



The University of the State of New York
The State Education Department
State Review Officer
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No. 25-059

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

Appearances:

Bronx Legal Services, attorneys for petitioner, by Nelson Mar, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nicole Daley, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which granted her request that respondent (the district) fund the costs of her son's tuition at the Cooke School and Institute (Cooke) for the 2023-24 school year but at a reduced amount. The district cross-appeals from that portion of the IHO's decision which found that it failed to offer an appropriate educational program to the student and ordered it to fund a portion of the student's tuition costs at Cooke for the 2023-24 school year. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

A CSE convened on October 20, 2022, and, after finding the student to be eligible for special education services as a student with autism, developed an IEP with a projected implementation date of November 3, 2022 (Dist. Ex. 1; see Dist. Exs. 4, 5).¹ The October 2022

¹ The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

CSE recommended the student attend a 12-month program in a 12:1+1 special class in a specialized school, with three periods per week of adaptive physical education and the following related services: one 45 minute session per week of individual counseling services, one 45 minute session per week of group counseling services, two 45 minute sessions per week of individual occupational therapy (OT), three 45 minute sessions per week of individual speech-language therapy, and one 45 minute session per week of group speech-language therapy (*id.* at pp. 18-19, 25). Additionally, the CSE recommended parent counseling and training once a month for 60 minutes, and that the student receive special transportation from the closest safe curb to school (*id.* at pp. 19, 25). The student was recommended to take part in alternate assessments (*id.* at pp. 23-24). A private neuropsychological evaluation report, from an evaluation conducted in January 2022, was part of the assessments considered by the October 2022 CSE (*id.* at pp. 1-2; see Parent Ex. C; see also Parent Ex. O **PP** 11-12).²

By prior written notice to the parent dated June 24, 2023, the district summarized the October 2022 CSE's recommendations (Dist. Ex. 2). By a school location letter dated June 24, 2023, the district notified the parent of the particular public school location it assigned the student to attend for the 2023-24 school year (Dist. Ex 3).³

On October 10, 2023, the parent signed a re-enrollment contract with Cooke for the student for the 2023-24 school year (Parent Ex. L).⁴ As part of the contract's terms, the parent agreed that, in the event that she was denied funding in a due process proceeding, she would pay the outstanding tuition within 60 days of a final decision, or 30 days within any settlement for less than the full amount of tuition owed (*id.* at p. 2).

By letter dated March 15, 2024, the parent, through her attorney, informed the district of her intention to unilaterally place the student at Cooke for the 2023-24 school year (Parent Ex. B at p. 1). The parent further notified the district of her disagreement with the October 2022 IEP, asserting that the district failed to develop an appropriate IEP, failed to develop an updated IEP that would take effect after the October 2022 IEP expired, and failed to assign the student to attend an appropriate public school location (*id.* at pp. 2-4). The parent contended that the IEP, among other things, did not contain meaningful annual goals for the student's related services, did not reflect why a nonpublic school program was not considered, did not reflect why a 12:1+1 special class was sufficient, did not document the student's progress in a class of eight students, and did not include appropriate recommendations of related services (*id.* at pp. 2-3). The parent also

² The hearing record contains duplicative copies of the January 2022 neuropsychological evaluation report (compare Parent Ex. C with Dist. Ex. 7). For purposes of this decision, only the parent's exhibit is cited.

³ In her written testimony, the parent indicated that after the October 2022 CSE meeting, she "never received any information from the [district] about a school placement for [the student] for the 2023-2024 school year" (Parent Ex. D ¶ 8). Ultimately, however, the parent did not raise this as an allegation in the due process complaint notice, despite the parent raising a similar allegation in the due process complaint notice regarding prior written notice (see Parent Ex. A at p. 4). As such, this allegation is not properly before me and will not be further addressed herein (see 20 U.S.C. § 1415 [c][2][E][i][II]; [f][3][B]; 34 CFR 300.507[d][3][ii]; 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][b]; [i][7][i][a]; [j][1][ii]; Application of a Student with a Disability, Appeal No. 24-175).

⁴ Cooke 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).

alleged that she never received a prior written notice or school location letter from the district (*id.* at pp. 3-4). Finally, the parent contended that the school placement was not appropriate because the proposed classroom at the assigned public school site would consist of a "large number of students who experience[d] severe dysregulation" which would have been "detrimental to [the student's] emotional well being and [would have impeded] his ability to learn" (*id.* at p. 4). The parent indicated that, due to the alleged failures of the district, the parent would be seeking public funding for the student's attendance at Cooke for the 2023-24 school year (*id.*).

