



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 16-058

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

#### Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Garret L. Silveira, Esq., of counsel

The Cuddy Law Firm, PLLC, attorneys for respondents, Kerry McGrath, 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 the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents) daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Eagle Hill School (Eagle Hill) for the 2015-16 school year. The parents cross-appeal from the IHO's determination which found that the educational program the district's Committee on Special Education (CSE) had recommended for their daughter for a portion of the 2013-14 school year and for the 2014-15 school year was appropriate and denied their request for compensatory educational services. The appeal must be sustained. The cross-appeal must be dismissed.

#### II. Overview—Administrative Procedures

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

initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

The hearing record indicates that the student received speech-language therapy as a preschool student with a disability but that, in June 2009, a Committee on Preschool Special Education recommended declassifying the student (Parent Ex. JJ at pp. 1-2). As a result of a July 2010 private neuropsychological consultation, the student received diagnoses of attention deficit hyperactivity disorder (ADHD), combined type, and development coordination disorder, and was noted to exhibit a profile placing her at risk for a language-based disorder and a learning disorder (Parent Ex. J at p. 11). Subsequently, the student also received a diagnosis of Tourette's Syndrome (see Dist. Ex. 2). The student received response to intervention programs (RtI) and/or academic

intervention services (AIS) during the 2010-11 and 2011-12 school years (first and second grades) (Parent Exs. J at p. 2; K at p. 2).<sup>1</sup> In May 2012, the student was initially found eligible for special education and, during the 2012-13 school year, received integrated co-teaching (ICT) services (Parent Exs. B at pp. 1, 7-9; C at pp. 7, 9), as well as building level services in the form of occupational therapy (OT) (Tr. p. 94). At a Subcommittee on Special Education (CSE subcommittee) meeting in October 2012, additional processing time, special seating arrangements and cues to focus the student during instructional time were added to her IEP (compare Parent Ex. B at p. 7, with Parent Ex. C at p. 8).

On March 14, 2013, a CSE convened to develop the student's IEP for the 2013-14 school year (Parent Ex. D at pp. 1, 7). Finding the student eligible for special education and related services as a student with a learning disability, the CSE recommended a 12:1+1 special class placement for reading and math and ICT services for social studies and science classes, along with modifications and accommodations and assistive technology in the form of adaptive seating (id. at pp. 1, 5, 7-8).<sup>2</sup> The CSE further recommended a 12:1+1 special class for "skills" three times a week and twice weekly OT in a small group (5:1) (id. at p. 7). The CSE also recommended 11 annual goals in the areas of reading, writing, mathematics, and motor skills (id. at pp. 5-6).

The student attended the recommended program during the 2013-14 school year (Parent Exs. N at p. 1; O at p. 1). According to the hearing record, in November 2013 the student also began attending a social skills group, which was a building level service offered to all students (Parent Ex. F at p. 5; Tr. pp. 328, 921-23).

On May 8, 2014, a CSE subcommittee convened to review the student's progress and to develop her IEP for the 2014-15 school year (Parent Ex. F at p. 1). The CSE subcommittee recommended a 12:1+1 special class placement for reading, math, social studies, science, and language arts with modifications and accommodations, as well as assistive technology in the form of adaptive seating (id. at pp. 8-10). The CSE subcommittee further recommended twice weekly OT sessions in a small group (5:1) (id. at p. 9). The CSE subcommittee also recommended 13 annual goals in the areas of study skills, reading, writing, mathematics, and motor skills (id. at pp. 7-8). According to the meeting minutes, the parents provided the CSE subcommittee with a private auditory language processing evaluation report and the CSE subcommittee agreed to conduct a speech-language evaluation of the student and to reconvene in June to review the reports (id. at p. 1).

On June 12, 2014, a CSE subcommittee convened to review a May 2014 speech-language evaluation report (Parent Ex. E at p. 1). In addition to the program and services included in the

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<sup>1</sup> State regulations define AIS as "additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting the State learning standards . . . and/or student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance" but does not include special education services and programs (8 NYCRR 100.1[g]; see 8 NYCRR 100.2[ee]). RtI programs are defined as "[a] school district's process to determine if a student responds to scientific, research-based instruction," including "increasingly intensive levels of targeted intervention and instruction for students who do not make satisfactory progress in their levels of performance and/or in their rate of learning" (8 NYCRR 100.2[ii]; see 8 NYCRR 100.1[g][7]).

<sup>2</sup> The student's eligibility for special education services and classification as a student with a learning disability during all school years at issue is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

May 2014 IEP, the June 2014 CSE subcommittee additionally recommended speech-language therapy twice weekly in a small group (5:1) and once weekly in a small group (2:1), and added four speech-language annual goals to the IEP (compare Parent Ex. E at pp. 8, 10-11, with Parent Ex. F at pp. 7-10). The June 2014 IEP further indicated the student's need for a device or service to address her communication needs and recommended the student's use of a personal FM device during instructional time (id. at pp. 8, 12).

During summer 2014, the student attended a summer camp for reading, provided as part of the district's AIS program (Tr. pp. 114-16, 780-82, 839). Additionally, according to the hearing record, the student began attending a reading group in November or December 2014 (Tr. pp. 782-84, 786, 1871-72, 1925, 1927).

During November and December 2014, the district completed the student's triennial evaluation (see Parent Ex. JJ at p. 1). On January 23, 2015, a CSE subcommittee convened for a reevaluation review and to develop the student's IEP for the remainder of the 2014-15 school year (Parent Ex. G at p. 1). The CSE subcommittee added weekly counseling in a small group (5:1) to the student's IEP (id. at pp. 1, 9). According to the CSE meeting minutes, the student was also working with a reading specialist and continued to attend a social skills group (id. at p. 1).

The parents obtained a private neuropsychological evaluation of the student, which was conducted during February and March 2015 (Parent Ex. Q at p. 1). According to the evaluation report, the student's overall cognitive abilities were in the below average range, and she exhibited delays in all academic areas consistent with a language-based learning disorder (id. at pp. 5-6).

On April 30, 2015, a CSE subcommittee convened for the student's annual review and to develop the student's IEP for the 2015-16 school year (Parent Ex. H at p. 2). According to the meeting minutes, the April 2015 CSE subcommittee reviewed the student's progress and the neuropsychologist who completed the private neuropsychological evaluation of the student reviewed his report with the CSE subcommittee (id.). The CSE subcommittee did not complete the review during the April 2015 meeting but reconvened on May 22, 2015 (id. at p. 1). The May 2015 CSE subcommittee recommended a placement consisting of a 12:1+1 special class for English, mathematics, social studies, and science, a 5:1 special class for reading, and a 12:1 special class for "skills" (three times per six-day cycle), along with modifications and accommodations, as well as assistive technology (adaptive seating and FM system) (id. at pp. 12-15). The CSE subcommittee recommended the following related services: weekly OT in a small group (5:1), speech-language therapy twice weekly in a small group (5:1) and once weekly in a small group (2:1), and weekly counseling in a small group (5:1) (id. at pp. 12-13). The CSE subcommittee also recommended 24 annual goals in the areas of study skills, reading, writing, mathematics, speech-language, social/emotional/behavioral, and motor skills (id. at pp. 5-6).

On June 1, 2015, the parents entered an enrollment contract with Eagle Hill for the student's attendance during the 2015-16 school year (Parent Ex. U2 at p. 2).

By letter dated August 5, 2015, the parents informed the district of their disagreement with the May 2015 IEP (Parent Ex. R). The parents indicated that the district had "consistently failed to recognize the extent of [the student's] academic and social struggles" and "consistently failed to evaluate [the student] thoroughly to determine her areas of need" (id. at p. 1). The parents expressed their frustration with the student's lack of progress and their view that the May 2015 IEP

recommended a program similar to those the student attended since the 2013-14 school year with "limited to no progress" (id.). The parents asserted that the May 2015 CSE subcommittee failed to develop an intensive and specialized program as recommended by the private neuropsychologist (id. at p. 2). The parents also objected to the CSE subcommittee's failure to address the student's social/emotional needs (id.). Based on the foregoing, the parents notified the district of their intent to unilaterally place the student at Eagle Hill for the 2015-16 school year and to seek the costs of "tuition, services, and transportation," as well as "any supplemental private services" from the district (id.). Finally, the parents also noted that they remained willing to cooperate with any attempts the district might make to provide the student with a FAPE (id.).

By letter dated August 14, 2015, the district acknowledged the parents' letter and stated its position that the May 2015 IEP offered the student an appropriate program in the least restrictive environment (Parent Ex. S). The district also indicated that it would arrange for the student's transportation to Eagle Hill (id.).

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

By due process compliant notice dated December 18, 2015, the parents claimed that the district failed to provide the student a FAPE for "at least" the 2014-15 and 2015-16 school years (Parent Ex. A at pp. 7-9).

While acknowledging that they may be outside of the statute of limitations, the parents asserted that school years prior to the 2014-15 school year were "relevant in considering where the [s]tudent would have been if she was provided a FAPE in previous school years" (Parent Ex. A at p. 7). Thus, with respect to the 2010-11 and 2011-12 school years, the parents alleged that the district failed to identify the student as a student with a disability and inappropriately provided RtI and AIS in lieu of special education services (id. at pp. 2-3, 7). The parents further alleged that the district failed to evaluate the student's speech-language needs for many years and failed to recommend speech-language therapy until June 2014 (id. at pp. 5, 8).

With respect to the 2014-15 school year, the parents asserted that the district failed to recommend an appropriate program that would allow the student to make meaningful progress and, as a result, the student regressed (Parent Ex. A at p. 8). Further, the parents alleged that, despite the district's triennial evaluation results demonstrating such regression, the district did not change the student's placement (id.).

Turning to the 2015-16 school year, the parents contended that the district failed to develop an IEP for the student that included recommendations for a "research-based multisensory program," with appropriate annual goals that encompassed such methodology (Parent Ex. A at p. 8). Additionally, the parents asserted that the May 2015 IEP failed to include sufficient "pull-out" speech-language therapy (id.).

Additionally, for the time period from the 2013-14 school year through the time of the due process complaint notice, the parents alleged that the CSE failed to address the student's social/emotional needs in her IEPs, which resulted in the student experiencing bullying (Parent Ex. A at p. 9).

Finally, the parents asserted that Eagle Hill was an appropriate unilateral placement for the student for the 2015-16 school year and that the student had made progress during her attendance there (Parent Ex. A at pp. 9-10). For relief, the parents sought reimbursement for the costs of the student's tuition at Eagle Hill for the 2015-16 school year, along with the costs of "services, transportation and fees," and compensatory educational services in the form of research-based multisensory tutoring and speech-language therapy services to remedy the district's failure to provide the student a FAPE "in previous school years" (*id.* at p. 10).

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

After a prehearing conference on January 13, 2016, the parties convened for an initial hearing on February 12, 2016 on the limited issue of application of the statute of limitations to the parents' claims (Tr. pp. 1-176). By interim decision dated March 14, 2016, the IHO found that application of the statute of limitations barred the parents' claims that predated December 22, 2013, two years prior to the date of the due process complaint notice, and that no exceptions to the statute of limitations applied (IHO Ex. IV at pp. 11-16).<sup>3</sup>

On April 12, 2016, the parties continued with the impartial hearing, which concluded on June 8, 2016, after eight days of proceedings (Tr. pp. 177-2168). By decision dated July 27, 2016, the IHO found that the parents did not allege a meritorious claim relating to the 2013-14 school year and, further, that the district provided the student a FAPE for the 2014-15 school year but failed to offer the student a FAPE for the 2015-16 school year (IHO Decision at pp. 10-23).

