evaluation and for the costs of the student's privately-obtained tutoring services (id. ¶¶ 4-5).

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

On September 12, 2023, the IHO conducted a prehearing conference, and at that time, the parents withdrew their claims for transportation and compensatory educational services (see IHO Decision at p. 6; see also Parent Ex. A at p. 14, ¶¶ 2, 6).<sup>15</sup> The impartial hearing resumed on November 16, 2023, and concluded on April 19, 2024, after 10 total days of proceedings (see Tr. pp. 1468-1696).<sup>16</sup>

In a decision dated November 18, 2024, the IHO noted that the parents challenged the special education programs recommended for the student for the 2021-22 and 2022-23 school years, and had alleged that the district failed to provide them with a meaningful opportunity to participate in the "IEP process by ignoring their concerns for developing an appropriate program, placement and services" (IHO Decision at p. 8). The IHO also noted that the parents alleged that the district failed to develop appropriate annual goals and failed to offer or provide "appropriate language and reading instruction" to the student (id.).

In the next section of the decision—the findings of fact—the IHO described some of the testimony elicited from the parent at the impartial hearing, information gleaned from the parents' privately-obtained September 2018 psychological evaluation of the student and testimony by the evaluator who conducted that evaluation, and information from the district's April 2021 psychoeducational evaluation of the student as well as some of the testimony by the district school

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<sup>15</sup> Pursuant to State regulation, a "transcript or a written summary of the prehearing conference shall be entered into the record by the [IHO]" (8 NYCRR 200.5[j][3][xi]). Although the IHO mentioned in the decision that a prehearing conference took place, the hearing record does not include a transcript or written summary of the prehearing conference. The IHO is reminded to comply with State regulation in the future.

<sup>16</sup> While the majority of the transcripts from the impartial hearing in this matter were consecutively paginated throughout the impartial hearing, two transcripts were not consecutively paginated and resulted in some transcript pages that were duplicative. Specifically, the February 26, 2024 transcript includes pages 1087 through 1158 and the next transcript, dated March 13, 2024, includes pages 1087 through 1281; thereafter, the transcripts are consecutively paginated from page 1282 through 1696. For clarity, transcript citations in this decision will refer to the date of the impartial hearing and the page number, such as "Feb. 26, 2024 Tr. p. 1122," when necessary to cite to a transcript page that is duplicated in the February and March 2024 transcripts.

psychologist who conducted that evaluation (see IHO Decision at pp. 9-18). Within this section of the decision, the IHO characterized the parent as a "strong and credible witness" (id. at p. 11).

After setting forth the legal framework, the IHO turned to the 2021-22 school year, indicating that the "primary issue" focused on whether the district "appropriately identified" the student's needs and whether the district developed a program to address those needs (IHO Decision at pp. 18-21). According to the IHO, the parents asserted that the district ignored the student's "academic struggles as a result of his dyslexia," which "resulted in years of lack of progress," and moreover, that the student's unaddressed learning disability manifested in the "development of years of anxiety" in the student (id. at p. 18).

The IHO noted that, in support of its position that the district offered the student a FAPE for the 2021-22 school year, the district presented the district school psychologist who attended the June 2021 CSE meeting and who had conducted the student's April 2021 psychoeducational evaluation (see IHO Decision at p. 21). The IHO thereafter reviewed the testimonial evidence elicited and specifically noted that the June 2021 IEP reflected the parents' concerns about the "student's struggles," and in response to those concerns, the CSE had recommended 12-month programming (id. at pp. 21-26).<sup>17</sup> In addition, the IHO found that it was "clear that the CSE was aware of the parents (sic) concerns about [the student's] reading deficits and academic struggles," but the question to be answered was whether the June 2021 IEP was "actually sufficient to address those needs" (id. at p. 26). Next, the IHO found that the June 2021 IEP included a "description of [the student's] classroom functioning," which indicated that, based on teacher report, the student was "reading at a Fountas and Pinnell Independent and Instructional Level U"; the student was a "'hardworking and motivated reader' who consistently trie[d] his best"; and the student could properly retell "what he read but struggle[d] with inferential and higher level questions" (id. at pp. 26-27). Additionally, the IEP noted that the student solidly understood "small group reading lessons," the student "'benefit[ed] from 1:1 and small group support in reading in order to apply strategies taught,'" and in resource room, the student was provided with "multi-sensory instruction in decoding" but continued to received report card scores indicating that he had partially met the learning standards in "decoding and fluency" (id. at p. 27).

Next, the IHO described some of the student's testing results from the parents' June 2021 psychoeducational evaluation (see IHO Decision at pp. 27-29). The IHO noted that, based on the student's results, the evaluator "told [his] parents that he w[ould] continue to not make progress

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<sup>17</sup> Within this section of the decision, the IHO found that the district school psychologist "dismissed" the scores the student obtained in decoding and explained that other factors were to blame for his low scores (IHO Decision at p. 22, citing Tr. p. 48). However, this mischaracterizes or misstates the testimony. The district school psychologist testified that the "comprehensive test of phonological processing" measured the student's "understanding of sounds that ma[d]e up words" and specifically noted that he was asked to "blend sounds," "identify words when sounds were removed," "recite non-words and words" (i.e., "typical words"), and "identify letters and numbers in rapid succession" (Tr. p. 47). The school psychologist testified that the student's scores fell within the "very poor to below average range," and when asked if she had an opinion regarding why the student did not perform well on this assessment, she explained that it "tap[ped] into . . . his area of struggle with regards to reading," but "other factors . . . had to be taken into account during this time" (Tr. pp. 47-48). She noted that "[t]esting was done with masks, with a Plexiglass barrier," and she was an "unfamiliar adult" to the student; however, although "some extraneous factors" existed, the school psychologist testified that this assessment "really look[ed] at the area of weakness that required additional support" (Tr. p. 48).

with only a handful of hours of reading instruction" and the student "needed a program which would address his needs throughout the school day" (*id.* at p. 29). The IHO further noted that the parents felt that the district's program for the 2021-22 school year was not the program the student needed (*id.* at pp. 28-29). Next, the IHO noted that the "district was well aware of the parents' concerns as expressed" in the December 2020 updated social history, which specifically indicated that they were concerned about the student's reading skills; the student's continued struggle in "decoding, fluency and rapid naming"; his weaknesses in writing, spelling, punctuation, and capitalization"; and his difficulty with organization (*id.* at p. 20). According to the IHO, the evaluator found that the student's "greatest challenge was his dyslexia and writing struggles" (*id.*).<sup>18</sup> The IHO noted that the evaluator recommended that the parents place the student in a "specialized school for students with language based learning disabilities where staff would know how to manage the breadth and depth of his unique needs" (*id.*).<sup>19</sup>

With regard to the June 2021 CSE meeting, the IHO found that it was properly composed and included a representative from the district middle school the student was expected to attend for sixth grade during the 2021-22 school year (see IHO Decision at pp. 29-30; Dist. Ex. 10 at p. 1). As noted by the IHO, the CSE chairperson testified that the student had "received Orton-Gillingham based reading instruction when he was in fifth grade, as part of his small group special class" (IHO Decision at p. 30). The IHO continued to recount portions of the CSE chairperson's testimony, noting in particular what the chairperson learned about the student's strengths and weaknesses at the June 2021 meeting, as well as noting the chairperson's viewpoint that the student's working memory had a "significant impact on [his] ability to make progress at a quick clip for some of those reading skills" (*id.*). According to the CSE chairperson's testimony, he—and the June 2021 CSE—viewed the student "more holistically," and the CSE believed the student had met "with success based on the general education curriculum standards" (*id.*). Turning to the reading instruction recommended in the June 2021 IEP for the 2021-22 school year, the CSE chairperson indicated that it "would be 'targeted special education scientifically based multisensory reading supports, . . . Lindamood-Bell, which [wa]s more of a visually oriented strategy, . . . Orton Gillingham, . . . and Wilson'" (*id.*). The CSE chairperson also testified that "[t]here was no specific discussion at the CSE meeting of the reading instruction" and that the student would have

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<sup>18</sup> The IHO indicated that, at the time of the district's reevaluation, the student had not yet been diagnosed as having "dyslexia" or an "aud[i]t[o]ry processing disorder" (see IHO Decision at p. 29).

<sup>19</sup> The IHO also pointed to a portion of the district school psychologist's testimony during cross-examination and opined that, based on this testimony, the school psychologist "did not appear to be too concerned that the anxiety described by the parents during her evaluation was elevated as compared to what was being reported by school personnel" (IHO Decision at p. 29). However, this mischaracterizes or oversimplifies the witness's testimony. At the impartial hearing, the school psychologist was asked how she had viewed the BASC scores reported by the parents about the student's behavior at home when compared to the BASC scores reported by the school personnel related to the student's behavior at school (see Tr. pp. 157-58). Initially, the district school psychologist testified that she was not "in [the student's] home" and therefore, could not "speak to their observations" but she could "speak to [her own] observations within the school day, in the school setting" (Tr. p. 158). When asked if there was "cause for concern" based on what the parents had reported, the school psychologist explained that the parents had reported "some scores that were discrepant from the school BASC," which had arisen from "two different environments, [and] three different observers and reporters" (Tr. pp. 158-59). She then clarified that the parents "did identify conduct problems and aggression as areas of elevation, which were not consistent with the school observation" (Tr. p. 159).

"continued to receive Academic Intervention Services ('AIS') for mathematics while in middle school" during the 2021-22 school year (id.).

Next, the IHO turned to the November 2021 CSE meeting, which reconvened to review the parents' privately-obtained evaluations (i.e., the June 2021 psychoeducational evaluation and the May 2021 auditory processing evaluation) (see IHO Decision at pp. 30-31). The CSE chairperson testified that the CSE reviewed the annual goals in the IEP and had "agreed that no changes needed to be made" (id. at p. 31). The IHO noted that the November 2021 IEP documented the concerns expressed by the parent attending the meeting, including the parent's belief that the "recommended program was insufficient to address [the student's] needs as he was reading at a 2<sup>nd</sup> and 3<sup>rd</sup> grade level" (id., citing Dist. Ex. 13).

With respect to the December 2020 classroom observation reviewed by the June 2021 CSE, the IHO indicated that, based on the parent's testimony, it was consistent with what the parent had "observed when [the student] was being instructed" (IHO Decision at p. 31). According to the parent's testimony, the student, during the 2020-21 school year, was "'keeping it together in school all day, but the cognitive load was so hard for him, and he was beginning to feel more incompetent, beginning to feel like he was stupid, and he would just come home and we were his safe space, and he would lose it'" (id.). The IHO also noted that, based on the parent's testimony, the district recommended the same "ICT class" for the student where he made "little progress" (id.). With respect to reading instruction, the parent testified that "she had a lot of questions because of all that had been revealed in the testing"; she also testified that the student would receive the "'Wilson reading program'" if he attended the district middle school for sixth grade, but "'it would have been prior to school starting'" as an "'extension of his school day'" (id.). According to the parent's testimony, she was concerned about the recommended program "because the testing had revealed 'significant deficits'" and the student had not made progress in the same program (id.).

Next, the IHO found that the parent "asked a lot of questions at the CSE meeting and [had] expressed her concerns," including that the district testing had revealed a "full standard deviation drop" in the student's IQ score (IHO Decision at p. 32). The parent also testified about the student's difficulty with reading fluency, decoding, reading comprehension, executive functioning, and anxiety (id.). Due to concerns about the program recommended at the June 2021 CSE meeting, the parent testified that they contacted the evaluator who conducted the student's privately-obtained psychoeducational evaluation to "discuss options" and then researched programs that could "address the concerns they had to address [the student's] dyslexia," which ultimately led to the decision to unilaterally place the student at Eagle Hill for the 2021-22 school year (id. at pp. 32-33).

Turning to the 2022-23 school year, the IHO indicated that the May 2022 CSE modified the recommended program from ICT services to a 15:1 special class placement for instruction in ELA (90 minutes per day), mathematics (45 minutes per day), and ICT services for instruction in science and social studies (each for 45 minutes per day) (see IHO Decision at p. 34). In addition, the IHO noted that the May 2022 CSE recommended OT services and 12-month programming, consisting of a "summer reading class in a small group" (3:1 ratio) (id.). The IHO further noted that, based on the parent's testimony, the "CSE felt that since [the student] was receiving an increased level of support at Eagle Hill, he would need more support in the [d]istrict" (id.). The IHO indicated that the parent had expressed "her concerns" at the May 2022 CSE meeting about

placing the student with a "suitable group of students who shared his areas of need," but was reportedly told by the CSE chairperson that it was "'not something they could possibl[y] do'" (id. at pp. 34-35). According to the parent's testimony, however, the CSE indicted that "they could try but not guarantee an appropriate peer group" and the parent was "concerned that [the student] would be placed with student's (sic) who did not have dyslexia but were in the small class to address behavioral difficulties" (id. at p. 35).

The IHO found that, based on the parent's testimony, she did not "believe the program recommendations would provide [the student] with the support he needed" (IHO Decision at p. 35). The parent also testified that, at the May 2022 CSE meeting, she indicated that the student "continued to need direct instruction in his area of need which would not be available in the ICT classes or small classes" and while the student had made "'nice progress at Eagle Hill, he still struggle[d] in these areas'" and required "direct, explicit instruction for his decoding, for the mechanics, for his writing, [and] for the decoding" (id.). As a result, the parents decided to unilaterally place the student at Eagle Hill for the 2022-23 school year (id.).

Based on the foregoing, the IHO concluded that the district failed to sustain its burden to establish that "it had acted appropriately regarding [the student's] education" for the 2021-22 and 2022-23 school years (IHO Decision at p. 36). The IHO found that although the district reviewed "significant evidence concerning the student's functioning" at both the June 2021 and November 2021 CSE meetings, "it [wa]s clear that the [d]istrict staff did not have the program available which [the student] needed" (id.). According to the IHO, the "recommendations were essentially the same program that [the student] had been receiving in prior school years, but failed to make progress" (id.).