A. Due Process Complaint Notice

In a due process complaint notice dated July 10, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). The parent contended that the district failed to develop an appropriate IEP for the student because: the October 2022 CSE did not document why a nonpublic school placement was not considered, despite the student attending a non-public school for 11 years; failed to discuss the recommendations of the January 2022 neuropsychological evaluation report; did not document why a 12:1+1 special class program would be sufficient, when the student was placed in an 8:2:1 class at Cooke; and the did not document the student's progress in that smaller class size (*id.* at pp. 2-3). The parent further contended that the IEP did not contain meaningful annual goals for the student's related services, as the October 2022 IEP: failed to include sensorimotor goals related to attention and participation; failed to include OT goals focused on positioning of the student's body; included a goal on personal hygiene, despite the student receiving the highest score on this skill; included goals on connecting with peers despite this being a strength of the student's; and failed to set benchmarks for organization and homework skills (*id.* at p. 3). The parent also contended that the IEP failed to recommend appropriate levels of related services, as the student received a higher frequency of related services at Cooke (*id.* at pp. 3-4). Additionally, the parent asserted that the student was denied a FAPE because the October 2022 IEP expired on October 23, 2023, and a new IEP was not developed (*id.* at p. 4). Finally, the parent contended that she had not received any notices from the district regarding a CSE meeting scheduled after the October 2022 meeting or any prior written notice "since October 22, 2022" (*id.*). The parent sought funding for the student's tuition at Cooke for the 2023-24 school year (*id.*).

B. Impartial Hearing Officer Decision

An IHO from the Office of Administrative Trials and Hearings (OATH) was appointed, a prehearing conference was held on August 20, 2024 (Aug. 20, 2024 Tr. pp. 1-15), and a status conference was held on September 17, 2024 (Sept. 17, 2024 Tr. pp. 16-25).⁵ On September 18, 2025 a new IHO from OATH was appointed to the matter (IHO Decision at p. 4; see IHO Ex. II at pp. 11-12). On September 18, 2025, the newly appointed IHO (hereinafter "the IHO") issued an order to "set firm expectations of the Parties to resolve the matter fairly and efficiently" (IHO Ex. I). A hearing date devoted to the merits was held on November 21, 2024 (Nov. 21, 2024 Tr. pp. 1-54).

⁵ The third transcript in the hearing record, the transcript of the impartial hearing in November 2024, is not sequentially paginated with the first two transcripts from August and September 2024. Therefore, each citation to the transcripts will include the date and page number.

In a decision dated December 20, 2024, the IHO found that the district failed to meet its burden in establishing that it offered a FAPE to the student for the 2023-24 school year, that the parent met her burden in establishing that Cooke was an appropriate unilateral placement, and that, because the parent failed to provide a ten-day-notice prior to unilaterally placing the student at Cooke, the tuition award to the parent would be reduced (see generally IHO Decision). With respect to the district's burden, the IHO found that the district's witness, a school psychologist, offered little more than general assertions in her testimonial affidavit, providing little explanation or analysis on how the October 2022 IEP was reasonably calculated to enable the student to make progress (*id.* at pp. 8-10). The IHO also did not find the school psychologist's written testimony to be credible, as she had conceded during her testimony at the impartial hearing that she did not carefully review her testimonial affidavit, and that she merely signed an affidavit prepared by the district's attorney (*id.* at p. 9). The IHO noted that the school psychologist also conceded that her testimonial affidavit contained two errors, the first related to the student's attendance at the October 2022 CSE meeting, and the second related to a reference in the affidavit to an "incorrect date for an IEP that may not [have] exist[ed]" (*id.*). The IHO also found that, in light of the testimony that the parent and Cooke school officials raised several concerns "during various IEP meetings" for the student, and in light of the "more comprehensive recommendations contained in" the January 2022 neuropsychological evaluation report, it would have been "an error to determine that any of the IEPs in evidence were sufficient based on their contents" without evidence explaining why the CSE's recommended programs were reasonably calculated to enable the student to receive an educational benefit (*id.* at p. 10).

With respect to the appropriateness of Cooke, the IHO found that the student's placement in the private school consisting of 12 students, one head teacher, and one assistant teacher, conformed to the recommendations in the private neuropsychological evaluation report (IHO Decision at p. 12). Additionally, the IHO found that two progress reports in the hearing record provided substantial evidence of the student's progress while at Cooke (*id.*; see Parent Exs. H, I). Finally, with respect to the reduction of the parent's award, the IHO found that, because the parent had provided a ten-day notice in March 2024, approximately eight months after the student began attending Cooke for the 2023-24 school year in July 2023, a reduction was warranted (IHO Decision at pp. 13-15). On this basis, the IHO reduced the award to \$34,608.34 from a total tuition cost of \$97,825 (*id.* at pp. 15-16).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in reducing the awarded tuition under equitable considerations. The parent concedes that written notice of her intent to unilaterally place the student was not given until "many months after the student started attending" Cooke, but she asserts that she provided notice at the October 2022 CSE meeting when she "expressed [her] dissatisfaction with the IEP recommendations for the Student and rejected the placement proposed by the" district. The parent further asserts that she placed the district on notice of her intent to enroll the student in Cooke at public expense because "the Student was already attending a private school at public expense at the time of the IEP meeting on October 20, 2022." The parent contends, in the alternative, that the hearing officer abused his discretion by reducing the tuition award by approximately 65 percent, as the finding is "not consistent with recent decisions" of the Office of State Review, and because "not once" in the 10 years that the student attended Cooke, did the district respond to the parent's rejection of the recommended program. As such, the parent argues

that the district was not deprived of an opportunity to recommend a FAPE for the 2023-24 school year, as "it is clear the [district] would not have made any recommendation other than the one the Parent has rejected throughout the past 10 years." The parent contends that, at most, a reduction of 30 percent would be appropriate. The parent further contends that the IHO did not inquire about equitable considerations during the impartial hearing, but that the issue of the ten-day notice was only raised during the district's closing argument.⁶