As to the portion of the 2013-14 school year within the statutory period, the IHO found that, beyond a "recit[al] of events," the parents' due process complaint notice did not articulate any claims relating to the 2013-14 school year with the exception of a "global assertion" that the district failed to evaluate the student in the area of speech-language until 2014 (IHO Decision at p. 11). On the latter allegation, the IHO found that the district had completed a speech-language evaluation of the student in July 2012 and, therefore, the parents' claim was without merit notwithstanding that the district did not recommend speech-language therapy until June 2014 (*id.* at pp. 11-12).

With respect to the 2014-15 school year, the IHO opined that, because the May 2014 CSE subcommittee adjusted the student's educational program relative to the 2013-14 school year to include a 12:1+1 special class for all core academic subjects (as opposed to the combined program consisting of a 12:1+1 special class for reading and math and ICT services for science and social studies), this "presumably" reflected the CSE subcommittee's assessment that the student had not made appropriate progress during the 2013-14 school year (IHO Decision at p. 16). Given this lack of progress, the IHO found the provision of the "more intense, direct instruction" available in the 12:1+1 special class "reasonably . . . calculated" to provide the student with "some meaningful benefit" (*id.* at pp. 16-17).

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<sup>3</sup> The parents do not challenge the IHO's interim decision on appeal and, therefore, the IHO's determination that the statute of limitations barred the parents' claims that predated December 22, 2013 is final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6, \*10 [S.D.N.Y. Mar. 21, 2013]).

Despite finding that the May 2014 IEP was "reasonabl[y] calculated to provide [the student] with meaningful educational benefit," the IHO determined that "such calculation was not realized" (IHO Decision at p. 23). In reaching this conclusion, the IHO found that information in the May 2015 IEP as to the student's progress during the 2014-15 school year was insufficient in light of the findings of a private neuropsychologist and a district school psychologist that "established" that the student made "little or no progress" (*id.*). In light of his conclusion regarding the student's lack of progress during the 2014-15 school year, the IHO found that the district failed to offer the student a FAPE for the 2015-16 school year since the educational program recommended in the May 2015 IEP remained "virtually identical" to the program the student received during the previous school year (*id.*).<sup>4</sup>

The IHO also determined that the parents' claim that the district did not respond to allegations of bullying to be without merit, finding that the district addressed any alleged incidents properly and quickly (IHO Decision at pp. 26-27). Thus, the IHO noted that there was no need for the CSE subcommittee to review allegations of bullying and, further, there was no proof that any bullying had an impact on the student's educational program (*id.*).

Having found that the district failed to offer the student a FAPE for the 2015-16 school year, the IHO reviewed the testimony of the Eagle Hill educational consultant and the private neuropsychologist and found that, at the time of the parents' decision to unilaterally place the student, Eagle Hill was reasonably calculated to provide the student with meaningful educational benefit (IHO Decision at pp. 23-25). However, the IHO also observed that the student made little progress at Eagle Hill during the 2015-16 school year, "render[ing] it inappropriate for [the parents] to consider further placement of [the student] at Eagle Hill School" (*id.* at p. 25). With respect to equitable considerations, the IHO found nothing that would warrant denial or reduction of a reimbursement award to the parents (*id.* at p. 26).

Based on the foregoing, the IHO ordered the district to pay the costs of the student's tuition at Eagle Hill for the 2015-16 school year (IHO Decision at pp. 26, 28). The IHO denied the parents' request for compensatory educational services, opining that, in light of the student's lack of progress in the district, as well as at Eagle Hill, the student would also be unlikely to make progress with the requested tutoring services (*id.* at p. 27).

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

The district appeals, seeking to overturn the IHO's determination that that the district failed to offer the student a FAPE for the 2015-16 school year and the IHO's order that the district pay for the costs of the student's tuition at Eagle Hill.<sup>5</sup> The district contends that the IHO erred in finding that the student did not make progress during the 2014-15 school year and argues that

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<sup>4</sup> In addition, with respect to the both the May 2014 and May 2015 IEPs, the IHO indicated that, while the IEPs referenced the student's need for multisensory instruction, no provision for such instruction was made in either IEP (IHO Decision at pp. 16, 23).

<sup>5</sup> The district does not appeal the IHO's determinations relating to the appropriateness of Eagle Hill or equitable considerations. Therefore, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see *C.H.*, 2013 WL 1285387, at \*9; *M.Z.*, 2013 WL 1314992, at \*6, \*10).

teacher assessments and reports demonstrated the student's progress in reading, writing, math, and social skills. Further, the district argues that the IHO erred in finding that the district offered the student the same program in 2015-16 as it did in the 2014-15 school year, noting the May 2015 CSE subcommittee's recommendation for a reduction in class size for the student's reading class from 12:1+1 to 5:1 and the addition of annual goals in the area of counseling and accommodations and modifications to the May 2016 IEP.

In an answer and cross-appeal, the parents respond to the district's petition by admitting or denying the district's assertions and arguing that the IHO correctly determined that the student did not make progress in the district program during the 2014-15 school year, that the district failed to offer the student a FAPE for the 2015-16 school year, and that the parents are entitled to an award of the costs of the student's tuition at Eagle Hill for the 2015-16 school year. In their cross-appeal, the parents assert that the IHO erred by not finding that the district denied that student a FAPE for the 2013-14 or 2014-15 school years and by dismissing the parents' request for compensatory educational services.

Initially, the parents assert that the IHO inappropriately considered retrospective evidence regarding the district's provision of additional supports or services, which were not identified in the student's IEPs. Next, the parents argue that the IHO erred in finding that the due process complaint notice did not include claims relating to the recommended program for the 2013-14 school year or the implementation thereof, noting that their due process complaint notice included claims relating to the district's failure to evaluate the student's speech-language needs for several years and failure to recommend speech-language therapy until June 2014.<sup>6</sup> The parents also assert that the IHO erred in finding that the district sufficiently evaluated the student's speech-language needs, arguing that the district should have uncovered the student's language needs before the parents sought a private evaluation. The parents also assert that the IHO erred in finding that the district provided the student a FAPE for the 2014-15 school year, contending that the June 2014 CSE subcommittee failed to include multisensory instruction / remedial support or reading services on the IEP. Additionally, the parents assert that the IHO erred by not finding that that January 2015 CSE subcommittee inappropriately failed to recommend changes to the student's academic program or annual goals despite results of the district's reevaluation of the student, which revealed the student's declining performance. The parents also contend that the IHO erred in finding that the district addressed claims of bullying or that the CSE subcommittee did not need to review claims of bullying during both the 2013-14 and the 2014-15 school years.

With respect to the unilateral placement, the parents assert that the IHO exceeded his authority by concluding that the student's lack of progress at Eagle Hill could render it inappropriate in the future. The parents further cross-appeal the IHO's denial of compensatory educational services to remedy the district's failure to provide the student a FAPE for the 2013-14 and 2014-15 school years. In particular, the parents contend that the IHO's finding that the student was not capable of making progress was in error and contrary to the evidence.

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<sup>6</sup> The parents also note that the due process complaint notice raised claims relating to the district's failure to address the student's social/emotional needs from at least the 2013-14 school year. Review of the due process complaint notice reveals that, in context, this allegation related to the claim that the district's failures resulted in the student being subjected to bullying, which was addressed by the IHO (IHO Decision at pp. 26-27; see Parent Ex. A at p. 9).

The district answers the parents' cross-appeal, admitting or denying the parents' allegations. In addition, the district contends that the parents' answer and cross-appeal did not conform with the form requirements of State regulation in that the font used appears smaller than 12-point type in an apparent attempt to circumvent page length limitations. The parents reply, asserting that they complied with State regulations and submitted their answer and cross-appeal and memorandum of law in the proper form.<sup>7</sup>

## V. Applicable Standards

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

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<sup>7</sup> State regulation provides that "the petition, answer, or memorandum of law shall not exceed 20 pages in length" and that "[a] party shall not circumvent page limitations through incorporation by reference" (8 NYCRR 279.8[a][5]). In addition, "[a]ll pleadings and memoranda of law shall be in . . . 12-point type in the Times New Roman font (footnotes may appear as minimum 10-point type in the Times New Roman font)" (8 NYCRR 279.8[a][2]). The parents contend that their pleadings were prepared in 12-point type font. However, there appeared to be an issue with respect to the conversion of the document from Microsoft Word to PDF. Along with their reply, the parents submit a copy of their answer and cross-appeal printed using a Microsoft Word format. State regulation provides that documents that do not comply with the pleading requirements "may be rejected in the sole discretion of the State Review Officer" (8 NYCRR 279.8[a]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at \*4-\*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178, 181-82 [1962]). Under these circumstances, I decline to exercise my discretion to reject the parents' answer and cross-appeal.

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][iii]; 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. 2013-14 School Year—Speech-Language**

Before reaching the merits of the parents' arguments relating to the 2013-14 school year, a review of the parameters of the claims is necessary. As noted above, neither party appeals the IHO's finding that the statute of limitations barred the consideration of issues or claims that arose prior to December 22, 2013 and, therefore, that determination is final and binding on both parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). The IHO reviewed the parents' due process complaint notice to ascertain whether any claims remained for the 2013-14 school year. The IHO determined that the parents asserted a claim relating to the district's failure to evaluate the student's speech-language needs during the 2013-14 school year (IHO Decision at p. 11). The parents argue that the IHO erred in this limited interpretation of the parents' claims. Instead, the parents argue that the due process complaint notice included claims relating to the recommended program for the 2013-14 school year and the implementation thereof.

As to the recommended program, the March 2013 IEP (see Parent Ex. D) was developed before December 2013; therefore, the program recommendations included therein are outside the scope of the statute of limitations. Further, review of the parents' due process complaint notice reveals that the parents did not assert a claim that the district failed to implement the March 2013 IEP (see Parent Ex. A; cf. *K.P. v. Juzwic*, 891 F. Supp. 703, 716-17 [D. Conn. 1995] [noting that the date of the CSE meeting is not determinative for statute of limitations purposes where plaintiff "challenge[d] the IEPs and the implementation of his IEPs"]; accord *G.R. v. Dallas Sch. Dist. No. 2*, 823 F. Supp. 2d 1120, 1130-35 [Or. 2011]). Specifically, the parents' allegation that the district failed to provide speech-language services during the 2013-14 school year is not an implementation claim—there was no mandate for speech-language therapy for the student for the district to implement (Parent Ex. D at p. 7); rather, when read in light of the application of the

statute of limitations, the parents' actionable claim amounts to an allegation that the CSE subcommittee should have reevaluated the student's speech-language needs and convened to recommend speech-language therapy after December 22, 2013 but before the CSE subcommittee convened to conduct the student's annual review for the 2014-15 school year.

A district must conduct an evaluation of a student when the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

In the petition, the parents do not point to and a review of the hearing record does not show that from December 2013 through the remainder of the 2013-14 school year the student exhibited speech-language needs that would have required the district to initiate an evaluation or provide remediation of the student's speech-language needs. Information about the student's speech-language skills prior to the statutory timeframe applicable in this appeal includes a July 2012 speech-language evaluation that the district conducted in response to weaknesses in verbal comprehension skills identified by formal cognitive testing administered to the student in March 2012 (Parent Ex. L at p. 1; see Parent Ex. K at pp. 3-5). The July 2012 administration of receptive and expressive vocabulary assessments to the student yielded scores within the high average and average range, respectively (Parent Ex. L at pp. 1-2). Formal administration of the Clinical Evaluation of Language Fundamentals-4 (CELF-4) to the student yielded the following standard scores, all of which were described as within the average range: a core language of 109; a receptive language index of 96; an expressive language index of 112; a language content index of 100; and a language structure index of 108 (id. at pp. 2-7). The evaluator concluded that, in light of the student's average formal test scores and her placement in an ICT class for third grade, speech-language therapy was not recommended for the student at that time (id. at p. 7).