Next, the IHO indicated that the district "attempted to demonstrate that the student was making progress, but there was little attention given to the genuine and well expressed concerns of the parents that [the student] was struggling academically and emotionally because they simply had not taught him to read" (IHO Decision at p. 36). The IHO found that the "instruction provided" to the student was "not designed to meet this particular student's well documented needs," and the parent had testified "about the struggles the student was having, even with the support provided" (id.). The IHO noted that the parent's testimony "was compelling" and she had described the student's inability to complete homework independently and the excessive amount of time it took the student to complete homework (id. at pp. 36-37). The IHO further noted that the district did not present any evidence contradicting that the student had been diagnosed as having a language-based learning disability and a language processing disorder, and similarly failed to present any evidence that the "recommended program would be able to remediate the deficits" described by the private evaluator (id. at p. 37).

Next, the IHO found that the district was "unable to overcome the discrepancy between what was being reported by school personnel working with [the student] and the parent's testimony concerning the intense struggles observed at home" (IHO Decision at p. 37). According to the IHO, it was "apparent from the evidence that the [d]istrict was inflating how the student was performing and failed to address the legitimate concerns expressed by the parent of the student's lack of participation and inability to read" (id.). Consequently, the IHO opined that the "CSE made decisions based upon a self-serving fiction which was repeatedly challenged by the parents but not addressed" (id.).

Having found that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years, the IHO then analyzed whether Eagle Hill was an appropriate unilateral placement and whether equitable considerations weighed in favor of the parents' requested relief (see IHO Decision at pp. 37-40). The IHO found in favor of the parents on both questions, and directed the district to reimburse the parents for the costs of the student's tuition at Eagle Hill for the 2021-22 (\$71,150.00) and 2022-23 (\$23,650.00) school years (*id.* at p. 41). The IHO also denied "[a]ll other requested relief" (*id.*).

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

The district appeals, alleging that the IHO erred by finding that the district failed to offer the student a FAPE in the LRE for the 2021-22 and 2022-23 school years, that Eagle Hill was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' requested relief. More specifically, the district contends that, with respect to the FAPE determinations, the IHO erred by finding that the student failed to make progress in previous school years and that the district had failed to teach the student to read. The district asserts that the IHO erred by concluding that the student's recommended programs were essentially the same as previous school years. In addition, the district argues that the IHO erred by overemphasizing the parent's testimony, by failing to afford due weight to the district's evidence, and by failing to sufficiently analyze the evidence in the hearing record in reaching her conclusions. Next, the district contends that the evidence in the hearing record supports a finding that the parents were provided with a meaningful opportunity to participate in the decision-making process in the development of the student's IEPs; the annual goals addressed the student's various special education needs, including reading, writing, executive functioning, and motor needs for both school years; the May 2022 IEP included a special class placement for mathematics, as well as annual goals; and the district offered the student appropriate reading and writing instruction through scientifically based reading instruction and small group instruction. Moreover, the district argues that, contrary to the IHO's finding, the district offered counseling services to address the concerns reported by the parents with regard to the student's behaviors at home.

Next, the district argues that the IHO improperly concluded that Eagle Hill was an appropriate unilateral placement for the 2021-22 and 2022-23 school years and that equitable considerations weighed in favor of the parents' requested relief.

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's decision in its entirety. Additionally, the parents assert that the district failed to timely initiate the appeal.<sup>20</sup>

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<sup>20</sup> To the extent that the parents did not appeal or otherwise challenge the IHO's determinations denying their request to be reimbursed for the costs of the privately-obtained June 2021 psychoeducational evaluation of the student and for the costs of the student's privately-obtained tutoring services—as adverse findings—these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see *M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).



In a reply to the parents' answer, the district asserts that the request for review was timely served and generally argues in further support of its appeal.<sup>21</sup>

## 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

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<sup>21</sup> Contrary to the parents' assertion, the district timely initiated the appeal in this matter. An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a notice of request for review and a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). Here, as described by the district in its reply, the final day to timely serve the request for review fell on a Saturday, which, consistent with State Regulation, permitted the district to timely serve the request for review on the following Monday, or December 30, 2024 (see Reply ¶ 1). Therefore, the parents' argument is without merit and must be dismissed.

300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>22</sup>

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-

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<sup>22</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

## **VI. Discussion**

### **A. Preliminary Matters—IHO Bias**

The district asserts that the IHO made "several arbitrary and presumably biased statements throughout her decision" (Req. for Rev. ¶ 6). More specifically, the district points to the weight the IHO afforded to portions of the parent's testimony compared to portions of the district school psychologist's testimony and the April 2021 psychological evaluation results (see Dist. Mem. of Law at pp. 9-12). For example, the district argues that by overemphasizing the parent's testimony and "granting exorbitant weight" to her testimony, the IHO ignored other relevant and credible evidence presented by the district, such as testimony by district staff who had actually worked with the student and were familiar with the district's programs and services (id. at p. 9). The district also argues that the IHO failed to acknowledge in the decision that the district had provided the student with AIS throughout elementary school and that the student had benefitted from those services (id. at p. 10). Next, the district argues that, while focusing on evaluative information obtained prior to the school years at issue and the parent's testimony about a comment made by a district elementary school principal in or around 2018 describing the student as "'lazy,'" the IHO ignored contradictory evidence in the hearing record describing the student as "'hardworking' and 'detail oriented' with a 'meticulous answering style,'" which the district school psychologist noted in the April 2021 psychological evaluation report (id. at pp. 10-11). Finally, the district asserts that the IHO's commentary about the district school psychologist's findings about the student based on his testing results demonstrated "extreme bias" against the district and ignored the fact that the hearing record, as a whole, supported and corroborated the school psychologist's testing results (id. at pp. 11-12).

In response, the parents argue that the IHO made "objective statements throughout her decision" and her "statements [we]re rooted in the [hearing] record and in the law" (Answer ¶ 8). Additionally, the parents contend that the IHO gave "proper weight" to the parents' witnesses and the district's witnesses, as well as with regard to the district's documentary evidence (Parent Mem. of Law at p. 11). In support, the parents assert that they testified "with specifics" about the student's "long standing learning challenges and his challenges in the [d]istrict which precipitated his placement at Eagle Hill," and had "expressed concern at the June 2021 IEP meeting about [d]istrict testing which found a full standard deviation drop in [the student's] IQ [score]," which demonstrated the parent's credibility as a witness (id.). Notwithstanding the parents' concern about the drop in IQ score, they contend that the same information did not cause any sense of alarm

among the district staff and the district continued to recommend the same program for the student at the district (id.).

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]; C.E. v. Chappaqua Cent. Sch. Dist., 695 Fed. App'x 621, 625 [2d Cir. June 14, 2017]).

Generally speaking, a party's disagreement with the conclusion(s) reached by the IHO does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083). However, the district's concerns with the IHO's decision do not arise from adverse rulings; instead, the district directly challenges the weight the IHO afforded to evidence in the hearing record and the conclusions drawn therefrom, which is precisely the reason for the district's appeal. Therefore, while the IHO's opinions or commentaries about the evidence presented are not consistent with the actual evidence in the hearing record as described below, this, alone, does not demonstrate bias against the district.

## **B. 2020-21 School Year**

While the district's special education program recommendations for the 2020-21 school year are not at issue, a review thereof provides a relevant backdrop for, and facilitates the discussion regarding, whether the district offered the student a FAPE in the LRE for the 2021-22 school year, and in part, for the 2022-23 school year. Additionally, although the IHO did not issue any direct determinations about whether the district offered the student a FAPE in the LRE for the 2021-22 school year, her conclusions with respect to the 2021-22 and 2022-23 school years appear to be tethered to her determinations that the district's recommended programs for the school years at issue consisted of the same special education program the student had received in previous school years and had not resulted in any progress (see IHO Decision at pp. 36-37).

As previously noted, during the 2020-21 school year, the student attended fifth grade at a district public school and received a special education program consisting of ICT services for instruction in ELA (90 minutes per week), resource room services (three 30-minute sessions per

week in a 5:1 group), OT (one 30-minute session per week individually), indirect consultant teacher services (one 90-minute session per week), program modification and accommodations, and testing accommodations (see Dist. Ex. 5 at p. 1; see also Parent Exs. A ¶¶ 56, 58; C at p. 9). The evidence further reflects that the student received AIS consisting of speech-language therapy and mathematics during the 2020-21 school year (see Tr. p. 614; Dist. Ex. 5 at p. 1). In addition, the evidence demonstrates that the student's annual goals for the 2020-21 school year targeted his needs in the areas of study skills, reading, writing, and motor skills (see Parent Ex. C at p. 9-10; see generally Dist. Ex. 24).<sup>23</sup>

At the impartial hearing, the district presented several witnesses who worked directly with the student in fifth grade during the 2020-21 school year, including his regular education teacher, the special education teacher who delivered ICT services for ELA instruction (co-teacher or special education teacher), and the special education teacher who delivered resource room services (resource room teacher). In addition to providing direct instruction to the student, evidence in the hearing record reflects that all three of these teachers participated in the student's June 2021 CSE meeting to develop his IEP for the 2021-22 school year (sixth grade) (see Dist. Ex. 10 at p. 1).

As the co-teacher in the student's fifth grade ICT setting for instruction in ELA, the special education teacher testified that her responsibilities generally included working alongside the regular education teacher for planning, implementing, and modifying the curriculum for students with IEPs, such as for the student in this matter, as well as keeping in mind the students' modifications and accommodations in order for them to access the curriculum (Tr. pp. 602-03; see Tr. pp. 647-48).<sup>24</sup> She explained that the fifth grade curriculum included using "Teachers College for reading and writing" and for mathematics, they used "Eureka and Great Minds" (Tr. p. 607). She described "Teachers College" as a "literacy program" with a "process oriented curriculum," which was "step by step for some students" (id.). The special education teacher testified that as the co-teacher for ELA instruction, she delivered services to the student in the areas of reading and writing (see Tr. p. 609). In addition to describing the student's strengths, she also described the student's academic needs as phonological awareness and writing (i.e., conventions, mechanics, and spelling); she also testified that the student's needs in reading were addressed in resource room (see Tr. pp. 610-12). She added that the student was able to access the skills and strategies taught

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<sup>23</sup> As part of the parents' privately-obtained auditory processing evaluation completed in May 2021, the parent reported that the student received "private reading support services utilizing the Barton method twice per week" (Dist. Ex. 7 at p. 3). The evidence in the hearing record reveals that the parents initially reached out to obtain private tutoring services for the student in or around August 2020 (see Tr. p. 1371). However, due to various scheduling issues, the student did not begin receiving private reading services until January 2021 and although the tutor recommended three sessions per week, logistics and financial concerns resulted in the student receiving two sessions per week of private services for 55 to 60 minutes per session (see Tr. pp. 1371-72, 1374-75, 1378). At the impartial hearing, the private tutor testified that she used Orton-Gillingham with the student to deliver services, which, due to the COVID-19 pandemic, resulted in the private tutor using the "Barton platform" to more easily access and upload lessons (Tr. p. 1420; see Tr. pp. 1421-22, 1439-40). The private tutor also testified that she continued to provide services to the student through August 2021 (see Tr. p. 1439). During cross-examination, the private tutor clarified that she delivered a "structured literacy program" that "lapse[d] into Orton-Gillingham" and that Orton-Gillingham was the "overarching methodology" for the actual program she used, which was the "Neuhaus Multisensory" structured literacy program (Tr. pp. 1448-50).

<sup>24</sup> The special education teacher was dually certified in both general education and special education (see Tr. p. 600).

in the resource room for reading into the writing and reading periods delivered in the "co-taught setting" (Tr. pp. 611-12).

To support the student in writing, the special education teacher pulled him into a small group after the "mini-lesson was delivered" to the entire group (Tr. p. 612). The special education teacher targeted the student's areas of need identified in his IEP and worked with the student to achieve his annual goals (id.). The special education teacher also used an assistive technology platform to help the student access the curriculum (see Tr. pp. 612-13). According to her testimony, the student "benefitted immensely from" using assistive technology in writing because it allowed him to use tools, like spell check, to bridge or remove obstacles in his writing process, such as spelling and punctuation (see Tr. p. 618).

With regard to reading, the special education teacher testified that, based on her observations in the classroom, the student had "strong" comprehension skills, and during the "co-taught reading block" in the regular education classroom, he was "able to access the curriculum" (Tr. pp. 635-36). She also noted that the student's areas of need included "decoding and fluency, which [wa]s something" not worked on in the classroom because those were skills addressed in resource room (Tr. p. 636). According to the special education teacher, the student could, however, "carryover" some of his decoding and fluency work done in resource room to the small group sessions, and she was able to "piggyback or echo" what was done in resource room to assist the student in implementing strategies learned in resource room (Tr. pp. 636-37). For example, the special education would prompt the student to "tap out the sounds in each syllable" when he encountered a word he did not know how to spell, as this was a strategy taught in resource room (Tr. p. 638). In addition, the special education teacher testified that the student "really accessed the fifth grade curriculum" due to his strong comprehension skills and verbal skills (Tr. p. 637).

In reviewing the student's annual goals for the 2020-21 school year, the special education teacher explained that, due to the COVID-19 pandemic, homework was not mandatory; therefore, the student's annual goals for study skills targeting homework were not assessed (see Tr. p. 616; Dist. Ex. 24 at p. 3). She further explained that the student could complete independent class work, but still needed reminders and program modifications (refocusing, redirection) to do so (see Tr. pp. 616-17). With respect to the student's annual goals for writing, the special education teacher testified that she was responsible for implementing these annual goals with the student (see Tr. pp. 618-19). The first annual goal addressed spelling, which she and the student's regular education teacher assessed through writing samples and "benchmark assessments" (Tr. p. 619). To implement the annual goal the student was assessed before, during, and after the school year started and the curriculum was used to determine where the student "might fall" in terms of "grade level" for spelling (id.; see Dist. Ex. 24 at p. 5). According to the special education teacher, the student achieved this annual goal, noting that he could "identify his spelling errors specifically in his own writing" and that using assistive technology was helpful (Tr. p. 620). Turning to the second annual goal for writing targeting punctuation and capitalization, the special education teacher testified that she relied on the description of the student's present levels of performance in his IEP for the 2020-21 school year to determine where the student "left off from the prior year" so she could "continue to instruct [him] and assess [him] moving forward" on this annual goal (see Tr. pp. 620-21; Dist. Ex. 24 at p. 5). The student also achieved the second annual goal (see Tr. p. 621; Dist. Ex. 24 at p. 5). Finally, with respect to the student's third annual goal for writing addressing his ability to write a three paragraph essay, the special education teacher testified that it was an

"ambitious" goal given that writing, overall, was "laborious" and a nonpreferred task for the student; however, the student achieved this annual goal with support (Tr. pp. 621-22; see Dist. Ex. 24 at p. 5).<sup>25</sup>

Turning to the student's report card for the 2020-21 school year, the special education teacher testified that the student's regular education classroom teacher was responsible for recording his grades and that his grades reflected assessments made on a fifth grade level (see Tr. pp. 624-25; Dist. Ex. 9 at pp. 1-2). She noted that this was in contrast to the student's achievement of his annual goals in writing, which, when embedded with a particular grade level (i.e., third grade level), indicated that the student had achieved the particular annual goal at the grade level embedded within the annual goal and not at a fifth grade level (see Tr. p. 625). When asked to explain why the student received a grade of "1" in his ability to apply grade level conventions when writing on his report card, the special education teacher testified that it was because the student was being assessed at a fifth grade level for the report card (Tr. p. 626). She noted that "benchmark assessments" were used as part of the assessment process (id.). The special education teacher confirmed that the student's report card grades indicating that he was "meeting the learning standards" or "partially meeting the learning standards" were accurate (id.; see Dist. Ex. 9 at pp. 1-2). She also confirmed that, in mathematics, the grades the student received indicating that he was "meeting the learning standards" meant that he was meeting the learning standards on a fifth grade level (Tr. pp. 626-27; see Dist. Ex. 25 at p. 1). Next, the special education teacher agreed with the assessment of the student's behaviors that promoted learning on the report card, noting that he "consistently met these standards" (Tr. p. 627). She indicated that the student was "engaged" in the classroom and in small groups, he "brought a lot of humor to [the] groups," he possessed a lot of "background knowledge," and he made "meaningful dialogue with peers and [with her]" (id.). The special education teacher also agreed that the student was appropriately placed in the classroom, testifying that the student's report card reflected that he followed the rules, took responsibility for his actions, listened while others spoke, followed directions, cooperated, participated, and "really ha[d] a lot of strengths that he brought to [the] classroom" (Tr. pp. 627-28). In addition, the special education teacher testified that, during the 2020-21 school year, she never questioned whether the student required a placement outside the district because he was "meeting grade level expectations in a lot of areas," and he had "so many strengths that he really was flourishing inside this type of placement, with gen[eral] ed[ucation] students, [and] with other IEP students" (Tr. p. 628).

As noted above, the student's regular education classroom teacher during fifth grade (2020-21 school year) also testified at the impartial hearing. She testified that her fifth grade classroom consisted of approximately 22 students and "other support staff, that worked with [her] throughout the day," including her "co-teacher" (i.e., special education teacher) (Tr. pp. 847-48).<sup>26</sup> The regular education teacher characterized the 2020-21 school year as "atypical," because the school year began with remote instruction and therefore, it was a "little difficult forming a rapport with the

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<sup>25</sup> Although the special education teacher was not responsible for implementing the student's motor skills annual goals, she noted that the student's visual perceptual skills impacted his writing (see Tr. pp. 622-24; Dist. Ex. 24 at p. 6).

<sup>26</sup> The regular education teacher testified that, when the district moved to hybrid instruction, the classroom consisted of 22 students total, but the students were divided into groups of 10 or 11 (see Tr. p. 873).

students right away" due to meeting her students "on-line for the first day of school" (Tr. pp. 848-49). With respect to the student in this matter, the regular education teacher described one his strengths as "want[ing] to learn," noting that he would raise his hand to participate in mini-lessons (Tr. p. 849). As another strength, she noted that the student was "very verbal" and "liked to talk things out," such as in mathematics, "which helped him understand what he was learning a little bit more" (Tr. pp. 849-50). In addition, the regular education teacher testified that the student was supported in the 90-minute reading and writing block (i.e., ELA) by her co-teacher, and the student also received support in reading and writing outside the classroom from his resource room teacher (see Tr. pp. 850-51, 855).<sup>27</sup> To support the student during the school day, the regular education teacher explained that, for example in mathematics, she would teach the entire classroom a mini-lesson, and if the AIS mathematics specialist teacher was in the classroom, the AIS teacher would support students with AIS services; otherwise, when the AIS teacher was not in the classroom for mathematics, she, herself, would "pull small groups" and "work individually with students, depending on their needs, their fluency of facts" (Tr. pp. 855-56). During the 2020-21 school year, the regular education teacher testified that the student was "meeting grade level expectations" in mathematics (Tr. p. 856).

In other core academic classes, such as science and social studies when the co-teacher was not in the classroom to support the student in reading and writing, the regular education teacher testified that she would provide the student with support in these areas by using "different resources" or "tools," such as providing the student with a graphic organizer to help the student with "organization," "vocabulary words," "elements of fiction," or "writing a literary essay" (Tr. pp. 862-63). She also differentiated instruction for the students depending on their needs, such as using "multiplication tables" or "calculators" for this student's weakness in "fluency of facts" (Tr. p. 864).

Turning to the student's 2020-21 report card, the regular education teacher explained that, in ELA, the student's grades reflected that he was "meeting grade level expectations in most areas" (Tr. p. 865; see Dist. Ex. 9 at p. 1). Similarly, she noted that the student's report card grades in social studies reflected that he was "meeting grade level expectations" and further noted that the student's "wonderful commercial" on a social studies topic stood out to her with respect to his class participation and enthusiasm for the assignment (Tr. pp. 866-67; see Dist. Ex. 9 at p. 1). Socially, she described the student as having "wonderful" self-esteem and confidence, as well as having "lots of friends" (Tr. p. 867).

Next, the regular education teacher testified that, in mathematics, the student's report card grades reflected that he was "meeting grade level expectations," and his receipt of "2s" in the third trimester in "multistep word problems" and "performing operations with whole numbers" correlated to the increased difficulty of the curriculum as the school year progressed, as well as to the student's "difficulty with organization" and the "very visual" nature of "multidigit numbers" (Tr. pp. 868-69; see Dist. Ex. 9 at p. 1). The student found using graph paper to align numbers was helpful and "talking out the problem" also proved helpful (Tr. pp. 868-69). In science, the regular education teacher testified that the student's report card grades reflected that he was

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<sup>27</sup> The regular education teacher described the student's "reading profile" as needing "some phonological support," but added that his "literal comprehension and his inferential comprehension . . . maintain[ed] grade level expectations" (Tr. pp. 875-76).



"meeting grade level expectations," and when he required support in the "writing of an experiment," the special education teachers helped him (Tr. p. 869; see Dist. Ex. 9 at p. 1).

The regular education teacher also testified that she believed the student was appropriately placed in her classroom during the 2020-21 school year because he was "learning" and "thriving," and "it was a good year for him academically" (Tr. pp. 867-68). Later, she testified that the student was appropriately placed because he made progress and more specifically, because "children that ha[d] different learning styles, if they're able to be with other students, whether they ha[d] IEPs or not, so that they ha[d] role models and they [we]re able to access the general education curriculum, then children should be included" (Tr. pp. 869-70).

Next, the student's resource room teacher testified at the impartial hearing. As previously indicated, the resource room teacher had been involved with delivering special education services to the student in third and fourth grade (see Tr. pp. 693, 695-96, 701-02, 705, 708-09, 776-77). Evidence in the hearing record demonstrates that the resource room teacher was certified in reading for kindergarten through sixth grade, and had "training in two Orton-Gillingham methodologies," "preventing academic failure [PAF]" and the "[Institute for Multisensory Education (ISME)]" (Tr. pp. 697-98). Throughout her work with the student from third grade through fifth grade, the evidence reflects that she addressed the student's needs in writing during ELA instruction and focused on his needs in reading during resource room in fourth and fifth grades, as well as when she delivered direct consultant teacher services and resource room services to the student in fourth grade (see Tr. pp. 693, 695-96, 701-02, 705, 708-09, 776-77, 785).<sup>28</sup>

Evidence in the hearing record reveals that the resource room teacher provided the student with a continuity of special education services during third, fourth, and fifth grades at the district. For example, the resource room teacher testified that, as "part of a small group of students during the consultant teacher part of the day" in fourth grade, the student worked on reading fluency and oral reading and built on his "strength in comprehension" (Tr. pp. 705-06). The resource room teacher described the student in fourth grade as a "real leader in the group discussion" and "it was really important for him, despite his difficulties in writing, to be able to jot his ideas and then share his ideas with the group" (Tr. p. 706). She further testified that the small group also provided the student with an opportunity to practice his oral reading daily and "to really target those areas of weakness in his oral reading, which were omissions of those little functional words, like the, is, in or addition of those words or, again, omission or addition of suffixes" (Tr. pp. 706-07). The resource room teacher also testified that the "daily practice" allowed her to "monitor for those types of errors," and the student was able to "develop his skills in oral reading fluency, as well as

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<sup>28</sup> At the impartial hearing, the resource room teacher testified that, during ELA instruction in third grade, she worked with the student on his annual goals for writing (see Tr. pp. 701-03). The resource room teacher described the student's weaknesses at that time as his "handwriting and spelling," and he needed assistance with "organization of his writing," "writing mechanics," and "checking his work for capitalization and punctuation" (Tr. pp. 703-04). Within the third grade classroom, the resource room teacher testified that she had used "Teachers College units of study"; however, when necessary to modify instruction for the student, she "incorporated aspects of Writing Revolution and the Orton-Gillingham approach" (Tr. p. 704). For example, the resource room teacher explained that "techniques to or strategies to edit his work for spelling and capitalization and punctuation and sentence structure were addressed through specific strategies in the Orton-Gillingham approach" (id.). She also testified that the student made progress during third grade in the areas of "organization, writing mechanics, and spelling" with "teacher support" (Tr. pp. 704-05).

attention to the punctuation . . . and expression" (Tr. p. 707). During resource room, the teacher explained that she used the "Orton-Gillingham methodology to address his decoding needs," and he "worked on the scope and sequence of the Orton-Gillingham program"; in the classroom, she—as his co-teacher for ELA—helped him work on the "application of those skills in connecting them" (*id.*). The resource room teacher confirmed that the student was able to generalize what he learned during his "reading sessions to the classroom setting," with "prompting," in fourth grade (Tr. pp. 707-08). According to the resource room teacher, the student had fit well within the "profile of the classroom" in third and fourth grades, and he "enjoyed being in his group of peers"; she further testified that the student "flourished in the classroom," noting that he was "receptive to teacher support," "easygoing," and "he found his voice in terms of participating in discussion" (Tr. p. 708).<sup>29</sup> In her later testimony, the resource room teacher noted that, in fourth grade, she worked with the student in the classroom in reading in small groups, and that "with teacher support," he was capable of reading "grade level material" (Tr. p. 719).

Similarly, with respect to the resource room services delivered to the student during the 2020-21 school year in fifth grade, the evidence demonstrates that the resource room teacher worked on the student's annual goals in reading and used an "Orton-Gillingham-based program" (Tr. p. 709). More specifically, the program addressed the student's "syllabication needs in a multisensory way," decoding skills, and encoding skills (*id.*). The resource room teacher testified that, overall, "there was some variation to the typical sequence [of the Orton-Gillingham-based program] based on the limitations of the pandemic learning," but the program "incorporate[d] visual, auditory and kinesthetic learning to phonics, sound symbol relationships, for both decoding and encoding in a very systematic, sequential manner" (Tr. p. 710).

The resource room teacher testified that the student made progress in resource room, which occurred three days per week in fifth grade, and the program she used with the student "really capitalized on his auditory strengths to be able to participate in classroom learning" while simultaneously "addressing those specific needs in reading" (Tr. p. 710). According to the evidence in the hearing record, the student made progress in reading, improving from a Fountas & Pinnell level P (mid-third-grade level) at the end of fourth grade (May 2020) to a Fountas & Pinnell level U (mid-fifth-grade level) by the time of the June 2021 CSE meeting (*see* Tr. p. 717; Parent Ex. A ¶ 57; Dist. Ex. 10 at pp. 7-8). Additionally, the resource room teacher testified that the student was "capable of reading on [grade] level material with teacher support" during fifth grade (Tr. pp. 718-19). During cross-examination, the resource room teacher explained that, although the student was at or near grade level expectations in reading, she understood that he did not perform at grade level expectations on standardized assessments because the student "did have gaps in his learning" and thus, had "specific areas of need, specifically in his phonological processing, that would not have been at grade level, and that[ wa]s indicated by the standardized testing" (Tr. p. 772). However, she further clarified that the student was "able to compensate well and to use contextual cues in order to read efficiently enough to read middle of fifth grade text by the end of his fifth grade year" (*id.*). The resource room teacher also testified that, by "context cue," she meant that the student could "gain meaning from the text," noting that he was a "bright

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<sup>29</sup> Based on the parents' own allegations in the due process complaint notice, at the time of the May 2020 CSE meeting—or, the end of fourth grade—the student was "at a middle of third (3rd) grade reading level" or a "level P" (Parent Ex. A ¶ 57). The June 2021 IEP similarly reflects that, on a district-wide assessment administered on February 24, 2020, the student's reading level was at a Fountas & Pinnell level "P" (*see* Dist. Ex. 10 at pp. 7-8).

student, with strong comprehension skills," and thus, he was "often able to derive meaning from the words in the sentences, and that would allow him to decode an unfamiliar word" (Tr. p. 773). She also agreed that the scores the student achieved on the KTEA-3 in March 2021 with regard to decoding, phonological processing, silent reading fluency, and sound symbol composite were of concern (see Tr. pp. 785-86; Dist. Ex. 10 at pp. 3-4). Similarly, she agreed that the student's scores on the KTEA-3 in the areas of writing fluency, written expression, and written language were also of concern (see Tr. pp. 787-88; Dist. Ex. 10 at p. 4). Additionally, the resource room teacher agreed that, at the time of the June 2021 CSE meeting, the student was a "struggling writer"; however, she clarified that, with regard to reading, she perceived the student as "struggling with some aspects of reading," as he had made "considerable progress in reading," but continued to "struggl[e] with [the] phonological basis of decoding" (Tr. p. 788). The resource room teacher testified, however, that although the student was "not thriving in those particular subtests," he was "thriving" overall (Tr. p. 791). The resource room teacher also testified that the student had received "targeted instruction in those areas that he required, but at the same time in the classroom, with a co-teacher, receiv[ed] supplementary supports, to ensure that he would be able to access the curriculum" (id.). When questioned about the student's percentile scores on subtests that fell below the first percentile within the CTOPP-2 and whether these scores indicated that he had been receiving a reading program that "worked" during fifth grade, the resource room teacher responded that his "weaknesses in phonological processing were being addressed through the multisensory program" (Tr. pp. 792-93; see Dist. Ex. 10 at p. 4). She also testified that "careful consideration" had been given to "how much time out of the classroom would be appropriate for [the student] versus time spent in the classroom, receiving the delivery of instruction of a general ed[ucation] student" (Tr. p. 793). As a result, the resource room teacher testified that the "hour and-a-half across the week" of resource room, which "specifically target[ed] the syllabication skills" and "phonological processing," was appropriate and "was working, to an extent" (Tr. pp. 793-95).

In addition to the foregoing, the resource room teacher described "team meetings" she participated in during her work with the student in third, fourth, and fifth grades (Tr. p. 711). She indicated that these "more informal meetings" included special education teachers who worked with the student, the school psychologist, his AIS provider, his occupational therapist and speech-language therapist, and his regular education classroom teacher (Tr. pp. 711-12). She testified that the team meetings were "very frequent" (two to three times per week) and "very impactful in determining the best ways to address [the student's] needs and really maximize his opportunities to be in the classroom and build on his strengths" (Tr. pp. 711-12). Finally, the resource room teacher testified that the student had achieved his annual goals in reading and writing during the 2020-21 school year (see Tr. p. 830).

The student's progress in reading during the 2020-21 school year was also documented within the present levels of performance in his June 2021 IEP. For example, it was reported that, in June 2021, the student's independent and instructional reading levels were at a Fountas & Pinnell level U (see Dist. Ex. 10 at p. 11). In addition, the June 2021 IEP noted that the student demonstrated 98 percent accuracy at this level, reading "primarily in three- or four-word phrase groups with some smooth expression guided by the author's meaning and punctuation" (id.). The IEP also reflected that the student scored "7/10 on the comprehension component which [wa]s considered satisfactory," and he could provide a "proper retell however [he] struggled with the inferential, higher-level questions" (id.). According to the IEP, the student was "very insightful and ha[d] a solid understanding of small group reading lessons," which was "reflected through his

independent work, comments and participation" (*id.*). The student demonstrated "relative strengths" in his comprehension and in his "ability to engage in collaborative discussions to express ideas about a text" (*id.*). Additionally, the IEP indicated that the student benefitted from "1:1 and small group support in reading in order to apply strategies taught" (*id.*).

Based on an independent review of the hearing record, and contrary to any implicit or explicit finding by the IHO with respect to the student's progress during the 2020-21 school year, the evidence demonstrates that the student made progress during fifth grade in the special education program recommended by the district, which included ICT services for instruction in ELA; resource room services; annual goals targeting his identified needs; strategies to address his management needs; supplementary aids and services; program modifications and accommodations; and testing accommodations.

### **C. June 2021, November 2021, and May 2022 CSE Process**

The district contends that the evidence in the hearing record does not support the finding that the parents were deprived of an opportunity to meaningfully participate in the "IEP process" (Req. for Rev. ¶ 16). In support, the district argues that at least one parent attended each of the CSE meetings and "actively participated" when the CSE discussed the student's "strengths and weaknesses, and developed the programs, services and goals for [the student] for the two years at issue" (*id.*). The district also argues that the parents "contributed to the discussion at each of the CSE meetings" (*id.*). Additionally, the district asserts that the information within the June 2021 psychoeducational evaluation report contributed to the "discussion and recommendations" made by the CSE, as well as input from the "private school administrator" with respect to the student's present levels of performance (*id.*).

The parents deny the district's assertions, arguing that the evidence demonstrates that the district predetermined the student's program recommendations because the district failed to consider out-of-district placements at any of the CSE meetings and failed to fully consider the parents' June 2021 psychoeducational evaluation (Answer ¶ 18).<sup>30</sup>

### **1. Parent Participation and Predetermination**

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see *E.H. v. Bd. of Educ.*, 361 Fed. App'x 156, 160 [2d Cir. 2009]; *E.F. v. New York City Dep't of Educ.*, 2013 WL 4495676, at \*17 [E.D.N.Y. Aug. 19, 2013] [holding that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district]

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<sup>30</sup> Generally speaking, both of the parents' arguments more accurately relate to appropriateness of the district's placement recommendation, which will be addressed below.

ultimately decides not to follow the parents' suggestions"]; DiRocco v. Bd. of Educ., 2013 WL 25959, at \*18-\*20 [S.D.N.Y. Jan. 2, 2013]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["[a] professional disagreement is not an IDEA violation"]; Sch. For Language and Comm'n Development v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"])).

To the extent that the IHO found that the parents were deprived of an opportunity to participate in the development of the student's IEPs, the evidence in the hearing record reflects that at least one parent—here, the student's mother—attended the June 2021, November 2021, and May 2022 CSE meetings (see Dist. Exs. 10 at p. 1; 13 at p. 1; 16 at p. 1). In addition, based on her own testimony, the evidence demonstrates that the parent "asked a bunch of questions" at the June 2021 CSE meeting, she testified that she was not "shy" about making statements at the meetings and "routinely shared information" with the CSEs about the student, and the district also gathered information about her concerns prior to the CSE meetings (Tr. pp. 1500, 1505-06, 1640-41, 1647-48). With respect to the June 2021 CSE meeting, the parent testified that she participated in the discussion about the CSE's recommendation for reading instruction in a 3:1 setting and that she had a "lot of questions because of everything that was shown in [the student's] testing" (Tr. pp. 1502-03; see Tr. pp. 1504-05). The parent also testified that the June 2021 CSE captured her concerns about the student's spelling, punctuation, and capitalization skills in writing, his reading fluency his decoding and morphological skills, and his poor executive functioning skills (see Tr. pp. 1510-11; Dist. Ex. 10 at p. 13).

With respect to the November 2021 CSE meeting, the parent confirmed that she attended this meeting (see Tr. pp. 1535-36). She also testified that, while the November 2021 CSE did not discuss the special education program recommendations in the IEP—such as the ICT services or the special class for study skills or the summer program—the November 2021 CSE reviewed the privately-obtained June 2021 psychoeducational evaluation at the meeting (see Tr. pp. 1537-38; Dist. Ex. 13 at pp. 1-2). In addition, the CSE corrected "some errors in the previous IEP, that needed to be corrected, so [they] discussed changing those" (Tr. p. 1538). The parent noted that the CSE discussed the "deficits that were shown" in the evaluation report and "that they were adding them into the IEP" (*id.*). The parent further testified that, at the November 2021 CSE meeting, she "offered up [her] opinion" about a 15:1 special class placement option for the student as not being appropriate for him; she also "offered up [her] opinion" about the ICT services recommendation (Tr. pp. 1540-41). With regard to the parents' concerns noted within the November 2021 IEP, the parent confirmed that "it [wa]s something [she] always br[ought] up . . . in every meeting" (Tr. pp. 1543-44; Dist. Ex. 13 at p. 17). She also confirmed that she participated in the discussion of the CSE "offering the counseling support based on" the June 2021 psychoeducational evaluation report and how she "did not feel that he needed it because, number one, in Eagle Hill it [wa]s embedded in their program" and they "had him in private counseling" so she did not feel it was something needed at school at that time (Tr. pp. 1544-45, 1666; see Dist. Ex. 13 at p. 17).

Turning to the May 2022 CSE meeting, the parent confirmed that she attended this meeting (see Tr. p. 1566; Dist. Ex. 16 at p. 1). Prior to the CSE meeting, the parent had provided the district with a copy of the student's December 2021 Eagle Hill progress report; she also testified that an Eagle Hill "point person" attended the May 2022 CSE meeting (Tr. pp. 1566-68; Dist. Ex. 16 at p.

1). She noted that the Eagle Hill attendee reviewed the progress report with the May 2022 CSE, and the CSE used the information to "update those present levels of function on the IEP and create the goals" (see Tr. pp. 1567, 1569, 1571). According to the parent, she "made [her] concerns" known to the May 2022 CSE about the recommendations for a 15:1 special class placement, including questioning the class profile of the students (Tr. pp. 1575-76). With regard to the continued recommendation of ICT services for instruction in social studies and science, the parent testified that she offered her opinion that it would not be sufficiently supportive for the student, and "stated several times" that she was "not confident that the [d]istrict could be able to appropriately educate" the student (Tr. pp. 1577-78). Finally, as to the student's strengths and the parents' concerns reflected in the May 2022 IEP, the parent testified that, although the two lists had been included in previous IEPs, the information remained accurate and she offered her opinion that the student had "made a nice amount of progress at Eagle Hill" but continued to struggle in these areas and needed "direct, explicit instruction for his decoding, for the mechanics for his writing, [and] for decoding" (Tr. pp. 1578-79; Dist. Ex. 16 at p. 17).

Thus, in light of the foregoing, the evidence in the hearing record demonstrates that, not only did the parents have an opportunity to participate the June 2021, November 2021, and May 2022 CSE meetings held to develop the student's IEPs for the 2021-22 and 2022-23 school year, but also that the parents actively participated at the CSE meetings and provided information about the student's needs and their concerns about recommendations.

Next, as to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. 2015 WL 4597545, at \*8-\*9; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at \*10-\*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at \*18 [S.D.N.Y. Jan. 2, 2013] [alteration in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

Here, the IHO's conclusory finding is not supported by the evidence in the hearing record. Initially, as found by the IHO, predetermination does not arise merely because a CSE recommends a special education program that was similar to previous programs for a student. Rather, as noted above, predetermination occurs when a CSE arrives at the meeting with a preformed opinion concerning the special education program for the student and does not have an open mind to changes that may be needed or to consider input from the parents. Toward this end, the hearing record lacks evidence that either the June 2021, the November 2021, or the May 2022 CSEs arrived at the respective meetings with preformed opinions about the student's special education program for the subsequent school years to the extent that the individual CSEs did not have the requisite open mind to modifications or input from the parents in the development of the student's IEPs, and the IHO did not point to any evidence of such preformed opinions in the decision (see generally

Tr. pp. 1-1086; Feb. 26, 2024 Tr. pp. 1087-1158; Mar. 13, 2024 Tr. pp. 1087-1281; 1282-1696; Parent Exs. A-Z; AA-ZZ; AAA-DDD; Dist. Exs. 1-24; IHO Decision). For example, with respect to the June 2021 CSE meeting, the parent testified that the CSE chairperson was "inputting further information or omitting certain things" from the student's draft IEP at the meeting (Tr. pp. 1500-01). Throughout her testimony about the individual CSE meetings, the parent explained that draft IEPs were displayed onscreen at the meetings as the information was reviewed, and new information added to the IEPs was indicated by "red" typeface, rather than "black" typeface, which indicated that the information had already been part of the student's IEPs (see, e.g., Tr. pp. 1500, 1571-73, 1598, 1652-54). In addition, the parent testified that when she "wanted some things changed" in the student's IEP, the district held another CSE meeting to make those changes (Tr. pp. 1653-54).

In light of the foregoing, and having found that the evidence in the hearing record demonstrates that the parent actively participated in the June 2021, November 2021, and May 2022 CSE meetings, the hearing record supports a finding that the district did not predetermine the student's program recommendations for the 2021-22 and 2022-23 school years.

#### **D. June 2021 IEP**

Initially, the June 2021 IEP is the operative IEP to be reviewed in connection with determining whether the district offered the student a FAPE for the 2021-22 school year, as that is the IEP that was in effect when the parents made their initial decision to place the student at Eagle Hill for the 2021-22 school year (see Bd. of Educ. of Yorktown Cent. Sch. Dist., 990 F.3d at 173; R.E., 694 F.3d at 187-88).

#### **1. Present Levels of Performance**

While not in dispute, an overview of the student's present levels of performance is useful to determine the parents' substantive claims concerning the June 2021 IEP. Evidence in the hearing record reflects that the June 2021 CSE reviewed and considered the following evaluative information to develop the student's IEP: two educational summaries dated June 2021, an April 2021 speech-language evaluation, an April 2021 OT evaluation, an April 2021 psychoeducational evaluation, a January 2021 physical examination, a December 2020 classroom observation, a December 2020 social history, a December 2020 teacher report, and parent input (see Dist. Exs. 10 at pp. 2, 13; 11 at p. 2; see also Tr. pp. 1500, 1505-06, 1510-11, 1640-41, 1647-48).<sup>31</sup>

With respect to the April 2021 psychoeducational evaluation, the cognitive assessments administered to the student revealed that he achieved a full-scale intelligence quotient (IQ) of 81 (low average range) with a relative strength found in the area of verbal comprehension (average range) and weaknesses in fluid reasoning (very low range) and working memory (very low range) (see Dist. Ex. 3 at pp. 4-7, 17, 19).<sup>32</sup> Testing also revealed that the student functioned in the low

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<sup>31</sup> In the decision, the IHO found that the June 2021 CSE reviewed the April 2021 psychological evaluation—which the IHO characterized as a "fairly extensive assessment of [the student's] functioning"—in the development of the student's IEP for the 2021-22 school year (IHO Decision at p. 18).

<sup>32</sup> The district school psychologist who conducted the evaluation also noted in the evaluation report that the

average range on the visual spatial index and processing speed index (id. at pp. 5, 7, 17, 19). In the area of reading, the student performed in the below average range in the areas of letter and word recognition, phonological processing, and nonsense word decoding and within the average range in reading comprehension, silent reading fluency, word recognition fluency, decoding fluency, and reading vocabulary (id. at pp. 7-8, 19-20). In other academic areas assessed, the student performed in the below average range in the areas of mathematics and written language (id. at pp. 9, 19-20). Additional and ancillary academic skills were measured through assessments including the Comprehensive Test of Phonological Processing—Second Edition (CTOPP-2), the Gray Oral Reading Test—Fifth Edition (GORT-5), the Test of Word Reading Efficiency—Second Edition (TOWRE-2), and the Test of Written Language—Fourth Edition (TOWL-4), which revealed relative strengths in the areas of listening comprehension, memory for digits, and blending nonwords, and in contrast, weaknesses and difficulties in the areas of phonological processing, elision, blending words, phoneme isolation, rapid letter naming, segmenting nonwords, and written expression (id. at pp. 9-13, 17-18). An assessment of the student's visual motor integration skills yielded scores in the low range for visual perception and the very low range for motor coordination, which the evaluator noted could have an impact on a student's early letter and number formation, writing development, and writing fluency (id. at pp. 13-14). Finally, an administration of the Behavioral Assessment System for Children—Third Edition (BASC-3) revealed that, based on the parents' ratings, the student's behaviors were clinically significant in the areas of aggression, conduct problems, and externalizing problems, as well as indicating an elevated score in the area of activities of daily living; in contrast, the ratings reported by the student's teachers revealed at-risk scores within the learning problems subtest (id. at pp. 14-17). Overall, the district school psychologist noted that the student's "pattern of scores varied based on the reporter," and noted that, based on his teachers' assessments, he "achieved solidly [a]verage scores" otherwise (id. at p. 18).<sup>33</sup>

In addition to incorporating the student's testing results to identify the present levels of performance in the June 2021 IEP, the CSE relied on teacher and parent reports to further describe the student's present levels of performance, including that he was a hardworking and motivated reader, who consistently tried his best and who primarily read in three- or four-word phrases with some smooth expression guided by the author's meaning and punctuation (see Dist. Ex. 10 at p. 11). The CSE noted that the student exhibited satisfactory comprehension skills and that he was

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evaluation was completed during the COVID-19 pandemic and therefore, masks were worn, there was a plexiglass barrier between the examiner and the student, and wherever possible, six feet of distance was maintained (see Dist. Ex. 3 at p. 2). In addition, the school psychologist noted that students had not been in a typical school environment in months and therefore, it was impossible to predict the impact of those changes on student performance, development of rapport between student and examiner, and even comprehension of spoken responses (id.). For this reason, the school psychologist opined that the ability to confidently compare the student's performance to the norm group was compromised, and while the student's performance may still provide useful information about strengths and weaknesses, the results would likely be an underestimate of the student's true abilities and the results should be interpreted with caution (id.).

<sup>33</sup> At the impartial hearing, the parent confirmed that her own assessment of the student's behaviors—and more specifically, "levels of aggression and conduct problems" as "clinically significant"—differed from "what the school was seeing" (Tr. p. 1638-39). She also testified that she did not "doubt what the school was observing" and moreover, that she and the student's teachers were just having a "different experience" with the student (Tr. p. 1639).



able to give a "proper retell," but struggled with the inferential, higher-level questions (*id.*). It was also noted that the student was very insightful and had a solid understanding of small group reading lessons, as reflected through his independent work, comments, and participation, and it was also noted that comprehension and his ability to engage in collaborative discussions to express ideas about a text were relative strengths (*id.*). According to the June 2021 IEP, the student exhibited deficits in the areas of letter and word recognition, phonological processing, nonsense word decoding, phonological awareness, decoding, and fluency (*id.* at pp. 8-11). Based on teacher reporting, the student benefitted from individual and small group support in reading to apply strategies taught (*id.*). The June 2021 IEP further noted that, in resource room, the student had received multisensory instruction in decoding, he was able to decode multisyllabic (two- to three-syllable) words, he was an active participant, and he responded positively to explicit instruction in decoding (*id.*). The June 2021 CSE noted the parent's report that the student's "CTOPP scores indicate[d] that he [wa]s dyslexic" and that the student was "beginning to lose confidence and that he d[id no]t like missing [s]cience and [s]ocial [s]tudies to attend the resource room" (*id.*).

In the area of writing, the June 2021 IEP included reports that the student had made "nice gains" in this area, and he could generate ideas independently, add "voice" into his writing, and was very receptive to support in applying strategies learned into his writing (Dist. Ex. 10 at pp. 11-12). It was noted that, without support, the student would revert to writing in simple sentences as well as producing the minimal amount needed to complete a writing task (*id.* at p. 12). Identified areas of need included written expression, writing mechanics, writing fluency, and spelling, and it was noted that the student benefitted from working on a computer, frequent individual conferencing, small group support, graphic organizers, models, and sentence starters (*id.* at pp. 8, 11-12). The student also benefitted from kinesthetic cues (pounding syllables and tapping sounds) and visual cues in order to spell phonetically-regular words and dictated sentences (*id.* at p. 12).

## **2. Annual Goals**

The district asserts that the evidence in the hearing record reflects that the student's IEPs included appropriate annual goals to address his identified needs, and more specifically, with regard to the student's weaknesses in reading and writing. In addition, the district contends that the student's IEPs included annual goals to address his executive functioning and motor needs.

The parents deny these assertions, arguing that the annual goals failed to properly support the student's needs in mathematics and attention.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; *see* 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Generally, the IDEA does not require that a district create a specific number of goals for each deficit, and the failure to create an annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as

to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need. (*J.L. v. New York City Dep't of Educ.*, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]; see *C.M. v. New York City Dep't of Educ.*, 2017 WL 607579, at \*20-\*21 [S.D.N.Y. Feb. 14, 2017]).

Upon review, the June 2021 IEP included approximately 11 annual goals targeting the student's identified needs in the areas of study skills, reading, writing, and motor skills (see Dist. Ex. 10 at pp. 16-17). More specifically, the two study skills annual goals addressed the student's ability to arrive to class on time with the necessary materials and to consistently hand in completed assignments on a timely basis (*id.* at p. 16). The three annual goals for reading addressed the student's ability to "orally identify the rules for word attack skills regarding vowel diphthong (e.g. oil, how) and read the words," to work on decoding multisyllabic words and breaking multisyllabic words into syllables, and to improve his ability to decode sentences, paragraphs, and stories using phrasing when given material at the fifth-grade level (*id.*). For writing, the three annual goals in the IEP addressed the student's ability to identify and correct spelling errors at a mid-fourth-grade level; to identify and correct punctuation and capitalization errors; and to use the "process of pre-writing, drafting, revising and proofreading to produce a [three] paragraph story or essay" (*id.* at pp. 16-17). Finally, the three annual goals for motor skills targeted the student's need to improve his "visual figure ground skills," to improve his "spatial relation skills," and to improve his "visual closure skills noted by increased note taking abilities" (*id.* at p. 17).

At the impartial hearing, testimony from the CSE chairperson, the student's regular education and special education teachers, the student's resource room teacher, and the district school psychologist—all of whom participated at the June 2021 CSE meeting—explained that the CSE developed the annual goals based on testing, CSE discussion, data points reviewed, input and feedback from the providers, and interventions used by the special education teacher and the occupational therapist with the student during fifth grade (see, e.g., Tr. pp. 78, 209). The school psychologist testified that the reading, writing, and motor annual goals aligned with the student's areas of need based on testing and teacher reporting, and therefore, the annual goals were appropriate (see Tr. pp. 79-80). The resource room teacher testified that she recalled the discussion regarding the annual goals included on the June 2021 IEP, and she believed they were appropriate for the student moving forward into the sixth grade (see Tr. p. 722). She explained that the student continued to need study skills annual goals for his organizational needs, especially moving into a middle school environment (*id.*). Regarding whether the IEP included annual goals to address the student's ADHD, focus, and executive functioning needs, the school psychologist testified that, in rereviewing the study skill annual goals, "it seem[ed] that they did touch on organization, preparedness, and completion of tasks," and added that they "suggest[ed] support" in executive functioning and organizational skills (Tr. pp. 178-79; see Dist. Ex. 10 at p. 16). The school psychologist added that the June 2021 IEP included modifications to assist the student with refocusing, redirection, reteaching, and checks for understanding, and those modifications would be appropriate for a student with a diagnosis of an ADHD (Tr. pp. 154-55; see Dist. Ex. 10 at p. 18).

In terms of reading, the resource room teacher testified that the student continued to need annual goals in decoding and word attack skills, and the annual goal identifying a fifth-grade level for decoding was "where the student had left off in fifth grade," so the annual goal essentially picked up where he left off and moved him forward to the next sequence in the Orton-Gillingham program (Tr. p. 723; see Dist. Ex. 10 at p. 16). Additionally, she testified that the annual goal

involving decoding stories with a 95 percent success rate as a criteria for achievement at the fifth-grade level was appropriate for the student since he was reading close to grade level on connected text at that time and had reached a level U, which was close to grade level (see Tr. p. 804; Dist. Ex. 10 at p. 16). She also testified that the student was reading fifth grade material, but he needed to improve his accuracy and fluency at that level (see Tr. p. 804). She further acknowledged that, although the student had been assessed at the fourth percentile in phonological processing, the student's testing results were one data point to be considered and that, on other data points, the student was in the average range for decoding (see Tr. pp. 804-05; see also Dist. Ex. 3 at pp. 19-23). Next, the resource room teacher testified that the June 2021 CSE continued the annual goal of reading multisyllabic words, but increased the criteria for achievement of the annual goal, noting that the multisyllabic words were going to get longer and would require more mastery of the skills of the syllable types (see Tr. p. 723; Dist. Ex. 10 at p. 16). According to the resource room teacher, the third annual goal in reading—which involved decoding whole sentences, paragraphs, or stories using phrasing—was an appropriate fluency goal because the oral reading component continued to be an area of need for the student (see Tr. pp. 723-24; Dist. Ex. 10 at p. 16).

Turning to the annual goals in the June 2021 IEP for writing, the student was to identify and correct spelling errors in a mid-fourth-grade assignment, identify and correct punctuation and capitalization errors in a written assignment, and use the prewriting, drafting, revising, and proofreading processes to produce a three paragraph story or essay (Dist. Ex. 10 at pp. 16-17). Regarding the spelling annual goal, the resource room teacher testified that it was appropriate because it not only focused on identifying incorrectly spelled words, but the annual goal also held the student accountable to do the work of correcting spelling words (see Tr. p. 724).

During cross-examination, the CSE chairperson who attended the June 2021 CE meeting acknowledged that, although the IEP did not include annual goals specifically targeting or using the terms "nonsense word decoding," "writ[ing] single letters that represent sounds," and "writ[ing] words in isolation," the annual goals, overall, "target[ed] in on specific areas that [we]re the most prevalent in order for there to be an opportunity to progress monitor" (Tr. pp. 382-86; Dist. Ex. 10 at p. 16). He explained that the student's annual goal addressing his ability to "breakdown multisyllabic words . . . include[d] nonsense words" (Tr. pp. 382-83). The CSE chairperson further testified that the "ability to breakdown a nonsense word" targeted "phonics," noting that "nonsense word decoding [wa]s a true indicator of whether or not you can decode because you[ we]re practicing those skills in the context of something that[ was no]t real" (Tr. p. 383). He added that if a person could "decode a nonsense word, it indicate[d] that your skills [we]re somewhat intact" (id.). In addition, the CSE chairperson testified that the absence of a specific annual goal did not "necessarily mean that [the district] d[id no]t work on any identified need outside the context of an annual goal" (Tr. p. 386).

Regarding the student's motor annual goals, the CSE chairperson testified that in light of the student's limited progress in the area of motor skills during the 2020-21 school year, and as reflected in the 2020-21 progress report, the June 2021 CSE determined it was necessary to carry over two of the annual goals into the next school year (see Tr. pp. 333-34; Dist. Ex. 24 at p. 6).<sup>34</sup>

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<sup>34</sup> The student's April 2021 OT evaluation indicated that the student continued to have needs in the area of motor skills. According to the evaluation report, the focus of treatment during the 2020-21 school year consisted of increasing the student's visual perception, specifically in the areas of visual memory and visual tracking, for

Consistent with this information, a review of the June 2021 IEP reveals that the CSE recommended annual goals addressing the student's motor skills with respect to improving spacing consistency in writing and increasing his note taking abilities (compare Dist. Ex. 10 at p. 17, with Dist. Ex. 24 at p. 6).

Turning to the parents' claim that the June 2021 IEP failed to include annual goals to address the student's difficulties with mathematics word problems, a review of the IEP reflects that it does not include any annual goals specific to the area of mathematics. However, evidence in the hearing record indicates that the June 2021 CSE discussed the student's needs in mathematics with the AIS mathematics specialist attending the meeting, who "explained the student's past STAR scores and suggested that it [wa]s not an accurate depiction of his true levels of performance" (Dist. Exs. 11 at p. 1; 13 at p. 2). For example, although the student received a "score within the 13th percentile on his most recent STAR report," he was "receiving 3s on the report card," which indicated that he was meeting grade-level standards and which included his ability to solve multistep word problems (Dist. Ex. 11 at p. 1; see Dist. Ex. 9 at p. 1).<sup>35</sup> It was further noted that the student's "STAR data, AIS work and classroom work did not align," and the student "made progress with conceptual understanding," although he continued to struggle with "full fact fluency" (Dist. Exs. 11 at p. 1; 13 at p. 2). Within the June 2021 IEP, the CSE reported that the student's scores on the mathematics subtests of the KTEA-3 fell within the below average range (see Dist. Ex. 10 at p. 12). At the June 2021 CSE meeting, it was noted that the student could "add and multiply fractions," and continued to "build his understanding of dividing fractions" (Dist. Exs. 11 at p. 1; 13 at p. 2). Evidence also indicates that, based on reports by his "classroom teacher" at the June 2021 CSE meeting, he was "hard worker and compensate[d] in the classroom," and in mathematics, he "respond[ed] to verbal prompts and reminders" and had "access to a multiplication table" (Dist. Ex. 13 at p. 2). She also noted that he had the "skills, [but] not necessarily the facts memorized" (id.). When asked on cross-examination about the student's performance in mathematics based on his report card grades, the regular education teacher explained that "in the third trimester he received 2s, one in multistep word problems and one in performing operations with whole numbers" (Tr. p. 868). She also explained that his "score dipped" for several reasons,

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overall improvement in school-related tasks and graphomotor organization (see Dist. Ex. 4 at p. 1). The evaluation report indicated that assessments found the student's fine motor precision and integration skills within the average range and noted that, when holding writing implements, the student demonstrated a right tripod grasp with an open workspace and that he had improved in his ability to remain within one-eighth of an inch of boundaries when coloring and tracing through narrow mazes, and was therefore found to be within normal limits (id. at p. 2). The student also performed in the average range in the areas of design copying skills, visual discrimination, visual memory, visual form constancy, and visual sequential memory, but performed in the below average range in the areas of visual spatial relations, visual figure ground, and visual closure (id. at pp. 2-3). The evaluators noted that, functionally, the student's graphomotor organization remained inconsistent and testing results indicated slower than normal copying speed, decreased overall legibility, and inconsistencies in letter and word sizing and spacing (id. at pp. 3-4). According to the evaluation report, lingering difficulties in note taking and graphomotor abilities were believed to be secondary to visual tracking and he demonstrated decreased visual tracking skills as the student's ability to scan from left to right and from top to bottom continued to emerge (id. at p. 4).

<sup>35</sup> In addition, a review of the student's report card reflects that he consistently received scores of "3" (meeting learning standards) and one score of "4" (meeting learning standards with distinction) in mathematics across all three semesters (Dist. Ex. 9 at p. 1). As reported by the student's "classroom teacher," he received scores of "3" and "4" on his report card in mathematics "namely because of his compensation level" (Dist. Ex. 13 at p. 2).

including that the "fifth grade curriculum [became] more difficult as the year" progressed, the "whole number operations" and "multidigit numbers" were "very visual," and the student had difficulties with "organization" (Tr. p. 868; see Dist. Ex. 9 at p. 1).

At the impartial hearing, the student's regular education teacher during fifth grade testified that for mathematics instruction, she would pull small groups or work individually with students depending on their needs and their fluency of facts, but the student in this case was "meeting grade level expectations" in mathematics (see Tr. pp. 855-56). She also noted that the AIS mathematics specialist would "push-in, once or twice a week, to support students that had AIS services," such as for the student in this matter (Tr. p. 856). In addition, the student's special education teacher during fifth grade testified that she discussed how the student was "managing the general education math[ematics] work in the classroom" with the regular education teacher, and the regular education teacher told her that the student was "doing fine," and although "computation and fluency" were areas of difficulty for him, he was "still [on] grade level" (Tr. p. 615).

While the June 2021 IEP did not include annual goals specifically targeting mathematics skills, the IEP did include special education services to support the student in mathematics, including daily ICT services for instruction in mathematics and supplementary aids and services and program modification and accommodations (see Dist. Ex. 10 at pp. 1, 17-19). The special education teacher testified that the student was given a "trial run" using a calculator, which she noted "worked out very nicely" and the use of a calculator was added as an accommodation in his June 2021 IEP to "support computation and fact fluency" (Tr. p. 615; see Dist. Ex. 10 at p. 18). In addition to the use of a calculator, the June 2021 IEP included various accommodations that also supported the student in mathematics, such as checks for understanding, refocusing and redirection, additional time to complete assignments, support for organization skills, and reteaching of materials (see Dist. Ex. 10 at p. 18). Finally, the June 2021 IEP included annual goals in other areas, which ultimately supported the student's difficulty with mathematics word problems, such as those targeting organizational and preparedness skills, decoding skills, reading with the use of phrasing, improved spacing consistency, and increased note taking abilities (id. at pp. 16-17).

Overall, the evidence in the hearing record supports a finding that the June 2021 IEP included annual goals that specifically addressed and aligned with the student's identified needs, and included additional supports and services to address his needs in mathematics.

### **3. Educational Placement**

The district argues that the IHO erred by finding that the district failed to offer the student a FAPE in the LRE for the 2021-22 school year. More specifically, the district asserts that the special education program recommendations were tailored to the student's needs and provided sufficient supports and services that would enable him to make progress appropriate in light of his circumstances. The district also asserts that the IHO erred by finding that the recommendations for the 2021-22 school year were problematic because the recommendations were similar to previous programs the student received.

The parents argue that the district did not consider out-of-district placements and failed to fully consider the June 2021 psychoeducational evaluation report in making a placement

determination. The parents also assert that the student previously failed to make meaningful progress in the same (or substantially similar) program.

As previously noted, the June 2021 CSE recommended a general education placement with ICT services for instruction in ELA, mathematics, social studies, and science; a 12:1 special class placement for study skills (once every other day); and related services consisting of one 30-minute session per week of individual OT (for attention needs) and a specialized reading program in a small group (three times per six-day cycle) (see Dist. Ex. 10 at pp. 1, 17-19). In addition, the June 2021 IEP included strategies to address the student's management needs, annual goals, supplementary aids and services and program modifications, and testing accommodations (*id.* at pp. 15-19). The CSE also recommended 12-month programming to address the student's reading and writing needs (*id.* at p. 19).

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

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 [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]).

As summarized above, the hearing record supports a finding that the student made progress in his special education program during the 2020-21 school year—which included, among other things, a general education placement with ICT services for instruction in ELA, resource room services, and related services—and therefore, the June 2021 CSE's recommendation of a similar special education program for the 2021-22 school year was reasonably calculated to enable the student to enable the student to make progress. Notably, by recommending ICT services for instruction in all of the student's core academic classes, the June 2021 IEP differed from the student's program in fifth grade and provided more special education support. In addition, the evidence in the hearing record reflects that the June 2021 IEP included a recommendation for specialized reading instruction, which, together with ICT services for instruction in ELA, specifically addressed the student's needs in reading—similar to the ICT services in ELA and resource room services the student's received in fifth grade, which addressed his reading needs. And as already noted, the student made progress in reading during fifth grade, improving from a Fountas & Pinnell level P (mid-third-grade level) at the end of fourth grade (May 2020) to a Fountas & Pinnell level U (mid-fifth-grade level) by the time of the June 2021 CSE meeting (see Tr. p. 717; Parent Ex. A ¶ 57; Dist. Ex. 10 at pp. 7-8). The June 2021 IEP also included a recommendation for a 12:1 special class placement for study skills, and OT services (see Dist. Ex. 10 at pp. 1, 17-18).

At the impartial hearing, the student's fifth grade regular education teacher testified that the June 2021 CSE recommended ICT services for the student, in part, because he was successful in the fifth grade with the ICT services (see Tr. p. 883). Regarding the recommendations for ICT services for all core academic subjects, the resource room teacher testified that, at the June 2021 CSE meeting, the discussion included noting that ICT services would provide the environment for the student to continue to build his verbal strengths, fund of background knowledge, and provide him with an opportunity to share what he knew and build his self-confidence, while at the same time receiving supplemental services, such as support from the ICT co-teacher, to address his areas of continued need in reading and writing (see Tr. pp. 719-20). She also testified that the student would have the support of the specialized reading program to address those continued areas of weakness and the study skills class as an additional block in his schedule to address organizational and study skills needs (see Tr. p. 720-21).

At the impartial hearing, the district school psychologist testified that the student's special education program for sixth grade (2021-22 school year) was further supported by the 12:1 special class placement for study skills, which was a separate class with a smaller student-to-teacher ratio and which allowed for both preteaching and reteaching of concepts taught in the regular education setting (see Tr. p. 81; Dist. Ex. 10 at pp. 1, 17).

According to meeting minutes and the June 2021 prior written notice, the June 2021 CSE included the participation of a district middle school representative who reviewed sixth grade program options and detailed the interventions and support levels involved with each respective program (see Dist. Exs. 11 at p. 1; 13 at p. 2). In addition, the CSE "outlined" the student's "potential schedule . . . with different academic program options," and the CSE "explained the benefits of participating in the Wilson reading program"; according to the evidence, the parent attending the June 2021 CSE meeting indicated that "she would like to research the programs further" (Dist. Exs. 11 at p. 1; 13 at p. 2). Evidence in the hearing record further reflects that both the district principal and the CSE chairperson "reminded the parent that the IEP [wa]s a fluid

document and at any time, the team c[ould] convene for a requested review to make any necessary changes" (Dist. Exs. 11 at p. 2; 13 at p. 3).

Additionally, the June 2021 IEP included accommodations and modifications to address the student's needs and to support his learning in the recommended special education program (see Dist. Ex. 10 at p. 18). At the impartial hearing, the district school psychologist testified that, given the student's working memory and executive functioning weaknesses, modifications such as checking for understanding, refocusing and redirection, and reteaching were ideal (Tr. pp. 84-85; see Dist. Ex. 10 at p. 18). In addition, she testified that preferential seating would be delivered so the student would have access to frequent refocusing and redirection, a copy of class notes would be provided to support and assist with the student's writing deficits, and additional time was recommended to assist the student in completing assignments to address his executive functioning weaknesses and as support for organizational skills (see Tr. p. 85; Dist. Ex. 10 at p. 18). The school psychologist added that the use of a calculator would assist with some of the student's "visual perceptual deficits" and having access to a computer would be useful to the student during writing tasks and assisting in strengthening his written expression, where, as here, the student's handwriting, writing, and copying skills were areas of weakness (Tr. pp. 85-86; see Dist. Ex. 10 at p. 18). The student's special education teacher testified that, because of the student's areas of weakness in spelling and punctuation, he benefitted from having access to a computer with spell check (see Tr. p. 618). She added that with respect to writing, much of this task was computer based, and if the student had to physically write something, it often lacked attention to spelling, punctuation, and grammar, and he would not write much (see Tr. pp. 623-24).

In addition, the district school psychologist testified at the impartial hearing that receiving ICT services would allow the student to have access to the modifications and accommodations in his IEP, and provide additional strategies to support the student's educational advancement while also allowing for the student to be in a "mainstream setting" with a variety of "typical learners" and learners with additional needs (Tr. pp. 81-82).

Next, the district school psychologist testified that the middle school representative explained the programs at length for the June 2021 CSE and the CSE discussed the "most optimal [l]east [r]estrictive program" that would meet the student's needs, as identified in the student's testing, his classroom performance, and his achievement of his annual goals (Tr. p. 80). Having found that ICT services for the student's core academic classes, together with a 12:1 special class placement for study skills, a specialized reading program, together with OT services and supplementary aids and services and program modifications, would meet the student's needs in the LRE, the district was not obligated to consider a placement with a smaller class size as the parents have suggested (see, e.g., B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F., 2013 WL 4495676, at \*15 [explaining that "under the law, once [the district] determined . . . the [LRE] in which [the student] could be educated, it was not obligated to consider a more restrictive environment"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the [LRE] that could meet the [s]tudent's needs and did not need to inquire into more restrictive options "]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2010]).



#### 4. Reading Instruction

Next, the district asserts that the IHO erred by finding that the district failed to teach the student how to read, and further argues that the district provided the student with appropriate reading and writing instruction.

The parents deny the district's assertions, and argue that the district could not identify the specific reading instruction that would be delivered to the student or identify the professional development training provided to district staff in the area of reading instruction.

In pertinent part, the June 2021 CSE recommended daily ICT services for instruction in ELA (which addressed reading and writing), one 45-minute session every other day of a 12:1 special class study skills, three 45-minute sessions per six-day cycle of specialized reading program in a small group, and two hours per week of a 3:1 special class for reading instruction during summer 2021 (see Dist. Ex. 10 at pp. 1, 17-19).

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs, as defined in subdivision 2 of section 4401 of the Education Law, in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). Education Law § 4401(2), in turn, sets for the definitions of "[s]pecial services or programs," which includes, among other things, special classes, resource rooms, consultant teacher services, and related services. Consistent with the reference to the various special services or programs included in the definition of special education under State Law, State guidance notes that specialized reading instruction could be recommended in the IEP of the student as a special class, direct consultant teacher service, related service, resource room program ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Requirements," at p. 31, Office of Special Educ. Mem. [Updated Oct. 2023], available at [https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development\\_0.pdf](https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development_0.pdf)).

Here, it is undisputed that the student had needs in the area of reading, and the evidence in the hearing record indicates that the district was aware of the student's needs in reading and had been providing the student with various special education supports and services in reading throughout his attendance at the district. In addition, the evidence, as noted, reflects that the student made progress in reading, as demonstrated by his improvement on the Fountas & Pinnell scales for reading and by achieving his annual goals in reading for the 2020-21 school year. Moreover, at the impartial hearing, the student's resource room teacher testified that the student experienced great difficulty with the phonological component of reading and had particular difficulty with the sound symbol relationship, the smallest units of decoding (see Tr. p. 718). However, she further testified that the student used his strengths to compensate for those weaknesses and as a result, was reading close to grade level; with regard to the June 2021 CSE meeting, she recalled discussing the need to continue to address the student's weak phonological processing skills while, at the same time, meeting the student's need to access grade level reading material (id.). The resource room teacher also testified that, based on discussions and the student's running record assessments, she believed the student was capable of reading grade-level material with teacher support (see Tr. pp. 718-19).

At the impartial hearing, the special education teacher testified that the student was "very strong" verbally and in reading comprehension; she further testified that the student was very insightful and brought "a lot" of conversation and meaningful dialogue to the small groups used for reading and writing supports (Tr. pp. 609-10).<sup>36</sup> She added that the student benefitted from the small group support to access the curriculum and make meaningful progress toward his annual goals (see Tr. p. 617). In addition, the district school psychologist testified that, based on the April 2021 testing results and the identified areas of need, the June 2021 CSE felt that a multisensory approach for reading in a smaller group setting would be "ideal" for the student, as it would help to close the gap between where he was functioning and where he was expected to be functioning by offering "pretty intense remediation" with a very small student-to-teacher ratio (Tr. pp. 83-84; see Dist. Ex. 10 at pp. 1, 18).

Evidence in the hearing record also reflects that, contrary to the parents' assertions, while some members of the June 2021 CSE may not have specifically recalled discussions about a reading instruction program, the parent testified that she was told at the June 2021 CSE meeting that the student would receive the "Wilson reading program, but it would have to be prior to school starting, so it would be an additional time, an extension of his school day" (Tr. pp. 1502-03).<sup>37</sup> She was also told that she would need to transport the student to school for this service (see Tr. p. 1503). In addition, the reading instruction would be delivered in a group of three to six students (*id.*). The parent also testified that, at the meeting, she asked for clarifications about the reading instruction, such as the "skill set" of the student's anticipated cohorts, how progress monitoring would occur, and whether the students in the class had "behavior[s]" (Tr. p. 1504). Evidence further demonstrates that the parent voiced concerns at the June 2021 CSE meeting regarding "recent reevaluation testing and shared concerns regarding the student's fluency, phonological awareness and written expressions weaknesses on testing"; she also "questioned the decrease in [the student's full-scale] IQ scores" (Dist. Exs. 11 at p. 2; 13 at p. 3). According to the evidence in the hearing record, despite these noted concerns in reading, the parent declined the June 2021 CSE's recommendation for summer reading services due to a "scheduling conflict" (Dist. Exs. 11 at p. 2; 13 at p. 3).

To the extent that the parents' arguments concern the failure to recommend a specific methodology for reading instruction, 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

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<sup>36</sup> The special education teacher explained that after the delivery of a mini-lesson as a whole group, she would typically pull small groups of students every single day and categorized by areas of need, to help them in the writing and reading process and to enable them "make meaningful gains" (Tr. p. 610).

<sup>37</sup> Despite the parents' testimony concerning the logistics of the delivery of the reading instruction to the student, the due process complaint notice does not include any implementation claims with respect to the educational programs recommended by the CSE for the 2021-22 and 2022-23 school years.

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]).

In this matter, the evidence in the hearing record does not include any recommendation for a specific methodology in the area of reading, such that the June 2021 CSE was required to include a specific methodology in the IEP to address the student's needs in reading (see generally Dist. Exs. 1-6). Given the student's continued needs in reading, and in light of his progress with both ICT instruction in ELA and resource room services in fifth grade to address these needs, the June 2021 CSE's recommendation for both ICT services in ELA and a specialized reading program, were reasonably calculated to enable the student to make progress in reading in light of his needs.

### **E. May 2022 IEP**

Before turning to examine the appropriateness of the student's May 2022 IEP for the 2022-23 school year, it is important to note that, in response to receiving the parents' June 2021 psychoeducational evaluation report, a CSE convened in November 2021 with the specific purpose of reviewing and considering the testing results obtained therein (see Dist. Exs. 13 at p. 1; 14 at p. 1; see generally Parent Ex. C; Dist. Ex. 7).<sup>38</sup> The CSE chairperson testified that the November 2021 CSE convened for the reevaluation review meeting to review the private testing and to "embed" any of the pertinent information within the IEP that was in place for the student (Tr. pp. 223-24; see Dist. Exs. 13 at pp. 1-2; 14 at pp. 1-2).

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<sup>38</sup> To be clear, although the parents privately-obtained two evaluations of the student, the parents have not asserted any challenges with respect to the findings or recommendations contained within the May 2021 audiological evaluation report, which was included as part of the November 2021 CSE's review and consideration. Instead, the parents' concerns focused primarily on the district's failure to fully consider the June 2021 psychoeducational evaluation results and recommendations; consequently, this decision will not address the May 2021 audiological evaluation report and its findings.

## 1. November 2021 CSE Process and IEP

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

According to the June 2021 psychoeducational evaluation report, the parents reported that the student had displayed long standing problems in his reading and writing development, which were impacting his academic functioning and affecting his emotional well-being (see Parent Ex. C at p. 1). An administration of the Wechsler Abbreviated Scale of Intelligence—Second Edition (WASI-II) revealed that, cognitively, the student functioned in the average range (*id.* at p. 15). Academic assessments administered to the student revealed weaknesses in decoding and spelling skills, as well as in all areas of written expression, such as sentence composition, sentence building, and sentence combining (*id.* at pp. 15-16).<sup>39</sup> The private evaluator who conducted the evaluation, based on the information, diagnosed the student as having a specific learning disorder with impairment in reading (which she identified as synonymous with dyslexia) and a specific learning disorder with impairment in written expression (*id.* at pp. 2-3). Recommendations in the June 2021 psychoeducational evaluation report included placement in a specialized school that could manage the breadth and depth of the student's needs, a proper placement, a multisensory program and teaching strategies, OT, reading and writing interventions, reading and writing progress monitoring, word problems read and broken down, extra time, oral reader audio books, attention and self-monitoring prompts, breaks, writing supports, preferential or flexible seating, and previewing and reviewing class content (*id.* at pp. 3-6). More specifically, the private evaluator recommended that, with respect to an educational placement and without identifying a particular school or methodology for instruction, the student required a "proven instructional program

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<sup>39</sup> The June 2021 psychoeducational evaluation did not assess the student in the area of mathematics (see generally Parent Ex. C).

threaded through the entire curriculum in an overall environment that [wa]s specifically designed for children with dyslexia and writing deficits" (id. at p. 4).

As reflected in the November 2021 CSE meeting notes, the district school psychologist reviewed the June 2021 psychoeducational evaluation report testing and summarized the findings to the CSE (see Dist. Ex. 13 at p. 1).<sup>40</sup> The school psychologist reported the student's diagnoses, and noted further that the areas and behaviors associated with an ADHD-inattentive type, mathematics weaknesses, and anxiety should be monitored (id.). The CSE further noted in the IEP that the evaluation results showed that the student continued to struggle with an auditory processing disorder, and the CSE chairperson suggested sharing the May 2021 audiological report with appropriate district staff in case the student was to need an "FM system or other device to help improve his auditory processing in his classrooms" (id.).

Evidence in the hearing record reflects that, after reviewing the June 2021 psychoeducational evaluation, the November 2021 CSE reviewed the annual goals and the "committee agreed that no changes needed to be made" (Dist. Exs. 13 at p. 2; 14 at p. 1). At the impartial hearing, the school psychologist at the November 2021 CSE meeting testified that she believed the annual goals were specific and calculated to enable the student to make progress (see Tr. pp. 930, 1075). The evidence also reflects that the November 2021 CSE discussed that the student's recommendations would remain the same, notably, daily ICT services with a study skills class every other day, a specialized reading program every other day, and OT services (see Dist. Exs. 13 at pp. 1-2, 21-22; 14 at p. 1).

The evidence in the hearing record demonstrates that, while much of student's IEP remained unchanged, the November 2021 CSE did modify the student's IEP with regard to the supplementary services and aids and program modifications and accommodations. For example, the CSE added clarifying language with respect to the checking for understanding support, which indicated that "[t]eachers need[ed] to check in with the student to clarify and repeat information" (compare Dist. Ex. 13 at p. 21, with Dist. Ex. 10 at p. 18). Similarly, the CSE added language with regard to the using a graphic organizer support, which indicated that it would be used "for writing assignments and math word problems" (compare Dist. Ex. 13 at p. 22, with Dist. Ex. 10 at p. 18). The evidence also demonstrates that both of the changes made were noted within the June 2021 psychoeducational evaluation report (see Parent Ex. C at pp. 4-6). In addition to the aforementioned changes, the November 2021 CSE also waived the student's foreign language requirement, as recommended in the June 2021 psychoeducational evaluation report (Dist. Ex. 13 at p. 2; see Parent Ex. C at p. 6).<sup>41</sup> With this modification, the November 2021 CSE discussed that the student's schedule would then allow for the student to possibly receive more reading support and academic help during the school day (see Dist. Ex. 13 at p. 2). Finally, it was noted in the

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<sup>40</sup> As a point of clarification, the district school psychologist who attended the November 2021 CSE meeting and the subsequent May 2022 CSE meeting, was from the district middle school and was not the same school psychologist who attended the student's June 2021 CSE meeting.

<sup>41</sup> The evidence indicates that the November 2021 CSE discussed that the student could struggle with coping with feelings of frustration and lack of confidence, as noted in the June 2021 psychoeducational evaluation report, and the CSE indicated that in-school counseling could be provided; however, the same evidence demonstrates that the parent did not feel the support was needed at the time (see Dist. Exs. 13 at p. 2; 14 at p. 1).

November 2021 IEP that the CSE had discussed the possibility of further modifications to the student's special education program, such as recommending a 15:1 special class placement for instruction in reading and writing if the student did not do well with the ICT services for instruction in ELA (id.; see Dist. Ex. 14 at pp. 1-2).

According to the evidence, the parent asked about the students' profiles in the self-contained classes at the CSE meeting, and the CSE discussed that both the "co-taught" and "self-contained class" programs included various student abilities (Dist. Exs. 13 at p. 2; 14 at p. 2). The evidence demonstrates that, at the November 2021 CSE meeting, the parent "stated a few times, . . . , and wanted it noted, that she still d[id no]t feel that the discussed support and classes at [the district middle school] would be enough to help improve [the student's] reading and writing skills," which, according to the parent, were "tested at the 2 and 3 grade levels" (Dist. Exs. 13 at p. 2; 14 at p. 2). The evidence indicates that the CSE chairperson concluded the meeting by noting that another meeting would be "held in the future to obtain teacher input from [the student's] current school of Eagle Hill" (Dist. Ex. 13 at p. 2; 14 at p. 2).

Next, the November 2021 prior written notice reflected that the November 2021 CSE "considered programs and/or services that [we]re less restrictive (more time within the general education setting) but rejected those due to the student's current functioning levels and skills" (Dist. Ex. 14 at p. 2).

At the impartial hearing, the parent confirmed in her testimony that she "had an opportunity to compare the [April 2021] evaluation that was conducted by [a district] school psychologist . . . with the [June 2021] evaluation" that the parents privately obtained (Tr. p. 1638). She further confirmed that the "scoring was really very similar" in both evaluations and more specifically, that the district's "evaluation assessed [the student] very similarly to how [the private evaluator] assessed the student" (id.). The parent also testified, however, that she did not recall a discussion at the November 2021 CSE meeting concerning the "specialized program" recommended in the June 2021 psychoeducational evaluation report (Tr. p. 1539; Parent Ex. C at p. 4).

At the impartial hearing, the CSE chairperson acknowledged the specialized program recommendation in the June 2021 psychoeducational evaluation report, but noted that it was "one data point and recommendation by one person's assessment" (Tr. p. 500). The district school psychologist who attended the November 2021 CSE meeting testified that, although the contents of the June 2021 psychoeducational evaluation report were not displayed or shared on-screen during the meeting, the contents of report—including the recommendation for a specialized program—were discussed (see Feb. 26, 2024 Tr. pp. 1107-09; Parent Ex. C at p. 4). She could not, however, recall "specific statements" from the evaluation report that were discussed, noting that the November 2021 CSE meeting occurred "over two years ago" (Feb. 26, 2024 Tr. pp. 1111, 1117). The school psychologist also testified that the "evaluation was reviewed," and the CSE discussed the "recommendations, as well as her diagnoses" of the student (Feb. 26, 2024 Tr. p. 1051).

In consideration of the foregoing, the evidence reflects that the district convened a CSE meeting for the sole purpose of reviewing the parents' June 2021 psychoeducational evaluation and the May 2021 audiological evaluation, and moreover, that the November 2021 CSE adequately reviewed and considered the evaluative information, as reflected by the modifications made to the

student's IEP in describing his present levels of performance and adding clarifying language to the supplementary aids and services and program modifications and accommodations. To the extent that the evidence in the hearing record demonstrates that the November 2021 CSE may not have engaged in a robust discussion about the "specialized program" recommended by the private evaluator or modified the student's IEP to adopt that recommendation, it is well settled that, generally, district staff may be afforded some deference over the views of private experts (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at \*16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at \*6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]).

Here, in addition to the views set forth in the June 2021 psychoeducational evaluation, the November 2021 CSE had the benefit of the June 2021 IEP already developed by district staff who had worked directly with the student and based on evaluative information demonstrating that the student, when he had attended the district public school, had advanced from grade to grade and made academic progress in a general education class with ICT services. Thus, the November 2021 CSE was not obligated to adopt the recommendations of the private evaluator in this instance (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]). Moreover, in addition to considering what supports and services the student needed in order to receive educational benefits, the district was mandated to consider placing the student with his nondisabled peers in light of the IDEA's LRE requirements. Where, as here, the student could be educated satisfactorily in a general education classroom with supplemental aids and services, the placements recommended in the November 2021 IEP represented the student's LRE (see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 119-20).

## **2. May 2022 IEP**

Turning, now, to the appropriateness of the May 2022 IEP, the evidence in the hearing record indicates that, in addition to the evaluative information available to the June 2021 and November 2021 CSEs, the May 2022 CSE also had additional information from the student's providers at Eagle Hill, as reflected in a December 2021 Eagle Hill progress report (December 2021 progress report). A review of the December 2021 progress report provided information about the student's classes at Eagle Hill, such as "Tutorial," mathematics, writing, "content" (incorporating instruction in both social studies and science), and literature (Parent Ex. I at pp. 1-17). The progress report noted the areas of emphasis in each course, the student's participation, and his grades for the fall semester (*id.*). According to the progress report, the student's classes at Eagle Hill ranged in size from five students to eight students with one teacher per class (*id.*).

According to the December 2021 progress report, the student received intensive remedial instruction in the language arts in the tutorial class, and the materials used were written on an uncontrolled fifth grade reading level (see Parent Ex. I at pp. 3-4). Teacher reporting indicated that the student followed the posted agenda, consistently applied the morphology rules he learned to read new multisyllabic words, had shown much improvement in spelling through daily drills, was careful to highlight and annotate along with the teacher during class reading, and always participated in oral reading and was an active participant (*id.*). According to the progress report, the student benefitted from listening to a word spoken slowly so he could syllabicate the word as he spelled it, from reading a text multiple times, and from using a graphic organizer to help him summarize the text at the end of each week (*id.* at p. 4).

In mathematics, the December 2021 progress report described the student as "strong" and whose solid number sense allowed him to grasp concepts of multiplication with ease (Parent Ex. I at p. 7). The progress report noted that the student benefitted from having new concepts broken down (especially those that were multistep) and from having word problems read aloud while discussing keywords and highlighting important information (*id.*). The mathematics teacher also noted in the progress report that the student actively participated in class, he cared about the quality of his work, and his positive attitude was a wonderful addition to the class (*id.*).

With respect to writing, the December 2021 progress report reflected that the student arrived to class ready to write and was eager to participate, consistently contributed to class discussions and activities, accepted feedback from teachers and peers, and offered specific and targeted feedback to others (see Parent Ex. I at p. 10). The teacher noted in the progress report that the student was not always aware of when he did not understand an assignment, and he benefitted from check-ins at the beginning of the assignment to confirm that he understood the directions and that he was on the right track (*id.*). In addition, it was noted that the student was open to teacher redirection and was working on reading and rereading directions and asking clarifying questions (*id.*).

In the student's daily content class, the December 2021 progress report indicated that the student was an active participant in class and continued to develop whole-group discussion skills; at that time, the student was working on using flexible thinking when a new concept did not relate "perfectly" with his background knowledge (Parent Ex. I at pp. 12-13). The student benefitted from extra time to process information presented orally, prompts that reminded him to listen to key words, hands on activities and experimentation, a variety of projects that were completed as an individual or small group or whole group to gain different perspectives on ways to solve problems, and a structured class setting where expectations and demonstrations were provided before initiating tasks (*id.*).

Finally, with respect to his literature class, the December 2021 progress report noted that the materials used in class were written at a fourth grade reading level, and the student participated frequently and independently in a way that supported class discussion and allowed conversation related to the chapter (see Parent Ex. I at p. 15). The teacher reported that the student benefitted from guided questioning to recall the plot and the most important information and from acting out the parts of the story (*id.*). The progress report indicated that the student had been successful in managing partner interactions and group work, but sometimes required redirection to remain on topic (*id.*).



Based on the evaluative information available, the May 2022 CSE recommended the following for the student's special education program for the 2022-23 school year: a general education placement with ICT services for instruction in science and for instruction in social studies; a 15:1 special class placement for instruction in ELA (90 minutes daily); a 15:1 special class placement for instruction in mathematics (45 minutes daily); and OT services (for attention needs) (see Dist. Ex. 16 at pp. 1, 22). The May 2022 CSE also recommended summer services, consisting of reading instruction in a small group for two hours weekly (id. at p. 24). In addition, a review of the May 2022 IEP reflects that the CSE relied on and incorporated information from the December 2021 progress report into the student's IEP to describe his present levels of performance (compare Dist. Ex. 16 at pp. 13-17, with Parent Ex. I at pp. 3-16).

### **3. Annual Goals**

The district contends that the May 2022 IEP included appropriate annual goals to address all of the student's needs in reading, writing, and mathematics, as well as executive functioning and motor needs.

The parents acknowledge that the May 2022 IEP included two annual goals in mathematics, but argue that the annual goals are vague and boilerplate.

A review of the May 2022 IEP reflects that it included approximately 15 annual goals addressing the student's needs in the areas of study skills, reading, writing, mathematics, and motor skills (see Dist. Ex. 16 at pp. 20-22). Initially, the IEP included three annual goals in study skills, which target the student's ability to independently access and apply tools for learning, check his own understanding of a task and ask for clarity on his own if needed, and his ability to arrive to class on time and with the necessary materials (id. at p. 20). At the impartial hearing, the CSE chairperson testified that the annual goals were appropriate based on the student's identified needs in the areas of executive functioning, proofreading his written work, and relying on different learning resources and tools to help support his learning (see Tr. pp. 278-79; Parent Ex. I at pp. 4-5, 7-8, 10-17).

Regarding reading, the annual goals in the May 2022 IEP targeted the student's needs in reading fluency skills, word attack skills, and identifying contextual clues in defining unfamiliar vocabulary words (see Dist. Ex. 16 at p. 21). Here, the CSE chairperson testified that these annual goals were appropriate to address the student's needs discussed at the CSE meeting (see Tr. p. 279; see Parent Ex. I at pp. 3-4, 15; Dist. Ex. 16 at pp. 10-13).

For writing, the May 2022 IEP included four annual goals targeting the student's ability to identify and correct spelling errors of words at the middle of the fourth-grade level; identify and correct punctuation and capitalization errors; write at least one paragraph with attention to complexity, organization, and sequential order; and use the process of prewriting, drafting, revising, and proofreading in producing written work (see Dist. Ex. 16 at p. 21). The CSE chairperson testified that these annual goals were discussed at the May 2022 CSE meeting and were consistent with the student's identified areas of need (see Tr. pp. 279-80; Parent Ex. I at pp. 3-4, 9-10; Dist. Ex. 16 at pp. 13-15).

In mathematics, the May 2022 IEP included two annual goals, which targeted the student's basic facts mathematics fluency and word problems (see Dist. Ex. 16 at p. 21). Regarding the appropriateness of the mathematics annual goals, the CSE chairperson testified that, although it was an area of "relative strength" for the student, "ultimately enhancing [his] math[ematics] fluency skills and supporting the word problems would be areas of support offered" (Tr. p. 280; see Parent Ex. I at pp. 6-7; Dist. Ex. 16 at p. 15).

Next, the May 2022 IEP included three annual goals in the area of motor skills, addressing visual figure ground skills, spatial relations, and visual closure skills used in note taking (see Dist. Ex. 16 at pp. 21-22). The CSE chairperson testified that he did not know if the student received OT at Eagle Hill and noted that the December 2021 progress report did not include any progress for OT (Tr. p. 278; see Parent Ex. I at pp. 1-18). He further noted that the student's IEP still referenced needs for supporting his visual perceptual skills, and in particular, spatial relations, visual figure ground, and visual closure (see Tr. p. 277; Dist. Exs. 4 at pp. 3-4; 16 at p. 19).

Based on the evidence in the hearing record, the annual goals in the May 2022 IEP, including those for mathematics, targeted the student's identified areas of need.

#### **4. Educational Placement**

On appeal, the district asserts that the hearing record supports a finding that the special education program recommended in the May 2022 IEP was reasonably calculated to enable the student to make progress appropriate in light of his circumstances. As a result, the district argues that the IHO erred by finding that the district failed to offer the student a FAPE in the LRE for the 2022-23 school year.

In response, the parents deny the district's assertions, arguing that the May 2022 IEP was not based on the student's unique needs and failed to support his academic challenges in a meaningful way.

As noted, the May 2022 CSE recommended, in part, a general education placement with ICT services for instruction in both social studies and science, as well as a 15:1 special class placement for instruction in both ELA and mathematics (see Dist. Ex. 16 at pp. 1, 22). The May 2022 CSE also recommended reading instruction during summer 2022 for two hours per week in a 3:1 setting (id. at pp. 1, 24). Therefore, while the district's special education program for the student for the 2022-23 school year continued to include recommendations for ICT services, the special education program changed by recommending a 15:1 special class placement to address the student's needs in ELA and mathematics—a point that the IHO failed to recognize in the decision when finding that, for the 2022-23 school year, the district continued to recommend the same, previously ineffective program for the student (see IHO Decision at p. 36).

State regulation defines a 15:1 special class placement as the "maximum class size for those students who special education needs consist primarily of the need for specialized instruction" (8 NYCRR 200.6[h][4]). At the impartial hearing, the district school psychologist who attended the May 2022 CSE meeting testified that the CSE recommended a 15:1 special class placement for both ELA and mathematics based, in part, on what had been reported from Eagle Hill, which had "shown that [the student] was in very small classes at Eagle Hill," and the student was "still behind

in reading and was receiving a lot of reading support"—so the CSE wanted to "match," as best it could, the amount of support provided to the student in reading (Feb. 26, 2024 Tr. p. 1122). With regard to the 15:1 special class placement recommendation for instruction in mathematics, the school psychologist testified that, even after discussions, the CSE was uncertain as to the curriculum the student was working on at Eagle Hill, and as the student was transitioning from sixth to seventh grade, the CSE wanted to ensure that the student was able to continue on with parts of the curriculum that carried over into seventh grade (Feb. 26, 2024 Tr. pp. 1122-23). In addition, the school psychologist testified that the May 2022 CSE reviewed and considered the different programs offered at the district middle school (see Tr. p. 970). As noted in the May 2022 prior written notice, the CSE "considered programs and/or services that [we]re less restrictive (more time within the general education setting) but rejected those due to the student's current functioning and skills" (Dist. Ex. 17 at p. 1).

At the impartial hearing, the district school psychologist testified that the 15:1 special class placement would follow the same curriculum as a classroom with ICT services ("co-taught class") (see Tr. p. 945). However, she also noted that, within the special class placement, the delivery of the scope and sequence would not necessarily be the same when compared to its delivery in an "ICT classroom," because the pace of a special class provided more time to deliver the curriculum, and as a result, the special class "might start off with more fundamentals and build into the curriculum" (Tr. p. 1036). The school psychologist explained that the special class might also "use curriculum as an example to help with fundamentals that might be found as [annual] goals" on the students' IEPs (id.). She continued explaining that the "ICT [classroom]" was a "regular class," and therefore, the pace of the classroom adhered to the delivery of the curriculum and "st[u]ck to a rubric of lessons" (id.). Regarding mathematics instruction in a 15:1 special class placement, the school psychologist testified that it would, again, use the same curriculum but there may be less examples compared to those provided within the "ICT [classroom]," and the ICT classroom would be moving at a faster pace than compared to the pace of a 15:1 special class placement (February 26, 2024 Tr. p. 1130). In comparing the size of the two programs, the school psychologist stated that the special class would not have more than 15 students, all of whom have IEPs, and one special education teacher who taught the class, whereas the "ICT class" was much larger and could have up to 29 total students (see Tr. p. 1033).

Additionally, the CSE chairperson testified that the May 2022 CSE changed the student's program recommendation from ICT services to a 15:1 special class for both ELA and mathematics based on the CSE discussion and feedback reviewed at the time of the meeting (see Tr. pp. 538-39, 541). The CSE chairperson added that the decision to change the placement recommendation was made based on a collaborative dialogue, which included the consideration of "feedback and data" from Eagle Hill and the "representation from the school helping guide us," as well as a review of information available at the CSE meeting resulting in a revision to the student's program to "provide more support under the LRE continuum" (Tr. pp. 561-62). Moreover, the CSE chairperson testified that the 15:1 special class placement would have provided the student with a "general education level," but with more specially designed instruction and an additional period of support in the area of ELA to address the student's specific, identified weaknesses (Tr. p. 327).

With respect to the specific recommendation for a 15:1 special class placement for instruction in ELA, the school psychologist who attended the May 2022 CSE meeting testified that it was based on the input the CSE received from Eagle Hill, which indicated that the student was

making improvements in their program, and therefore, the school psychologist explained that the CSE tried to adopt a similar class size based on the student's needs (see Tr. p. 981). With respect to the recommendation for a 15:1 special class placement for instruction in mathematics, the school psychologist testified that it was based on the information provided by Eagle Hill indicating that the student was making progress in mathematics; therefore, the CSE, again, tried to match the class size (see Tr. p. 982). In addition, the school psychologist testified that, in reaching the decision to recommend a 15:1 special class placement rather than ICT services, the May 2022 CSE considered the discussion about the student's performance in his current classes, teacher input, the expertise of a special education teacher and the regular education teacher, and data from current and past reports and evaluations (see Tr. p. 1032).

Turning to the 15:1 special class placement for instruction in ELA, the school psychologist described the daily, 90-minute session as two full periods of ELA (see Tr. pp. 985-86; Dist. Ex. 16 at pp. 1, 22). She explained that, during the first period of the ELA class, students worked on curriculum, and the second period of the ELA class could be used for a continuation of the lesson for that day and was more focused reading support (see Tr. p. 987; Feb. 26, 2024 Tr. pp. 1139-40; see also Mar. 13, 2024 Tr. pp. 1114-15). She added that every other day, during that second period, the students worked on decoding, encoding, comprehension, sentence building, and organization in reading and writing with a reading specialist (see Tr. p. 987; Feb. 26, 2024 Tr. p. 1140; see also Mar. 13, 2024 Tr. p. 1115). The school psychologist explained that, every other day, the second period of the 15:1 special class placement for ELA included specialized reading instruction embedded within the program (see Feb. 26, 2024 Tr. pp. 1140, 1142). She further explained that the May 2022 CSE "dropped" the specialized reading program previously recommended for the student in the 2021-22 school year because it was "now embedded in the 15:1 program" (Tr. pp. 988-89; compare Dist. Ex. 13 at pp. 1, 21, with Dist. Ex. 16 at pp. 1, 22).

With respect to the student's language and reading needs, the CSE chairperson testified that testing showed that the student was consistent in his decoding and phonological awareness weakness and the district addressed these needs by providing more scientifically-based support, using a methodology that was calculated for the student to make progress (see Tr. pp. 273-74; Dist. Ex. 16 at pp. 4-5). Additionally, the May 2022 IEP included supplementary aids and services and program modifications and accommodations to support the student's language and reading needs, such as checking for understanding (i.e., the student would receive clarification and then verbally express his understanding), providing him with a copy of class notes, additional time to complete assignments, use of graphic organizers for writing assignments and mathematics word problems, reteaching of material, and access to a computer with speech-to-text software (see Dist. Ex. 16 at pp. 22-23).

Based on the aforementioned evidence, the hearing record demonstrates that, contrary to the IHO's determination, the May 2022 CSE identified and addressed the student's needs through its special education program recommendations for the 2022-23 school year, such that the evidence supports a finding that the district offered the student a FAPE in the LRE for the 2022-23 school year.

## **VII. Conclusion**

Having determined that, contrary to the IHO's conclusions, the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2021-22 and 2022-23 school years, the necessary inquiry is at an end and there is no reason to reach the issue of whether Eagle Hill was an appropriate unilateral placement for the student for the 2021-22 and 2022-23 school years or if equitable considerations weighed in favor of the parents

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated November 18, 2024, is modified by reversing that portion which found that the district failed to offer the student a FAPE in the LRE for the 2021-22 and 2022-23 school years; and,

**IT IS FURTHER ORDERED** that IHO's decision, dated November 18, 2024, is modified by reversing that portion which ordered the district to reimburse the parents for the costs of the student's tuition at Eagle Hill for the 2021-22 and 2022-23 school years.

**Dated:**           **Albany, New York**  
                      **May 2, 2025**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**