In an answer and cross-appeal, the district contends that equitable considerations do not favor relief for the parent, and that the IHO erred in determining that the district did not meet its burden to prove a FAPE was offered to the student. With respect to equitable considerations, the district contends that the parent did not inform the district of her intention to place the student at Cooke and seek public funding for the 2023-24 school year until March 2024, and that, merely because the parent placed the student at Cooke for 10 years, did not relieve the parent of her duty to timely notify the district of such rejection and unilateral placement. With respect to the district's arguments on cross-appeal regarding the offering of a FAPE to the student, the district contends that the October 2022 IEP contained goals that were in line with the objectives specified in Cooke's progress report and input from the parent. The district contends that the information in the IEP demonstrates that the October 2022 CSE reviewed and considered the private neuropsychological evaluation report, school reports, the parent's input, and, in light of least restrictive environment (LRE) considerations, the CSE reached a different conclusion regarding appropriate placement than the private neuropsychologist. The district notes that, while a CSE is required to consider reports from privately retained experts, it is not required to adopt the recommendations of such experts. Additionally, the district alleges that the CSE's recommendation of a placement in 12:1+1 special class in a specialized school was appropriate, whereby a smaller class setting in a specialized school would not have provided appropriate peer groupings for the student. The district also asserts that is bound by LRE standards, unlike the parent, Cooke, and the private neuropsychologist. The district asserts that the testimony of the school psychologist offered further support of the CSE's recommendations. Finally, the district contends that it provided the parent with notice of the public school to which it assigned the student to attend prior to the start of the 2023-24 school year.

In an answer to the cross-appeal, the parent contends that the IHO properly found that the district failed to meet its burden to prove that it offered a FAPE to the student for the 2023-24 school year and contends that this finding should not be disturbed. Specifically, the parent contends that the district failed to support its assertion that a FAPE was offered with credible evidence, as the district's sole witness was found to not be credible, and that the witness' testimony on cross-examination undermined her testimonial affidavit. The parent also asserts that the IHO correctly found that the only other testimony in the hearing record supported a finding that a FAPE

⁶ The parent submits additional evidence with her request for review. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The additional evidence submitted by the parent is not necessary in order to render a decision on this matter, and therefore will not be considered.

was not offered to the student, and that the October 2022 IEP recommendations were not in accord with the private neuropsychological evaluation report. The parent also makes additional arguments with respect to equitable considerations and her entitlement to relief.

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" (Andrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁷

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

⁷ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

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

VI. Discussion – FAPE – October 2022 IEP

In finding that the district did not meet its burden to prove that it offered the student a FAPE, the IHO largely relied on an analysis of the testimony presented at the impartial hearing (IHO Decision at pp. 8-10). With respect to the IHO's finding regarding the credibility of the district school psychologist's testimony generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this case, the IHO found that the written testimony of the school psychologist was not credible because she made only general assertions in her testimonial affidavit, she conceded during her testimony that she did not carefully review her testimonial affidavit, which she did not personally author, and conceded that her testimonial affidavit contained two errors (IHO Decision at pp. 8-10). Under the circumstances of this case, the evidence in the hearing record does not lead me to a contrary conclusion regarding the school psychologist's credibility and, therefore, I defer to the IHO's credibility determination, and I will not consider the school psychologist's testimony.

After finding that the school psychologist's testimony could not be relied upon, the IHO then went on to consider the testimony presented by the parent and indicated that he could not rely on the IEP itself to discern the CSE's rationale for its recommendation (see IHO Decision at pp. 8-10). However, the IHO's decision does not reflect that he weighed the substance of the district's documentary evidence or considered the parent's discrete claims in light of the district's obligations. It is to this analysis that I now turn.

A. Student Needs

A review of the student's needs and current functioning will provide the background necessary to evaluate the appropriateness of the October 2022 CSE's recommendations.⁸

⁸ While the parent raised in her due process complaint notice the issue of a new IEP not being developed for implementation after October 23, 2023 (see Parent Ex. A at p. 4), this is a matter that the IHO did not rule on, and neither party has advanced the issue on appeal; to the contrary, both parties agree that the operative IEP for these proceedings was the October 2022 IEP (see Req. for Rev. ¶ 7; Answer & Cr.-App. ¶ 5). Thus, this allegation is deemed abandoned and will not be addressed (8 NYCRR 279.8[c][2], [4]). However, even if the allegation was before me, the evidence in the hearing record demonstrates that the October 2022 IEP was in effect at the beginning of the 2023-24 school year, and therefore, the district met its obligation to have an IEP in place at the beginning of the school year, and the CSE was not required to conduct an annual review and develop a new IEP prior to the beginning of the school year. Additionally, the Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unliterally] place" their child before the beginning of a school