The July 2012 speech-language evaluation report included an explanation of the statistical discrepancy between the student's average range receptive language index and expressive language index standard score results, noting that the discrepancy "may have an impact on intervention and the classroom," such that in the classroom the student "may have difficulty understanding directions given by the teacher, identifying relationships between words and phrases, or

understanding simple and complex sentences" (Parent Ex. L at p. 4). During the impartial hearing, a district speech-language pathologist reviewed the July 2012 speech-language evaluation report and testified that the potential concern about the student's ability to follow directions given by the teacher was not reflected in the test results, as the student achieved a score in the "solidly average" range on the concepts and directions subtest (Tr. pp. 381, 481-82, 493-94; Parent Ex. L at p. 4). She further testified that "at that point it wasn't indicated [that the student] had any difficulty following directions in class" (Tr. p. 494).

Review of the March 2013 IEP present levels of performance indicates that the student was able to answer more concrete comprehension questions when listening to a story than reading it, and that she required additional processing time, which the IEP provided as a supplementary aid/program accommodation (Parent Ex. D at pp. 3, 7). Although the IEP reflected other parent concerns (i.e., homework), it did not indicate that the parents or district staff had concerns about the student's speech-language skills at that time (see id. at pp. 3-4).

Turning to that part of the 2013-14 school year within the statutory period, the hearing record is devoid of evidence suggesting that the student exhibited speech-language needs requiring the district to conduct an evaluation. The parents obtained a private auditory-language processing evaluation in March and April 2014, which reported that at that time the student did not listen carefully to directions, was distracted by background noise, could not attend to auditory stimuli, exhibited auditory memory and sound discrimination difficulties, and displayed delayed responses to verbal stimuli (Parent Ex. N at p. 1). The evaluation report indicated that, although she scored within the average range on a speech-language evaluation in 2012, in March 2014, the student was struggling with listening skills that had an impact on her language abilities (id. at p. 7). According to the report, in all but two areas of the listening-language portion of the evaluation (auditory memory and auditory reasoning), the student's skills were "within normal limits" (id.). The evaluator reported that, while testing results indicated slow and labored processing of information, the student's strong language abilities masked her language struggles (id.). Results of the portion of the evaluation conducted by an audiologist on April 9, 2014 revealed the student's main weaknesses at that time included the ability to understand words in adverse conditions (i.e., when background noise is present) and the ability to quickly and accurately decode an auditory speech message (id. at pp. 8, 13). Overall, the auditory-language processing evaluation report provided numerous recommendations including language therapy, teaching strategies related to targeted language therapy skills, and classroom accommodations (id. at pp. 7-8, 13-16).

At a CSE subcommittee meeting on May 8, 2014, members discussed the private auditory-language processing evaluation results and requested that the district conduct a speech-language evaluation of the student, which occurred over two days in May 2014 (Parent Exs. F at p. 1; O).<sup>8</sup>

During the May 2014 speech-language evaluation, the speech-language pathologist observed that the student appeared to be "very sweet, polite, and quiet," and also distracted and

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<sup>8</sup> The May 2014 speech-language evaluation report indicated that the purpose of the evaluation was to provide a comprehensive profile of the student's then-current communication strengths and weaknesses, and to determine the need for intervention (Parent Ex. O at p. 1). The evaluating speech-language pathologist indicated that, prior to conducting the May 2014 speech-language evaluation of the student, she reviewed both the July 2012 speech-language evaluation report and the private auditory-language processing evaluation report (Tr. pp. 385-88, 4128; Parent Exs. L; N).

tired at times (e.g., twirling her hair, playing with her toy, looking around the room, and yawning) (Parent Ex. O at p. 5).<sup>9</sup> Review of the May 2014 speech-language evaluation report indicates that the evaluator administered the Clinical Evaluation of Language Fundamentals-5 (CELF-5), a newer edition of the standardized assessment tool administered to the student in July 2012 (Tr. p. 390; Parent Ex. O).<sup>10</sup> Administration of the CELF-5 revealed relative strengths in perceiving relationships between words, repeating sentences of increasing length and complexity presented verbally by the evaluator, and formulating logical and meaningful sentences when provided with pictures and target vocabulary words (Parent Ex. O at p. 5). Areas of weakness included the student's difficulties in defining target vocabulary words, listening comprehension tasks, following directions of increasing length and complexity, and answering questions related to the main idea, specific details, sequencing, inferences, social context, and predictions based on verbally presented short stories (*id.*). In addition, the student struggled to sequence out-of-order words and phrases into logical and meaningful sentences, indicating she had not yet internalized complex syntactic structures (*id.*). The May 2014 speech-language evaluation report recommended that the student receive speech-language therapy and suggested that language intervention focus on listening comprehension and improving the student's ability to define words, follow directions, and apply syntactic structures (*id.*).

In spring 2014, the student was receiving reading, math, and skills instruction in a 12:1+1 special class placement, ICT services in her social studies and science classes, as well as additional processing time, special seating in close proximity to the teacher and white board, and cues to focus (Parent Ex. D at p. 7). Although the evaluations conducted in March, April and May 2014 revealed that the student was experiencing some difficulty with language and auditory processing, the hearing record does not show that—given the supports the IEP provided to the student—she failed to progress toward her IEP annual goals or otherwise exhibited difficulties in the classroom environment so as to require the district to initiate an evaluation of her speech-language skills (see Parent Ex. GG). Once the parents raised their concerns about the student's speech-language needs, the district acted promptly to evaluate the student. Ultimately, based on the new information, the June 2014 CSE subcommittee recommended speech-language therapy twice weekly in a small group (5:1) and once weekly in a small group (2:1), and added four speech-language annual goals to the student's IEP for the 2014-15 school year (Parent Ex. E at pp. 8, 10-11). However, this recommendation for the subsequent school year does not cast aspersions retroactively on the district's actions in the prior school year (see, e.g., *T.L. v Lower Merion Sch. Dist.*, 2016 WL 3405453, at \*16 [E.D. Pa. June 20, 2016] [rejecting a parent's argument that the addition of services or supports in a later IEP was evidence of a lack of progress under an earlier IEP]). Based on the

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<sup>9</sup> The evaluating speech-language pathologist indicated that, during the evaluation, the student frequently answered, "I don't know"; however, the speech-language pathologist felt the student was capable of providing more information (Tr. pp. 411-12). For example, the speech-language pathologist testified that, although the student had an "adequate vocabulary," when asked to provide a synonym for the word "little," the student responded, "I don't know" (Tr. pp. 412, 473-74; Parent Ex. O at p. 4).

<sup>10</sup> Extensive testimony by the evaluating speech-language pathologist demonstrated her understanding of the content and scoring of the CELF-5, and implications of the student's performance on the standardized test (Tr. pp. 391-409; 475-76). Similar expertise was demonstrated in the evaluating speech-language pathologist's testimony on cross examination about the student's scores on receptive and expressive vocabulary testing conducted in July 2012 and March and April 2014, and the discrepancy analysis per results of the CELF-4 in 2012 (Tr. pp. 466-469, 477-481; Parent Exs. L; N). She testified that the term "discrepancy" did not mean "deficiency" (Tr. pp. 475-77).

foregoing, the hearing record does not support a finding that the district denied the student a FAPE based on the timing of the May 2014 speech-language evaluation and the June 2014 CSE subcommittee's recommendation for speech-language therapy.

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

### **1. June 2014 IEP**

The parents contend that the district failed to provide the student a FAPE for the 2014-15 school year because the CSE subcommittee failed to develop a program that was research-based and provided the academic and language support the student required. The parents contend that the student was significantly behind and required intensive interventions in order to make any gains in reading or math. Additionally, the parents claim that the IHO erred by relying in part on reading services the student received that were not included on her IEP.

As noted above, a CSE subcommittee convened on May 8, 2014 for the student's annual review, at which time members reviewed the private auditory-language evaluation report, recommended the district conduct a speech-language evaluation, and agreed to reconvene in June 2014 to review evaluation findings and discuss recommendations for the student (Tr. p. 424; Parent Ex. F at p. 1). The CSE subcommittee reconvened on June 12, 2014 in order to complete the student's IEP for the 2014-15 school year (Parent Ex. E). Review of the June 2014 IEP reflects that the CSE subcommittee considered the results of district and private evaluations, as well as information from the student's teachers and service providers (Tr. pp. 424-25, 1843; Parent Ex. E at pp. 1-8).

To facilitate an assessment of the June 2014 CSE subcommittee's recommendations, a discussion of the student's needs as described in the present levels of performance included in the IEP and the annual goals developed by the CSE subcommittee to meet those needs, although not directly at issue (Parent Ex. A at p. 8; see Tr. pp. 250-55), is necessary to frame the discussion below. Review of the student's present levels of reading performance included in the June 2014 IEP indicated that the student showed "tremendous growth in her reading abilities throughout her fourth grade school year," and that over time the student gained confidence in herself, which enabled her to participate in reading aloud on numerous occasions (Parent Ex. E at p. 5). During times when the student felt unsure about her capabilities, she was always willing to try when encouraged by her teachers, and she demonstrated satisfactory listening skills during English language arts (ELA) instruction (id.). According to the IEP, at the beginning of the 2013-14 school year, an administration of the Dynamic Indicators of Basic Early Literacy Skills (DIBELS) assessment indicated that the student read 39 words correct per minute with 89 percent fluency accuracy, and her most recent performance on the DIBELS assessment indicated she read 59 words correct per minute with 89 percent fluency accuracy (Parent Ex. E at p. 5; see Tr. p. 752). The June 2014 IEP also indicated that, although the increase in the student's progress monitoring scores suggested improvements in her reading skills, those skills still fell well below the benchmark for fourth grade (Parent Ex. E at p. 5). According to the June 2014 IEP, the student needed continued and consistent monitored practice in fluency and reading comprehension (id.).

The student's June 2014 IEP present levels of performance for writing included that the student's writing exhibited insightful phrases and sentences (Parent Ex. E at p. 6). The IEP reflected that the student required teacher support when working on writing activities, as she

exhibited difficulty formulating sentences and expressing her ideas on the assigned topic and often needed guidance and support in order to write a topic sentence and add details (id.). The student also demonstrated difficulty with spelling and writing mechanics (id.). The student's use of capitalization improved over the course of the 2013-14 school year (id.).

According to the June 2014 IEP, administration of the fourth grade fall placement inventory and math assessment resulted in a score of 8/30 for computation and 0/5 for problem solving (Parent Ex. E at p. 6). The IEP noted that the student had difficulty taking notes and required assistance in order to stay on task (id.). According to the IEP, the student was "not an active participant in class," but as accepted help from teachers and peers when working in groups (id.). The IEP also indicated that the student completed her homework on a regular basis (id.).

