



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-043

**Application of the BOARD OF EDUCATION OF THE**  
**[REDACTED] for**  
**review of a determination of a hearing officer relating to the**  
**provision of educational services to a student with a disability**

### **Appearances:**

Frazer & Feldman, LLP, attorneys for petitioner, Laura A. Ferrugiari, Esq., of counsel

Mayerson and Associates, attorneys for respondents, Gary S. Mayerson, Esq., of counsel

Bakshi Law, attorneys for respondents, C. Lara Bakshi, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2012-13, 2013-14, and 2014-15 school years were not appropriate. The appeal must be sustained in part.

### **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 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**

According to the hearing record, the student demonstrated difficulties with reading, mathematics, writing, fine motor skills, pragmatic language, executive functions, visual tracking, visual memory, auditory processing, attention, and social/emotional/behavioral functioning (see Tr. pp. 32, 41, 69, 251, 1411, 1464, 1466, 1491-92; Dist. Exs. 31 at p. 2; 33 at pp. 4-5; 34 at pp. 9, 12; Parent Ex. G at pp. 7, 15-16). With respect to the student's educational history, the hearing

record shows that the student attended a district public school since the 2004-05 school year (see Parent Ex. G at p. 2).

For the 2012-13 through 2014-15 school years, the district's CSE convened no fewer than eight times (see generally Dist. Exs. 4; 14; 16; 21; 27; 28). The parents taped and transcribed three of the CSE meetings and the district taped and transcribed four different CSE meetings (see generally Dist. Exs. 40-43; Parent Exs. A; B; F).<sup>1</sup> No fewer than 10 persons attended each meeting, including attorneys for both parties (see Dist. Exs. 4 at p. 1; 14 at p. 1; 16 at pp. 1-2; 21 at p. 1; 27 at p. 1; 28 at p. 1).

The CSE convened on May 24, 2012 to develop the student's IEP for the 2012-13 school year (see generally Dist. Ex. 28). The CSE determined that the student continued to remain eligible for special education as a student with a learning disability (id. at p. 1).<sup>2</sup> In addition to multiple supports, modifications/accommodations, assistive technology, and annual goals, the May 2012 CSE recommended that the student be placed in a 12:1+1 special class in a community school for his core academic subjects and receive resource room in a group (5:1) and the following related services on a weekly basis: "2.5" 30-minute sessions of speech-language therapy in a group (5:1), one 30-minute session of individual occupational therapy (OT), and one 30-minute session of counseling in a group (5:1) (id. at pp. 1, 9-14). The May 2012 IEP also included provision for an indirect OT consult one time per month as a support for school personnel (id. at p. 14). The district implemented the May 2012 IEP starting in September 2012 (see Tr. p. 60). On November 30, 2012, the CSE reconvened at the parent's request to discuss the student's progress thus far under the educational plan recommended in the May 2012 IEP (see Dist. Ex. 27 at pp. 1-3). The November 2012 CSE made no changes to the special education program and related services included in the May 2012 IEP (see Dist. Ex. 27 at pp. 2-3; compare Dist. Ex. 27 at pp. 1, 12-13, with Dist. Ex. 28 at pp. 1, 13-14).

For the student's 2013-14 school year, the hearing record shows that the CSE convened and reconvened June 17, October 21, and November 12, 2013, as well as on April 2, 2014, to develop, discuss, and/or modify the student's special education program and related services (see generally Dist. Exs. 14; 16; 21). The June 2013 CSE recommended a "Foundations" 15:1 special class for the student's core academic subjects, along with resource room (5:1) and related services of individual OT and group counseling (5:1), as well as one 30-minute session of speech-language therapy (5:1) on alternate days (Dist. Ex. 21 at pp. 1, 14-15).<sup>3</sup> The October and November 2013 CSEs reconvened for the purpose of reviewing the student's progress since entering high school (Dist. Ex. 16 at p. 2).<sup>4</sup> The November 2013 CSE recommended the following modifications to the student's IEP: support of a teacher's aide in the resource room, one

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<sup>1</sup> There is no transcript for the November 30, 2012 CSE meeting in the hearing record.

<sup>2</sup> The student's eligibility for special education as a student with a learning disability is not in dispute (34 CFR § 300.8[c][6]; 8 NYCRR 200.1[zz][6]).

<sup>3</sup> The hearing record describes Foundations as a class that offers Regents level curriculum in a particular subject area taught over a two year period rather than one year, and which provided a small class size, structure, support, repetition of concepts, and a slower academic pace (Tr. pp. 95-96, 1141-42).

<sup>4</sup> No IEP was generated as a result of the October 2013 CSE meeting (see Dist. Ex. 16 at p. 3).

40-minute session of direct consultant teacher services every other day in a small group as a "skill building support," and a reduced frequency of counseling services (twice monthly) (*id.* at pp. 1, 4, 14-15). At the November 2013 CSE meeting, the parents requested that the district conduct an assistive technology evaluation and a neuropsychological evaluation of the student (*id.* at p. 4). The CSE agreed to the assistive technology evaluation and indicated that the district agreed to conduct a psychoeducational reevaluation of the student early, in the spring 2014, as part of the student's triennial evaluation, which was due in September 2014 (*id.*). The parents indicated that they would obtain a private neuropsychological evaluation (*id.*). The April 2014 CSE convened at the parent's request to review a private neuropsychological evaluation report that they obtained in December 2013 (*see* Dist. Ex. 14 at pp. 1, 2; *see generally* Parent Ex. G).<sup>5</sup> The April 2014 CSE made no modifications to the special education program and related services included in the November 2013 IEP (*see* Dist. Ex. 14 at p. 6; *compare* Dist. Ex. 14 at pp. 1, 16-17, *with* Dist. Ex. 16 at pp. 1, 14-15).

For the 2014-15 school year, the CSE convened on June 5 and June 24, 2014 to develop the student's IEP (*see generally* Dist. Ex. 4).<sup>6</sup> During the June 5, 2014 CSE meeting, the parents notified the district of their intent to file a due process complaint notice (Parent Ex. F at p. 16). In addition, at the beginning of the June 24, 2014 CSE meeting the parents provided the CSE chairperson with a copy of their due process complaint notice and stated that they would not agree to an IEP for the student unless it mirrored the placement, supports, and services, which the parents requested in the due process complaint notice (Dist. Ex. 43 at pp. 7-8). The June 2014 IEP continued the student's educational program for the 2013-14 school year except that the student's counseling mandate was modified to be delivered once weekly on an individual basis and the student's speech-language therapy mandate was changed from a group session on alternate days to an individual session (*compare* Dist. Ex. 4 at pp. 1, 14-15, *with* Dist. Ex. 14 at pp. 1, 16-17). The parents rejected the June 2014 IEP at the end of the meeting and informed the district of their intent to enroll the student in a program at the Lindamood-Bell Learning Center (LMB) for the summer and seek public funding for the costs of the program (Dist. Ex. 43 at p. 43).

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

The parents filed a due process complaint notice, dated June 24, 2014, which contained a number of factual allegations embodied within 111 numbered paragraphs and multiple subparagraphs, alleging that the district deprived the student of a FAPE for the 2011-12, 2012-13, and 2013-14 school years (*see* Parent Ex. H at pp. 1-25). The parents also asserted claims pursuant to section 504 of the Rehabilitation Act of 1973 (section 504), the Americans with Disabilities Act (ADA), and 42 U.S.C. § 1983 (section 1983) (*id.* at pp. 1, 3).

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<sup>5</sup> The private neuropsychological evaluation report indicates that the evaluation took place on December 17, 2013 but that a classroom observation and feedback to the parents and student occurred subsequently in February and March 2014 (*see* Parent Ex. G at p. 1).

<sup>6</sup> No IEP was generated as a result of the June 4, 2014 CSE meeting (*see* Dist. Ex. 4 at p. 3).

While it is difficult to ascertain from the due process complaint notice to which school year each allegation relates, multiple claims may be fairly read as relating to one or all of the disputed school years (see Parent Ex. H at pp. 2-23). Specifically, with respect to the CSE processes, the parents asserted, among other things, that the district: failed to provide them with a procedural safeguards notice; failed to ensure the attendance of all required members at the CSE meetings; deprived them of the opportunity to participate in the development of the student's IEPs; created the student's IEPs based on the resources available rather than the student's needs; failed to thoroughly, appropriately, and timely evaluate the student; and failed to provide them with prior written notice of changes to the student's IEP or of its rejection of related services and testing requested by the parents (id. at pp. 2-4, 9-10, 18-19, 21).

As for the resulting IEPs, the parents asserted that the CSEs: failed to incorporate recommendations from the private neuropsychological evaluation report; inadequately described the student's present levels of performance; included annual goals that were vague, immeasurable, and not individually tailored to the student's needs, and which lacked benchmarks; failed to develop a behavioral intervention plan (BIP); failed to recommend adequate levels of assistive technology support and instruction; recommended similar educational programs in multiple IEPs notwithstanding the student's lack of progress; failed to include enough individualized instruction and support to allow the student to progress in a general education environment; failed to recommend 1:1 instruction for the student in the areas of mathematics or reading, after school tutoring, or adequate levels of resource room; failed to recommend a specific methodology; failed to recommend sufficient parent counseling and training services, including training for the parents in the use of the student's assistive technology devices; failed to include transition services relative to the student's post-secondary planning; failed to include adequate transitional support services to facilitate the student's movement from middle school to high school; and failed to recommend 12-month school year services (see Parent Ex. H at pp. 2-3, 7-10, 15, 17-21). In addition, the parents asserted that the district failed to properly implement the student's IEP and, in particular, failed to properly implement the student's assistive technology mandates (see id. at pp. 2, 10, 17, 20).

The parents requested that the IHO awarded them relief in various forms. Specifically, the parents requested an order requiring the CSE to reconvene and develop an IEP that would include, among other things, placement at a particular nonpublic school; math and reading instruction at LMB; 1:1 instruction for the student, including 1:1 tutoring; and assistive technology, accommodations and modifications, and transportation (Parent Ex. H at p. 24). Characterized in the due process complaint notice as a request for "an immediate interim order under Section 504" but incorporated by reference in other paragraphs of the parents' proposed resolution, the parents also requested various other "services and accommodations," including reimbursement for the costs of the student's LMB program, as well as the costs of privately purchased assistive technology and the student's private counseling (id.). In addition, the parents requested relief in the form of compensatory education or additional services, including: prospective placement of the student at a particular nonpublic school; 1:1 tutoring in writing and mathematics; use of and training in assistive technology; and physical therapy and OT (id. at p.

24-25). Finally, the parents requested reimbursement of the costs of privately obtained evaluations (see id. at pp. 24-25).<sup>7</sup>

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

An impartial hearing convened on August 25, 2014, and concluded on January 13, 2015, after 14 days of proceedings (see Tr. pp. 1-2173). Prior to the first day of proceedings, the parties submitted several written motions for the IHO's consideration (see generally IHO Exs. I-V). During the first day of the impartial hearing, the IHO ruled that the special education program and related services found in the student's November 2013 IEP formed the basis of his pendency (stay-put) placement (Tr. p. 52). In addition, the IHO denied the district's motion to dismiss the section 504 claims, but granted its motion to dismiss the parents' section 1983 and ADA claims for lack of subject matter jurisdiction (Tr. p. 51; see IHO Decision at pp. 30-31).<sup>8</sup> The IHO also ruled that the statute of limitations barred the parents' claims that arose prior to June 24, 2012 (Tr. pp. 51-52; see IHO Decision at p. 30).

In a final decision, dated March 23, 2015, the IHO determined that the district denied the student a FAPE for the 2012-13, 2013-14, and 2014-15 school years (see IHO Decision at pp. 32- 37). As an initial matter, the IHO determined that the district behavioral consultant lacked credibility, noting such things as his apparent lack of appropriate credentials, inability to testify as to details of the student's reading program for the 2013-14 school year, the lack of support for his opinion about remediation of the student's executive functioning delays, and the timing of a document developed by the behavioral consultant, which the IHO found was created for the purposes of litigation, as well as the witness's "contrived and rehearsed" testimony (id. at pp. 24-26).

With respect to the 2012-13 school year, the IHO determined that, notwithstanding the May 2012 CSE's awareness of parent and teacher concerns about the student's progress and of the student's performance on standardized testing and state assessments, which revealed severe cognitive, attentional, and academic deficits, particularly in reading, writing, and mathematics, it recommended the same program the student attended the prior school year (IHO Decision at pp. 31-32). In particular, the IHO noted that, although the May 2012 CSE added resource room to the student's special education program, the CSE failed to develop specific reading or mathematics programs to address the student's needs (id. at p. 32). The IHO acknowledged evidence that the student received special reading instruction during the 2012-13 school year but found such evidence insufficient to overcome the CSE's failure to specify a "more intensive and more structured reading remediation program" on the student's IEP (id.). Next, while the IHO

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<sup>7</sup> During the impartial hearing, in lieu of the request for placement in a nonpublic school, the parents modified their requested relief to include, in addition to tutoring at LMB, an order that the student remain in the district's 15:1 special class for his core academic classes and receive one period per day of tutoring with a certified special education teacher in each core subject, as well as an academic and social summer program and assistive technology training for the parents (see Tr. pp. 1230-31).

<sup>8</sup> The IHO ultimately determined that the hearing record did not support the parents' section 504 claim arising from the allegations that the district discriminated against the student by exempting him from the high school's foreign language requirement (IHO Decision at pp. 30-31).

acknowledged that eligibility for a 12-month school year program should be based on evidence of a student's regression, he found that, given the lack of discussion about an extended school year for the student at the May 2012 CSE meeting, as well as evidence that the student struggled during the 2011-12 school year and "had to be retaught the basic skills in math and reading throughout the school year," the May 2012 CSE should have recommended a 12-month school year program for the student (id. at p. 33).

Turning to the 2013-14 school year, the IHO held that the 15:1 special class placement recommended in the July 2013 IEP was insufficient to meet the student's needs (IHO Decision at p. 34). The IHO noted that the CSE considered a 12:1+1 special class placement but rejected this option because "it was a life skills class" and too restrictive (id.). However, the IHO found that the July 2013 CSE did not discuss how the 15:1 special class would benefit the student, given his struggles in a 12:1+1 special class (id.). Based on information available to the July 2013 CSE, the IHO concluded that the student required more adult support than that available in a 15:1 special class (id. at pp. 34-35). The IHO also determined that, based on the student's "low academic skills in reading and math," an educational program that utilized "a Regents level curriculum, even if taught at a slower pace," was not appropriate (id. at p. 34). The IHO also found that the July 2013 IEP again failed to detail a reading program for the student, other than to note that the student would work on reading in the resource room, and that the reading instruction provided to the student during the 2012-13 school year "was eliminated" during the 2013-14 school year (id. at p. 35). The IHO found "for the same reasons set forth above," the July 2013 CSE should have recommended a 12-month school year program for the student and additionally noted that the parents' counsel requested 12-month services during the June 2013 CSE meeting (id.).