The hearing record reflects that, in developing the student's IEP, the October 2022 CSE relied on a January 2022 private neuropsychological evaluation, a June 2022 Cooke progress reports, and input provided at the CSE meeting by the parent, the private neuropsychologist, a teacher from Cooke (Dist. Exs. 1 at pp. 1-8, 29; 4; 5; see Parent Ex. C; Dist. Ex. 6). The October 2022 IEP included the results of a January 2022 administration of the Comprehensive Test of Nonverbal Intelligence, Second Edition (CTONI-2) which indicated the student attained a full-scale IQ of 86, characterized as falling in the below average range (Dist. Ex. at p. 1). Additionally, the IEP reported the results of a January 2022 administration of the Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V), which showed the student's performance fell in the low average range on the verbal comprehension and processing speed indices and average range on the working memory index (id.). The October 2022 IEP also included the results of achievement testing that indicated the student's reading comprehension was in the average range as measured by the Wechsler Individual Achievement Test, Fourth Edition (WIAT-4) and the student's mathematics ability fell in the low range and academic skills in the low average range as measured by the Woodcock-Johnson Tests of Achievement, Fourth Edition (WJ ACH IV) (id.). Lastly, the IEP reflected that completion of the Comprehensive Parent/Caregiver Form of the Vineland Adaptive Behavior Scale, Third Edition (Vineland-3) yielded an adaptive behavior composite score in the low range (id. at p. 2).

The October 2022 IEP indicated that the neuropsychologist who completed the January 2022 neuropsychological evaluation attended the CSE meeting and reported that the results of the administration of the CTONI-2 were within the average range and the results from the WISC-V ranged from average to low average (Dist. Ex. 1 at p. 5; see Parent Ex. C).⁹ Additionally, the neuropsychologist reported that the student continued to require specialized placement support for students with autism, and hands-on real-world activities to work on adapted skills (Dist. Ex. 1 at p. 5; see also Dist. Ex. 4 at p. 1). He further reported that academic functioning delays were evident in all areas; however, he noted that the student's reading comprehension skills were "strong and intact," and that the student struggled more with math tasks (Dist. Ex. 1 at p. 5). Regarding language and executive skills, the neuropsychologist reported that the student was able to complete executive functioning tasks without language, however, he struggled when language was involved (id.). He reported that the student did not have "an intellectual impairment but did have a language impairment contributing to the diagnosis" (id.). The IEP also indicated that the student insisted on

year (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]). There is evidence in the hearing record that the student began attending Cooke on July 24, 2023, and that the parent signed the re-enrollment contract with Cooke on October 10, 2023, prior to the alleged IEP expiration of October 20, 2023 (Parent Exs. G, L). Thus, in line with the prospective analysis required by the Second Circuit, the October 2022 IEP was the operative IEP at the time of the parent's placement decision and the district was not required to defend any subsequent IEP developed—or not developed as the case may be—after the student was attending the unilateral placement during the school year at issue (see Bd. of Educ. of Yorktown Cent. Sch. Dist., 990 F.3d at 173; R.E., 694 F.3d at 187-88).

⁹ The October 2022 IEP included an explanation from the neuropsychologist that, due to time constraints, he did not complete a "Full Battery," instead he started with the CTONI-2 measure of nonverbal functioning and added the WISC-V after the fact (Dist. Ex. 1 at p. 5). Additionally, the teacher version of the Vineland was not completed, rather, only the parent version was completed as an interview that was conducted in Chinese by a graduate student (id.).

wearing the same clothes and hat and that "the discrepancy in [a]dapted [s]kills is a feature in the [a]utism presentation" and that the student's adaptive skills were "also impaired and in need of support" (*id.*).

Academically, the October 2022 IEP noted that the student was demonstrating decoding skills at the seventh grade level and reading comprehension skills at the eighth grade level (Dist. Ex. 1 at p. 6). The IEP further noted that the student had "a lot of skills," however, he would require support if asked questions unrelated to his interests (*id.* at pp. 5-6). Information provided at the CSE meeting by the student's then-current teacher indicated that he had "some solid reading and comprehension skills" and would use classroom supports like graphic organizers and visuals such as a list of "wh" questions to aid in asking himself questions related to a text or novel (*id.* at p. 5). The IEP reported that the student had demonstrated the ability to make text-to-self and text-to-world connections independently, had a strong literal understanding of the text he read, could provide relevant details when retelling a text to help expand answers, and could make inferences independently and accurately (*id.*).

Based on teacher report, the October 2022 IEP stated the student's was functioning in the fifth to sixth grade range for writing and noted that he was able to explain his arguments, but required support to "generate a counterclaim" and explain it logically (Dist. Ex. 1 at p. 6). Additionally, according to the October 2022 CSE meeting minutes, the student required supports such as frequent check-ins, teacher modeling of strategies and skills, and step by step demonstration (Dist. Ex. 4 at p. 1).