The June 2014 IEP present levels of performance for speech-language reflected the results of the May 2014 speech-language evaluation, including the CELF-5, which indicated that the student demonstrated substantial difficulty with various aspects of language (Parent Exs. E at p. 6; O at p. 5). Specifically, the IEP noted that the student's standard scores on the receptive language, expressive language, language content, and language memory indices were all below average (Parent Exs. E at p. 6; O at p. 3). In addition, the IEP indicated that the student struggled with listening comprehension, defining target words, following directions of increasing length and complexity, and answering questions about presented short stories (Parent Ex. E at p. 6; O at p. 5). The IEP further reflected that the student had difficulty sequencing out-of-order words and she had not yet internalized complex syntactic structures (id.). Reflecting the results of the private auditory-language processing evaluation, the June 2014 IEP indicated that the student exhibited limited auditory processing and listening skills, background noise was problematic for the student, and she had difficulty quickly and accurately interpreting speech (Parent Ex. E at p. 6; see Parent Ex. N).

With respect to social development, the June 2014 IEP indicated that the student was well liked by her teachers and peers, got along well with her classmates, and participated in a social skills group at the building level (Parent Ex. E at pp. 6-7).<sup>11</sup> According to the IEP, the student's tic behaviors could look like inappropriate responses to comments or social interactions and needed to be ignored (id. at p. 7). The June 2014 IEP noted that the student's tic behavior was much less evident in school during the 2013-14 school year than at home and, although she needed "support in social situations where her tic behaviors might affect responses from other children," there were no social/emotional needs that needed to be addressed through special education at that time (id.).<sup>12</sup>

The student's present levels of performance pertaining to physical development in the June 2014 IEP reflected the student's diagnoses of ADHD and Tourette's Disorder (Parent Ex. E at p. 7). The IEP included detailed information about the student's graphomotor, visual motor, and

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<sup>11</sup> The June 2014 IEP included parental report that the student fared better with younger children who were "more on her emotional level" (Parent Ex. E at p. 7). The student also participated in an after school social skills group where she was reportedly doing well (id.).

<sup>12</sup> The June 2014 IEP also indicated that during the 2012-13 school year, the student's tic behaviors "could be significant" but that a change in medication occurred over the summer which "minimized the tics" (Parent Ex. E at p. 7).

gross motor skills, and noted that her OT program focused on activities to improve upper body strength and coordination, visual motor skills, graphomotor skills, visual perceptual skills, and overall endurance (id.). The June 2014 IEP noted that, although the student continued to require extended time to complete writing assignments, she demonstrated an overall improvement with her work pace, which could fluctuate from day to day (id.). The student's self-confidence reportedly continued to improve, and she interacted well within a small group setting (id.).

Regarding the student's needs, the June 2014 CSE subcommittee determined that the student needed the additional support of special education services to be successful in the regular education classroom, a multisensory approach to learning, to improve her reading fluency and comprehension skills, to receive support with writing assignments and extended time to complete writing tasks, and for math concepts to be reviewed and practiced after a lesson was taught (Parent Ex. E at pp. 6, 8). Consistent with the private auditory-language evaluation report, the IEP indicated the student would benefit from an FM auditory system and auditory training (id. at p. 6, see Parent Ex. N at pp. 12, 15). According to the IEP, the student required extended time to process her thoughts and the use of a footstool at her desk to facilitate postural stability during tabletop tasks (Parent Ex. E at p. 8).

Further review of the June 2014 IEP reveals the CSE subcommittee developed measurable annual goals aligned to the student's identified needs (Parent Ex. E at pp. 7-10). The June 2014 IEP includes approximately 17 annual goals that addressed the student's study skills (i.e., note taking), reading (i.e., reading fluency, accuracy, and rate, and identifying main idea or theme and summarizing text), and writing (i.e., capitalization and punctuation; spelling; and writing an opinion piece) (id. at p. 9). Additional annual goals addressed the student's needs in mathematics (i.e., problem solving using multiplication and division; place value and properties of operations to add and subtract; fractions), speech-language (i.e., describe details and main idea of orally presented material; comprehend speech presented at an average rate; formulate grammatically correct sentences and maintain appropriate verb tense in oral communication; and use vocabulary aligned to fourth grade level content area curriculum), and motor skills (i.e., upper body and fine motor strength, and fine and visual motor skills) (id. at pp. 9-10). The June 2014 IEP specified the criteria for achievement for each goal, how student progress would be measured (i.e., teacher derived tests, writing samples, structured observation of targeted behavior), and the schedule of when progress would be measured (i.e., weekly, monthly, every two weeks, every marking period) (id. at pp. 7-10). The IEP reflected that the parents would receive written reports on the student's progress toward meeting the annual goals three times per year (id. at p. 10).

After reviewing the student's then-current evaluative information, for the 2014-15 school year, the June 2014 CSE subcommittee recommended a 12:1+1 special class placement for reading, math, social studies, science, and language arts, which represented an increase in the amount of special class instruction from what was provided during the 2013-14 school year (compare Parent Ex. D at pp. 7, with Parent Ex E at pp. 1, 10-11). State regulations provide that a 12:1+1 special class placement is intended for 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 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]).

CSE subcommittee meeting minutes showed that the team recommended small group instruction for all academic subjects because the student presented with weak academic skills and as a "high needs" student and exhibited difficulty maintaining her focus and attention (Parent Ex. E at p. 1). In conjunction with the 12:1+1 special class placement, the June 2014 CSE subcommittee recommended that the student receive related services consisting of two 30-minute sessions of OT in a small group (5:1) per week, two 30-minute sessions of speech-language therapy in a small group (5:1) per week, and one 30-minute session of speech-language therapy in a small group (2:1) (Tr. p. 425; Parent Ex. E at p. 11). The district speech-language pathologist who conducted the May 2014 evaluation and attended the June 2014 CSE subcommittee meeting testified that she recommended the student receive two small group sessions to focus on the student's speech-language skills and one smaller group session to work on auditory training (Tr. p. 426; Parent Ex. E at p. 1; see Parent Ex. O). She opined that "at that level of service [the student] would make adequate progress," in that therapy would focus on the student's listening comprehension skills, ability to reason with language, and auditory skills (Tr. p. 426).

For the 2014-15 school year, the CSE subcommittee also recommended supplementary aids and services, program modifications, and/or accommodations for daily use during instructional time in the classroom including: additional processing time for the student to develop her thoughts and respond; special seating arrangements close to smart/white board and proximity to teacher; refocusing and redirection during listening activities, lessons, writing and independent work time; check for understanding of directions, material and assignments; break assignments and directions into smaller components to facilitate manageability; provide organizational support for materials and assignments; visual supports to aid in understanding of lessons and concepts; copy of class notes (check for accuracy and completeness of class notes and provide assistance if needed); and highlighted work (assist with highlighting key details within assignments or text) (Parent Ex. E at pp. 11-12). In addition, the IEP included a recommendation for use of a graphic organizer in the classroom for lengthier writing activities to assist with development and organization of thoughts (id. at p. 11).

The June 2014 CSE subcommittee recommended assistive technology to be used in the classroom during instructional time included adaptive seating (a footstool or footrest to improve postural stability) and an FM system (Parent Ex. E at p. 12). Recommended testing accommodations were for extended time (1.5) for all tests, test passages, questions, items and multiple-choice responses read to the student except as prohibited by State Education Department policy on State assessments, tests administered in location with minimal distractions for all tests (minimize visual and auditory distractions; student must be in close proximity to test administrator), use of break periods for tests longer than 30 minutes (provide three-minute break), and on-task focusing prompts for all tests (minimal extraneous noises, minimal visual distraction) (id. at p. 13).

The hearing record shows that many of the June 2014 CSE subcommittee's recommendations for the student, including speech-language therapy, numerous supplementary aids and services, and program modifications and/or accommodations for daily use during instructional time in the classroom were consistent with the recommendations from the private auditory-language evaluation report and the district May 2014 speech-language evaluation report (compare Parent Exs. E at pp. 1, 3, 6, 9, 11, with Tr. p. 425, and Parent Exs. O; N at pp. 7-8, 13-16).

In assessing the adequacy of the June 2014 IEP, the IHO also acknowledged evidence that the student received special reading instruction during the 2014-15 school year (see IHO Decision at p. 17). The hearing record shows that, in response to parental concerns about the student's below grade level proficiency in reading, the June 2014 CSE subcommittee discussed during the meeting that the student would continue receiving small group reading instruction three times per week, delivered to the student by the district reading specialist (Tr. pp. 110-11). The district reading specialist testified that, in addition to the daily 12:1+1 special reading class the student received pursuant to the June 2014 IEP, she also received building-level AIS for reading to address needs in phonics, decoding, and comprehension skills (Tr. pp. 783-86; see Parent Ex. E at p. 10).<sup>13</sup> The student's special education teacher during the 2014-15 school year testified that the student also continued to participate in the building-level social skills group when school began in September 2014 (Tr. pp. 198, 328). State regulation specifically contemplates that AIS be made "available to students with disabilities" provided that such services are provided in a manner consistent with such students' IEPs (8 NYCRR 100.1[g]). According to State guidance, AIS are provided in addition to, and must not supplant, special education services (see "Academic Intervention Services: Questions and Answers," at p. 5, Office of P-12 Mem. [Jan. 2000], available at <http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf>). Moreover, in this case, the parent correctly notes that the provision of the AIS or the student's attendance at a summer reading camp should not be considered in determining whether the June 2014 IEP offered the student a FAPE because the evidence is impermissibly retrospective in that it relates to "additional services beyond those listed in the IEP" (R.E., 694 F.3d at 186). However, the IHO explicitly noted, these services were not "a part of the student's special education program" and hearing record supports the IHO's ultimate determination that the IEP nonetheless appropriately addressed the student's needs (IHO Decision at pp. 16-17).

Without factoring evidence of the AIS implemented during the 2014-15 school year, review of the June 2014 IEP reflects that, to address the student's reading needs, the CSE subcommittee recommended a variety of supports, as summarized above. In particular, there is no merit to the IHO's finding that the June 2014 IEP lacked provision for multisensory instruction; rather, the IEP referenced the student's need for the same (IHO Decision at p. 16; Parent Ex. E at p. 6). The district reading specialist testified that multisensory instruction utilized a student's "listening, speaking, seeing and hearing" (Tr. p. 788). Further, the parents do not detail what multisensory instruction they feel should have been included in the June 2014 IEP.<sup>14</sup>

In light of the above discussion, a review of the hearing record shows that the June 2014 IEP was appropriate to meet the student's needs and supports the IHO's finding that the IEP was reasonably calculated to provide the student educational benefit.

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<sup>13</sup> The reading specialist also testified that she worked with the student over two summers in a district summer reading camp (Tr. pp. 780-82).

<sup>14</sup> In support of their argument relating to multisensory instruction on the June 2014 IEP, the parents' answer and cross-appeal references testimony by the student's mother indicating that the student did not initially receive the AIS instruction with the district reading specialist during the 2014-15 school year (Tr. pp. 1926-27). However, this evidence relates to implementation of AIS and not the content or implementation of the IEP. Further, the evidence in the hearing record indicates that, at a minimum, the student received multisensory instruction in her classroom during the 2014-15 school year (Tr. pp. 788-89).

Additionally, however, the parents argue that the IHO erred in finding that the district offered the student a FAPE for the 2014-15 school because he also found that the program did not allow the student to make meaningful progress. Progress, although an important factor in determining whether the student is receiving educational benefit, is not dispositive of all claims brought under the IDEA (see M.S. v. Bd. of Educ., 231 F.3d 96, 103-04 [2d Cir. 2000], abrogated on other grounds, Schaffer v. Weast, 546 U.S. 49 [2005]). The goal of the IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the extent possible (20 U.S.C. §§ 1400[d]; 1414[d][1][A]). The IDEA provides no guarantee of any specific amount of progress, so long as the district offers a program that is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192). Further, even assuming that the student did not make progress during the 2014-15 school year, an IEP must be evaluated prospectively as of the time it is created and the parents may not rely on evidence that the student did not make progress to establish that the IEP was not appropriate (R.E., 694 F.3d at 186-88). As set forth above, the June 2014 IEP offered the student special education and related services and supports to meet her academic, speech-language social/emotional, and motor needs.