Next, the IHO found that the district denied the parents the opportunity to meaningfully participate in the CSE process since April 2014 (IHO Decision at p. 36). Specifically, the IHO found that the district members of the CSEs "consistently disregarded" and ignored the parents' concerns and unjustifiably claimed that the parents were impeding the student's progress because they were not "'buying-in' to the [d]istrict's program" (id.). With respect to the 2014-15 school year, the IHO also found that the district denied the student a FAPE because the June 2014 CSEs continued to recommend the same 15:1 special class placement for the student "with a Regent's track diploma," despite information in a private neuropsychological evaluation report available to the CSEs, which revealed the student's "severe deficits" in reading, writing, and mathematics, and that the student had "regressed academically from 2011" (id. at pp. 35-36). In so finding, the IHO accorded weight to the private evaluation results, along with the district's 2011 testing results, over the teacher's report with the respect to the student's academic progress during the 2013-14 school year (id. at p. 36). Finally, the IHO also found that the CSEs should have recommended a 12-month school year program for the 2014-15 school year (id. at p. 37).

For relief, first, the IHO ordered the district to reimburse the parents for the cost of the student's enrollment at LMB for summer 2014 (IHO Decision at pp. 39, 40). In granting this relief, the IHO found that LMB's remediation program appropriately addressed the student's needs, the student made progress during the summer 2014, and that equitable considerations weighed in favor of awarding the parents reimbursement (id. at p. 29).

Next, the IHO ordered the district to provide compensatory additional services in the form of tutoring at LMB in the areas of reading (up to 750 hours) and mathematics (up to 750 hours) (IHO Decision at pp. 37, 40). However, the IHO denied the parents' request for an additional class each day in each of the student's core subjects (id. at p. 37). The IHO also ordered that the CSE reconvene and develop a new IEP within 30 days that "recommends a smaller class than a 15:1 class and class that does not include a Regents curriculum" (id. at pp. 37, 40).

Turning to the parents' request for relief in the form of evaluations of the student, the IHO found that the district refused to fund a neuropsychological evaluation requested by the parents and "did not initiate an impartial hearing to defend its own evaluation" (IHO Decision at p. 38). Therefore, the IHO ordered the district to pay for the costs of the private neuropsychological evaluation report obtained by the parents (id. at pp. 39, 40). In contrast, the IHO found no evidence in the hearing record that the parents requested from the district an independent speech and/or auditory processing educational evaluation of the student and, therefore, denied the parents' request for the costs of the privately obtained speech-language evaluation.

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

The district appeals, asserting that the IHO erred in his determinations that it failed to offer the student a FAPE for the 2012-13, 2013-14, and 2014-15 school years. Initially, the district asserts that, although the IHO correctly determined that the parents' claims that arose prior to June 24, 2012 were barred by the statute of limitations, he then erred in ruling on the merits of the May 2012 CSE and resulting IEP. With regard to the scope of the impartial hearing, the district asserts that the IHO made sua sponte findings on claims that the parents did not include in their due process complaint notice. Specifically, the district asserts that the parents requested reimbursement or placement in an extended school year summer program for the student as a form of relief relative to their section 504 claim but not as a claim or request for relief arising under the IDEA. In addition, the district asserts that the IHO erred in reaching the merits of any claim relating to the 2014-15 school year as it was not part of the due process complaint notice and because the parents ultimately requested that the student attend the educational program recommended in the IEP developed for the student for the 2014-15 school year. As to the IHO's analysis, the district asserts that he misquoted, misstated, and otherwise mischaracterized testimony from district witnesses and erred in his determinations as to the credibility of the witnesses and in the weight he accorded to the evidence.

Turning to the merits, with respect to the 2012-13 school year, the district argues that the IHO erred in finding that the CSE failed to develop a specific reading program for the student, noting that annual goals in the IEP targeted such needs and, further, that the IDEA does not require an IEP to identify a particular program, provider's name, or methodology. The district asserts that the CSEs develop an appropriate special education program for the student. As to the 12-month school year, the district asserts that the IHO applied an incorrect legal standard to find that the CSE should have recommended services for the student during summer 2012. The district argues that the May 2012 CSE did not have before it evidence of the student's substantial regression. Relative to the 2013-14 school year, the district argues that the IHO again erred in concluding that the student's IEP inappropriately failed to detail a specific reading program and

argues that the hearing record does not support the IHO's finding that the district terminated the reading instruction that the student had received during the 2012-13 school year. In addition, the district argues that the CSEs developed an appropriate program for the student and that the IHO erred again in finding that the June 2013 CSE should have recommended a 12-month school year program for the student. Finally, as for the 2014-15 school year, the district avers that the IHO erred in determining that the parents were denied a meaningful opportunity to participate in the CSE process starting in April 2014, that the student's June 2014 IEP was inappropriate, and that the CSE should have recommended a 12-month school year program for the student.

Next, the district asserts that the IHO erred in his determination that equitable considerations weighed in favor of the parent's request for reimbursement of the costs of the student's attendance at LMB for the summer 2014. As to the IHO's ordered relief, the district also argues that the IHO erred in ordering 750 hours of tutoring each in the areas of reading and mathematics at LMB, arguing that the evidence did not support such an award. In addition, the district objects to the IHO's order that the CSE recommend a class smaller than the 15:1 special class without a Regents curriculum. As to the IHO's order that the district pay for the costs of the privately obtained neuropsychological evaluation of the student, the district argues that the evaluation was neither alleged nor shown to be an independent educational evaluation (IEE), that the parents never disagreed with a district evaluation, and that the parent's due process complaint notice sought the costs of evaluations as relief for their section 504 claim and not as relief under the IDEA.

In an answer, the parents respond to the district's allegations with admissions and denials, and argue to uphold the IHO's decision in its entirety.<sup>9</sup> As to the scope of the impartial hearing, the parents argue against the district's "rigid and 'formulaic'" interpretation of the pleading requirement (see Ans. at ¶ 2) and assert, in particular, that the issues relating to the student's 2014-15 school year constituted the core of the dispute and that, in any event, the district opened the door to such claims. In addition, the parents dispute the district's characterization of their request for services for summer 2012 and summer 2013, asserting that the due process complaint notice requested such relief in the form of compensatory additional services. In addition, the parents assert facts tending to support various claims from their due process complaint notice that the IHO did not address, including, that the district denied the parents an opportunity to participate in the development of the student's IEPs for all three school years and that the student's assistive technology mandate was never implemented.

## **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

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<sup>9</sup> The parents have not asserted a cross-appeal challenging the IHO's: determination regarding the accrual of the statute of limitations or the inapplicability of an exception thereto; dismissal of their claims arising under section 504, the ADA, and section 1983; or denial of their request for reimbursement of the costs of a private speech/auditory evaluation (see Ans. at ¶ 3; Parent Mem. of Law at p. 3 n.2). Therefore, these determinations, which were adverse to the parents, have become final and binding on the parties and will not be further addressed (see 34 C.F.R. 300.514[a]; 8 NYCRR 200.5[j][5][v]).

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. 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; 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at \*15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## VI. Discussion

### A. 2012-13 School Year

#### 1. Statute of Limitations

The district asserts that, while the IHO correctly found that the statute of limitations barred the parents' claims that arose prior to June 24, 2012 (see IHO Decision at p. 30), he erred in then determining that the May 2012 IEP denied the student a FAPE. The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at \*17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57, 2014 WL 519641 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ., 2011 WL 4375694, at \*2, \*4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]).<sup>10, 11</sup>

In this case, the parents attended the May 2012 CSE meeting and understood the recommendations for the student (see, e.g., Dist. Ex. 28 at pp. 1-3; see generally Parent Ex. A). Thus, the hearing record demonstrates that the parents had until May 24, 2014 to file a due process complaint notice with respect to the May 2012 IEP (see G.W., 2013 WL 1286154, at \*17; Keitt v. New York City, 882 F.Supp.2d 412, 437 [S.D.N.Y. 2011]; G.R. v. Dallas Sch. Dist. No. 2, 823 F. Supp. 2d 1120, 1131 [D. Or. 2011]), and the due process complaint notice, filed on June 24, 2014, was untimely with respect to claims directed to the May 2012 CSE or resulting IEP (see Parent Ex. H at p. 1). As the IHO made his determination that the district denied the student a FAPE for the 2012-13 school year based on the May 2012 IEP, which was developed more than two years before the due process complaint was filed, (IHO Decision at pp. 31-33), this portion of the IHO's decision must be reversed.

However, the parents' due process complaint notice placed the entirety of the 2012-13 school year at issue, including claims relating to the implementation of the student's IEPs and the procedural and substantive adequacy of the November 2012 CSE and resulting IEP (see, e.g., Parent Ex. H at pp. 2, 19-20). Accordingly, the parents timely raised these different claims of injury relating to the 2012-13 school year (see K.P. v. Juzwic, 891 F. Supp. 703, 716-17 [D.

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<sup>10</sup> New York State has not explicitly established a different limitations period.

<sup>11</sup> An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 WL 4375694, at \*6). The parents have not asserted that an exception to the rule applies in this case.

Conn. 1995] [date of CSE meeting not determinative for statute of limitations purposes where plaintiff "challenge[d] the IEPs and the implementation of his IEPs . . ." ] [emphasis added]; accord G.R., 823 F. Supp. 2d at 1130-35). Therefore, while the design of the student's May 2012 IEP will not be addressed, the November 2012 IEP and the student's 2012-13 school year are addressed below. However, the actionable aspects of the 2012-13 school year do not encompass the summer 2012, as any claims regarding the lack of a 12-month school year would be challenges against the design of the May 2012 IEP that was created just prior to summer 2012. Therefore, the IHO's determination that the May 2012 CSE improperly failed to recommend 12-month school year services for the student (see IHO Decision at p. 33) must be reversed as a faulty IEP design claim that became barred by the statute of limitations in this instance.

## **2. Progress during the 2011-12 School Year**

Contrary to the IHO's determination that the student's placement for the 2012-13 school year was inappropriate because it was similar to the program recommended for the student's 2011-12 school year, the hearing record shows that the student made progress during the 2011-12 school year. A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. June 24, 2013]; Adrienne 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, at \*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., at p. 18 [December 2010]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has 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. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]). Here, the hearing record does not include a copy of the student's IEP for the 2011-12 school year making comparison of the educational programs less precise; however, the May 2012 CSE meeting minutes indicated that, during the 2011-12 school year, the student attended a 12:1+1 special class for core academic subjects along with related services (see Dist. Ex. 28 at p. 2). The May and November 2012 IEPs recommended a similar placement but added resource room services (Dist. Exs. 27 at pp. 1, 2, 12; 28 at pp. 1, 3, 13). Given this variation in the recommended placement and services, the student's rate of progress during the 2011-12 school year does not provide a clear indicator of the appropriateness of the subsequent IEPs.

In any event, the evaluation report completed during the course of the 2011-12 school year—the February 2012 OT report—as well as the minutes of the November 2012 CSE meeting, the November 2012 IEP, and discussion of the CSE members, indicated that, while the student continued to struggle in all academic areas, he demonstrated some progress within a 12:1+1 special class with supports and related services (see Dist. Exs. 27 at pp. 2-3, 6-7; 28 at p. 1; 31 at pp. 1-2). For example, although he continued to struggle in mathematics and was resistant to receiving assistance from the teacher and teacher assistant, he demonstrated progress in his ability to multiply multi-digit numbers (id. at pp. 2, 6).

The February 2012 OT report indicated that the student improved his ability to locate the keys of the keyboard but his visual processing and visual scanning skills negatively affected his task completion (Dist. Ex. 31 at p. 1). In addition, the report indicated the student improved in his use of both hands to type but frequently removed his hands to localize the keys and had difficulty with finger isolation (id.). According to the report, the student adequately wrote his first and last name in cursive and printed all upper and lower case letters but exhibited difficulty with spacing between letters and words (id. at p. 2).

According to the minutes of the May 2012 CSE meeting, the parents expressed concern that the student did not make any progress during the 2011-12 school year (Dist. Ex. 28 at p. 2). However, with respect to reading, the minutes indicated the student "made gradual progress" but his visual tracking delays led him to add or misread words (id.). The minutes of the CSE meeting indicated student had made "some progress" with underlining text to assist with understanding the reading material (id.). The special education teacher indicated the student progressed during the 2011-12 school year; for example, by exhibiting "good retention for the curriculum material" (id.). The speech-language therapist indicated the student demonstrated "nice progress" in decreasing response time during speech-language therapy sessions (id.). The minutes also memorialized information consistent with student's progress described in the February 2012 OT report (id.; see Dist. Ex. 31 at pp. 1-2). The minutes further indicated that with respect to counseling sessions, the student made progress in adhering to game rules (Dist. Ex. 28 at p. 2).

Many examples of the student's steady progress with support were memorialized in the student's present levels of performance in the November 2012 IEP, summarized below, including in the areas of mathematics, reading, English, writing, social studies, speech-language, and physical development (Dist. Ex. 27 at pp. 6-7). In addition, the hearing record shows that, at the time of the November 2012 CSE meeting, the student was attending the recommended 12:1+1 special class placement with resource room and related services and making progress in that setting (Dist. Ex. 27 at pp. 1-3, 6-9). The chairperson of the November 2012 CSE testified that the student demonstrated "good progress" in reading during the first three months of the 2012-13 school year leading up to the November 2012 CSE meeting (Tr. p. 68). While the IHO focused on the student's performance on State assessments as evidence of the student's lack of progress (see IHO Decision at pp. 31-32; Dist. Ex. 21 at p. 1), on the contrary, the hearing record shows that the student demonstrated meaningful progress during the 2011-12 school year commensurate with his abilities (Mrs. B., 103 F.3d at 1121 [noting that a "child's academic progress must be viewed in light of the limitations imposed by the child's disability"]; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at \*13-\*14 [S.D.N.Y. May 24, 2012], aff'd, 528 Fed. App'x 64, 2013 WL 3155869 [2d Cir. June 24, 2013]). Although I sympathize with the parents' concern about the student's rate of progress in the district program, the IDEA guarantees access to an appropriate public education, not specific results (see Rowley, 458 U.S. at 192; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 195; Walczak, 142 F.3d at 132).

### **3. November 2012 IEP**

#### **a. The Student's Needs**

In order to assess the November 2012 CSE's recommendations, a brief discussion of the student's needs, as known to the November 2012 CSE and as described in the present levels of performance included in the November 2012 IEP, although not directly at issue, is necessary to frame the below discussion. As agreed to by the parties at the time of the May 2012 CSE meeting, the November 2012 CSE convened in order to assess the student's progress and acceptance of the supports recommended in the May 2012 IEP (Dist. Exs. 27 at pp. 1-3; 28 at p. 3). The hearing record indicates that the November 2012 CSE had available to it the following information: a September 2011 psychoeducational evaluation report, a September 2011 speech-language reevaluation report, and a February 2012 OT evaluation report (Dist. Exs. 27 at pp. 4-6; 31; 33-34).

The September 2011 psychoeducational evaluation, conducted by a district psychologist, described the student's needs in the areas of cognition, academic achievement, visual-motor skills, and social/emotional functioning (see generally Dist. Ex. 34). The psychologist assessed the student's needs utilizing a classroom observation, behavioral observations, a review of records, and the results of standardized testing (see generally id.). Based on his assessment, the psychologist reported that overall, the student's intellectual abilities ranged from borderline to average and that the student struggled most on measures of processing speed and fluid reasoning (id. at p. 9). In addition, with respect to academic achievement, the psychologist reported that the student's reading, writing, and mathematics standard scores scattered between the low average to borderline/mildly delayed range (id. at p. 12). The psychologist indicated that the student demonstrated borderline to average skills in the area of visual-motor integration (id. at p. 8). With respect to social/emotional/behavioral functioning, the results of standardized testing were variable ranging from average to clinically significant depending on whether the teacher, parent, or student provided the information (id. at pp. 8-9, 13-14).

In September 2011, a district speech-language therapist conducted a speech-language reevaluation of the student to assess the student's needs related to receptive, expressive, and pragmatic language, as well as memory and processing (see generally Dist. Ex. 33). Results of standardized testing indicated that the student demonstrated average receptive and expressive vocabulary skills but exhibited difficulties in the areas of auditory processing, memory, and pragmatic language (id. at pp. 4-5).

On February 27, 2012, a district occupational therapist completed an OT report that reflected her observations of the student during therapy (Dist. Ex. 31). As noted above, the OT report indicated the student exhibited progress during the 2011-12 school year in his ability to locate keys on a keyboard (id. at p. 1). The report also indicated the student demonstrated the ability to print all upper and lowercase letters with adequate legibility but had difficulty with proper spacing between letters and words as well as copying simple sentences (id. at p. 2). The

occupational therapist recommended OT services to address the student's typing and visual memory skills (id.).

The evaluative information available to the November 2012 CSE and the present levels of performance contained in the November 2012 IEP provided a consistent description of the student's academic achievement, social/emotional functioning, and physical development (see Dist. Ex. 27 at pp. 4-8; see generally Dist. Exs. 31; 33; 34). For example, consistent with the September 2011 psychoeducational evaluative report, the November 2012 IEP contained both the standardized intelligence and achievement testing results (compare Dist. Ex. 34 at pp. 11-12, with Dist. Ex. 27 at p. 5). In accordance with the September 2012 speech-language reevaluation report, the IEP reflected the results of the Comprehensive Assessment of Spoken Language (CASL) which indicated the student's achieved standard scores (percentile rank) of 74 (5) in pragmatic judgment, the Expressive Vocabulary Test-Second Edition (EVT-2) 90 (25), and the Peabody Picture Vocabulary Test- Fourth Edition (PPVT-IV) 102 (55) (compare Dist. Ex. 33 at p. 4, with Dist. Ex. 27 at pp. 4-5). Consistent with the February 2012 OT evaluation, the IEP indicated the student needed to improve keyboarding skills (compare Dist. Ex. 31 at p. 2, with Dist. Ex. 27 at p. 8).

According to November 2012 CSE meeting minutes, the parents expressed frustration regarding the student's education, in particular what they believed to be a lack of progress in the student's reading ability (Dist. Ex. 27 at p. 2). The parents further indicated that they would like to see the student use the "math lab" more effectively (id.). The student's teachers provided verbal updates of the student's functioning across curriculum areas and their descriptions of the student's needs and abilities were incorporated into the present levels of performance section of the November 2012 IEP (compare Dist. Ex. 27 at pp. 2-3, with Dist. Ex. 27 at pp. 6-8).

Notably, with respect to academics, the November 2012 IEP indicated that the student demonstrated progress in his ability to perform single digit computations using the four basic operations (Dist. Ex. 27 at p. 6). The IEP noted that the student had not yet memorized his math facts but that he did use "strategies" to assist him in finding the answer (id.). According to the IEP, the student demonstrated progress in his ability to multiply two digits by one digit with regrouping, but struggled with multiplying two digits by two digits with regrouping (id.). The IEP also noted that the student demonstrated difficulties with fractions, decimals, percentages, word problems, and algebraic equations (id.). The IEP indicated the student worked below grade level in math and required much support to succeed in the special class setting (id.).

With respect to reading, the November 2012 IEP indicated that the student had made some progress in decoding multisyllabic words with and without suffix endings (Dist. Ex. 27 at p. 6). According to the IEP, the student used a pencil to track while reading and, although his tracking had improved, he continued to move his pencil beyond the word that needed to be read (id.). The IEP noted that the student continued to omit or change the suffix in some words, although with diminished frequency (id.). The IEP described the strategies used to address the student's difficulty in this area, including keeping a log of the words with which the student had difficulty and reminding the student to read the base word first, without the suffix (id.). The IEP stated that the student was taking more time to decode words that were difficult to read and again noted how words the student had difficulty decoding were written in a log, where syllable

division rules were employed as support (id. at p. 7). The words were then practiced in each session (id.). The IEP noted that running records were "administered" in September and the end of November and, further, that the student's independent reading was at the third grade level, with his decoding level higher than his overall comprehension, due to problems with summarizing and retelling (id.). According to the IEP, the student was able to answer concrete and literal questions (id.). The student demonstrated some improvement in his ability to answer critical thinking and inferential questions in texts read independently, but showed greater success in answering critical thinking questions for texts read orally to the student (id.). The IEP noted some progress in the student's ability to retell a story in order with support and indicated that the student was getting better at minimizing the number of irrelevant details included in his retell but indicated that he sometimes needed support to include relevant information (id.). According to the IEP, the student demonstrated good progress in his ability to identify the main idea, when given multiple choices, in response to a short passage read silently (id.). The IEP stated, however, that the student preferred to read orally or listen to the teacher read rather than to read silently (id.). Finally, the IEP noted that the student required significant support to spell high frequency words and indicated that, many times, the student had trouble spelling words practiced on multiple prior "meetings" where syllable and sound-to-letter strategies were consistently employed (id.).

With respect to the content area classes of English and social studies, the November 2012 IEP stated that the student was making progress in his use of highlighting/underlining text as a strategy for identifying important information in homework assignments (Dist. Ex. 27 at p. 6). According to the IEP, the student successfully answered comprehension questions independently at his reading level (id. at p. 7). When introduced to content area vocabulary, the student was able to identify newly learned words in other parts of the text (id.). The IEP indicated that the student performed well on tests when he studied related vocabulary and that he could appropriately use the new words in sentences (id. at p. 6).

With respect to writing, the November 2012 IEP indicated that the student required teacher support to express his ideas in written form, as well as many prompts to generate ideas verbally or in writing (Dist. Ex. 27 at p. 7). According to the IEP, the student's paragraph writing was "somewhat improved" but he still required teacher support to make sure that the paragraph included a topic sentence with at least two details (id.). The IEP indicated that all writing assignments were modified for the student, even within the small class environment (id.). The IEP also indicated that, when presented with facts to summarize, the student might write about one fact and was beginning to remain on topic when adding other details (id.). The IEP stated that the student was attempting to refer to graphic organizers when writing (id.). According to the IEP, the student's writing often lacked proper capitalization and punctuation and was often difficult to decipher due to poor formation of letters and misspellings (id.). However, the IEP also noted improvement in the student's writing mechanics and noted that he was beginning to use phonic spelling when writing independently (id.).

In terms of study skills, the November 2012 IEP noted that the student used an agenda to record homework assignments and was "pretty" consistent with homework completion (Dist. Ex. 27 at p. 7). The IEP also noted the student needed to be more willing to accept assistance from teachers and to advocate for assistance when needed (id.). In addition, as part of the November

2012 CSE's review of the student's IEP, the district's behavior consultant shared his observation of the student with CSE members (id. at p. 2). According to November 2012 CSE meeting minutes, the consultant indicated that, although the student often "tried," the consultant believed he could motivate the student to work even harder (id.). The consultant agreed to come up with additional motivational strategies for the student (id.). Due to the lack of significantly disruptive or inappropriate behaviors in school, the behavior consultant did not recommend a formal BIP for the student (id.). However, the consultant opined that it would be helpful for the student to work on decreasing response latency and increasing automaticity and recommended implementing strategies and rewards for improving the student's latency in responding to tasks (id.). The November 2012 IEP indicated that the student did not require supports or strategies to address behaviors that interfered with his learning or that of others and also indicated that the student did not require a BIP (id. at p. 9).

With respect to speech-language, the November 2012 IEP stated that the student had made some progress toward all of his goals from the prior school year including reducing response time, initiating and requesting clarification in a conversation, and comprehending and sequencing events (Dist. Ex. 27 at p. 7). The IEP stated that the student responded in a timely manner to questions asked of him, contributed to classroom conversations and activates, showed increased willingness to initiate conversation, and acknowledged when he did not understand directions, or needed more time to complete a task (id.). The IEP further indicated that the student's comprehension skills had improved and that he was able to sequence and answer simple "wh" questions about a passage, at his level, read aloud to him (id.).

With respect to the student's social development, the November 2012 IEP noted that the student was well liked by both peers and teachers in school (Dist. Ex. 27 at p. 8). However, the IEP also noted that the student was resistant to communicating his feelings verbally and often responded to questions with one-word answers (id.). The IEP further noted that the student often had a difficult time focusing on the topic at hand and tended to steer a discussion toward his dislike of school (id.). According to the IEP the student continued to work on initiating and maintaining appropriate interaction with his peers, as he tended to engage them in a silly or immature manner, and on making eye contact when speaking with others (id.).

The November 2012 IEP reflected that, with respect to physical development, the student demonstrated increased awareness of the location of keys on a keyboard and appropriately rested both hands on the home row of keys (Dist. Ex. 27 at p. 8). In addition, the student was able to write his signature legibly (id.). However, the student continued to require a long time to complete typing tasks and his difficulty with finger isolation impacted his ability to strike one key at a time (id.).

### **b. Educational Placement and Services**

Initially, as to the IHO's determination that the student's IEP for the 2012-13 school year should have detailed a reading or mathematics program (see IHO Decision at pp. 32), to the extent the IHO meant that the IEP should include a particular methodology or curriculum, the law does not support such a finding. Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a

matter to be left to the teacher (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at \*4 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66, 2014 WL 3715461 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86, 2013 WL 3814669 [2d Cir. 2013]; M.H., 685 F.3d at 257 [the district is imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*9 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2, 2014 WL 53264 [2d Cir. 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*11-\*12 [W.D.N.Y. Sept. 26, 2012], report and recommendation adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; H.C.2012 WL 2708394, at \*15, \*17). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.B., 2014 WL 5463084, at \*4; R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (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]; see also R.B., 2014 WL 5463084, at \*4; A.S., 573 Fed. App'x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"]).

Here, no particular methodology or curriculum was identified in the evaluative materials before the CSEs or raised by any CSE member during the meetings (see generally Dist. Exs. 27; 28; 31; 33-34; Parent Ex. A). The IHO acknowledged evidence that the student received special reading instruction during the 2012-13 school year (see IHO Decision at p. 23). Indeed, the hearing record shows that the district provided the student with additional building level services, not reflected in the November 2012 IEP, during the 2012-13 school year (see Dist. Ex. 45). For example, the chairperson reported that the student received additional building level support in the form of a math lab, which he attended every other day and where he worked on his math skills, as well as additional reading instruction on alternating days on an individual basis (Tr. pp. 69-70, 76-77; see Tr. p. 86; Dist. Ex. 22 at p. 1).<sup>12</sup> According to the chairperson, the reading instruction addressed the student's reading needs in the areas of phonics, decoding, reading fluency, and reading comprehension (Tr. p. 77). In addition, the chairperson stated that the special education teacher providing the reading instruction was "Wilson trained" and implemented multiple programs to address the student's reading deficits (Tr. p. 78). However, while there is some reference in the November 2012 IEP and the meeting minutes to a "reading class," a "reading teacher," and a "math lab" (see Dist. Ex. 27 at pp. 2, 6), to the extent the testimony about the building level services could be deemed impermissibly retrospective, it cannot be relied upon to "rehabilitate a deficient IEP after the fact" (see R.E., 694 F.3d at 186).

Nonetheless, without factoring in evidence of the building level services implemented during the 2012-13 school year, review of the November 2012 IEP reflects that, to address the

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<sup>12</sup> The chairperson testified that the student was to receive reading within a small group but that mostly the student received one-to-one instruction (Tr. p. 70).

student's reading and mathematics needs, the CSE recommended the 12:1+1 special class, as well as resource room services (see Dist. Ex. 27 at pp. 2-3, 12). In particular, when added to the student's program in the May 2012 IEP, the meeting minutes reflected that the resource room would target the student's use of assistive technology and foundational skills in reading and mathematics (Dist. Ex. 28 at p. 3; see Dist. Ex. 37 at p. 1). Further, the November 2012 IEP indicated that the student demonstrated progress in the area of reading when provided with accommodations and supports—including modeling, verbal reminders, and positive reinforcement (see Dist. Ex. 27 at pp. 6-7).

Further, the November 2012 CSE described the student's needs, including those related to reading and mathematics, and developed annual goals to target these needs. Specifically, based on classroom observations and assessments of the student's progress toward his annual goals, the November 2012 IEP specifically identified the following mathematics and reading needs of the student to: improve mathematical skills, including computation of multiplication problems that require regrouping; evaluate numerical expressions using the correct order of operations; solve algebraic expressions recognizing variables, identifying exponents, and combining like terms using the rules for order of operations; solve multi-step word problems; answer main idea and "why" questions about a reading passage and distinguish between relevant and non-relevant information when reading content area material; and highlight important information when reading (Dist. Ex. 27 at pp. 6-7). The IEP also identified the following writing and communication needs of the student to: edit writing for proper capitalization, punctuation and grammar; use the process of prewriting, drafting and revising to write a multi-paragraph essay that is logical and sequential in development and includes a topic sentence and supporting details; categorize vocabulary; answer complex "wh" questions; initiate conversations and maintain a topic; and expand expressive language by expanding opinions and feelings with reasoning (*id.* at p. 7).

To address the student's academic and communication needs, the CSE developed annual goals that targeted the student's study skills, including his ability to edit his own documents and highlight important information when reading content area materials, and reading, including his ability to develop knowledge of content area vocabulary, orally retell events from a book in sequential order, decode multi-syllabic words, identify the main idea and pertinent details in a story read to himself, and answer comprehension questions from factual materials (Dist. Ex. 27 at pp. 9-10). In addition, the CSE developed annual goals addressing the student's ability to correctly write high frequency words, as well as use correct capitalization and punctuation in writing assignments, write a paragraph with a topic sentence and at least two supporting details, and summarize presented facts in complete sentences (*id.* at p. 10). The CSE also developed annual goals for mathematics related to the student's ability to solve multiplication problems that require regrouping, math problems using the four basic operations, problems involving integers, problems with signed numbers and simple algebraic equations, and word problems, including determining which operation to use (*id.* at pp. 10-11). Lastly, the CSE developed speech-language goals for the student that targeted his ability to express opinions and feelings using appropriate verbal reasoning skills, identify and use vocabulary related to content areas using classification and categorization skills, recall and comprehend a passage and answer two part "wh" questions", and practice and use appropriate intonation in conversations and maintain the

topic of conversation (id. at p. 11). In addition the CSE recommended that the student receive small group (5:1) speech-language therapy for "2.5" 30-minute sessions per week (id. at p. 12).