With regard to mathematics, the October 2022 IEP noted that according to a June 2022 school progress report the student was eager to learn in math class and enjoyed challenging math assignments (Dist. Ex. 1 at pp. 2-3). Additionally, the IEP reported that the student was working on explaining his mathematical thinking and benefitted from frequent teacher check ins to address any misconceptions (*id.* at p. 3). The student continued to develop skills in multi-digit arithmetic with support such as repetition, small group instruction, and graphic organizers (*id.*). The IEP further reported that the student could independently tell time to the minute and with the use of a graphic organizer could solve word problems with intervals of hours and minutes (*id.*). Additionally, the student demonstrated the ability to independently identify and tell the value of coins and bills, as well as count a collection of mixed coins and bills (*id.*). Finally, the IEP reported that, while the student had not demonstrated independence in all of these skills, the level of prompting he required had decreased (*id.*).

Additionally, information provided at the October 2022 CSE meeting indicated that the student was functioning at a fifth grade level in mathematics (Dist. Ex. 1 at p. 6). The student could add and subtract multi-digit numbers; however, he would need additional help if the information was presented in a word problem (*id.*). The IEP indicated that the student was working on applying strategies to multiplication and division, applying properties of operations, learning strategies for multiplication and division, understanding division as an unknown factor problem, solving equations to determine an unknown whole number in various operations, and to apply and extend strategies to algebraic expressions (*id.*).

The October 2022 IEP indicated that, based on the June 2022 Cooke progress report, the student had been working to improve his verbal reasoning skills, cognitive flexibility, and task

initiation, and noted that during structured tasks while working in the school store he was able to answer "why" and "how" questions with 60 percent accuracy given minimal to moderate verbal cueing (Dist. Ex. 1 at p. 3). Additionally, the IEP noted the student was able to initiate a class routine 60 percent of the time given moderate support and required moderate verbal support such as repetition of directions and visual cues to complete his work within a given time frame (id.). The IEP reported that while working at the school store the student was "able to listen to peer's ideas, collectively formulate a short and long term goal and adjust a plan due to scheduling conflicts or absences with moderate cueing" (id.).

With regard to speech and language, information provided by Cooke at the October 2022 CSE meeting indicated that the student was working on improving pragmatic skills such as reading social cues and facial expressions, and it was noted that he would continue to work on applying knowledge from social skills groups, such as perspective-taking, in varying social situations in the community and at his internship (Dist. Ex. 1 at p. 3). Additional information provided in the October 2022 CSE meeting minutes indicated that the student could follow directions and initiate text-based tasks independently and that he could take three to four conversational turns with peers and adults on a topic of interest (Dist. Ex. 4 at p. 2).

According to the October 2022 IEP, the student completed an in-house based internship at Cooke as the facilities assistant, with primary responsibilities that included performing indoor and outdoor maintenance duties around the school, sweeping floors, cleaning tables in the lunchroom, and removing trash and recycling from classrooms and offices (Dist. Ex. 1 at p. 4). The IEP reported that the student demonstrated punctuality, dressed appropriately, maintained personal hygiene, and often showed initiative with minimal prompting (id.). The student communicated effectively with his advisor, asked for help when needed, responded positively to feedback, listened attentively, applied learned skills, began developing problem solving skills, and solved recurring challenges independently (id.).

In terms of social development, the October 2022 IEP reported that the student struggled with interacting and collaborating with others even if they were familiar (Dist. Exs. 1 at p. 7; 4 at p. 2). Additionally, the IEP indicated the student was aware of how intellectually advanced he was compared to peers and noted that because of his significant background knowledge about historical information he would seclude and step away from bigger groups and be alone (Dist. Ex. 1 at p. 7). The IEP indicated that the student's most recent counseling goals had targeted his ability to appropriately advocate for himself, interpret social cues, and develop coping strategies to implement when anxious (id. at p. 6). According to the IEP, the June 2022 Cooke progress report indicated that the student had appropriately advocated for himself more often that semester in structured settings; however, he required moderate support to self-advocate in unstructured settings (id. at pp. 2, 6). Additionally, the IEP indicated that the student required moderate support to participate in discussions or activities about defining relationships and ways to foster friendships (id.). The IEP stated that the student could interpret the perspectives of others with moderate support (id.). The parent expressed concerns about the student always being alone at home, and inquired about possible ways the school could support helping him find a friend to play with outside of school (id. at p. 7).

With regard to physical development, information provided by Cooke staff at the October 2022 CSE meeting indicated that the student needed support in personal hygiene, adaptive daily

living skills, household chores, food preparation, and safety and travel within the community (Dist. Ex. 1 at p. 7).

B. Annual Goals

The IHO did not address the parent's claim raised in the due process complaint notice pertaining to the annual goals contained in the October 2022 IEP (see Parent Ex. A at p. 3; see generally IHO Decision at pp. 8-10). In its cross-appeal, the district asserts that the IEP outlined goals designed to address the student's needs. Other than denying the allegation, the parent does not in her answer to the district's cross-appeal meaningfully engage with the district's assertion in this regard.

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]).