## **2. January 2015 IEP**

The parents further assert that the IHO erred by not finding that the January 2015 CSE subcommittee denied the student a FAPE by failing to recommend changes to the student's academic program or annual goals despite the student's declining performance in reading and math.

In order to evaluate the parents' claim, it is necessary to review what new information was available to the January 2015 CSE subcommittee. Turning to the beginning of the 2014-15 school year, the district special education teacher testified that at the start of fifth grade, the student exhibited academic difficulties in reading, writing, and math, which she addressed in part through small group instruction (Tr. pp. 198-200). In addition to the 12:1+1 special class instruction and the OT and speech-language services the student received pursuant to her IEP, the student also participated in a building-level social skills group (Parent Exs. G at p. 5; H at pp. 6-7).

The district conducted a "routine" psychoeducational reevaluation between November and December 2014 (Parent Ex. JJ at pp. 1, 12). The December 2014 psychoeducational reevaluation report indicated that, during testing sessions, the student was cooperative, motivated and generally attentive, although she maintained a shy, quiet, and tenuous manner (id. at p. 12). Administration of the Weschler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded results reflecting overall intellectual functioning in the low average range with a full scale score of 80 (9th percentile), a score noted to be consistent with previous testing (id. at pp. 12-14). The student's verbal comprehension standard score was in the low average range (85, 16th percentile), as was her processing speed standard score (83, 13th percentile) (id.). The student's perceptual reasoning standard score was in the average range (90, 25th percentile), while her working memory standard score was in the borderline range (77, 6th percentile) (id. at pp. 13-14). The evaluation report indicated that on some tasks the student's erratic pattern of responses reflected inconsistencies in her functioning and "some cognitive unreliability" (id. at p. 13). The student's relative strength was seen in perceptual judgments, nonverbal problem solving and straightforward rote auditory short-term memory (id.). Relative weaknesses were evident in the student's abstract reasoning

within a verbal context, fund of factual information, and working memory when mental manipulation of the data was required (id.).

On academic tests, the evaluator observed the student to engage in increased restlessness, response latencies, and occasional pauses in the midst of tasks (Parent Ex. JJ at p. 12). The report indicated the student's academic skills were well below grade level (id. at p. 13). Although the student had basic reading skills, her decoding, fluency, and comprehension were weak (id.). The student's "sense of math" was "quite limited" and her calculation and problem solving skills were at a basic level (id.). The student had considerable difficulty expressing her thoughts in written form (id.). The report noted that, since basic academic tasks were not automatic for the student, she needed to "put forth a great deal of effort" that was difficult to sustain (id.). Higher level tasks were challenging for her, and her motivation and stamina in the classroom was limited (id.). The report indicated the student was hesitant to express herself verbally and often needed much encouragement, clear expectations, and prompting to respond, produce, and participate (id.). Rating scales reflected significant difficulties with attention, both at home and in school, consistent with her diagnosis of ADHD (id.). In her report, the evaluator described the student as sweet and personable with adults and peers, and as someone who wanted to please (id.). In addition, the evaluator described the student as sensitive, emotionally vulnerable, anxious, immature, and lacking in confidence (id.).

The December 2014 psychoeducational reevaluation report provided multiple recommendations such as a small group setting for all academic instruction and continuation of OT, speech-language therapy, social skills group, test accommodations, and program modifications (Parent Ex. JJ at p. 13). Additional recommendations included a variety of strategies for classroom staff to improve the student's in-class comfort and participation, as well as suggestions for the parents' consideration (id.).

On January 23, 2015, the CSE subcommittee convened for a reevaluation review (Parent Ex. G at p. 1). Meeting minutes indicated that, in addition to the December 2014 psychoeducational reevaluation report, the CSE subcommittee reviewed a January 2015 OT reevaluation report, and discussed "[a]spects of Central Auditory Processing Disorder" (Parent Ex. G at pp. 1-2; see Parent Ex. P at pp. 1-2). Information from the December 2014 reevaluation report and parental concerns about the student's "slow progress and weak academic skills" was included in the IEP present levels of performance (id. at p. 4). No changes were made in the student's "instructional program"; however, counseling was added to the student's IEP as a related service (id. at p. 1). The January 2015 IEP continued the student's OT and speech-language therapy and the CSE subcommittee meeting minutes noted that the reading specialist also worked with the student (id.).

Turning to parents' assertion that the January 2015 CSE subcommittee denied the student a FAPE by failing to recommend changes to the student's academic program or annual goals despite the student's declining performance in reading and math, review of the hearing record shows that March 2012 and December 2014 administrations of the WISC-IV to the student yielded full scale standard scores of 78 and 80, respectively (compare Parent Ex. K at p. 7, with Parent Ex. JJ at p. 14). Comparison of the student's performance on the WIAT-III in March 2012 and December 2014 shows that her subtest standard scores in both reading comprehension and word reading fell slightly from 81 to 78, and 89 to 84, respectively (compare Parent Ex. DD at p. 5, with

Parent Ex. JJ at p. 18).<sup>15</sup> During the same timeframe the student's subtest standard scores in pseudoword decoding decreased from 87 to 74, and oral reading fluency fell from 96 to 86 (*id.*). The student's math fluency subtest standard scores at the time of the March 2012 and December 2014 administrations remained at or below the 5th percentile for addition and subtraction, her numerical operations subtest standard score improved from 62 to 84, and her problem solving subtest standard score fell from 88 to 66 (compare Parent Ex. DD at p. 5, with Parent Ex. JJ at p. 18).

The district school psychologist who conducted the psychoeducational reevaluation in December 2014 testified that higher level comprehension increases with age and, regarding decreasing percentile scores, "the gap widens" for students who progress at a slower rate (Tr. p. 1852; Parent Ex. JJ at pp. 1, 13). She further testified that the student's higher level reasoning skills were developing at a slower rate and, because her age was a factor, her scores decreased and her progress "seems to be slower" than her peers (Tr. p. 1851).

The parents' memorandum of law also alleges that the student failed to make meaningful progress in reading due to her consistently low performance on the DIBELS and DAZE assessments (Parent Mem. of Law at pp. 8-9). As discussed in detail below, although the student's performance remained below grade level on those tests, she did exhibit progress in reading on those measures, as well as toward her IEP annual reading goals (Dist. Ex. 3 at p. 3; Parent Ex. HH). Similarly, a review of the 2014-15 IEP annual goal progress report shows that by mid-year the student was making progress toward her mathematics annual goals, such that the January 2015 CSE subcommittee was not required to alter those goals or the student's program in order for her to receive a FAPE (Dist. Ex. 3 at p. 5).

Despite an overall decline in the student's standardized test performance, review of the hearing record shows that the district was responsive to the student's lack of progress as shown on standardized testing by increasing the amount of academic supports and special education services the student received over time, from Tier III reading and math RtI services during the 2011-12 school year, to an increasing level of special education program and services once the CSE found the student eligible in May 2012 through and including the January 2015 IEP (Parent Exs. B at pp. 1, 7-9; C at pp. 7-9; D at p. 7; K at p. 2). Finally, review of the June 2014 IEP shows that the June 2014 CSE subcommittee was aware of the student's reading and math deficits, and recommended annual goals in those areas, as well as 12:1+1 special class instruction in all academic classes (Parent Ex. E at pp. 1, 5-6, 9-11). Despite the decline in the student's standard scores, as discussed below, the hearing record shows that the district increased the student's special education services for the 2014-15 school year, resulting in progress in reading and math (Dist. Ex. 3 at p. 3; Parent Ex. HH). Thus, the evidence before the January 2015 CSE subcommittee was not such that it

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<sup>15</sup> In the memorandum of law the parents assert that a comparison of results of administrations of the Weschler Individual Achievement Test, Third Edition (WIAT-III) to the student in 2012 and 2014 "confirm the [s]tudent's decline across the board in reading and math," citing to the district's December 2014 psychoeducational reevaluation report (Parent Ex. JJ) and an April 2016 neuropsychological evaluation report (Parent Ex. EE; Parent Mem. of Law at p. 9). A review of the December 2014 psychoeducational evaluation report shows that the WIAT-III was administered to the student; however, it does not appear to have been administered to the student as part of the April 2016 neuropsychological evaluation, nor does that report discuss WIAT-III results from 2012 (Parent Exs. EE; JJ at pp. 7-10, 18).

revealed the special education program and services set forth in the June 2014 IEP to be no longer appropriate for the student.

### 3. Progress During the 2014-15 School Year

While the student's progress during the 2014-15 school year was discussed to some extent above relative to the June 2014 and January 2015 IEPs, it shall receive separate in-depth treatment here since it is central to the parties' dispute and is relevant to a review of the appropriateness of the May 2015 IEP. The district argues that the IHO erred in finding that the student did not make progress during the 2014-15 school year and in concluding, as a result, that the student's May 2015 IEP was inappropriate since it recommended a similar program for the student for the 2015-16 school year. The district argues that the record demonstrates that the student made progress during 2014-15 in reading, writing, mathematics, and social skills. In contrast, the parents argue, based on the findings of the March 2015 private neuropsychological evaluation, that the student made insufficient progress during the 2014-15 school year.

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. June 24, 2013]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Dec. 2010], at p. 18, available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year, which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir. 2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," 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. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

The parents obtained a private neuropsychological evaluation for which the private evaluator assessed the student in February and March 2015 over the course of four sessions (Parent Ex. Q at p. 1). According to the March 2015 private neuropsychological evaluation report, the student's overall cognitive abilities were determined to be below average, which the report noted was "largely consistent" with the December 2014 district psychoeducational reevaluation results (id. at pp. 2, 5). Academic achievement test results showed that the student performed generally in the below average range on measures of her reading, mathematics, and written language skills (id. at p. 5). The evaluator reported that the student exhibited "a pattern of diffuse primarily language and higher order skills deficits that interact[ed] to reduce what [the student] c[ould] process and understand" and her "gross delays" in all academic areas were consistent with a language-based learning disorder (id. at p. 6).

According to the evaluator, a review of data from March 2012 to the time of the neuropsychological evaluation showed that the student was "not progressing" (Parent Ex. Q at p. 6). The report opined, "[r]eal progress equates to an upward movement of the percentile ranks in core academic areas," and that the student's historical trajectory was maintained in areas such as reading and noted to decline in math computation (id.). The private evaluation report indicated that the student psychologically was "fairly well-adjusted," social and warm, although she was beginning to experience distress from academic challenges (id. at p. 7). Due to the student's "poor academic trajectories," the evaluator suggested a few options for private schools designed for students with language-based learning disabilities (id.). The evaluation report also contained numerous recommendations regarding special education classification, frequency of related services, reading intervention, and instructional strategies and accommodations in the classroom related to reading, writing, and math (id. at pp. 7-11).

In his decision, the IHO generally indicated that results of the private neuropsychological evaluation "comported with the findings and conclusions" of the district's December 2014 psychoeducational reevaluation (see IHO Decision at p. 21; Parent Exs. Q at pp. 5, 7-11; JJ at pp. 12-13). It appears the IHO based his determination about the student making "little or no progress" during the 2014-15 school year primarily on the formal psychoeducational and neuropsychological test results, as well as the private neuropsychologist's testimony (see IHO Decision at pp. 21, 23; Parent Exs. Q at pp. 5, 7-11; JJ at pp. 12-13). A review of the IHO's decision shows that he failed to consider other indications of student progress contained in the hearing record, including the June 2015 progress report for IEP annual goals, testimony from the student's teacher and related service providers, and progress monitoring tools, including a profile sheet that tracked the student's progress in reading throughout the 2014-15 school year, which indicated that the student made progress in reading over the course of the school year (see, e.g., Tr. pp. 201, 219, 508, 516-17, 629-30, 755-56; Parent Ex. HH).

The special education teacher testified that, when she first began working with the student for academics, she noticed the student had difficulties in various areas such as reading, writing, and math (Tr. p. 199). The 12:1+1 special classes for academics in which the student was enrolled offered the opportunity for the teacher to break the class into smaller groups for instruction and support with either herself or the certified teaching assistant assigned to the 12:1+1 classes (Tr. pp. 199, 217, 219). The teacher noted that despite her fine and gross motor difficulties, the student functioned (Tr. pp. 204-05). The teacher's testimony reflected her feeling that, as the student needed support in academic areas and because the teacher was able to provide supports to the student in her classroom such as seating the student close to instruction, providing frequent check-ins with the student, reviewing and repeating directions or concepts, as well as pulling the student aside and giving her support, the student was able to make gradual progress in the 12:1+1 special class (Tr. p. 219; see Parent Exs. F at p. 9; G at p. 10).

With regard to the student's 2014-15 IEP annual goals, the special education teacher testified that the student, "for the most part reached all of her goals" during the 2014-15 year (Tr. p. 255). A June 2015 IEP annual goal progress report reflected the student's progress at three different intervals over the course of that school year, and by June 2015, the student had achieved 11 of 17 annual goals (Dist. Ex. 3 at pp. 1-7). Annual goals achieved addressed the student's needs related to note taking; reading fluency, accuracy, and rate; identifying the main idea or theme, explaining how the theme was supported by key details, and summarizing text; writing an opinion piece; using mathematical place value, properties of operations, and fractions; comprehending

speech at an average rate of utterance; using vocabulary related to the fourth grade curriculum; and improving upper body strength, fine motor strength, control, and endurance, and fine motor and visual motor skills related to printing (*id.* at pp. 2-7).

With respect to the remaining IEP annual goals, the June 2015 progress report reflected that three goals related to capitalization/punctuation, spelling, and multiplication/division were achieved but with moderate teacher assistance; it was recommended that those goals continue to be addressed during the next school year (Dist. Ex. 3 at pp. 4-5). The progress report indicated that the student made gradual progress on goals involving describing details and the main idea of orally presented material, formulating grammatically correct sentences and maintaining appropriate verb tense in oral communication, and using far point copying skills (*id.* at pp. 6-7).

The hearing record also includes a fifth grade reading progress profile created by the special education teacher (Tr. p. 751; *see* Parent Ex. HH). Testimony by the special education teacher indicated that the progress profile contained information about the student's oral reading fluency performance on the DIBELS, her reading comprehension on a measure called the DAZE, and the student's reading level in relation to her comprehension based on an informal assessment called Reading A to Z (Tr. pp. 751-55; Parent Ex. HH). The profile included benchmarks for how students in fifth grade should perform on the DIBELS and DAZE, at the beginning, middle, and end points of the school year (Tr. pp. 752-55, 758-59; Parent Ex. HH at p. 1).

Review of the progress report profile shows that, although the student was below benchmark expectations for each trimester of the school year, she made progress in the number of words she could read correctly per minute on the DIBELS, her reading comprehension improved on the DAZE, and she began the 2014-15 school year reading at level "I" (first grade), moved to level "K" (second grade) by mid-year, and ended the school year at level "O" (end of second grade) (Tr. pp. 756, 770; Parent Ex. HH at p. 1; *see* Parent Ex. II at p. 1). Although the special education teacher confirmed that the student continued to require "intensive support," the hearing record shows that progressing from first grade level "I" to end of second grade level "O" demonstrates that the student made at least approximately one year's progress with the instruction provided to her, progress meaningful for this student, particularly in light of her reading difficulties discussed herein and in the evaluative information (Tr. p. 760; *see* Parent Exs. Q at pp. 5, 13; JJ at pp. 8-9, 18).

Information about the student's progress during the 2014-15 school year was also documented in the May 2015 IEP (Parent Ex. H) and, during the impartial hearing, the student's special education teacher and related service providers elaborated on the student's progress (*e.g.*, Tr. pp. 198, 200-01, 364, 500-01, 517-21, 629-30, 919, 922-25, 933-35, 965).

Specifically, according to the present levels of performance in the IEP, by May 2015, the student had exhibited gradual progress toward her writing goals, and with prompting and support the student demonstrated the ability to write a paragraph with a topic sentence and three supporting details (Parent Ex. H at p. 6). The student's handwriting showed "nice improvement" from earlier in the year, and by the end of the school year it was described as "legible" (*id.*).

As to the student's progress in math, the IEP reflected that, by May 2015, the student performed the operations of addition and subtraction with regrouping with multi-digit whole numbers and decimals (Parent Ex. H at p. 7). Additionally, the special education teacher testified

that, by May 2015, the student multiplied a two-digit whole number by a one-digit whole number and, at times, demonstrated the ability to multiply a two-digit number by a two-digit number (Tr. p. 364). She further testified that the student divided two- and three-digit dividends by one-digit divisors and, at times, showed the ability to divide a four-digit dividend by a single-digit divisor (id.).

The IEP indicated that, by May 2015, the student had demonstrated growth in confidence and comfort level with peers as well as with the speech-language related service provider (Parent Ex. H at p. 7). Specifically, the speech-language pathologist who worked with the student during the 2014-15 school year testified that the student initially appeared reserved and not as willing to speak to peers without some adult facilitation (Tr. pp. 500-01, 517). By the end of the 2014-15 school year, the student raised her hand frequently and participated without much encouragement (Tr. p. 517). She successfully engaged in auditory training strategies such as using vocabulary to relate a memory about her personal life, frequently sharing stories about her siblings (Tr. pp. 517-18). Regarding higher level thinking skills, the student was able to pick out and repeat concrete details from auditory information (Tr. pp. 518-19). The student required prompting for various tasks throughout the school year, but the speech-language pathologist testified that she faded the amount of verbal or visual prompting provided to the student (Tr. p. 519). Although the student did not reach the end of the auditory training program, she showed gradual progress throughout the entire school year (id.). The speech-language pathologist testified that the student's vocabulary showed a "great amount of growth" and that she did well using vocabulary words in spoken sentences (Tr. pp. 520-21).

As of May 2015, the IEP indicates that the student was better able to do far point copying, her written work improved to where she generally produced legible writing and "acceptable" letter/word/number formation, and her scissor skills, orientation, paper manipulation, and cutting skills were grade appropriate (Parent Ex. H at pp. at pp. 7-9). The occupational therapist testified that the student progressed in OT during the 2014-15 school year, she improved her upper body strength, and her handwriting improved when the student was focused (Tr. pp. 629-30). In addition, the occupational therapist testified the student was "fulfilling" her IEP goals (Tr. p. 630; see Dist. Ex. 3 at p. 7).

In regard to the student's social/emotional progress during the 2014-15 school year, the district social worker testified that she provided building-level social skills group services to the student during the 2014-15 school year until January 2015, when one group counseling session per week was added to the student's IEP (Tr. pp. 919, 922-25).<sup>16</sup> Although the student presented as shy, she participated in the social skills group when spoken to, and responded to and interacted with the other students (Tr. p. 933). By the end of fifth grade, the student volunteered in class and was "chatty-chatty" with other students, "sharing a lot" about her family, her pet, and things she was doing with other peers (Tr. pp. 934-35). Testimony by the student's special education teacher during the 2014-15 school year indicated the student made great social improvement within the first few months of the school year (Tr. pp. 198, 200-01). Initially, the student presented as very quiet, kept to herself, and hesitated to participate and get to know her peers (Tr. p. 200). With respect to the student's social/emotional presentation, the special education teacher testified that,

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<sup>16</sup> The social worker testified that the student remained in the same group setting after counseling was added to the January 2015 IEP (Tr. p. 924; see Parent Ex. G at p. 9).

at first, the student would not raise her hand but, within a few months of the school year, the student raised her hand, willingly participated and shared answers, and came up to the board to show what she knew and what she learned (Tr. pp. 201-02). The teacher indicated that she saw more self-confidence in the student, as a student and as a person (Tr. p. 202). According to the May 2015 IEP, the special education teacher reported that, at the beginning of the 2014-15 school year, the student was "quiet and shy," but over the year demonstrated more self-confidence, which increased her class participation and created relationships with peers (Parent Ex. H at p. 8). With encouragement and positive reinforcement, the student raised her hand, asked questions, shared her thoughts, and worked collaboratively with peers (*id.*). The social worker testified that during the 2014-15 school year, the student's teachers felt she was "really blossoming and volunteering more in class" (Tr. p. 965).

The Second Circuit has held that, in determining whether a student made progress, the SRO must examine the record for objective evidence (E.S. v. Katonah-Lewisboro Sch. Dist., 487 Fed. App'x 619, 622 [2d Cir. July 6, 2012]). On balance, despite the student's apparent failure to make progress as measured by her standardized tests scores, the hearing record as a whole reveals that the student demonstrated meaningful progress during the 2014-15 school year (see E.S., 487 Fed. App'x at 622 [finding evidence of progress "despite . . . low test scores"]; M.H. v Pelham Union Free Sch. Dist., 168 F. Supp. 3d 667, \_\_\_, 2016 WL 2353949, at \*5-\*6 [S.D.N.Y. Mar. 7, 2016] [finding based on the record "as a whole" that the student made progress despite evidence of declining test scores]; H.W. v New York State Educ. Dep't, 2015 WL 1509509, at \*17 [E.D.N.Y. Mar. 31, 2015] [upholding the SRO's determination that, "even assuming that the [standardized] tests showed minimal progress," testimony from teachers and evidence of progress towards achieving annual goals showed that the student made meaningful progress]). As detailed above, the student's progress was established by other objective measurements such as the DIBELS and DAZE administered in an educational setting, as well as by annual goal progress reports and reports and testimony from educational and related services professionals who worked with the student on a day-to-day basis. While this may have not been the progress the parents desired for their daughter, the student's progress—including the growing gap between the student and her nondisabled peers—must be measured in light of her abilities and the circumstances surrounding her educational experiences (H.C., 528 Fed. App'x at 67; see Rowley, 458 U.S. at 202; Mrs. B., 103 F.3d at 1121).

### **C. 2015-16 School Year—May 2015 IEP**

Turning now to the 2015-16 school year, a review of the hearing record does not support the IHO's finding that the district denied the student a FAPE for the 2015-16 school year because the program recommended in the May 2015 IEP was "virtually identical" to the previous school year, and the progress calculated under the 2014-15 IEP was "not realized" (IHO Decision at p. 23). The previous detailed discussion about the student's progress during 2014-15 school year reflects otherwise.

The hearing record reflects that the CSE subcommittee met on April 30 and May 22, 2015 to develop the student's IEP for 2015-16 school year (Tr. p. 1024; Parent Ex. H at pp. 1-2). During the April 2015 CSE subcommittee meeting, the private neuropsychologist participated via teleconference and reviewed the results of the March 2015 private neuropsychological evaluation

(Tr. pp. 1376-77; Parent Ex. H at p. 2; see Parent Ex. Q at pp. 7-13).<sup>17</sup> The CSE subcommittee was unable to complete the student's annual review at that time and decided to reconvene prior to the end of the 2014-15 school year (Parent Ex. H at p. 2).

The CSE subcommittee reconvened on May 22, 2015 to complete the student's annual review and to review the student's updated reading goals, program accommodations, testing accommodations, program, and related service recommendations for the 2015-16 school year (Parent Ex. H at p. 1). Information the CSE subcommittee received since the January 2015 meeting included a March 2015 social history update and, although the March 2015 private neuropsychological evaluation was not listed on the May 2015 IEP, as noted above, the private neuropsychologist reviewed the results of and recommendations from the private evaluation at the April 2015 meeting (Tr. pp. 334, 798, 1728; Parent Ex. H at pp. 2-3; see Parent Exs. G at pp. 1-2; Q at pp. 7-13). Based on the aforementioned evaluative information, the May 2015 IEP subsequently identified the student's then-current strengths and needs, and the parents' concerns about the student's performance in the areas of study skills, reading, writing, speech-language, social development, physical development, and classroom management (Parent Ex. H at pp. 4-9). The May 2015 IEP provided a detailed and thorough description of the student's present levels of performance and progress observed during the 2014-15 school year, as previously discussed herein (id.).

The May 2015 CSE subcommittee developed approximately 24 measurable annual goals aligned with the student's needs (Parent Ex. H at pp. 10-12). Most of the recommended goals were different than the goals in the January 2015 IEP, and the few goals that continued from the 2014-15 school year included more stringent criteria for mastery, requiring increased performance from the student (compare Parent Ex. G at pp. 7-9, with Parent Ex. H at pp. 10-12). Several goals were newly recommended (Parent Ex. H at pp. 10-12).

The student's special education teacher during the 2014-15 school year attended the May 2015 CSE subcommittee meeting and developed two study skills annual goals to address the student's needs with respect to completion of classroom work and homework (Tr. pp. 255-57; Parent Ex. H at pp. 1, 10). The special education teacher and the student's reading specialist recommended six reading goals to address the student's needs with respect to decoding, fluency, and higher-level components of reading comprehension (Tr. pp. 257-58, 803-19; Parent Ex. H at pp. 10-11). Furthermore, the special education teacher recommended three goals for writing that addressed the student's needs in spelling, expanding sentence completion, and revising/editing her own writing (Tr. pp. 258-59; Parent Ex. H at p. 11). In addition, the special education teacher recommended three math goals in order to assist the student in continuing to develop her multiplication, division, and math problem solving skills (Tr. pp. 259-60; Parent Ex. H at p. 11).

The student's speech-language pathologist testified that for the 2015-16 school year she recommended that the unachieved goal for the student to formulate grammatically correct

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<sup>17</sup> The private neuropsychologist testified that he participated by telephone in a general conversation with participants at the April 2015 CSE subcommittee meeting, but never observed the student in the classroom because an observation is not "scientific" (Tr. pp. 1730, 1735-36 1761; Parent Ex. H at p. 2). During cross-examination, however, he responded affirmatively that it was important for an evaluator to know how a child performs in their day-to-day performance relative to how they performed on standardized assessment (Tr. p. 1711).

sentences continue, which she modified to be "slightly more intensive" (Tr. pp. 532-33; Parent Ex. H at p. 11). Another goal addressed the student's need to use categorization, classification, and association to comprehend and define sixth grade vocabulary (Tr. pp. 535-36; Parent Ex. H at p. 11). Another continued speech-language goal addressed the student's listening comprehension skills as part of her auditory training program (Tr. pp. 518-19; Parent Ex. H at p. 11). Furthermore, the speech-language pathologist recommended a goal for the student to work on higher-level thinking and figurative language skills and enhance her independence (Tr. pp. 540-41; Parent Ex. H at p. 11).

Testimony from the student's occupational therapist indicated that the student's 2015-16 OT annual goals continued to address the student's needs with respect to her stamina and copying, and that the addition of a word processing goal would help the student begin to learn to accommodate her weakness in writing (Tr. pp. 646-651; Parent Ex. H at pp. 1, 12).

The school social worker testified that the recommended counseling goals for the 2015-16 school year aligned with the student's need to build confidence and difficulty identifying her own strengths (Tr. pp. 936-38; Parent Ex. H at pp. 11-12). The social worker also recommended a goal that addressed the student's ability to maintain attention, and participate in discussions and activities with others (Tr. pp. 940-42; Parent Ex. H at p. 12).

As discussed above, a comparison of the January 2015 and May 2015 IEPs shows that the May 2015 CSE subcommittee developed new, or modified continued, annual goals based upon the student's then-current skills and needs (compare Parent Ex. G at pp. 7-9, with Parent Ex. H at pp. 10-12). Further review of the January and May 2015 IEPs shows, contrary to the IHO's finding, that the programs recommended were not virtually identical (compare Parent Ex. G at pp. 9-11, with Parent Ex. H at pp. 12-15).<sup>18</sup>

While the May 2015 IEP continues the provision of 12:1+1 special class instruction for ELA, math, science, and social studies, the May 2015 CSE subcommittee recommended a reduction in the student to teacher ratio of the student's 12:1+1 special class for reading, an area of primary deficit, to a ratio of 5:1 (compare Parent Ex. G at pp. 1, 9, with Parent Ex. H at pp. 1, 12). The May 2015 IEP also provided the student with a 42-minute 12:1 skills special class, three times per six-day cycle (Parent Ex. H at pp. 1, 12). A district middle school psychologist who attended the May 2015 CSE subcommittee meeting testified that the CSE subcommittee added the 12:1 skills special class to assist the student with any additional remedial skills she might need in her content level classes (Tr. pp. 1023-24, 1052; Parent Ex. H at p. 1). Although the May 2015 IEP continued recommending the same frequency and type of OT, speech-language, and counseling as the January 2015 IEP, duration of all related service sessions increased from 30 to 42 minutes (compare Parent Ex. G at p. 9, with Parent Ex. H at pp. 12-13). The May 2015 IEP added a

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<sup>18</sup> When the 2014-15 school year began, the June 2014 IEP was the IEP in effect for that school year (Parent Ex. E). After the CSE subcommittee reconvened in January 2015 for a re-evaluation review, the 2014-15 IEP was updated to include counseling as a mandated service for the student (Parent Ex. G at p. 1). At that point in time the January 2015 IEP took precedence over the May 2014 IEP for the remainder of the 2014-15 school year between January 23, 2015 and the end of the June 2015 (Parent Exs. E; G). It is for this reason that my discussion at this point addresses the January 2015 IEP as the IEP in effect for 2014-15 (Parent Ex. G).

recommendation for the student to receive extended school year small group (5:1) OT to address typing skills (Parent Ex. H at pp. 2, 14-15).

A comparison of the additional supplementary aids and services, program modifications, and/or accommodations included in the January 2015 and May 2015 IEPs shows that the May 2015 CSE subcommittee provided additional recommendations for the student including positive reinforcement to promote the student's comfort level, motivation, and task completion; cues and support to initiate tasks; copies of class notes; provision of a multiplication table; re-teaching of material to promote the student's understanding and retention of concepts; and access to a computer to assist the student with lengthy writing assignments (compare Parent Ex. G at pp. 9-10, with Parent Ex. H at pp. 13-14).

The May 2015 CSE subcommittee continued the January 2015 IEP recommendations for assistive technology including adaptive seating, specified as use of a stand up desk during instructional time in the classroom, and use of a personal FM system during instructional time (compare Parent Ex. G at p. 10, with Parent Ex. H at p. 14). The CSE subcommittee continued testing accommodations and added use of computer/word processor to record lengthy responses during test administration (compare Parent Ex. G at p. 11, with Parent Ex. H at p. 15).

The middle school psychologist who attended both the April 2015 and May 2015 CSE subcommittee meetings testified that the May 2015 CSE subcommittee recommendations aligned with or exceeded the recommendations made by the private neuropsychologist (Tr. pp. 1024, 1052-53). The school psychologist testified in detail how the May 2015 IEP reflected the private evaluator's recommendations and how the recommended program for 2015-16 school year provided the student with the needed annual goals, strategies and supports, modifications, accommodations, and related services (Tr. pp. 1052-81; see Parent Exs. H; Q at pp. 7-11). Specific to the private evaluator's recommendation for placement in a private special education school, the school psychologist's testimony explained how the May 2015 IEP addressed the student's needs for "an intensive specialized program" which she understood to be a continuation of the special class placement in each content area (Tr. pp. 1052-54, 1060, 1065-69, 1075).

A review of the evidence in the hearing record pertaining to the 2015-16 school year supports findings that the student exhibited progress during the 2014-15 school year, and that the programs provided in the January 2015 and May 2015 IEPs were not identical. Additionally, a review of the May 2015 IEP shows that it addressed the student's academic, speech-language, social/emotional, motor, and management needs, and was reasonably calculated to provide the student with educational benefits. While I can sympathize with the parents, who desire an ideal program for their daughter, it does not follow that the district has failed to meet the more modest standard required of it by the IDEA, because 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). The IDEA 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, 873 F.2d at 567 [citations omitted]). Therefore, I find that the district provided the student with a FAPE for the 2015-16 school year.

## D. Bullying

The parents assert that the district failed to offer a FAPE to the student for the 2013-14 and 2014-15 school years because it failed to develop an anti-bullying plan for the student's IEPs to address incidents of bullying. As a result of the alleged bullying, the parents claim that the student suffered anxiety, lost control of her bladder, and cried on an almost daily basis. A review of the hearing record reveals that the district was not made aware of the all of the incidents of alleged bullying asserted by the parents and that it responded appropriately to those of which it was made aware.

Under certain circumstances, if a student with a disability is the target of bullying, such bullying may form the basis for a finding that a district denied the student a FAPE (Dear Colleague Letter: Bullying of Students with Disabilities, 61 IDELR 263 [OSERS 2013] [stating that bullying that results in a student with a disability not receiving meaningful educational benefit constitutes a denial of a FAPE and that districts have an obligation to ensure that students who are targeted by bullying behavior continue to receive a FAPE pursuant to their IEPs]; see Smith v. Guilford Bd. of Educ., 226 Fed. App'x 58, 63-64 [2d Cir. June 14, 2007] [indicating that bullying might, under some circumstances, implicate IDEA considerations]; M.L. v. Fed. Way. Sch. Dist., 394 F.3d 634, 650-51 [9th Cir. 2005] [finding that "[i]f a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE"]; Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 199-201 [3d Cir. 2004] [reviewing whether the district offered the student "an education that was sufficiently free from the threat of harassment to constitute a FAPE"]; Dear Colleague Letter: Responding to Bullying of Students with Disabilities, 64 IDELR 115 [OCR 2014]; Dear Colleague Letter: Harassment and Bullying, 55 IDELR 174 [OCR 2010] [stating that "a school is responsible for addressing harassment incidents about which it knows or reasonably should have known"]; Dear Colleague Letter: Prohibited Disability Harassment, 111 LRP 45106 [OCR/OSERS 2000]).<sup>19, 20</sup> In determining whether

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<sup>19</sup> New York State has addressed bullying in schools through the Dignity for All Students Act, which imposes specific obligations on school districts with regard to the prevention and investigation of harassment and bullying (Educ. Law §§ 10-18). The law defines bullying as "the creation of a hostile environment by conduct or by threats, intimidation or abuse" that, among other things, interferes with a student's educational performance, mental, emotional, or physical well-being, causes a student to fear for his or her physical safety, or causes physical or emotional harm (Educ. Law § 11[7]).

<sup>20</sup> At least one district court in New York has found that "students have a right to be secure in school" under the IDEA and that bullying may constitute the denial of a FAPE if "it is likely to affect the opportunity of the student for an appropriate education" (T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 308, 316-17 [E.D.N.Y. 2011]). The Second Circuit stated the test the district court developed to determine whether bullying resulted in the denial of a FAPE as follows: "(1) was the student a victim of bullying; (2) did the school have notice of substantial bullying of the student; (3) was the school 'deliberately indifferent' to the bullying, or did it fail to take reasonable steps to prevent the bullying; and (4) did the bullying 'substantially restrict' the student's 'educational opportunities?'" (T.K. v. New York City Department of Education, 810 F.3d 869, 874 [2d Cir. 2016], citing T.K., 779 F. Supp. 3d at 316, 318; see T.K. v. New York City Dep't of Educ., 32 F. Supp. 3d 405, 417-18 [E.D.N.Y. 2014]). Despite the parents' assertion to the contrary, the Second Circuit did not decide whether an anti-bullying program must be included in a student's IEP, nor did it adopt the district court's four-part test (T.K., 810 F.3d at 876-77 & n.3).

allegations related to bullying rise to the level of a denial of FAPE, the United States Department of Education has clarified that:

A school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly.

(Dear Colleague Letter, 61 IDELR 263).

The parents allege that during the 2013-14 school year, the student repeatedly lost control of her bladder. Upon examination of the record, these incidents do not appear to be a result of bullying but rather the student's desire to socialize with peers at lunch and recess. In spring 2014, the school nurse brought to the parents' attention that the student was experiencing incidents of incontinence (Tr. p. 1902). The student's mother testified that these incidents occurred twice weekly and the parents arranged to meet with the student's teacher in order to determine the cause of the problem (Tr. pp. 1901-03). The student's mother testified that the incidents occurred before lunch and the parents believed that the student would hold off using the bathroom before or during lunch because she had difficulty integrating back into the peer group when she returned (Tr. pp. 1904, 2060). The student's mother opined that the student would avoid going to the bathroom after recess because she did not know how to integrate herself back into the group after returning from the bathroom (Tr. pp. 1904-05, 2058). The district responded with a plan that the student would check in with the school nurse before lunch, in order to use the nurse's bathroom (Tr. pp. 1905, 2059). The student's mother testified that after the meeting with the district and after this intervention was put into place—and, possibly, after the student changed her behaviors and/or routines—these incidents stopped (Tr. pp. 2059, 2061). While these incidents may have been understandably embarrassing for the student, there is no indication in the record that they were caused by the student being subjected to bullying behavior by other students or that these incidents impacted the student's educational opportunities or safety. Further, it appears that the district met with the parents in order to successfully resolve the issue. Accordingly, these incidents are unrelated to bullying and do not support a finding that the district denied the student a FAPE for the 2013-14 school year.

Turning to the 2014-15 school year, there were three specific incidents district staff addressed where the parents allege the student was bullied. The hearing record reflects an incident on the school bus where a peer was mean to the student and called her names. The student's special education teacher testified that, when the student's mother informed her of the incident, she spoke with the student, the other student, and the bus driver, and "did everything [she] could to make sure it didn't happen again," which, to her knowledge, it did not (Tr. pp. 233, 303, 313-14). The teacher further indicated that she informed the bus monitor, who was also the student's reading teacher, so that she could follow up as necessary (Tr. p. 314). The reading teacher also testified that she spoke to the other student, telling her of the importance of being kind and following rules, and that the other student felt remorse and apologized to the student (Tr. pp. 792, 874-75). The reading teacher testified that she was not made aware of any further issues on the school bus or of

any other negative social interactions the student had with her peers (Tr. pp. 792-93, 875, 887).<sup>21</sup> The student's mother testified that, despite these interventions, the incidents of teasing on the bus did not stop and "occurred on a daily basis" (Tr. pp. 1911-12, 1915-17, 2134). However, while the parent noted that the district did not offer to hold a CSE meeting, she also testified that she did not report any further incidents on the bus to the district because the student asked her not to and that she did not request a CSE meeting to address the issue (Tr. pp. 1917, 2066-68, 2133-34).

The student's special education teacher testified that the student's mother also reported an incident to her involving peers acting inappropriately towards the student in the community (Tr. pp. 233-35). The special education teacher testified that she spoke to both the student and her peers about the incident and the girls apologized (Tr. p. 234). The special education teacher testified that she advised the student's mother that she had spoken with the student and the peers involved and that she would do everything in her power to keep it from happening again (Tr. pp. 234-35). The special education teacher further testified that she was not contacted about the issue again (Tr. p. 235). The student's mother testified that the bullying did not stop but that she did not report it again because the student asked her not to (Tr. pp. 1913-17, 2069-72). The district school psychologist testified that the student's mother raised the issue at the May 2015 CSE meeting, reporting that the student was being "tormented by peers in her neighborhood," but stated that these issues were not seen in school (Tr. pp. 1049-50, 1143). The student's mother also testified to an incident of other students cutting in line in front of the student, upsetting her (Tr. pp. 1911-12). However, the student's mother testified that she did not report this incident to the district (Tr. pp. 2068-69).

The student's mother also testified that the student did not want to go to school in the morning and that the student would "hold it together" at school but would cry at home (Tr. pp. 1918-21, 2130). The student's mother testified that student did not report incidents of bullying because the student did not want to "tell on" her peers (Tr. p. 2072).

Review of the student's IEPs reveals that the CSEs did describe the student's social/emotional needs and her relationships with her peers, as described by both the school personnel and the parents. According to the June 2014 IEP, the student was "well liked by her teacher and peers" and "gets along well with her classmates," but the student's Tourette's Disorder caused tic behaviors that could look like inappropriate responses to comments or social interactions (Parent Ex. E at pp. 6-7). The June 2014 CSE subcommittee noted that the behaviors were much less evident during the school year and seen more at home (*id.*). The IEP further stated that the student's mother reported that the other children in the neighborhood understood her and accommodated her but her peers in Girl Scouts did not understand the student because she would regress emotionally, acting like a younger child (*id.* at p. 7; *see* Parent Ex. SS at p. 1).

According to the January 2015 IEP, the parents had concerns about the student's social/emotional needs and reported that the student often cried at home and was "stressed" about school (Parent Ex. G at pp. 4-6). The IEP noted that, according to the regular education teacher, the student was part of the class culture and integrated with peers from the general education class,

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<sup>21</sup> The district school social worker indicated that it was her understanding that the incident "did not warrant further investigation because it was a one-time incident" (Tr. p. 969).

interacting with them during recess (*id.* at p. 5). The January 2015 CSE subcommittee recommended counseling in a small group (*id.* at pp. 1, 9).

According to the May 2015 IEP, the student attended a weekly social skills group during the 2014-15 school year, which focused on recognizing personal strengths and weaknesses, developing skills for building/maintaining friendships, problem solving strategies for peer conflicts, and self-esteem building (Parent Ex. H at p. 8). The May 2015 CSE subcommittee noted that the student demonstrated more self-confidence, which increased her class participation and ability to create relationships with peers (*id.*). At the beginning of the school year, the student was described as quiet and shy but with encouragement and positive reinforcement, she would raise her hand, ask questions, share her thoughts, and work collaboratively with peers (*id.*). It was noted that the student would continue to benefit from counseling in the 2015-16 school year to develop her social skills and to support her transition into sixth grade (*id.*). The May 2015 IEP stated that the parents were concerned that the student did not have friends and was being teased by peers (*id.*). The CSE subcommittee recommended counseling in a small group and two social/emotional/behavioral goals (*id.* at pp. 11-13).

While the student's mother reported that other students were mean to the student, the school social worker testified that, during counseling sessions the student got along well with the other fifth grade students, the social worker did not receive reports from either the student's teacher or the student that she was having difficulty with peers, and the student did not complain to her about being teased (Tr. pp. 930-32, 966, 972). The occupational therapist indicated that based on her observations of the student during group OT sessions, the student demonstrated "great peer relations" and "was right in there," relating to the other students as an accepted member of the group (Tr. pp. 661-62). The occupational therapist and social worker indicated that they had observed the student playing with other children during recess (Tr. pp. 662-63, 931-32). The occupational therapist noted that school staff observed that the student was always part of the group, either playing, running, throwing balls, or sitting and chatting (Tr. pp. 661-62). The occupational therapist indicated the student was never alone during recess, as there were always other children around her (Tr. p. 663). In addition, according to the special education teacher, the student socialized with the other students in the class (Tr. p. 202). Furthermore, the teacher had opportunity to observe the student outside of her classroom when the student was at lunch with her large group general education homeroom class (Tr. p. 203). During those times, the teacher reported that the student was always sitting with a group of girls, socializing, and never sat by herself (Tr. pp. 203, 296-98).<sup>22</sup> The teacher indicated that, during recess, she observed the student playing with all of the other children in her class (Tr. pp. 203-04). The teacher reported that she observed no instances of bullying in the classroom during the 2014-15 school year (Tr. pp. 235-37).

Assuming that the incidents described above constituted bullying during the 2014-15 school year, the district took steps in response to the incidents of which it had received notice (Tr. pp. 233-35, 792-93, 929). In particular, the student's special education teacher and reading teacher addressed the bus incident and the incident in the community by approaching the students involved

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<sup>22</sup> The teacher did indicate that the student would sometimes have disagreements with other students, but that these incidents constituted normal social issues between students and that she was not "concerned that she was being singled out" (Tr. pp. 298-99, 303-04).

and had the offending peers apologize to the student (Tr. pp. 234-25, 791-92). When the CSE was informed of the parents' concerns of the student's social/emotional development, the January 2015 CSE subcommittee added counseling to the student's IEP (Parent Ex. G at pp. 1, 9). When the parents advised the May 2015 CSE subcommittee that the student was being teased, the counseling recommendation continued and the CSE subcommittee added social/emotional goals to the IEP (Parent Ex. H at pp. 11-13). Therefore, the record does not support a finding that the district failed to take action in response to known incidents of bullying or refused to consider the parents' concerns regarding bullying.

Moreover, the record demonstrates that the student made progress during the 2014-15 school year as discussed above and these incidents of alleged bullying did not interfere with the student's ability to receive educational benefit from her program, substantially restrict the student's learning opportunities, or prevent her from making progress. Accordingly, the student was not denied a FAPE for the 2014-15 school year as a result for the alleged instances of bullying (see N.M. v. Cent. Bucks Sch. Dist., 992 F. Supp. 2d 452, 470-72 [E.D. Pa. 2014] [holding that where a district responded to all allegations of bullying brought to its attention, the district did not deny the student a FAPE despite not convening a CSE to address the bullying by modifying the student's IEP, where the IEP provided emotional supports]).

## **VII. Conclusion**

Having found that the district offered the student a FAPE for the 2013-14, 2014-15, and 2015-16 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether Eagle Hill was an appropriate unilateral placement for the student for the 2015-16 school year or whether equitable considerations would have supported an award of tuition reimbursement (Burlington, 471 U.S. at 370; Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find them to be without merit.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated July 27, 2016, is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2015-16 school year and ordered the district to fund the costs of the student's tuition at Eagle Hill for the 2015-16 school year.

**Dated: Albany, New York  
October 6, 2016**

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**SARAH L. HARRINGTON  
STATE REVIEW OFFICER**