Turning to the student's social development, the November 2012 IEP stated that the student needed to: continue to identify appropriate topics of conversation and initiate conversation with peers using those topics; display assertive communication skills when he needed assistance; and initiate and maintain interactions with peers using appropriate behaviors (Dist. Ex. 27 at p. 8). To address the student's social/emotional needs the CSE developed study skill goals targeting the student's willingness to accept appropriate assistance from teachers and support staff without protest (id. at pp. 9-10). The CSE also developed social/emotional/behavioral goals targeting the student's ability to engage in conversation with peers using age appropriate topics, display assertive communication skills to indicate when he needed assistance, and initiate and maintain interactions with peers using appropriate behaviors (id. at p. 11). In addition the CSE recommended that the student receive small group (5:1) counseling for one 30-minute session per week (id. at p. 12).

Next, with regard to the student's physical development, the November 2012 IEP indicated that the student needed to learn keyboarding and how to use educational software to assist with the writing process, to improve motor learning as necessary to localize keys on the keyboard, and to improve tactile awareness of the keyboard so as to improve typing speed (Dist. Ex. 27 at p. 8). To address the student's physical development needs, the CSE developed goals related to the student's ability to: identify key locations for all letters, numbers, and punctuation; oppose each finger to his thumb in succession, and correctly type eight words per minute (wpm) using an adaptive keyboard (id. at pp. 11-12). The CSE recommended that the student be provided with a scribe for classwork that required more than two sentence responses (id. at p. 12). The CSE also recommended that the student receive individual OT for one 30-minute session per week and that the occupational therapist meet with the student's core academic teachers to address the student's OT needs within the classroom environment once monthly for 30 minutes (id.).

After ascertaining the student's present levels of performance and developing annual goals for the student, the November 2012 CSE recommended an educational placement and related services, as well as numerous supports to address the student's identified educational needs. State regulations provide that a 12:1+1 special class placement is designed to address 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" (8 NYCRR 200.6[h][4][i]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's academic achievement, functional performance and learning characteristics, social development, and physical development (8 NYCRR 200.1[ww][3][i][d]). In addition, State regulation defines resource room as a "special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]). State regulation describes the purpose of a resource room program as "supplementing the regular or

special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]).

The November 2012 CSE recommended that the student be placed in a 12:1+1 special class for core academic subjects (English, mathematics, social studies, and science) and also that he receive one 40-minute session per day of resource room services in a group setting (Dist. Ex. 27 at p. 12). Based on the present levels of performance, summarized above, as well as the supplementary aids and services/program modifications/accommodations also set forth in the November 2012 IEP, including refocusing and redirection, repetition and practice, positive reinforcement, modified testing, mnemonic devices, and directions explained as well as provision for assistive technology devices and/or services including a calculator and access to electronic textbooks (Dist. Ex. 27 at p. 13), the 12:1+1 special class setting along with resource room and related services constituted an appropriate educational program for the student, consistent with State regulations.

#### **4. Implementation—Assistive Technology**

With respect to the 2012-13 school year, the parents assert that district did not properly provide the student with assistive technology and that the district did not adequately train the parents with respect to the assistive technology.

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). Therefore, a district's failure to implement these services will constitute a denial of FAPE if a party establishes that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524, 2008 WL 3523992 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 535 F.3d 1243, 1252 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]; T.M. v Dist. of Columbia, 2014 WL 6845495, at \*6 [D.D.C. Dec. 3, 2014]; V.M. v N. Colonie Cent. School Dist., 954 F Supp 2d 102, 118-19 [N.D.N.Y. 2013]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 (D.D.C. 2007) [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

A review of the May and November 2012 IEPs indicated the student required the use of keyboarding skills and educational software to assist him with reading and writing (Dist. Exs. 27

at pp. 8, 11-13; 28 at p. 2). To address the student's reading and writing needs and related assistive technology needs, the May and November 2012 IEPs included provision for the student's access to electronic textbooks, including use of Bookshare (see Dist. Exs. 27 at p. 13; 28 at p. 14). The IEPs also provided an OT consultation for teachers to assist with the student's OT needs and use of assistive technology (see Dist. Exs. 27 at p. 13; 28 at pp. 2, 3, 14). The May and November 2012 IEPs also included annual goals to address the student's assistive technology and related fine motor needs (see Dist. Exs. 27 at pp. 11-12; 28 at pp. 12-13).

Documentary evidence supports that the district provided assistive technology to the student and that he was exhibiting progress in this area (see Dist. Ex. 27 at p. 2). Specifically, the minutes of the November 2012 CSE meeting indicated that district staff reported on the student's use of assistive technology and related progress (id.). The student's occupational therapist indicated the student's typing skills had improved (id.). With respect to the student's typing skills, the student typed two wpm at the beginning of the 2011-12 school year, four wpm at the end of the 2011-12 school year, and was, at the time of the November 2012 CSE meeting, typing eight wpm (id.). The occupational therapist also indicated the student was now using Sense-Typing software (id.). The chairperson and occupational therapist indicated the student also was utilizing a laptop in school that contained software including Draft:Builder, Read:OutLoud, and Dragon Naturally Speaking 12 (Tr. pp. 62, 989; Dist. Ex. 27 at p. 2). The February 2013 annual review report indicated that during the 2012-13 school year the student used the Kindle and Read:OutLoud software on a daily basis during his 1:1 reading instruction (Dist. Ex. 22 at p. 2). The report also indicated the student made progress with accessing reading text using the software but additional practice and support would be needed for the student to use Read:Outloud software without teacher support (id.). As set forth above, the evidence in the hearing record reflects that the district provided the student with assistive technology recommended in the November 2012 IEP to address his reading, writing, and fine motor needs, and that the student exhibited progress with the use of assistive technology.

The parents also assert that an assistive technology evaluation dated January 2011 made recommendations regarding assistive technology for the student that the district failed to implement, and that the district failed to provide training to the father in the area of the assistive technology.<sup>13</sup> However, the occupational therapist testified that the district's provision of assistive technology to the student aligned with the recommendations in the January 2011 assistive technology screening summary report (Tr. p. 2024; see Dist. Ex. 52 at pp. 1-4). Moreover, according to the testimony of the occupational therapist, the district implemented the recommendations in the January 2011 assistive technology screening report (Tr. pp. 2020-26). For example, the occupational therapist testified that, in alignment with the recommendation for keyboard zoom cap labels, she provided the student with a low vision keyboard with bright enlarged yellow letters which assisted the student to locate all the keys on the keyboard (Tr. p. 2022). Further, in accordance with the evaluative recommendations, the student had access to voice recognition software on the district laptop (see Dist. Exs. 27 at p. 2; 52 at p. 3). The

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<sup>13</sup> The minutes of the November 2012 CSE indicate the father stated to the CSE that the Kindle provided to the student was not helpful because the district failed to provide adequate instruction regarding the operation of the device (Dist. Ex. 27 at p. 2). The minutes of the CSE meeting further indicate that the district had addressed the parent's concern regarding the Kindle but the father was displeased as to how long it took the district to do so (id.).

occupational therapist testified that the district followed through with the recommendation for access to Write:OutLoud 6 and Co:Writer 6 once the student developed the prerequisite typing skills for such software (Tr. p. 2022).<sup>14</sup> According to the occupational therapist, the district provided the student with additional assistive technology beyond those recommended by the evaluator in the screening report, including access to electronic textbooks and use of Voice Stream Reader application (Tr. pp. 2024-25). The occupational therapist further testified that the district provided training to the parents in the area of assistive technology (Tr. pp. 2025-28). Based on the evidence in the hearing record, I find that the CSE provided the mandated assistive technology to the student and training in assistive technology to the parent.

## **B. 2013-14 School Year**

### **1. Progress during the 2012-13 School Year**

As noted above, to extent that the student's progress in a special education program is relevant to analysis of a subsequent IEP (see H.C., 528 Fed. App'x at 66), a review of evidence of the student's progress during the 2012-13 school year facilitates a review of the appropriateness of the educational program recommended in the June and November 2013 and April 2014 IEPs. For the 2012-13 school year, the IHO focused on the June 2013 CSE's recommendation for a less supportive 15:1 special class relative to the 12:1+1 special class the student attended during the 2012-13 school year (see IHO Decision at p. 34).

As discussed above, the November 2012 IEP detailed the gains that the student made during the initial months of the 2012-13 school year (Dist. Ex. 27 at pp. 1-3, 6-9; Tr. p. 68). In addition, in a January 2013 progress note, the school social worker reported that the student had made notable progress in counseling (Dist. Ex. 25). Specifically she indicated that participation with the other members of the student group was starting to supersede and become more important to the student than the outcome of the activity (id.). In addition, the social worker noted that the student was beginning to laugh in a natural manner in relation to spontaneous interaction amongst group members during counseling sessions (id.). In a February 2013 OT report, the student's occupational therapist reported that the student demonstrated improved ability to locate all of the keys on the keyboard but that his ability to type was still impacted by his visual processing and visual scanning skills (Dist. Ex. 23 at p. 1). According to the occupational therapist, the student "now" consistently placed both hands on the keyboard and removed them less frequently to locate keys (id.). She reported that the student demonstrated improved carryover of the typing program used in therapy, to home, and also demonstrated improved independence when accessing different computer software (id.). In addition, the occupational therapist reported that the student demonstrated improved ability to locate dictation inaccuracies and correct them with fewer verbal cues (id.). A February 2013 annual review report, written by the student's special education teacher, highlighted the student's continued struggles in all academic areas, despite receiving considerable teacher support (Dist. Ex. 22). Although much of the annual review report describes the student's difficulties, the teacher also reported that the student: had been using his Kindle successfully; was able to write an

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<sup>14</sup> While the occupational therapist's testimony is not clear as to the exact time period that the student used Co:Writer, she noted, during the November 2013 CSE meeting, that the student had been successfully using Co:Writer during the prior (2012-13) school year (Dist. Ex. 41 at pp.10-11).

introduction, two supporting bodies and a closing paragraph with teacher support; was able to stay on point with the use of graphic organizers and bullets; demonstrated improved spelling; demonstrated some progress in decoding multisyllabic words and tracking text using a pencil; included less irrelevant ideas when retelling a story; progressed in his ability to identify the main idea of a story read silently, given multiple choice options; and showed improved his ability to answer critical thinking and inferential questions in texts read independently (*id.*). In a February 2013 speech-language annual review report, the student's speech-language therapist reported that the student continued to show improvement in his ability to comprehend a passage and that he had been able to answer a more complex, two-part questions about the passage and other stories (Dist. Ex. 24 at p. 1).

The 2012-13 IEP progress report described the student's progress towards achieving his annual goals (*see generally* Dist. Ex. 19). With respect to study skills, the student achieved three goals related to accepting assistance without protest, underlining important information when reading content area materials, and turning homework in on time, and progressed gradually on the remaining goal (*id.* at p. 1). In the area of reading, the student achieved four of his five annual goals; specifically those related to decoding multisyllabic words with and without suffix endings, increasing his knowledge of content area vocabulary words, orally retelling a story in sequential order, and answering comprehension questions from factual materials (*id.* at p. 2). With respect to writing, the student achieved two of his four goals, which related to writing a paragraph with a topic sentence and at least two supporting details and summarizing presented information in writing using complete sentences (*id.* at p. 4). In mathematics, the student achieved three of his five goals; achieving those related to solving multiplication problems requiring regrouping, solving math problems using the four basic operations, and solving problems involving integers (*id.* at p. 5). In the area of speech-language, the student achieved two of his four annual goals related to identifying and using content area vocabulary and answering complex "wh" questions from a passage (*id.* at p. 6). The report indicated the student achieved one of three annual goals related to social/emotional/behavioral functioning that required him to initiate and maintain interactions with peers using appropriate behaviors and motor goals related to identifying the location of keys on a keyboard and typing eight wpm using an adaptive keyboard (*id.* at pp. 7-8). In all, the student achieved 17 of 28 IEP goals for the 2012-13 school year (*see* Dist. Ex. 19). While a student may or may not achieve every annual goal included on an IEP, the IDEA does not guarantee that a student will achieve a specific level of benefit and focus must instead be placed on the extent to which the student progressed toward achieving the annual goals (*see Gavrity v. New Lebanon Cent. Sch. Dist.*, 2009 WL 3164435, at \*31, \*36 [N.D.N.Y. Sept. 29, 2009] [noting the student's progress despite not meeting some goals and explaining that the CSE was obligated to provide the student the opportunity to make meaningful progress in the LRE]). Finally, the student's 2012-13 report card reflected the following course grades for academic classes: English 83, math 69, science 88 and social studies 87 (Dist. Ex. 45). The report card noted that the student's assignments and assessments were modified for these classes (*id.*).

## **2. June and November 2013 and April 2014 IEPs**

### **a. The Student's Needs**

Once again, a summary of the evolving information about the student's needs, available to the CSEs, facilitates review of the CSEs recommendations. On June 17, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (Dist. Ex. 21 at p. 1). The hearing record indicates that, in addition to the information described above with respect to the 2012-13 school year, the June 2013 CSE had available to it the following: the January 2013 counseling progress summary report, the February 2013 speech-language annual review report, the February 2013 OT report, the February 2013 annual review report, and the student's June 2013 report card (Dist. Ex. 21 at pp. 4-6; see generally Dist. Exs. 22-25).

The present levels of performance in the June 2013 IEP reflected, almost verbatim, the student's needs and abilities as described in the annual review reports and progress summaries available to the June 2013 CSE, as well as in the student's prior IEP (see generally Dist. Exs. 21-25; 27). For example, in accordance with the January 2013 counseling progress summary, the IEP indicated the student needed to improve his use of assertive communication skills so he could ask teachers for assistance (compare Dist. Ex. 25, with Dist. Ex. 21 at p. 9). Consistent with the February 2013 annual review report, the IEP indicated the student's independent reading was at the third grade level and math skills were below grade level (compare Dist. Ex. 22 at pp. 2-3, with Dist. Ex. 21 at pp. 6-7). Both the February 2013 annual review report and the June 2013 IEP indicated the student was well liked by his peers and teachers (compare Dist. Ex. 22 at p. 3, with Dist. Ex. 21 at p. 9). The June 2013 CSE discussed the student's significant difficulty initiating tasks and response latency when prompted by staff (Dist. Ex. 21 at p. 2). In addition, the IEP indicated that the student required strategies, including positive behavioral interventions and supports, to address behaviors that impeded his learning (id. at p. 10). The June 2013 CSE determined that the behavioral consultant would conduct a FBA and develop a BIP for the student (see Dist. Ex. 21 at p. 2).<sup>15</sup>

Following the June 2013 CSE meeting, the student was referred by his attorney for an auditory processing evaluation that took place in August 2013 (see generally Parent Ex. C). The evaluation, conducted by an audiologist, included an educational history, a social history, a medical history, previous evaluation results, and the results of current standardized testing which assessed auditory processing, temporal processing, temporal integration, phonological processing, auditory comprehension, auditory short-term memory, and word retrieval (id. at pp. 1-10). Based on her assessment, the audiologist concluded that the student presented with an auditory processing disorder in the areas of auditory figure ground listening, integration, discrimination, and temporal processing, all of which impacted his literacy skills (id. at p. 7). Notably, she reported that the student's phonological processing skills were deficient, indicating that the student had not yet mastered the decoding ability needed for reading (id.).

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<sup>15</sup> The notes of the June 2013 CSE meeting indicated the behavioral consultant reported that, during the 2012-13 school year, the teacher implemented behavioral strategies to assist the student to begin and complete classwork, including stating the work demands and frequent check-ins regarding the student's progress (Dist. Ex. 21 at p. 2). However, the IEP indicated that the student continued to demonstrate difficulties with latency in his response regarding completion of assignments (id.).

Also subsequent to the June 2013 CSE meeting, in October 2013, the behavior consultant for the district conducted a functional behavioral assessment (FBA) and developed a corresponding BIP (see generally Dist. Exs. 17-18). The FBA contained a description of the student's behaviors and the evaluative procedures used by the consultant (Dist. Ex. 17 at pp. 1-4). The FBA indicated that the student had a history of reading difficulties and lack of motivation, and that, when presented with a work task at school, the student often failed to initiate the task without significant prompting (id. at p. 1). The FBA further indicated that the student reportedly refused assistance from teachers and refused to use assistive technology in class (id. at p. 2). The behavior consultant identified the student's maladaptive behaviors as "noncompliance" and "inattention to tasks" (id. at p. 1). Based on his assessment, the consultant reported that the student's inappropriate behaviors were maintained by socially mediated negative reinforcement (in order to escape, or avoid or delay demands) and socially mediated positive reinforcement (to gain attention from instructors) (id. at p. 4). The resultant BIP indicated that the student had learned that, when he engaged in noncompliance and failed to attend to task, he was able to escape and avoid demands (Dist. Ex. 18 at p. 1). The behavior consultant recommended use of competing positive reinforcement schedules to increase the student's motivation to comply and attend to tasks (id.). The BIP described the target behaviors to increase (compliance with demands and attending to tasks), target behavior to decrease (noncompliance), and intervention strategies (including use of a self-management tool, positive reinforcement, use of a positive-to-corrective statement ratio of 5:1, and use of extinction procedures, among others) (id. at pp. 2-3). The BIP also included data collections procedures and completion criteria (id. at pp. 1-3).

The CSE reconvened on October 21, 2013 to review the student's progress since entering high school (Dist. Ex. 16 at p. 2). Notably, the student's special education teacher for social studies reported that the student was raising his hand to ask questions and participating in class and also that he received 90s on his quiz grades, which, with the exception of one, covered Regents level material (id.). The student's resource room teacher reported that she saw the student every day in resource room and that the student was making progress on his reading and other academic goals (id.). She indicated that, in addition to resource room, she saw the student every other day in a small group for one period of building level support and would see him for extra help during ninth period, if needed (id.). The student's health teacher reported that the student was participating in class and was proactive in getting notes, and the occupational therapist reported that the student had become more cooperative in using assistive technology (id.). According to the student's speech-language therapist, the student was working well within the small group setting by actively participating and socializing with peers (id.). The social worker reported that the student was sometimes resistant to attend counseling because he preferred to spend the time with his friends; however, she also noted that the student wanted to engage in the therapeutic work (id.). The October 2013 CSE reviewed the August 2013 auditory processing evaluation of the student, as well as the FBA and BIP completed by the district's behavior consultant (id.).

According to meeting minutes of the October 2013 CSE meeting, in response to questioning by the student's father, the resource room teacher suggested additional annual goals to address the student's reading deficits (Dist. Ex. 16 at p. 3). The student's father opined that the student did not make progress in reading except during his enrollment in an LMB program several years earlier (id.). The CSE discussed adding additional decoding and fluency goals to

the student's IEP (id.). With respect to the proposed BIP, the student's father expressed concern that implementation of the BIP would be isolating and detrimental to the student's self-esteem (id. at p. 2).<sup>16</sup> The CSE meeting ended and the parties agreed to reconvene (id. at p 3).

The CSE reconvened on November 12, 2013 (Dist. Ex. 16 at pp. 1, 3). The occupational therapist reported that new word prediction software was available for the iPad and that she had been exploring this software with the student (id. at p. 3). The occupational therapist also reported that the student was using a digital note taking/writing application with voice-to-text and text-to-speech software (id.). According to CSE meeting minutes, the student's father had crossed out important text in the user agreement for the iPad, which would have allowed the student to take the device home (id.). Meeting minutes also show that the district's behavior consultant discussed the program being used to address the student's reading and writing fluency and reported that the student responded very well to the program and was very motivated to participate (id.). The CSE reviewed the student's annual goals and determined that additional goals should be added targeting the student's homework completion, phonemic awareness, reading fluency, and phonics fluency (id.). The student's speech-language therapist discussed the auditory processing evaluation submitted by the student's parents and shared that many of the recommendations in the report that were already being implemented (id.). According to meeting minutes, the CSE discussed the evaluator's recommendation for use of an FM unit and an increase in speech-language services, but agreed that they were not necessary at that time (id. at p. 4). Consistent with the CSE meeting minutes, the transcript of the November 2013 CSE meeting indicated the district speech-language therapist reported, during the CSE meeting, that the student did not require either an FM unit or an increase in speech-language therapy and no CSE participant objected (Dist. Ex. 41 at pp. 55-56, 70).

Following the November 2013 CSE meeting, the student's father sought a comprehensive neuropsychological evaluation of the student (see generally Parent Ex. G). In December 2013, the student was evaluated by a licensed clinical psychologist, who recounted the student's developmental and educational history, conducted a classroom observation, and administered various standardized tests to the student (see generally id.).<sup>17</sup> The psychologist assessed the student's needs in the areas of cognition, reading, mathematics, writing, visual motor skills, executive functions, attention, and social/emotional/behavioral functioning (see generally id.). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student yielded standard scores of 95 (average range) in verbal comprehension, 79 (borderline range) in perceptual reasoning, 56 (extremely low) in working memory, 68 (extremely low) in processing speed, and 87 (low average) in general ability (id. at p. 22). Due to the significant discrepancy between the student's verbal and nonverbal reasoning abilities, the psychologist opined that the student's general ability index (GAI) composite score of 87 was a more appropriate indicator of his true cognitive potential than his full scale IQ (id. at p. 8). The psychologist noted that the student's current GAI composite score was "grossly consistent" with results from past evaluations (id.). The psychologist stated that, based on the results of testing,

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<sup>16</sup> The father did not approve the BIP for the student until April 2014 because he was concerned of the negative effect on the student's self-esteem (see Dist. Exs. 14 at p. 6; 16 at p. 2).

<sup>17</sup> The classroom observation was conducted on February 6, 2014 (Parent Ex. G at p. 1).

formal observation, and parent, teacher, and self-reports, the student exhibited significant difficulty sustaining attention and mental effort over time, organizing his work and activities, planning and prioritizing, consistently using working memory skills, and efficiently and quickly initiating, processing, and executing tasks, especially those that are academic in nature (id. at p. 15). According to the psychologist, the student also demonstrated reduced purposeful, goal-directed activity and struggled to determine good problem solving approaches (id.). With respect to academic achievement, the psychologist reported that the student's overall performance in standardized tests fell below grade level in each subject area (id. at p. 12). The psychologist noted that the student exhibited persistent difficulties with basic reading and decoding skills, despite "remediation" received at his school, and experienced greater difficulties in comprehension as questions were less structured and concrete (id. at p. 15). The psychologist reported that the student had made little to no progress in his reading skills and noted regression specifically with regard to the student's decoding skills (id.). Turning to writing, the psychologist reported that the student's skills were severely impaired, that the student's spelling skills were well below expectations, and that the student continued to exhibit difficulties in the mechanical aspects of writing, and also with theme development and organization for appropriate essay composition (id.). In addition, the psychologist reported that the student's writing fluency was poor (id.). Lastly, the psychologist characterized the student's mathematics skills as largely underdeveloped and below grade level (id. at p. 16). She reported that the student had difficulty with both numerical operations and applied problem solving and noted that the student's mastery of basic math facts was below expectations, especially when assessed under timed conditions (id.).

The psychologist offered the following diagnoses of the student: attention deficit hyperactivity disorder (ADHD) predominantly inattentive presentation (severe); developmental coordination disorder; specific learning disorder with impairment in reading (word reading accuracy, reading rate, reading fluency, reading comprehension; severe); specific learning disorder with impairment in written expression (spelling accuracy, grammar and punctuation accuracy; clarity or organization of written expression; severe) specific learning disorder with impairment in mathematics (number sense, memorization of arithmetic facts, accurate or fluent calculation; accurate math reasoning; moderate to severe) (Parent Ex. G at pp. 15-16). She concluded that, although the student was generally a content and sweet-natured boy, he was also sensitive with a growing awareness of his vulnerabilities, which took the form of feeling overwhelmed, frustrated and wanting to give up easily when things were more difficult for him (id. at p. 16). She opined that the student was at risk for further academic and social/emotional difficulties without appropriate support and intervention (id.). The psychologist offered numerous recommendations, among them that the student be placed in a more structured, smaller learning environment and receive: 1:1 instruction in a small therapeutic environment consisting of close coordination of care and availability of mental health professionals; speech-language therapy per the recommendation of his current providers to address difficulties with functional communication; individual OT services at an increased frequency focused on learning and independently using assistive technology; school counseling, as well as structured psychotherapy outside of the school environment; and individual tutoring to bolster basic academic skills (id. at p. 17). The psychologist suggested the student would benefit from LMB programs (id. at pp. 17-18).

At the request of the parent, on April 2, 2014, the CSE convened for to review of the student's then-current program, as well as the private neuropsychological evaluation obtained by the parents (Dist. Ex. 14 at p. 4; see generally Parent Ex G). The student's father expressed concern that the student was not reading and not progressing satisfactorily (Dist. Ex. 14 at p. 4).

The private psychologist who conducted the neuropsychological evaluation of the student participated in the April 2014 CSE and reviewed her findings with CSE members (Dist. Ex. 14 at p. 4). According to CSE meeting minutes, the psychologist stated that she did not think that the student's then-current program was meeting his needs because he was not making progress and moreover, her testing results showed that the student was regressing (id.). The CSE chairperson disagreed with the private psychologist, noting that: the student's current program was implemented just six weeks prior to the psychologist's assessment; the psychologist was making a judgement about the student's program without current teacher reports; the district was not able to fully implement behavioral interventions or assistive technology recommendations due to the parent's lack of consent for the BIP and failure to sign a user agreement for the iPad that would allow the student to take it home; and finally, the psychologist's evaluation showed that the student had made significant progress in reading comprehension (id.).

The district's behavioral consultant reported that the student was making significant progress in the reading fluency program and was "buying into" the program (Dist. Ex. 14 at p. 5). The behavior consultant reported that the student's spelling had also improved and opined that the student could improve his executive function skills once the behavior plan was implemented (id.).

## **b. Educational Placement and Services**

Initially, on a similar basis as set forth above, the hearing record does not support the IHO's determination that the student's IEPs for the 2013-14 school year should have specified a particular reading program (see IHO Decision at p. 35). To the extent that the IHO made this conclusion by relying on evidence that the reading instruction provided to the student during the 2012-13 school year was eliminated, that reasoning is not borne out in the hearing record (see IHO Decision at p. 25). Initially, as with the 2012-13 school year, this inquiry is at least in part retrospective except to the extent that the reading program was discussed at the CSE meetings.<sup>18</sup> In this instance, the hearing record shows that the October 2013 CSE discussed the student's IEP reading goals in the context of a particular reading program and the November 2013 CSE

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<sup>18</sup> In addition, much of the testimonial evidence regarding this reading program was provided by the district behavioral consultant, whose testimony the IHO did not credit (see IHO Decision at pp. 24-26; see, e.g., Tr. pp. 350-52; Dist. Ex. 44 at pp. 1-8). 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., 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. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). Here, while I may not have reached the same finding, the IHO explained his reasoning for rejecting and not relying on his testimony and the evidence in the hearing record reveals insufficient reason to overturn the IHO's credibility determination (see IHO Decision at pp. 24-26). Thus, in deference to the IHO, I have not relied upon the testimony of the behavioral consultant in reaching my conclusions.

meeting minutes reflect that the district's behavior consultant discussed the program being used thus far during the 2012-13 school year to address the student's reading and writing fluency (see Tr. pp. 141-43; Dist. Ex. 16 at p. 3).

However, with respect to inclusion of a particular reading program on the IEP, in contrast to the 2012-13 school year, the June 2013 CSE meeting minutes indicate that the parents informed the CSE of the student's success with LMB in the past and raised the possibility of recommending the LMB program to be implemented at school (see Dist. Ex. 21 at p. 3; see Parent Ex. B at pp. 47-48).<sup>19</sup> A district participant at the CSE meeting indicated that the program recommended in the IEPs had and would continue to address the student's reading needs including through support in the special classes and in the resource room (Parent Ex. B at pp. 48-49). Further, there is no information in the hearing record about the student's success in the LMB program years earlier other than the parents' representations during the June 2013 CSE meeting and the general testimony of the director of LMB (see Tr. pp. 1614-16; Parent Ex. B at p. 27). Under the circumstances, the evidence in the hearing record does not support a finding that the student could not make progress with another reading program or that the student needed the LMB program in order to receive an educational benefit (see R.B., 2014 WL 5463084, at \*4; R.E., 694 F.3d at 192-94).

Moreover, the hearing record indicates that the recommended placement and services would target the student's reading deficits. In explaining the June 2013 CSE's rejection of the parents' request to provide LMB instruction in school, the prior written notice indicated that the student's "reading difficulties have been addressed utilizing an eclectic approach to focusing on decoding, spelling and reading comprehension skills," with which he had demonstrated progress (Dist. Ex. 20 at p. 2). In particular, the prior written notice acknowledged the student's "significant learning deficits across multiple content areas" but specified that the resource room would address reading skills by focusing on previewing classroom assignments and highlighting main ideas (id. at p. 1; see Dist. Ex. 21 at p. 3). The notice further indicated that the 15:1 Foundations class would focus on "improving decoding and reading comprehension skills through preteaching/reteaching and utilizing a slower pace of instruction" (Dist. Ex. 20 at p. 1)

Further, the June 2013 IEP described the student's needs in all areas, including reading, and prescribed annual goals and related services to target such needs. The June 2013 IEP identified the following academic and communication needs of the student to: learn to accept academic assistance from staff; correctly set up and solve word problems; graph points correctly and solve problems involving fractions; solve algebraic equations and problems involving area, surface, and volume; identify main ideas by answering "wh" questions about a reading passage; distinguish between relevant and irrelevant details related to the main idea; improve literal and inferential reading comprehension skills; edit writing for proper use of capitalization, punctuation, and grammar; use the process of prewriting, drafting, and revising when writing an essay; and write a multi-paragraph essay that is logical and sequential and includes a topic sentence and supporting details for each paragraph (Dist. Ex. 21 at p. 8). For speech-language, the IEP indicated that the student needed to build vocabulary from his ninth grade curriculum,

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<sup>19</sup> According to the testimony of the director of LMB, the student received approximately 250 hours of LMB reading instruction during the 2009-10 school year (Tr. pp. 1614-16).

express himself with appropriate reasoning, improve his ability to draw conclusions and make inferences, and improve his pragmatic language (id. at pp. 8-9). With respect to the student's management needs, the June 2013 IEP noted that the student tended to stare or daydream in the classroom and required constant refocusing and redirection (id. at p. 9). The IEP also noted that many times the student appeared "unclear" of directions given and tasks that needed to be completed, and therefore it was important to check for the student's understanding of what was required (id.). According to the IEP the student required prompting to begin independent work assignments, benefitted from repetition and practice of previously learned concepts, and worked best when given positive reinforcement (id. at p. 10).

To address the student's academic and communication needs, the CSE developed annual goals that targeted the student's: study skills, including his ability to edit his own documents and highlight important information when reading content area materials; and reading skills, related orally retelling events from a book in sequential order, decoding multi-syllabic words, identifying the main idea and pertinent details in a story silently read to himself, and answering comprehension questions from factual materials (Dist. Ex. 21 at pp. 11-12). In addition the CSE developed annual goals addressing the student's ability to: correctly spell high frequency words; write a multi-paragraph essay; use the process of planning, revising and editing to strengthen writing; and produce and publish writing using the internet and available technology (id. at p. 12). The CSE also developed annual goals for mathematics related to the student's ability to: solve mathematical problems involving area, surface area and volume; graph five points in all four quadrants of the coordinate plane; solve algebraic equations; solve fraction problems using the four basic operations; and word solve problems, including determining which operation to use (id.). Lastly, the CSE developed speech-language goals for the student that targeted his ability to express opinions using appropriate verbal reasoning skills: identify and use vocabulary related to content area subjects; improve inferencing skills and draw conclusions when listening to a passage; and participate in and maintain a topic of conversation for one minute (id. at pp. 12-13). In addition, the CSE recommended that the student receive a 30-minute session of small group (5:1) speech-language therapy on alternate days (id. at p. 14).

With respect to the student's social development, the June 2013 IEP stated that the student needed to: display assertive communication skills when he needed assistance; work on responding to, initiating, and maintaining topics of conversations with peers; and express his thoughts, feelings, and ideas with appropriate and related affect (Dist. Ex. 21 at p. 9). To address the student's social/emotional needs, the June 2013 CSE developed a study goal targeting the student's willingness to accept appropriate assistance from teachers and staff without protest (id. at p. 11). The CSE also developed social/emotional/behavioral goals targeting the student's ability to acknowledge and respond to social interactions initiated by others and his ability to identify his own emotions and feelings (id. at p. 13). In addition, the CSE recommended that the student receive counseling in a small group (5:1) two times per month for 30 minutes (id. at p. 14). The minutes of the meeting indicate the CSE reduced counseling services to improve collaboration in the therapeutic process because the student was resistant to counseling (id. at p. 2). The CSE also recommended that an FBA and BIP be developed and implemented in the fall to address the student's difficulties with initiating tasks, working independently, and latency in response to academic demands (id. at pp. 2, 3, 10).

Turning to the student's physical development, the June 2013 IEP cited the student's need to address his typing skills and to use educational software to assist in the writing process; improve motor learning as necessary to localize keys on the keyboard, and minimize errors in near-point copying (Dist. Ex. 21 at p. 9). To address the student's weaknesses in this area, the CSE developed annual goals related to the student's ability to: identify all letters, numbers and punctuation on a keyboard within three seconds; use assistive technology programs independently; correctly type 14 wpm; and use near point copying skills to transcribe sentences with minimal errors (*id.* at p. 13). The CSE recommended that the student be provided with a scribe for class work that required more than two sentence responses (*id.* at p. 14). In addition, the CSE recommended that the student receive individual OT for one 30-minute session per week and that the student's occupational therapist meet with the student's core academic teachers to address the student's OT needs within the classroom, 10 times yearly for 30 minutes (*id.* at p. 15).

When the CSE convened in November 2013, the resultant IEP included some modified goals, as well as new annual goals related to the student's ability to: complete homework and classroom assignments; blend word components into words and take them apart; produce the correct sound when presented with pictures of letters and word components; read 140 wpm when presented with a third grade level literature text or a text related to the student's content area subjects; and to write his first and last name in cursive (Dist. Ex. 16 at pp. 11-12, 14).

In addition to developing annual goals for the student for the 2013-14 school year, the June 2013 CSE recommended special education and related services, as well as numerous supports to address the student's identified educational needs. Specifically, the June 2013 CSE recommended that the student be placed in a Foundations 15:1 special class for academic classes (English, mathematics, social studies, and science) and also that he receive one 40-minute session of resource room per day in a small group (5:1) setting (Dist. Ex. 21 at p. 14). The CSE also recommended supplementary aids and services/program modifications/accommodations of refocusing and redirection, repetition and practice, modified testing, mnemonic devices, use of a graphic organizer and checks for understanding (*id.*). The June 2013 IEP also called for assistive technology devices and/or services including a calculator and access to electronic textbooks and access to speech recognition software (*id.*). Finally, the June 2013 CSE recommended numerous testing accommodations for the student including extended time (x2), special location, tests read, prompting to refocus, use of a scribe, breaks, revised test format, and use of a calculator (*id.* at p. 16).

State regulations provide that a 15:1 special class placement is designed to address the needs of students "whose special education needs consist primarily of the need for specialized instruction which can be best accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]).<sup>20</sup> According to the June 2013 CSE meeting minutes, the CSE discussed other placement options for the student, including "special classes (Foundations), team taught classes,

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<sup>20</sup> As noted above, in contrast, State regulations provide that a 12:1+1 special class placement is designed to address 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" (8 NYCRR 200.6[h][4][i]).

resource room and the [12:1+1 special class] ACE program" before reaching the recommendation for the 15:1 special class with resource room (Dist. Ex. 21 at pp. 2-3). The prior written notice indicates that the CSE considered the 12:1+1 special class too restrictive because it focused on life and functional skills (Dist. Ex. 20 at p. 2). While the placement recommendation did not include the additional adult in the classroom, the CSE agreed to conduct an FBA and BIP in the fall, which according to the IEP and the prior written notice was needed to address the student's motivation and effort, "difficulties with initiating tasks, working independently, and improving the latency of his response to academic demands" (Dist. Exs. 20 at p. 1; 21 at p. 2).

In addition, the November 2013 IEP added additional supports, including the support of a teacher's aide in the resource room and one 40-minute session of direct consultant teacher services every other day in a small group as a "skill building support" (Dist. Ex. 16 at pp. 1, 4, 14-15). During the November 2013 CSE meeting, the student's father requested that the district approve an afterschool program suggested by the parent, asserting that the district's program did not address the student's difficulty with executive function (*id.* at p. 4).<sup>21</sup> The prior written notice indicates that the CSE rejected this option since the student's then-current program and services were meeting his needs (Dist. Ex. 15 at p. 1). After some discussion, the CSE instead agreed to add direct consultant teacher services every other day to the student's IEP (Dist. Ex. 16 at p. 4; *see* Dist. Ex. 15 at p. 1). In addition, the CSE agreed to provide an aide in the student's resource room (*id.*). The prior written notice indicated that the special classes, in combination with the resource room with the aide and the consultant teacher services would address the student's "need to complete assignments, study for tests, and accept adult assistance, as well as improve his reading skills[, including] decoding, fluency and comprehension, and his writing and math skills" (Dist. Ex. 15 at p. 1). The CSE reviewed the student's testing accommodations and added additional accommodations of recording answers in the test booklets and eliminating Scantron answer sheets (Dist. Ex. 16 at p. 4). The CSE also added additional supplementary aids and services/program modifications/accommodations to the student's November 2013 IEP including special seating arrangements (teacher proximity) and the provision of a copy of class notes (*id.* at p. 5). A review of the student's November 2013 IEP indicates that the special education programs and services, annual goals and testing accommodations were modified as agreed to by the CSE (*id.* at pp. 11-12, 14, 17).

According to April 2014 CSE meeting minutes, the parents did not believe that the district's program was adequately meeting the student's needs, and proposed a program in which the district would pay for 1:1 instruction in core classes at a private academy in the morning, provide the student with electives at the district's high school in the afternoon, provide LMB after school, and provide outside mental health counseling one time per week and parent counseling two times per month (Dist. Ex. 14 at p. 6). According to the prior written notice developed after the April 2014 CSE meeting, the CSE rejected the more restrictive options since the student's then-current program and services were addressing his needs and goals (Dist. Ex. 13 at p. 1). The notice indicated that, since the parents signed the consent, going forward,

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<sup>21</sup> According to CSE meeting minutes the parents indicated that, if the CSE did not recommend the proposed program, he would exercise his due process rights (Dist. Ex. 16 at p. 4).

implementation of the BIP and the student's use of assistive technology at home would "help improve his academic and social[/]emotional progress" (id.).

Thus, over the course of the 2013-14 school year, despite the higher adult-to-student ratio of the 15:1 special class relative to the 12:1+1 special class the student attended during the 2012-13 school year, the CSEs progressively added additional supports more targeted to the student's particular needs while balancing the benefit the student would receive by exposure to the content curriculum of the 15:1 special class, rather than the life and functional based skills addressed in the district's 12:1+1 special class.

### **c. 12-Month School Year Services**

The district asserts that the IHO applied an improper legal standard when determining that the student required 12-month school year services in order to receive educational benefit for all three school years in question. In developing an IEP for a student with a disability, a CSE "shall include" a recommendation for 12-month services in the IEP for students who meet the eligibility requirements (8 NYCRR 200.4[d][2][x]; see 34 CFR 300.106[a][1], [a][2] [requiring districts to "ensure that extended school year services are available as necessary to provide FAPE," and further requiring that extended school year services "must be provided" to a student if the CSE determines "that the services are necessary for the provision of a FAPE"], 300.106[b] [defining extended school year services as both "special education and related services" that are provided to a student with a disability beyond the "normal school year," in accordance with the student's IEP, and at no cost to the parents]). To determine eligibility, State regulations require that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1], [v]). "Substantial regression" is defined as the "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at <http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf>).

In this case, the IHO noted the correct legal standard in his decision (see IHO Decision at p. 33). However, the IHO did not cite to any evidence in the hearing record indicating that the June 2013 CSE had before it evidence of substantial regression. The only information before the June 2013 CSE that could be deemed reflective of regression relates to the annual goals the CSE determined appropriate for the student's 2013-14 school year, as compared to the 2012-13 school year. According to the 2012-13 progress report, the student achieved annual goals related to retelling a story in sequential order, decoding multisyllabic words with or without suffix endings, and answering comprehension questions from factual materials in the fourth quarter of the 2012-13 school year (Dist. Ex. 19 at p. 2). The hearing record shows that these same goals were carried over to the student's IEPs for the 2013-14 school year, with minor revisions; specifically, during the 2012-13 school year, the student's IEPs called for him to retell a story from a book and decode multi-syllable words with moderate assistance, while the 2013-14 IEPs specified that

book will be at the student's instructional level and did not specify a level of assistance for either goal (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 19 at p. 2). For the third annual goal, answering comprehension questions from factual materials, the student's IEPs for the 2012-13 school year called for the student to perform this task with "75% success with moderate assistance over 5 weeks," while the 2013-14 IEPs called for the student to demonstrate the task with "70% success over three weeks," with no assistance level specified (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 19 at p. 2). The student continued to work on these goals throughout the 2013-14 school year and did not achieve them until the fourth quarter of the 2013-14 school year (Dist. Ex. 2 at pp. 3-4).

The hearing record does not offer information explaining the repetition of annual goals over the two school years. However, without more, this duplication is an insufficient basis on which to conclude that there was any actual loss of skill. As described above, the hearing record includes evidence of the student's progress during the 2012-13 school year and, although the student continued to struggle with academic work, the hearing record does not include evidence that student demonstrated substantial regression.

### **3. Implementation—Assistive Technology**

The parents assert that district did not properly implement the assistive technology recommended for the student and that the district did not adequately train the parent with respect to the assistive technology regarding the 2013-14 school year. Review of the hearing record shows no material failure or deviation on the part of the district to implement the student's assistive technology mandates set forth in his IEP (see A.P., 370 Fed. App'x at 205).

The June 2013 prior written notice indicated that the student would use assistive technology to improve his access to written material and improve his ability to express his ideas (Dist. Ex. 20 at p. 1). The June 2013 IEP included provision for assistive technology for the student, including access to electronic books and speech and word predication software (Dist. Ex. 21 at p. 15). The CSE also continued to recommend an OT consult for school personnel to address the student's needs related to assistive technology (see id. at p. 15). The June 2013 CSE recommended annual goals related to assistive technology that indicated the student would identify the locations of all letters, numbers, and punctuation on a keyboard within three seconds and would independently use assistive technology programs such as speech-to-text, text-to-speech, and a word predication program (id. at p. 13).

With respect to the 2013-14 school year, documentary evidence supports that the district provided assistive technology to the student and that he was exhibiting progress in this area (see generally Dist. Ex. 16). The occupational therapist reported that the student was utilizing text-to-speech, speech recognition, and word predication software (id. at p. 2). The chairperson indicated that all of the student's software was now stored on the iPad to allow for easier access (id.). The minutes from the October 2013 CSE meeting indicate that the occupational therapist reported that the student was initially hesitant to utilize assistive technology but was now more cooperative (id.). The minutes from the November 2013 CSE meeting indicated that the occupational therapist reported that the student used Co:Writer word predication software to allow for flexibility in accessing words related to specific subject matter (id. at p. 3). The

occupational therapist also reported the student began to use PaperPort digital note taking/writing application with voice-to-text and text-to-speech capabilities (*id.*). Further, the occupational therapist indicated the student was using Voice Dream Reader that allowed the student to read electronic books, PDF files, and web pages, among other things (*id.*). The district provided the student with an iPad for both school and home use; however, the minutes of the November 2013 CSE indicated the parents had not yet signed in full the user agreement for the iPad that would have allowed the student to take the iPad home (*see id.*).

The minutes of the April 2014 CSE meeting indicated the occupational therapist reported the student was typing 13 wpm and that he used the student email account to send and retrieve documents to use at home and school (Dist. Ex. 14 at p. 5). The minutes also indicated the student made progress with use of electronic books and word predication software (*id.*). The May 2014 assistive technology evaluation indicated the student received access to a word processor with word predication software, access to a tablet computing device, access to text-to-speech for digital text to be read aloud, access to audio books/textbooks, and a copy of class notes (Dist. Ex. 35 at p. 1).

With respect to the parents' claim regarding lack of parent training pertaining to assistive technology, the minutes of the April 2014 CSE meeting indicate that the district arranged a meeting date of April 11, 2014 for both parents to receive training in the use of the iPad with the occupational therapist (Dist. Ex. 14 at p. 6). The prior written notice dated April 2, 2014 indicated the parents signed the user agreement for the student to take the iPad home but it also noted that the iPad and related software had been previously available for the student to take home and, despite repeated attempts by the district, the parents did not signed the user agreement until the April 2014 CSE meeting (Dist. Ex. 13 at p. 1). Based on the evidence in the hearing record, I find that the CSE provided assistive technology to the student and training in assistive technology to the parent and the parents' material deviation claims must be rejected.

## **C. 2014-15 School Year**

### **1. Scope of the Impartial Hearing**

Before reaching the 2014-15 school year, a determination must be made regarding whether or not claims relating to this school year are properly before me on appeal. The district asserts that the IHO improperly exceeded the scope of the impartial hearing when he determined that it denied the student a FAPE for the 2014-15 school year, since the parents had not included this claim in their due process complaint notice. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student With a Disability, Appeal No. 13-151). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*8-\*9 [S.D.N.Y.

Aug. 5, 2013]; see K.L., 530 Fed. App'x at 87). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at \*7-\*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include claims relating to the 2014-15 school year (see Parent Ex. H at pp. 1-25). However, to the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "open[s] the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51; see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-29 [S.D.N.Y. 2013]; N.K., 961 F. Supp. 2d at 584-86; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84[S.D.N.Y. 2013]; J.C.S., 2013 WL 3975942, at \*9; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at \*5-\*6 [S.D.N.Y. May 14, 2013]), a review of the evidence in the hearing record reveals that the district did argue and initially offer exhibits and elicit testimonial evidence relating to the student's 2014-15 school year (see, e.g., Tr. pp. 13, 19, 214-220; Dist. Exs. 1; 3; 4). Specifically, in its response to the parent's due process complaint notice and in its opening statement at the impartial hearing, the district referred to the student's June 2014 IEP as an example of a program offering specially designed instruction that would meet the student's needs (Tr. p. 19). Further, during direct examination of its first witness, the district focused some of the questions on the conduct of the June 24, 2014 CSE and the resulting IEP (see, e.g., Tr. pp. 214-20, 409-11). Based on the foregoing, the hearing record supports the parent's assertion that the district "opened the door" to these issues under the holding of M.H.

Notwithstanding my determination that the 2014-15 school year was properly reached by the IHO, given the parents' concessions during the impartial hearing, it is unclear what specific issues relating to this school year are actually disputed. That is, given that the parents modified their requested relief during the impartial hearing to consist of an order requiring, among other things, that the student continue to attend the district's 15:1 special class for his core academic classes (see Tr. pp. 1230-31), they cannot not at the same time insist that this aspect of the student's educational program failed to meet the student's needs. Nonetheless, the merits of the claims, to the extent they can be ascertained, are addressed below.

## **2. Parental Participation**

The district asserts that the IHO erred in his determination that it denied the parents a meaningful opportunity to participate in the creation of the student's educational program starting in April 2014. 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] 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 Commc'n Development v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]).

Initially, to the extent the parents continue to argue on appeal their claims relating to parental participation at the CSE meetings other than those identified by the IHO (not including the May 2012 CSE as a result of application of the statute of limitations, described above), a thorough review of both the audio recordings (see generally Dist. Ex. 53; Parent Ex. S) and over 500 pages of transcripts of those recorded CSE meetings, as well as the minutes of the CSE meetings, demonstrate that, while the CSEs did not accede to every request made by the parent, the parents and the accompanying attorney(s) were provided with ample opportunity to discuss the student, provide input into the student's present levels of performance and annual goals, and contribute to the development of his IEPs (see generally Dist. Exs. 4; 14; 16; 21; 27; 40-43; Parent Exs. B; F).

With respect to the April 2014 to June 2014 time frame specified by the IHO, the hearing record reveals the following broad observations: that the CSE chairperson maintained a rigid agenda with respect to the order in which information was presented and at times would not answer a question until the appropriate place in the agenda; the parents and their attorney often lacked an understanding of the flow of information required in developing an IEP; and the professionals responsible for conducting and analyzing similar evaluative data disagreed with each other (see generally Dist. Exs. 42; 43; Parent Ex. F). In addition, while the chairperson attempted to keep the flow of discussion on track and within time allotments, he at times appeared to talk in a manner that may have seemed curt (see, e.g., Dist. Ex. 42 at pp. 13, 47). However, the hearing record shows that the CSE members came to the meetings with an open mind, the district staff agreed to some of the parents requests, and that the parents and their counsel were afforded opportunity to raise concerns, ask questions, rebut CSE recommendations, and provide input from private evaluators (see generally Dist. Exs. 42; 43; Parent Exs. F). Therefore, while it appears the relationship between the parties became at times acrimonious and in conflict with the spirit of cooperation contemplated by the IDEA, this does not support a finding that the district impeded the parents' participation.

### 3. Progress during the 2013-14 School Year

Turning to the review of the student's progress under the IEPs developed for the 2013-14 school year as a means to evaluating the similar educational program included in the IEPs for the 2014-15 school year (see H.C., 528 Fed. App'x at 66), the evidence in the hearing record again reflects that the student made meaningful gains.

The hearing record shows that, with respect to his academics, the student received the following course grades for his Regents Foundations classes for the 2013-14 school year: English 70, social studies 76, mathematics 80, science 65 (Dist. Ex. 5). The prior written notice prepared by the district after the April 2014 CSE meeting indicated, based on teacher reports, the student was "receiving mostly C's in his core classes except science, and [wa]s making progress in his reading, writing and math skills" (Dist. Ex. 13 at p. 1). The notice further noted that the student's homework completion was inconsistent, which "negatively impact[ed] his grades and progress" and that he did not attend the "extra help sessions" scheduled during his school day (id.).

The 2013-14 IEP progress report also described the student's progress related to his annual goals (see generally Dist. Ex. 2).<sup>22</sup> With respect to study skills, the student achieved five of seven annual, including goals related to editing his work and underlining important information when reading content area materials (id. at p. 2). In the area of reading, the student achieved five of seven annual goals, including goals related to decoding multisyllabic words with and without suffix endings, orally retelling a story in sequential order, answering comprehension questions from factual materials, blending and separating word components, and identifying the main ideas and pertinent details when silently reading a story (id. at pp. 3-4).<sup>23</sup> In writing, the student achieved one of four annual goals; the achieved goal related to spelling high frequency words (id. at p. 5). In the area of mathematics, the student achieved one of three annual goals; the achieved goal related to solving algebraic equations (id. at p. 6). The report indicated that the other two math goals had yet to be introduced to the student (id. at pp. 6-7). With respect to speech-language, the student achieved three of his four annual goals, including goals related to expressing his opinions using verbal reasoning skill, drawing conclusions when listening to a passage and, and participating on conversations with group members and maintaining the topic of conversation (id. at pp. 8-9). The report also indicated that the student achieved one of three annual goals related to social/emotional/behavioral functioning that required him to exhibit assertive communication skills by asking for assistance with classwork when needed, and did not achieve one of his annual goals due to his inconsistent attendance in counseling (id. at pp. 10-11). In the area of motor skills, the student achieved four out of five annual goals, which related to identification of the locations of the letters, numbers and punctuation on a keyboard, independent use of use of assistive technology programs, writing his first and last name in

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<sup>22</sup> The student's progress and needs are also detailed in a May 22, 2014 confidential annual review report to the CSE, which is summarized below (Dist. Ex. 8).

<sup>23</sup> As discussed above, two of the annual goals related to reading marked as achieved during the 2013-14 school year had also been deemed achieved in the previous school year according to the 2012-13 progress report (see id. at pp. 3-4; 19 at pp. 2-3).

cursive, and using near point copying skills to transcribe sentences (id. at pp. 12-14). In all, the student achieved 17 of 32 IEP goals for the 2013-14 school year (see id. at pp. 1-14).

#### **4. June 2014 IEPs**

##### **a. The Student's Needs**

The CSEs convened on June 5 and June 24, 2014, for the student's annual review and to develop an IEP for the 2014-15 school year (see generally Dist. Ex. 4). A review of the recording, transcript and the CSE meeting minutes show that the CSEs reviewed the student's progress toward his IEP goals, described above, as well as his abilities and needs (id. at pp. 1-3; see generally Dist. Ex. 43; Parent Exs. F; S). In addition to information about the student reviewed during previous CSE meetings, described above, the hearing record indicates that the June 2014 CSEs had the following reports and evaluations available to them: a May 2014 psychological update report, a March/May 2014 assistive technology evaluation, a May 2014 speech-language reevaluation, a May 2014 OT reevaluation, a May 2014 classroom observation, a May 2014 annual review report, and the 2013-14 report card (see Dist. Ex. 4 at pp. 3, 5; see generally Dist. Exs. 5; 7-10; 35; 36).

The May 2014 psychoeducational update conducted by the school psychologist included background information, a social history update, behavioral observations during testing, a review of previous testing results, and current standardized testing results in the area of memory (see generally Dist. Ex. 10). The school psychologist identified the tests conducted by the private neuropsychologist in December 2013, as well as the diagnoses offered by the neuropsychologist, and noted that, due to the prior evaluation, a full cognitive battery was not necessary but that further assessment in the area of memory was needed (id. at pp. 2-3). The district psychologist noted that she conducted selected subtests of the Wide Range Assessment of Memory and Learning – Second Edition (WRAML-2) and Woodcock Johnson Third Edition Normative Update Tests of Cognitive Abilities (WJ-III-COG) in order to assess the student's immediate, verbal, and visual memory (id. at p. 3). According to the evaluation report, the results demonstrated that, in the areas of verbal and visual memory, the student achieved scores in the below average to average range (id. at p. 4).

In March and May 2014, the student underwent an assistive technology evaluation, which included assessment tasks, teacher input, a student interview, and a classroom observation to assess the student's assistive technology needs (see generally Dist. Ex. 35). During a writing task, the student wrote for approximately 15 minutes using paper and pencil and produced about 131 words in about 15 minutes (id. at p. 3). In the student's writing sample, the student made 30 spelling mistakes and approximately 75 percent of the words were one syllable words (id.). When provided with the iPad, the student chose to use Co:Writer, and typed with one finger and at times thumb typed (id.). Regarding the typed sample, within the 15 minute time frame, the student produced 123 words and had 15 spelling mistakes (id.). The typed sample included more multisyllabic words and sophisticated language compared to the paper and pencil writing sample (id.). The evaluator made numerous recommendations to address the student's assistive technology needs related to reading, composition, organization/learning/studying, and computer access, including, among others, use of audiobooks, e-books, Voice Dream Reader application,

voice recording, graphic organizers, a wired keyboard for the iPad, use of text-to-speech and talking spell check software, audio recordings of assignments and ideas, and access to keyboarding practice websites (id. at p. 4). In addition, the assistive technology evaluative report indicated that many of the student's teachers reported that the student exhibited resistance to using the iPad and other accommodations in the classroom (id. at p. 1). The assistive technology evaluation indicated the district provided the student with access to a word processor with word predication software, access to a tablet computing device, access to text-to-speech for digital text to be read aloud, access to audio books/textbooks, and a copy of class notes (id.).

In a May 2014 speech-language reevaluation report, the district speech-language therapist indicated that the student has been receiving speech-language therapy to improve his receptive and expressive language (see generally Dist. Ex. 36). The therapist assessed the student's abilities using standardized and informal measures (id. at p. 2). The report indicated that the student was cooperative and motivated and asked for clarification and repetition when needed throughout the assessment (id. at p. 1). The report also indicated that the student's hearing, voice, fluency, and oral motor skills were within normal limits (id.). The results of the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) indicated the student demonstrated average receptive and expressive language skills compared to same age peers (id. at p. 2). The Test of Adolescent and Adult Language-Fourth Edition (TOAL-4) indicated the student exhibited a significant weakness in written language ability (id. at p. 4). Results of the Peabody Picture Vocabulary Test-Fourth Edition (PPVT-4) indicated the student's receptive language was within normal limits and the Expressive One-Word Picture Vocabulary Test (EOWPVT) results indicated the student expressive language was age appropriate (id. at pp. 4, 6). The Comprehensive Assessment of Spoken Language (CASL) test results indicated the student demonstrated age appropriate pragmatic language skills (id. at p. 5). The speech-language therapist indicated that the student demonstrated progress with his annual goals related to vocabulary, comprehension, inferential thinking, and pragmatic language (id. at pp. 5-6). In summary, the speech-language therapist indicated that the student demonstrated progress in the area of speech-language skills but continued to present with language delays that negatively affected his classroom performance (id. at p. 6).

In her May 2014 OT evaluation of the student, the district occupational therapist described the student's fine and gross motor skills and deficits, indicating that the student typed 10 to 14 wpm, which was adequate but noted that his visual scanning skills appeared to have a negative effect on his typing skills (Dist. Ex. 9 at p. 2). The report also indicated "some improvement in visual memory" but that the student continued to require accommodations in this area (id.). According to the report, the student exhibited age appropriate gross motor skills (id.). The report reflected that, to address the student's delays in visual perceptual skills, he needed accommodations and assistive technology supports (id.).

In May 2014, the district school psychologist conducted a classroom observation of the student during science class (see generally Dist. Ex. 7). Among other things, the school psychologist noted that the student maintained attention and participated during the lesson, answered questions correctly, was receptive to positive reinforcement, copied important dates from the blackboard into his iPad, took notes on handouts as the notes were being presented, and that he was given a separate copy of the class notes by his teacher (id. at pp. 1-2).

A May 2014 annual review report described the student's needs in the areas of study skills, reading, writing, mathematics, physical development, and social skills, and detailed accommodations and supports the student required (Dist. Ex. 8 at pp. 1-4). For example, the student learned new vocabulary at a quick pace and was developing critical reading skills (id. at p. 1). In math class, the student demonstrated an understanding of algebra (id. at p. 2). With respect to writing, the student generated ideas to write on a topic and progressed in the area of spelling (id.). In the area of socialization, the student was well liked and respected by his peers (id. at p. 4).

The evaluative information available to the June 2014 CSE and the present levels of performance contained in the June 2014 IEP provided a consistent description of the student's academic achievement, social/emotional functioning, and physical development (see Dist. Ex. 4 at pp. 5-10; see generally Dist. Exs. 5; 7-10; 35; 36). For example, consistent with the May 2014 annual review report, the June 2014 IEP indicated the student demonstrated progress in both reading and mathematics (compare Dist. Ex. 8 at pp. 1-2, with Dist. Ex. 4 at pp. 8-9). The present levels of physical development indicated the student demonstrated progress in fluidity when typing but exhibited decreased visual scanning skills, which was consistent with the May 2014 OT evaluation (compare Dist. Ex. 9 at pp. 1-2, with Dist. Ex. 4 at p. 10).

#### **b. Educational Placement and Services**

As noted above, the parent's request that the student attend the educational placement included in the June 2014 IEPs makes review of the appropriateness of the placement carry limited utility. Nonetheless, the hearing record demonstrates that the June 2014 CSEs developed 28 annual goals to address the student's needs in study skills, reading, writing, mathematics, speech-language, motor skills, and social/emotional/behavioral functioning (Dist. Ex. 4 at pp. 12-14). A review of the June 2014 IEP shows that the annual goals aligned with the student's deficits and needs (see id. at pp. 5-10, 12-14). To address the student's needs related to language, fine motor, and social skills, the June 2014 IEP continued to recommend related services of speech/language therapy, OT, and counseling but modified the IEP to indicate the student would also receive individual speech-language therapy and counseling (see id. at pp. 1, 15). In addition, to address the student's needs, the June 2014 IEP included accommodations and supports, including refocusing, redirection, repetition, practice, use of a scribe, use of graphic organizers, modified testing, mnemonic devices, check for understanding, special seating arrangements, copy of class notes, use of a calculator, and access to electronic books and portable word processor, as well as an OT consultation for the teachers (id. at pp. 15-16).

For the 2014-15 school year, the June 2014 CSE continued to recommend a Foundations 15:1 special class in English, consultant teacher services, and resource room with the assistance of an aide to address reading, including skills related to decoding, reading fluency, and reading comprehension (Tr. p. 1996; Dist. Exs. 3 at p. 1; 4 at p. 1). To address the student's reading skills, the June 2014 CSE also continued to recommend accommodations and assistive technology for the student (see Tr. pp. 1060-64; Dist. Ex. 4 at pp. 15-16). The minutes of the June 2014 CSE meeting indicated the special education teacher reported the student was now working on a fourth grade independent reading level for some of his reading annual goals and

also on a tenth grade instructional level on other reading annual goals (Dist. Ex. 4 at p. 4). The June 2014 IEP indicated the student demonstrated progress in reading but also continued to exhibit delays (id. at pp. 8-9). For mathematics, in addition to the 15:1 special class, the June 2014 IEP also continued provision for an aide in the resource room and direct consultant teacher services to address the student's math deficits and math related annual goals (id. at p. 1).

Significantly, the minutes of the June 2014 CSE meeting indicated the student had improved his motivation and participation in class with the implementation of the BIP (Dist. Ex. 4 at p. 4).<sup>24</sup> In particular, the June 2014 IEP indicated the student had improved in seeking assistance in math but that the subject matter remained challenging for the student (id. at p. 2). As described above with respect to the 2013-14 school year, the recommended special education program and services still aligned with the student's needs for the 2014-15 school year and the ultimate implementation of the BIP appears to have made a difference in the student's motivation and success leading up to the June 2014 CSE meetings.

### **c. 12-Month School Year Services**

Applying the standard set forth above with respect to evidence of substantial regression as the basis for 12-month school year services (8 NYCRR 200.6[k][1], [v]), the hearing record support the district's position that the IHO erred in finding such services warranted for the student's 2014-15 school year. To the extent that the private psychologist reported that the student regressed academically, the hearing record shows that she administered four tests as part of her December 2013 evaluation of the student that had been previously administered by the district as part of a September 2011 psychoeducational evaluation: the WISC-IV, the Woodcock-Johnson III – Tests of Achievement (WJ-III-ACH), the Behavior Assessment System for Children-Second Edition (BASC-2) and the Beery-Buktenica Developmental Test of Visual-Motor Integration (Berry VMI) (compare Dist. Ex. 34, with Parent Ex. G). A comparison of the student's performance on the tests shows that his scores on the verbal comprehension subtests of the WISC-IV declined between September 2011 and December 2013; however, his percentile ranks for the subtests ranged between 37 and 63 (Dist. Ex. 34 at p. 1; Parent Ex. G at p. 22). The student's scores on the picture concepts subtest (perceptual reasoning), coding subtest (processing speed), and digit span and letter numbering sequence subtests (working memory) all declined between September 2011 and December 2013 (Dist. Ex. 34 at p. 11; Parent Ex. G at p. 22). With respect to the WJ-III ACH, the student's standard score and percentile rank for reading fluency remained the same; however, his standard score for math fluency dropped from 70 in September 2011 to 63 in December 2013 and his standard score in writing fluency dropped from a 71 to 66 during the same time period (Dist. Ex. 34 at p. 12; Parent Ex. G at p. 26). On the Beery VMI, the student's standard score increased from 73 to 75 between September 2011 and December 2013 (Dist. Ex. 34 at p. 11; Parent Ex. G at p. 22).

The student's responses on the September 2011 administration of the BASC-2 indicated that he was "at-risk" for school problems, while his December 2013 responses indicated that his attitude toward teachers, attitude toward school, attention problems, and relations with parents

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<sup>24</sup> As noted above, the father approved the BIP at the April 2014 CSE meeting allowing the district to move forward in implementing the BIP for the student (see Dist. Ex. 18).

were all "at-risk" (Dist. Ex. 34 at p. 13; Parent Ex. G at p. 29). The student's parents completed the parent report rating scales of the BASC-2 (Dist. Ex. 34 at p. 14; Parent Ex. G at p. 21). The student's father's responses on the September 2011 administration of the BASC-2 indicated that the student was "at-risk" in the areas of social skills, leadership, activities of daily living (ADL), and adaptive skills, and that his level of withdrawal was in the "clinically significant" range (Dist. Ex. 34 at p. 14). The father's December 2013 responses yielded similar outcomes, with the exception of adaptability and the behavioral systems index, which both went from "average" to "at risk" (Parent Ex. G at p. 27). In addition, the father's responses suggested that the student's atypicality and withdrawal were in the "clinically significant" range (Dist. Ex. 34 at p. 14; Parent Ex. G at p. 27). The student's mother's September 2011 responses also indicated that the student was "at-risk" in the areas of social skills, ADLs and adaptive skills and resulted in a behavioral symptoms index classification of "at risk" (Dist. Ex. 34 at p. 14). Her responses also suggested that the student's level of withdrawal was "clinically significant" (*id.* at p. 14). The mother's December 2013 responses yielded similar results but indicated that the student was also "at risk" in terms of leadership and social skills (Parent Ex. G at p. 27). With respect to the September 2011 administration of the BASC-2 to the student's teacher, the teacher's responses indicated the student was "at-risk" for school problems and in the "clinically significant" range for learning problems (Dist. Ex. 34 at p. 13). Subsequent administration of the BASC-2 to two of the student's teachers in December 2013 showed that one of the two teachers considered the student "at-risk" for learning problems (Parent Ex. G at p. 28).

During the April 2014 CSE meeting, the psychologist who conducted the December 2013 neuropsychological evaluation reported that the student had regressed since the last time he was tested (Dist. Ex. 42 at p. 9). She cited the student's scores on measures of academic achievement and opined that the student was not making progress in his then-current setting (*id.* at p. 10).<sup>25</sup> The CSE chairperson stated that he did not believe that the psychologist's assessment of the district's program was fair or accurate and noted that additional supports had recently been implemented (*id.* at p. 13). He stated that standardized assessment was only one piece of the picture and that the district also needed to look at teacher input and curriculum assessments (*id.*). The CSE chairperson noted that the district had developed a BIP to address the student's problems with motivation and executive functions, but that the student's father did not agree to implement the plan (*id.* at p. 14). Lastly, in response to the psychologist's claim that there was little carry through in terms of providing a device to facilitate the student's writing, the CSE chairperson noted that, despite repeated requests from the district, the parents did not sign a user agreement that would allow the student to take the iPad home (*id.* at pp. 14-15). Referring to the psychologist's testing, the CSE chairperson noted that there was a significant increase in the student's reading comprehension standard score (87, compared to 72 in previous testing) and that, on tests of semantic and verbal rote memory, the student scored in the average or low average range (*id.* at pp. 15-16).<sup>26</sup> Although the CSE chairperson reported that the student was

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<sup>25</sup> Although the transcript references the "Wyatt Dimension" and a second "inaudible" test, the scores discussed by the psychologist reflect the student's scores on the Wechsler Individual Achievement Test – Second Edition (WIAT-II) and the WJ-III- ACH

<sup>26</sup> A review of the CSE chairperson's statement and the psychologist's testing shows that the CSE chairperson was comparing the student's passage comprehension score from the WJ-III ACH, administered in September 2011, with the student's reading comprehension score on the WIAT-II, administered in December 2013 (compare Dist. Ex. 34 at p. 12, with Parent Ex. G at p. 26).

making progress, the psychologist stated that the student was "stagnating at a third grade level, especially with his reading skills" and emphasized that she did not see appropriate progress (*id.* at p. 62).

Further, as noted above, the hearing record reflects that the student exhibited progress toward achieving his IEP annual goals for the 2013-14 school year with no evidence of regression (*see* Dist. Ex. 2 at pp. 2-7). During the April 2014 CSE meeting, the private psychologist stated that the current program was not addressing the student's needs and that her assessment of the student showed regression (Dist. Ex. 14 at p. 4). However, at the impartial hearing, the private psychologist more equivocally testified that the student needed 12-month school year services so that instruction could be provided "without a break where regression could occur" (Tr. p. 1511 [emphasis added]). In addition, the minutes of the June 2014 CSE meeting indicated the district staff discussed that the student had not exhibited significant regression over the school year and did not believe it would take the student eight weeks to re-learn skills that may be lost over the summer (Dist. Ex. 4 at p. 4). Despite the student's struggles in academic areas, there is no evidence of substantial regression in the hearing record and, consequently, the June 2014 CSE recommendation of a 10-month program was appropriate.

## **5. Implementation—Assistive Technology**

Again, the parents assert that district did not properly implement the assistive technology recommended for the student and that the district did not adequately train the parent with respect to the assistive technology with respect to the 2014-15 school year. The June 2014 CSE recommended access to electronic books and portable word processor for the student, as well as on OT consultation for the teachers (Dist. Ex. 4 at p. 16). The minutes of the June 24, 2014 CSE meeting indicated that the speech-language therapist reported the student utilized assistive technology including the iPad, Voice Dream Reader, Co:Writer, and Google to assist him with academic tasks (Dist. Ex. 4 at p. 2; *see* Parent Ex. F at pp. 24-25, 60, 67-69). With respect to parent training in assistive technology, the minutes of the June 5, 2014 CSE meeting indicate that the parents' attorney's stated that the father had requested parent training for assistive technology but the district failed to provide it (Dist. Ex. 4 at p. 3). However, the occupational therapist indicated that parent training occurred over the last few months and there was no further request for additional training but that the district would provide further training if the parents were interested (*id.*). Based on the evidence in the hearing record, I find that the CSE provided appropriate assistive technology to the student and training in assistive technology to the parent.

### **D. Summary**

In summary, throughout the dense and fact intensive hearing record, important themes emerge with respect to the student that are relevant to all of the disputed school years. Significantly, the student presented in evaluations and to parents and teachers as having a complex backdrop of strengths and deficits. For example, normed testing reflected scatter within distinct academic skill areas, making it difficult to target the student's specific needs. Further, while the student's teachers reported the student's steady progress, testing revealed sustained deficits. Adding to the complexity were the student's executive functioning deficits that presented as either unwillingness or a lack of motivation to accept and benefit from the services

included on his IEPs. Further, although the student struggled with foundational skills, he also showed an ability to learn content based instruction. Notwithstanding these complexities, as described above, the hearing record supports that the CSEs continued to analyze the student's needs and then add to and modify the IEP recommendations in a continuing effort to develop an individualized program with sufficient support services to permit the student to benefit educationally from instruction. At no point did the CSEs efforts to achieve this goal run afoul of the IDEA by offering an educational program and services that were not reasonably calculated to provide some meaningful benefit to the student (Mrs. B., 103 F.3d at 1120; see Rowley, 458 U.S. at 192). While I can empathize with the parent's desire for the student to have achieved a specific level of benefit, to have received a more intensive level of support or instruction, or to be offered the specific instruction available at the parent's preferred LMB program, the district is not required to provide "every special service necessary to maximize each handicapped child's potential" (Rowley, 458 U.S. at 199) or "everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132).

### **E. Reimbursement for Cost of Evaluation**

As a final matter, the district appeals IHO's determination that the parents were entitled to the costs of the privately obtained February 2014 neuropsychological evaluation of the student. However, under the circumstances of this case I conclude that there is insufficient reason to overturn the IHO's order directing reimbursement for the cost of the private evaluations.

According to November 2013 CSE meeting minutes, the parents requested a neuropsychological evaluation (Dist. Ex. 16 at p. 4). The CSE chairperson indicated that the student was due for a reevaluation in September 2014 but that it could be done as early as spring 2014 (id.). The parents indicated that they would seek their own neuropsychological evaluation (id.). Thereafter, the district conducted a psychoeducational reevaluation in May 2014 (see generally Dist. Ex. 10). However, the hearing record shows that the May 2014 psychoeducational reevaluation, standing alone, did not evaluate the student in each of his areas of disability (see generally Dist. Ex. 10; see also U.S.C. § 1414[a][2][B][ii]; 34 CFR 300.303[b][2]; 8 NYCRR 200.4[b][4]). Rather, the district school psychologist indicated that, based on the extensive cognitive assessments conducted as part of the private neuropsychological evaluation, the only further assessment needed was in the area of memory, and she incorporated the results of the newly conducted subtests to fill in any gaps in the student's private assessment (Dist. Ex. 10 at p. 3). The United States Education Department's Office of Special Education Programs has stated that it would be consistent with federal regulation to allow reimbursement for an IEE when the district failed to provide an evaluation in compliance with the IDEA (see Letter to Anonymous, 55 IDELR 106 [OSEP 2010]; see also Letter to Baus, 65 IDELR 81 [OSEP 2015] [indicating that if a parent disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area]).

Accordingly, under the circumstances of this case, I find that the parents are entitled to reimbursement for the cost of the private evaluation. That is, where, as here, the district appeared to agree in part that the student required reevaluation, agreed to conduct the reevaluation, but did not complete a full assessment of the student's needs and, instead, chose to

rely on the parents' privately neuropsychological evaluation to develop the student's present levels of performance in his IEP (see e.g., Dist. Ex. 42 at pp. 15-20, 53-55, 63), I find that the district may not permissibly shift the costs of the student's evaluation to the parents and they are therefore entitled to reimbursement of the neuropsychological evaluation relied upon by the CSE to meet its statutory obligations.

## **VII. Conclusion**

Based on the foregoing, the hearing record supports a finding that the district offered the student a FAPE for the 2012-13, 2013-14, and 2014-15 school years but that the district must reimburse the parents for the cost of the private neuropsychological evaluation.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated March 23, 2015, is modified by reversing those portions which found that the district denied the student a FAPE for the 2012-13, 2013-14, and 2014-15 school years; and

**IT IS FURTHER ORDERED** that the IHO's decision, dated March 23, 2015, is modified by reversing those portions which ordered the CSE to reconvene and develop an IEP that recommended a smaller class that did not follow a Regents curriculum and ordered the district to pay for the costs of the student's enrollment at LMB for the summer 2014 and for the costs of compensatory additional services in the form of tutoring at LBM; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parents for the cost of the December 2013 private neuropsychological evaluation.

**Dated:** Albany, New York  
June 17, 2015

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**