Here, the October 2022 CSE developed seven annual goals with corresponding short-term objectives designed to improve the student's skills in reading; writing; math; interpersonal, intrapersonal, and self-advocacy skills; verbal reasoning, cognitive flexibility, and task initiation skills; and activities of daily living (ADL) skills (Dist. Ex. 1 at pp. 10-17). The annual goals generally included evaluative criteria (80 percent accuracy), evaluation procedures (teacher/provider observation, performance assessment task, teacher made materials, class activities), and schedules to measure progress (one time per quarter) (*id.*). Contrary to the parent's contention, the IEP included annual goals and short-term objectives specifically intended to be worked upon in the student's counseling, speech-language therapy, and OT services (*id.* at pp. 14-16).

For example, review of the IEP indicates that the annual goal for OT and corresponding short-term objectives were appropriate and addressed the student's specific needs (Dist. Ex. 1 at p. 16). The IEP noted that Cooke did not provide the CSE with an OT report, but, as described above, at the CSE meeting Cooke staff verbally reported that the student needed support in personal hygiene, ADLs, household chores, food preparation, and safety and travel within the community (*id.* at p. 7).¹⁰ A review of the October 2022 IEP shows the CSE created a goal to improve the student's ADL skills with short term objectives targeting his ability to improve his personal

¹⁰ The June 2022 Cooke progress report, reviewed by the October 2022 CSE, indicated that Cooke students "participated in an executive functioning class for one Adaptive Skills class period per month" and that "[o]ccupational therapy was further provided in a consultative manner, through collaboration with academic and related service team members to support student needs" (Parent Ex. 6 at p. 5). Although the Cooke progress report described sensory regulation as one of the areas generally addressed by OT in a school setting, the description was not specific to the student in this case (*id.*).

hygiene, make a purchase online, make a purchase in the community, manage items while making a purchase, demonstrate pedestrian safety skills, demonstrate left-right discrimination, and identify location using street names (*id.* at p. 16). Additionally, the CSE included in the coordinated set of transition activities that the student would continue to receive OT in order to support improving ADL and instrumental activities of daily living (IADL) skills including fine and gross motor control, balance, strength, posture, motor planning, manual dexterity, visual perceptual and visual motor deficits, handwriting, and sensory regulation (*id.* at p. 22).

The parent also set forth allegations identifying discrete skills areas for which the IEP did not include annual goals or for which the IEP included annual goals despite that the student had improved in the area (*see* Parent Ex. A at p. 3). However, courts have explained that an IEP need not identify annual goals as the only vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE (*see J.B. v. New York City Dep't of Educ.*, 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]). Moreover, courts generally have been reluctant to find a denial of a FAPE on the basis of an IEP failing to sufficiently specify how a student's progress toward his or her annual goals will be measured when the goals address the student's areas of need (*D.A.B. v. New York City Dep't of Educ.*, 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; *A.D.*, 2013 WL 1155570, at *10-*11; *J.L. v. City Sch. Dist. of New York*, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; *P.K. v. New York City Dep't of Educ. (Region 4)*, 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], *aff'd*, 526 Fed. App'x 135 [2d Cir. May 21, 2013]).

As one example, the parent cited the student's scores of "2 out of 4" on his 2021-22 Cooke progress report related to his ability to make use of sensorimotor strategies to increase attention and participation and his ability to position his body to maximize participation (Parent Ex. A at p. 3). However, the June 2022 progress report that was before the CSE did not include specific OT goals or scores for the student, nor does it include information related to the student's ability to use sensorimotor strategies to increase attention and participation, or his ability to position his body to maximize his participation (*see* Dist. Ex. 6). Next, the parent pointed to the "[n]eeds [i]mprovement" and "[s]ometimes" scores with regard to organization and homework to suggest the student required benchmarks for these skills (Parent Ex. A at p. 3).¹¹ The June 2022 Cooke progress report did not mention homework and, in terms of organizational skills, the report indicated the student was "[a]lways" organized and managed his materials necessary for all classes, with the exception of math (Dist. Ex. 6 at pp. 7, 9, 11, 13, 18).

With regard to personal hygiene and the ability to work collaboratively with peers, the parent noted that, although the student scored well on these skills, the IEP continued to focus on them (Parent Ex. A at p. 3). While the June 2022 Cooke progress report indicated the student practiced appropriate personal hygiene in his internship, the October 2022 IEP indicated that Cooke staff identified this as an ongoing area of need (*compare* Dist. Ex. 6 at pp. 21-22, *with* Dist. Ex. 1 at 7). Additionally, while the June 2022 Cooke progress indicated that the student was "[a]lways" able to collaborate with peers in some classes, it also indicated that in other classes the

¹¹ The October 2022 IEP indicated the student's mother wanted the school (Cooke) to provide the student with more homework "as he struggle[d] and show[ed] a lack of interest and additional encouragement was needed" (Dist. Exs. 1 at p. 6; 4 at p. 1).

student "[s]ometimes" or "[u]sually" collaborated with peers (compare Dist. Ex. 6 at pp. 7, 13-14, 18, 23, with Dist. Ex. 6 at pp. 9, 11).

Taking into account the student's needs and the programming and service recommendations discussed further below, the October 2022 IEP included appropriate annual goals, and the concerns raised by the parent in the due process complaint notice regarding the goals do not support a finding that the district failed to offer the student a FAPE.

C. 12:1+1 Special Class

Turning to the parent's contentions below and the IHO's findings in his decision that a 12:1+1 special class in a specialized school would not have appropriately supported the student, State regulation provides that "the maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]). By way of comparison, State regulation provides that 8:1+1 or 6:1+1 special classes are intended to address the needs of students whose management needs are determined to be "intensive" or "highly intensive" and requiring "a significant" or "a high" degree of individualized attention and intervention, respectively (8 NYCRR 200.6[h][4][ii][a]-[b]).

According to the June 2023 prior written notice, and as reported in the October 2022 IEP, the CSE considered 15:1, 8:1+1, and 12:1+(3:1) special classes in a community school but determined these "would not provide appropriate peer groups" for the student and that the "least restrictive setting [wa]s taken into consideration" (Dist. Exs. 1 at p. 28; 2 at p. 2).

While the parent contended that the recommended 12:1+1 special class would not have been appropriate, a review of the student's management needs indicates that the 12:1+1 special class aligned with the student's needs. In particular, the student required visuals, small group instruction, verbal prompts, visual cues, frequent check-ins with a teacher, modeling, graphic organizer, scaffolded instruction, explicit strategies, reminders, extra processing time, access to a counselor, collaborative model, access to the community, and positive praise (Dist. Ex. 1 at p. 8). The parent does not contend that the student had management needs that were intensive or highly intensive or that required a substantial or high degree of individual attention (see 8 NYCRR 200.6[h][4][i]-[ii]); rather, the parent's concerns with the recommended 12:1+1 special class related more to the parent's desire for the student to continue at Cooke, or at least to attend a program more similar to that provided at Cooke.

According to the IEP and the CSE meeting minutes, the parent and/or the representative from Cooke expressed at the CSE meeting that a 12:1+1 special class would not provide the student adequate support, particularly for adaptive and language skills, and that he required a setting that provided appropriate peer grouping with related services provided in the community and other settings (Dist. Exs. 1 at p. 28; 4 at p. 3; Parent Ex. O ¶¶ 22-23). It was also shared that the student had experienced bullying "in his prior setting . . . which led him to attend . . . Cooke" (id.).

With respect to concerns raised about the level of support for adaptive and language skills and level of access to community settings, the IEP included recommendations for one 45 minute session per week of individual counseling services, one 45 minute session per week of group counseling services, two 45 minute sessions per week of individual OT, three 45 minute sessions per week of individual speech-language therapy, and one 45 minute session per week of group speech-language therapy, with the setting for such services identified as a separate location or subject to the provider's discretion (Dist. Ex. 1 at pp. 18-19).¹² In addition, and as discussed further above, the IEP included annual goals targeting the student's personal hygiene, ADLs, speech-language needs, and skills related to functioning in the community, and provided for ongoing practice of community-based skills as part of the student's post-secondary transition plan (*id.* at pp. 10, 14-16, 21-23).

As for peer grouping, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). Accordingly, the district was required by State regulation to ensure that the student was appropriately grouped an any allegation that it would not have done so is speculative (J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP"], quoting R.E., 694 F.3d at 195, and citing M.O. v. New York City Dep't of Educ., 793 F.3d 236 [2d Cir. 2015]). Various district courts have followed this precedent post M.O. (G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at *4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"]).

Finally, while the student's past experiences with bullying before he began to attend Cooke 10 years prior are unfortunate, any concern that the student would again encountered bullying in a district public school was too speculative to inform the recommendations of the CSE. For that matter, according to the United States Department of Education, "placement in a more restrictive

¹² In the due process complaint notice, the parent had alleged that the October 2022 IEP was inappropriate, in part, because it did not recommend speech-language therapy and OT "in the same frequency or intensity as he was receiving these services at Cooke" (Parent Ex. A at p. 3); however, it is not clear at what frequency/intensity the student received these services at Cooke as, according to the June 2022 Cooke progress report that was before the CSE, OT and speech-language therapy were delivered as part of adaptive skills and executive functioning classes and pushed in to other parts of the student's schedule, without a minimum frequency stated (see Dist. Ex. 6 at pp. 4-5). Moreover, as discussed further below, the CSE was not required to adopt the same delivery model or program design used by the private school.

'protected' setting to avoid bullying behavior may constitute a denial of the IDEA's requirement that the school provide FAPE in the LRE" (Dear Colleague Letter, 61 IDELR 263 (OSERS/OSEP 2013]).

The parent contends that the student had attended a more supportive setting at Cooke, and that, therefore, the October 2022 CSE should have recommended a similar placement. Indeed, it appears that the parent and/or the neuropsychologist believed that the district should have recommended that the student attend Cooke (see Parent Exs. D ¶ 9; C at pp. 18-19). However, Cooke 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).¹³ Moreover, while the parent preferred the special class ratio provided at Cooke, districts are not required to replicate the identical setting used in private schools (see, e.g., M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). As a final point regarding the program the student was attending at Cooke, although the parent alleged in the due process complaint notice that the student was attending "a class with an 8:2:1 staffing ratio" (Parent Ex. A at p. 3), the hearing record reflects that the student had attended classes with ratios similar to the 12:1+1 special class recommended by the October 2022 CSE. In her written testimony, the assistant head of the Upper School of Cooke (assistant head) explained that the upper school's classes consisted of 10 to 12 students with two teachers, further noting that the 12th grade cohort consisted of up to 12 students with one head teacher, one assistant teacher, and an additional paraprofessional (Parent Ex. N ¶¶ 11, 27). Similarly, the June 2022 Cooke progress report that was before the CSE indicated that the student attended classes consisting of 12 students, supported by one to three teachers (head and assistant), with one paraprofessional in some classes (see Dist. Ex. 6).

¹³ The Supreme Court has noted that the IDEA contemplates that districts may not be able to address the needs of every student in public placements and may need to place some students in private placements at public expense in order to provide such students with a FAPE (Burlington, 471 U.S. at 369-70). However, the IDEA does not endow state or local educational agencies with regulatory authority over nonpublic schools, but instead requires state and local educational agencies to ensure that students placed in nonpublic schools by the educational agency receive a FAPE (Responsibility of SEA, 71 Fed. Reg. 46598-99 [Aug. 14, 2006]). A state educational agency must ensure that each student placed in a private facility by a public agency be provided special education and related services in conformity with an IEP, at no cost to the parents, and that meets the state's educational standards, and must also ensure that each such student is provided with all of the rights of a student who is served by a public agency (34 CFR 300.2[c][1]; 300.146). The IDEA also requires that special education and related services meet the standards of the state educational agency for a student to receive a FAPE (20 U.S.C. §1401[9][B]; 34 CFR 300.17[b]). Considering the State's obligations involving students placed in private facilities by public agencies, it is not surprising that, in providing special education to students with disabilities, districts are only authorized to contract with nonpublic schools which have been approved by the Commissioner of Education (Educ. Law § 4402[2][b][1], [2]; see Antkowiak v. Ambach, 838 F.2d 635, 640-41 [2nd Cir. 1988] [noting that pursuant to the IDEA a district can only place a student in a nonpublic school that meets State educational standards, including the requirement for approval by the Commissioner of Education], abrogated in part by Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). Indeed, while in-State and out-of-State "non-residential schools which have been approved by the commissioner" are included as part of the State's definition of special services or programs, nonpublic schools that have not been approved by the commissioner are not included (Educ. Law § 4401[2][e], [f]).

Also, to the extent the IHO found and the parent contends that the October 2022 CSE erred by not adopting the recommendations in the January 2022 private neuropsychological evaluation report, which included a recommendation that a "placement in a nonpublic or private specialized school [wa]is required," such as Cooke (Parent Ex. C at pp. 18-19; see IHO Decision at pp. 7-10), it is important to highlight that the CSE was not obligated to adopt the recommendations of a particular provider (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]).

This is particularly so given that, 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 to the greatest extent possible in light of the IDEA's LRE requirements. This is in contrast to the parent, representatives from Cooke, and the private neuropsychological evaluator, who were not required to take LRE considerations into account as they are not bound to adhere to the same mandates as the district personnel on the CSE in formulating recommendations for the student (see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 119-20). Where, as here, the CSE determined that the student could be educated satisfactorily in a district public school, the district was not obligated to consider a more restrictive setting, such as a nonpublic school (see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 148-49 [S.D.N.Y. 2006]). As one court described:

If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in the IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school . . . IDEA views private school as a last resort

(W.S., 454 F.Supp.2d at 148; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default" and that "[t]he statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education"] [emphasis in original]; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]; T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *19-*20 [S.D.N.Y. Sept. 16, 2013]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009];).

Based on the above, I find that the hearing record, without consideration of the school psychologist's testimony, demonstrates that the district's recommended program, including the 12:1+1 special class placement, was designed to provide the student with sufficient individualized support such that his IEP was reasonably calculated to enable the student to receive educational benefits and offered the student a FAPE for the 2023-24 school year.

VII. Conclusion

While there is no basis to disturb the IHO's credibility determination regarding the district's witness, I nonetheless find that the remaining evidence in the hearing record supports a finding that the district met its burden in establishing that a FAPE was offered to the student for the 2023-24 school year. As the district sustained its burden in establishing that it offered the student a FAPE for the 2023-24 school year, resulting in a reversal of the IHO's decision to award the parent with tuition funding, it is unnecessary to address the parent's contentions on appeal related to the provision of notice to the district or the IHO's reduction of the amount of tuition awarded to the parent.

I have considered the parties' remaining contentions and find the necessary inquiry at an end.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that that the IHO's decision dated December 20, 2024, is modified by reversing those portions that found that the district failed to offer the student a FAPE for the 2023-24 school year and ordered the district to fund a portion of the costs of the student's attendance at Cooke for the 2023-24 school year.

Dated: **Albany, New York**
September 25, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER