



The University of the State of New York

The State Education Department

State Review Officer

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No. 17-071

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Northport-East Northport Union Free School District

Appearances:

The Sanders Law Firm, attorneys for petitioner, by Edward J. Nitkewicz, Esq.

Ingerman Smith, LLP, attorneys for respondent, by Christopher Venator, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Fusion Academy (Fusion) for the 2016-17 school year. The appeal must be dismissed.¹

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee

¹ In September 2016, Part 279 of the Practice Regulations was amended, which became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although some of the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The hearing record reflects that the student has received diagnoses including an attention deficit hyperactivity disorder (ADHD), a generalized anxiety disorder, a learning disability NOS and displays sensory sensitivities as well as social immaturities (Dist. Exs. 6 at p. 2; 10; 11). The

student has also been described as having "profound developmental dyscalculia which has proven difficult to remediate because it impacts almost all aspects of the higher order cognitive processes which underlie mathematical thinking" (Parent Ex. 13 at pp. 13-14).

The hearing record reflects that at one time the student received special education services in a public school outside of the State, but was later removed from the public school and home schooled for his 2nd grade school year (Dist. Exs. 6 at p. 3; 7 at p. 1). The student was reportedly diagnosed with an anxiety disorder around this time and for third grade he attended a private "therapeutic" school (Dist. Ex. 7 at p. 1). After moving to New York State, the student attended a nonpublic school during his 4th and 5th grade school years (Dist. Exs. 6 at pp. 3-4; 7 at pp. 1-2). During that time, the student was classified as a student with multiple disabilities (Dist. Ex. 7 at pp. 1-2). During the student's 6th grade school year he was home-schooled part time and was enrolled in two classes at Fusion (id. at p. 2). During 7th grade, in the 2014-15 school year, the student attended Fusion full time, with the exception of math, for which he received private tutoring (id.; see Tr. p. 779-81). During the 6th and 7th grade school years, the parent discussed the student's math struggles with his math tutor and at some point they began to suspect that the student may have dyscalculia (Tr. p. 717).

The hearing record reflects that the student attended Fusion full time in an 8th grade program during the 2015-16 school year (Tr. pp. 711-12, 779-80; Dist. Exs. 6 at pp. 3-4; 7 at p. 2; 9 at p. 1). In August 2015, the student's parent referred the student to the district's CSE for an evaluation (Dist. Ex. 1). A district school psychologist prepared a social history, conducted a psychological evaluation, and prepared a psychological report in October and November 2015 in advance of a CSE meeting to determine the student's eligibility for special education (Dist. Exs. 6; 7; 9).

The CSE convened on November 25, 2015, and discussed the results of the psychological evaluation with the evaluator, Fusion's head of school, and both of the student's parents in attendance and found the student eligible for special education and related services as a student with an emotional disturbance (Dist. Exs. 12; 13 at p. 1). The CSE recommended that the student receive special education services for the 2015-16 school year (Tr. pp. 44-45; Dist. Ex. 13 at p. 1). Program recommendations included direct consultant teacher services in the areas of English, science, and social studies for three 43-minute sessions per six-day cycle (Dist. Ex. 13 at p. 7). The CSE also recommended a 12:1+1 special class for math for five 43-minute sessions weekly and resource room in a group of five for five 43-minute sessions per week (id.). One individual 30-minute counseling session weekly was also recommended as a related service and supplementary aids and services as well as testing accommodations were also recommended (id.). The November 2015 IEP also included a coordinated set of transition activities, and measurable post-secondary goals (id. at pp. 5, 7-9). The IEP indicated that the recommended special education and related services would begin on January 11, 2016 (id. at p. 7).

In December 2015, the parent visited the district's recommended program and toured the school and met with staff (Tr. pp. 782-83). The parent requested a re-convene of the CSE to review the recommended placement and services (Tr. p. 784).

On January 27, 2016, the CSE reconvened at the parent's request (Dist. Ex. 17 at p. 1). Finding the student eligible for special education as a student with an other health impairment, the

January 2016 CSE continued the same special education programs and services recommended by the November 2015 CSE (compare Dist Ex. 17 at pp. 5, 7-9, with Dist. Ex. 13 at pp. 5, 7-9).

In May 2016, the parent requested an independent neuropsychological evaluation, which was conducted by a private clinical neuropsychologist over three exam dates in May and June 2016 (Dist. Exs. 21; 22; 23 at p. 1). The neuropsychologist developed a detailed report of the neuropsychological evaluation that included diagnoses of a persistent depressive disorder, a generalized anxiety disorder, a severe specific learning disorder in mathematics, a developmental coordination disorder, and a severe attention deficit/hyperactivity disorder, and also included recommendations for the student's special education program (Dist. Ex. 23 at pp. 14-16).

On September 28, 2016, the CSE convened to review the results of the independent neuropsychological evaluation and to develop the student's IEP for the 2016-17 school year (Tr. pp. 69-73; Dist. Ex. 25). Finding the student eligible for special education as a student with an other health impairment, the September 2016 CSE recommended a 10-month program in a 15:1+1 special class for math with a resource room program for five 42-minute sessions per week, consultant teacher services in English, science, and social studies, and one 30-minute session per week of individual counseling (Dist. Ex. 25 at p. 9, 10).² The September 2016 IEP included testing accommodations and program modifications for the student, a coordinated set of transition activities, and measurable post-secondary goals (id. at pp. 7, 10-11).

By prior written notice dated September 28, 2016, the district summarized the special education placement and related services recommended for the 2016-17 school year and identified the evaluative information relied upon by the CSE and other options considered (Dist. Ex. 26). The student continued to attend Fusion for the 2016-17 school year (Tr. p. 711-12).³

A. Due Process Complaint Notice

In a due process complaint notice dated November 7, 2016, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) and requested that the district reimburse the parent for the annual cost of the student's attendance at Fusion (Parent Ex. 1). The parent described the student's academic and social and emotional needs and abilities and asserted that the program recommended by the CSE failed to address those needs (id. at p. 2). The parent asserted that Fusion met the student's unique academic, social, and emotional needs (id. at pp. 2-3). The parent claimed that she had advised the CSE at a September 28, 2016 meeting of her intention to unilaterally place the student at Fusion (id.). As relief, the parent requested reimbursement for the cost of tuition at Fusion and that the district pay for the student's transportation (id.).

The district responded to the parent's due process complaint notice in writing and denied that the program offered by the CSE would not meet the student's unique educational needs, but

² The student's eligibility for special education services as a student with an other health-impairment is not at issue in this appeal (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

³ The Commissioner of Education has not approved Fusion as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

did not dispute the allegations in the due process complaint notice with respect to the student's disabilities, deficits, and diagnoses (Dist. Ex. 30).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 17, 2017, and concluded on May 17, 2017 after four days of proceedings (Tr. pp. 1-836). By decision dated July 20, 2017, the IHO determined that the September 2016 IEP offered the student a FAPE for the 2016-17 school year and denied the parent's request for tuition reimbursement at Fusion (IHO Decision at pp. 15-19). The IHO noted that although the crux of the parent's arguments during the impartial hearing centered on the claim that the district failed to adequately address the student's needs with respect to a diagnosis of dyscalculia, that term did not appear in the parent's due process complaint notice (*id.* at p. 17). Additionally, the IHO found that no evaluation or testimony from witnesses brought by the district or the parent supported a finding that the student's dyscalculia or math learning disability required 1:1 instruction or could not otherwise be addressed in the recommended public school program (*id.* at pp. 17-18). The IHO did not discount the parent's opinion that Fusion provided a "better opportunity" for the student to learn; however, he noted that the district is not required to provide "what is best, but rather an education reasonably calculated for educational progress" (*id.* at p. 18). The IHO found that the district offered the student a FAPE, denied the parent's request for tuition reimbursement, and declined to consider whether Fusion was an appropriate unilateral placement (*id.*).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in finding that the district offered the student a FAPE for the 2016-17 school year, and contending that Fusion was an appropriate unilateral placement for the student. More specifically, the parent contends that the CSE refused to put the dyscalculia diagnosis on the student's IEP, and that dyscalculia is a neurological condition, and is different from a math learning disability which was identified in the student's IEP. The parent also asserts that the student would not have been able to make any progress in an 8th grade level math course under any circumstances, but was recommended for one. The parent relates that multiple CSE members stated that they did not know the student or understand dyscalculia, which led to a program that would not succeed, and that certain CSE members refused to recommend an out-of-district placement without first trying an in-district placement and seeing if it failed. Lastly, the parent asserts that the CSE erred in recommending a consultant teacher pushing into the student's regular education classes because that mode of instruction would exacerbate the student's anxiety and limited self-esteem.

In an answer, the district asserts general admissions and denials, and argues in favor of upholding the IHO's determination that the district offered the student a FAPE during the 2016-17 school year.

With respect to the parent's assertion that the recommended program failed to address the student's needs relating to his diagnosis of dyscalculia, the district asserts that the dyscalculia diagnosis was inserted into the student's IEP after the diagnosis occurred, and was not before the CSE until after the January 2016 CSE meeting. The district asserts that the recommended program offered a FAPE in the least restrictive environment (LRE) and addressed all of the student's needs, including mathematics and social emotional needs. The district contends that the recommended

special class for math with the support of the recommended resource room would have allowed the student to make progress in math, as attested to by witnesses who had knowledge of students with similar profiles.

With respect to the parent's claim that the recommended program would not address the student's social and emotional needs, the district asserts that the program addressed the student's social and emotional needs with resource room to assist the student with executive functioning deficits as well as counseling and access to a counselling center.

With respect to the parent's claim that the district "did not know the student" or understand dyscalculia, which led to a program that would not succeed, the district asserts that that the reason the district CSE members did not "know" the student is because the student has never attended public school in the district, and further describes the extensive evaluative information available, including an independent educational evaluation (IEE) conducted shortly before the September 2016 CSE meeting.

With respect to the parent's assertion that certain CSE members refused to recommend an out-of-district placement without first trying an in-district placement and seeing if it failed unfairly conflates the testimony of these witnesses, and further that taken in context, the witnesses were stating that the basis for the CSE's recommended public school program was rooted in the opinion that the recommended program could successfully educate the student and was the student's LRE.

With respect to the unilateral placement at Fusion, the district contends that the placement was inappropriate because Fusion failed to address the student's two primary needs. For math, the district asserts that there were no academic goals and only 1:1 instruction with inadequate evidence of progress in the hearing record. Next, Fusion failed to address the student's social and emotional needs in that the student was not provided counseling or therapy. The district also asserts that the 1:1 instruction Fusion provided in every class was not the student's LRE.

Lastly, with respect to equitable considerations, the district asserts that tuition reimbursement would not be appropriate because there is no evidence in the hearing record that the parent is obligated to pay tuition.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New

York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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).

VI. Discussion

A. 2016-17 School Year

The parent generally alleges that the district has not offered an appropriate program designed to address the student's needs. However, neither the parent nor the district have identified the specific IEP that is the subject of the parent's due process complaint notice and the CSE has convened multiple times to develop IEPs for the student (Dist. Exs. 13; 17; 25). The CSE convened on November 25, 2015 for an initial eligibility determination (Dist. Ex. 13 at p. 1). The CSE also convened on January 27, 2016 at the parent's request and again on September 28, 2016 to review a neuropsychological evaluation conducted in June 2016 (Tr. pp. 69-70; Dist. Ex. 25).⁵ While a

⁴ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

⁵ The parent states in her request for review that the district CSE members did not "know" the student and were intent on recommending a public school placement rather than an out-of-district placement, obliquely raising the suggestion that the CSE lacked sufficient evaluative information or predetermined its recommended placement (see Req. for Rev. ¶¶ 7, 19, 24, 26, 29, 30). After a review of the entire hearing record, and for additional reasons set forth in this decision, I find that the evaluative information before the various CSE's was adequate, and the CSE, which met several times and modified the recommended program as additional information was gathered, had an appropriately open mind with respect to determining the specifics of a program for the student.

review of the program developed by the district focuses on the September 2016 IEP, because it was the IEP developed for the school year at issue, due to the January 2016 and September 2016 CSE meetings being reconvened of the initial November 2015 CSE meeting, an analysis of the recommended program necessarily includes a review of the November 2015, January 2016, and September 2016 CSE meetings and the background information leading up to those meetings.

As noted above, the parent referred the student to the district for a CSE evaluation in August 2015 (Dist. Ex. 1). The CSE subsequently conducted an educational evaluation and a psychological evaluation in October 2015;⁶ the CSE also completed a social history during this time (Dist. Exs. 6-9). A CSE convened on November 25, 2015 for an initial eligibility determination meeting (Dist. Ex. 13 at p. 1). A prior written notice, also dated November 25, 2015 indicated that in addition to the evaluations completed by the CSE, the committee considered a March 2011 neuropsychological evaluation, the student's August 2014 medical health records, a psychologist's letter, learning support team review, and a doctor's letter, all dated November 2015 (Dist. Exs. 14 at p. 2; 15 at p. 1).⁷ In addition, the prior written notice indicated that Fusion's Head of School, as well as the parent, shared information with the other committee members regarding the student's then-current present levels of performance (Dist. Ex. 15 at p. 1).

The March 2011 neuropsychological evaluation included an assessment of the student's intellectual functions, academic abilities, neuropsychological functions, behavior and social/emotional functioning (Parent Ex. 31). Notably, the evaluation report indicated that the student's full scale IQ was in the low average range; that the student demonstrated academic weaknesses in reading comprehension, math (calculation, fluency, and problem solving), and writing fluency; and that behavior rating scales completed by the student's mother and tutor revealed concerns related to anxiety/depression and behavior regulation (*id.* at pp. 3-9). The evaluator concluded that the student's performance was consistent with diagnoses of generalized anxiety disorder and mathematics disorder (*id.* at pp. 1, 12).

According to the October 2015 educational evaluation, completed by the district, the student willingly attended the testing session, was very cooperative and tried to work on tasks to the best of his ability (Dist. Ex. 9 at p. 1). The evaluator reported that when a task was too difficult the student attempted it, but gave up very easily (*id.*). The evaluator further noted that the student appeared tired, engaged in limited conversation, and did not make eye contact (*id.*). She noted that the student appeared to have low self-esteem (*id.*). The evaluator assessed the student's academic skills using the Woodcock Johnson IV Test of Achievement, Form B (*id.*). According to the evaluator the student's broad reading skills fell in the average range; however, the student demonstrated difficulty with the passage comprehension subtest (low range), which required him to use syntactic and semantic cues to identify a missing word in text (*id.*). The evaluator also reported that the student's broad written language skills were in the average range; however, some of the student's sentences lacked capitalization and punctuation, and some were very simple and contained limited content (*id.* at pp. 2-4). In broad mathematics, the student performed in the very low range (*id.* at p. 2). According to the evaluator, the student did not use the worksheet provided to perform calculations, rather he solved presented problems mentally (*id.* at p. 3). The evaluator

⁶ The psychological evaluation was conducted on October 14, 2015; however, the report of the evaluation was not completed until November 16, 2015 (Dist. Ex. 8 at p. 1).

⁷ It does not appear that the August 2014 medical records were part of the hearing record.

noted that when a problem became too difficult, the student responded that he could not do it (id.). She further noted that the student was not able to read time on the clock because he only read digital clocks (id.). With respect to performing math calculations, the student solved single digit addition and subtraction most of the time and answered some multiplication problems, but would not attempt division problems (id.).

A psychological evaluation, conducted by the district school psychologist in October 2015, included assessments of the student's cognitive abilities and social/emotional functioning (Dist. Ex. 8). At the onset of the evaluation, the psychologist observed that the student appeared lethargic and that his eye contact and verbal responses were limited (id. at p. 3). The psychologist reported that during testing the student did not offer many verbal responses and often would not elaborate on his responses when queried, making it difficult to ascertain whether the student knew the information that was being asked of him (id.). The student also worked "quite slowly" on nonverbal test items (id.). According to the psychologist, the student "appeared quite sullen, tired, and unmotivated during testing, which directly affected his performance" during the assessment (id.). The psychologist opined that the results of the assessment should be considered a minimal estimate of the student's functioning (id.). With respect to the student's intellectual functioning, the psychologist reported that an administration of the Wechsler Intelligence Scales for Children - Fifth Edition (WISC-V) yielded a full scale IQ of 76, again noting that the score should be considered a minimal estimate of the student's cognitive functioning (id. at p. 4). The student's fluid reasoning and processing speed skills fell in the very low range, which according to the psychologist indicated significant areas of weakness (id. at p. 8).

In order to assess the student's social/emotional functioning, the psychologist administered the Behavior Assessment Systems for Children (Self-Report) – Second Edition to the student (Dist. Ex. 8 at p. 7). The student's responses yielded scores in the clinically significant range with respect to anxiety, sense of inadequacy, somatization, internalizing problems, attention problems, hyperactivity, and the emotional symptoms index (id.). According to the psychologist, the student reported that he almost always got nervous, worried, and was afraid of a lot of things (id.). The student further reported that he had trouble sitting still, failed when he tried hard, and couldn't think when he took tests (id.). Completion of the Behavior Assessment System for Children (Parent-Report) by the student's mother yielded clinically significant scores for hyperactivity, anxiety, somatization, and internalizing problems (id.). The psychologist reported that according to the student's mother, the student worried about making mistakes and what others would think, often acted without thinking, demonstrated poor self-control, could interrupt others, and often complained about his health (id.). Based on her assessment, the psychologist concluded that "it appears [the student] may qualify for special education services (id. at p. 9).

A social history, also conducted by the district school psychologist, provided an overview of the student's family background, developmental history, health history, school history, and the parent's perception of the student's personality (Dist. Exs. 6-7). Notably, the social history showed that the student had both oral and auditory sensitivities; struggled with anxiety, sensory processing and attending; had difficulties with math and the physical act of writing; and had attended numerous schools and been overwhelmed in numerous educational settings (Dist. Exs. 6-7). The social history also indicated that the student had previously been found eligible for and received special education services (Dist. Ex. 7 at pp. 1-2).

In addition to the assessments completed by the district, the November 2015 CSE reviewed a November 2015 note from the student's physician that indicated the student had been diagnosed with "ADHD (and other executive function difficulties), [a]nxiety disorder, [l]earning disabilities [s]ensory sensitivities, and social immaturities" (Dist. Ex. 10). The physician stated that the student's current academic setting (Fusion) was the first setting in which the student had had a successful academic experience and opined that it would be in the student's best interest to continue in his current school setting, due to his academic and social/emotional improvement (*id.*). The CSE also considered a second letter, from the student's psychologist, dated November 7, 2015 (Dist. Ex. 11). The psychologist reported that he had administered the WISC-IV to the student, on which he attained a full-scale IQ of 84, which the psychologist stated was "clearly a gross underestimate" of the student's true capabilities (*id.*).⁸ The psychologist explained that it was apparent from his work with the student, that the student's overall executive functioning and difficulty managing his day "from an organizational standpoint" presented considerable frustrations for him (*id.*). The psychologist further reported that coupled with the student's sensory issues, "the typical school day with its frequent transitions became especially difficult for him to negotiate" (*id.*). The psychologist opined that the student's difficulties in processing and retrieving information on demand made a "very unique academic setting specific to his needs absolutely essential" (*id.*). Lastly, the psychologist offered the following diagnoses of the student: generalized anxiety disorder, attention deficit disorder-inattentive and hyperactive type and learning disorder, not otherwise specified (*id.*).

The IEP summary sheet of the November 2015 CSE reflected the diagnoses provided by the student's physician and psychologist (Dist. Ex. 13 at p. 1). In addition, the present levels of performance section of the IEP reflected information regarding the student's cognitive abilities and academic functioning obtained through district testing (compare Dist. Ex. 13 at pp. 2-3, with Dist. Exs. 6-9). The present levels of performance also reflected the input of the student's parent and the head of school from Fusion (Dist. Ex. 13 at pp. 3-4). With respect to academics, the Fusion head of school reported that the student demonstrated improvement in his interactions with teachers and had made strides toward speaking up for his academic needs in class (*id.* at p. 3). The student demonstrated a strength in his ability to complete his assignments in full before handing them in and was mindful of how he spoke to others (*id.* at p. 4). The parent reported that the student had strong vocabulary skills, but struggled with math, science, and the physical act of writing (*id.*). They further reported that the student had difficulty with multiple tasks and fatigued easily and expressed concern that the student had difficulty staying on task, understanding complex directions, planning multi-step assignments, and retaining information from class to class (*id.*).

With respect to the student's social development, the IEP indicated that "it was reported" that the student was easy to talk to and respectful with adults, that he worried when he upset others and was exceptionally intuitive (Dist. Ex. 13 at p. 4). However, the IEP also stated that the student needed to relate appropriately to peers and adults in the classroom, increase his ability to cope with frustration and decrease anxiety (*id.*). The IEP stated that the student's physical levels and abilities were within age appropriate expectations (*id.*). With respect to the student's management needs, the IEP stated that the student required the additional support of special education services to be successful in the regular education classroom and had significant delays in math that necessitated he be instructed in a small teacher-to-student ratio, with minimal distractions, within a regular

⁸ The WISC-IV is presumed to be the Wechsler Intelligence Scale for Children, Fourth Edition.

school environment, in order to progress academically (id.4). The IEP noted that the student had significant delays in math, attending, and social/emotional skills that impacted his ability to progress in the general education curriculum (id.).

The IEP also indicated that the student needed strategies to address behaviors that impeded his learning or that of others, but did not require a behavioral intervention plan (Dist. Ex. 13 at p. 5). The IEP included goals targeting the student's weaknesses in reading comprehension, editing written work, solving math problems using all four operations, identifying his own feelings, communicating with peers, and employing coping skills (id.). The IEP also included postsecondary goals and a transition plan (id. at pp. 5, 8-9).

To address the student's identified academic and social/emotional needs, the CSE recommended that the student be placed in a 12:1+1 special class for math five times per week, and receive 5:1 resource room services five times per week, direct consultant teacher services three days out of a six-day cycle in English, science, and social studies classes, and individual counseling one time per week (Dist. Ex. 13 at p. 7). The CSE also recommended the following supplementary aids and services, program modifications, and accommodations: use of a calculator during instructional time, as needed; access to the counseling center throughout the day, as needed; breaks throughout the day, as needed (id.). In addition, the CSE recommended the following testing accommodations: use of calculator, extended time (2.0) and use of breaks (id. at p. 8).

The district IEP summary indicated that the implementation dates of the November 2015 IEP were January 11, 2016 through June 24, 2016 (Dist. Ex. 13 at p. 1). As the parent was unsure as to whether she was going to enroll the student in the district's middle school or continue the student's Fusion program, the November 2015 CSE also developed an IESP for the student that recommended he receive 5:1 resource room services five times per week and individual counseling one time per week (Dist Ex. 14 at pp. 1, 7).⁹

Following the November 2015 CSE meeting the parent visited the recommended district program and subsequently requested that the CSE reconvene, which it did in January 2016 (Tr. pp. 782-84; Dist. Ex. 17).

The district's IEP summary form for the January 2016 CSE meeting indicated that the parent had not yet signed consent for special education services (Dist. Ex. 17 at p. 1).

At the request of the parent, the January 2016 CSE changed the student's disability classification from emotional disturbance to other health impairment (Dist. Ex. 19; compare Dist. Ex. 13 at p. 2 with Dist. Ex. 17 at p. 2). In all other substantial aspects, the January 2016 IEP remained the same as the IEP developed by the November 2015 CSE (compare Dist. Ex. 13, with Dist. Ex. 17). A prior written notice, dated January 27, 2016 offered an explanation for the district's proposed and/or refused actions (Dist. Ex. 19 at p.1). The prior written notice indicated that the

⁹ The hearing record indicated that Fusion is located in another school district (Tr. pp. 61-62); which would, as the district of location, have been responsible for developing an IESP for the student, if requested to do so (see Educ. Law § 3602-c[2] [parents who seek to obtain educational services for students with disabilities placed in nonpublic schools must file a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made]). However, the district developed an IESP for the student (Dist. Ex. 14), because the district of location did not recognize Fusion as being a school within its boundaries (Tr. pp. 61-65, 434-37).

parent shared with the CSE that they had a difficult time finding an educational setting that fit the student's needs and that the student had struggled over the years (*id.*). According to the prior written notice, although the parent praised the public school's efforts and resources, she also expressed concern that the student would have difficulty attending an eight-period school day and with the eighth grade common core curriculum (*id.*). The parent expressed concern regarding the student's math deficits, and the special education teacher explained how instruction was delivered in the 12:1+1 special class using differentiation, multisensory approaches, and manipulatives (*id.*). The principal explained the middle school continuum of services, including academic intervention services (*id.*). According to the prior written notice, district staff also discussed ways in which they would attempt to engage the student in the learning process and help him acclimate to the middle school environment (*id.*). The prior written notice indicated that the parent requested, and the CSE considered programs and/or services, that were more restrictive than its recommended program, including an out-of-district placement such as BOCES; however, district staff considered those placements too restrictive at the time because the initial program had not yet been implemented (*id.* at p. 2). The prior written notice also indicated that the parent requested that the IEP/IESP reflect that the student had dyscalculia, but the CSE chairperson explained that the student had not been diagnosed with dyscalculia, that the student had not received formal math instruction in a school setting in several years, and moreover, that the proposed IEP reflected the student had a math disability (*id.*). The district advised the parent that if they wished to enroll the student in the district middle school, they would first need to return a signed consent for services (Dist. Ex. 20). In addition, the district provided the parent with guidance on how to obtain the recommended IESP services for the student if they chose to continue the student at Fusion (Dist. Exs. 19 at p. 2; 20).¹⁰

The student remained at Fusion for the 2015-16 school year (Tr. pp. 711-12, 779-80; Dist. Exs. 6 at pp. 3-4; 7 at p. 2).¹¹

By email dated May 6, 2016 the parent noted her dissatisfaction with the district's evaluation of the student and requested an out-of-district neuropsychological evaluation (Dist. Ex. 21).

The student participated in a neurological evaluation over the course of three days in May and June 2016 (Dist. Ex. 23). The evaluation provided background information on the student that included academic, medical, mental, and social histories, as well as the results of previous evaluations (*id.* at pp. 1-6). The evaluation also included behavioral observations of the student during testing, assessment of the student's intellectual functioning, executive functioning, memory and learning, verbalities/language functioning, visual-spatial/visual-motor functioning, academic achievement, emotional and behavioral functioning, and adaptive functioning (*id.* at pp. 7-13).

¹⁰ In an email dated May 12, 2016 the district advised the parent that the district of location was responsible for creating the IESP and providing special education services to the student at Fusion (Dist. Ex. 22). The district advised the parent that if they were interested in pursuing an IESP they should contact the district of location by June 1st (*id.*).

¹¹ The CSE chairperson who attended the November 2015 and September 2016 CSE meetings testified that the student did not receive special education services pursuant to the IESP at Fusion because the parent did not sign a consent to initiate services (Tr. p. 64).

With respect to behavioral observations during testing, the evaluating neuropsychologist noted that although the student appeared physically tired, sluggish and disinterested in taking part in the assessment he was able to be encouraged to participate (Dist. Ex. 23 at p. 7). The neuropsychologist reported that the student was most responsive when he could participate on his own terms and she permitted him to do so "whenever possible within the restrictions provided by the standardized assessment procedures" (*id.*). The neuropsychologist shared that the student exhibited motor restlessness, was slow to start on tasks and tended to give up easily when uncertain, and did not take risks or persevere (*id.*). She reported that the student's endurance was weak and he was unable to complete the evaluation within the scheduled appointments, necessitating an additional appointment (*id.*).

According to the neuropsychologist, the student's general conceptual ability score on the Differential Ability Scales, Second Edition (DAS-II) was 86, which was consistent with previous assessments of the student's intellectual functioning in 2011 and 2014 (Dist. Ex. 23 at p. 8). The neuropsychologist reported that the student's verbal and visual-spatial abilities were relative strengths for him, but that his overall cognitive ability score was lowered by weak nonverbal and quantitative reasoning abilities (*id.* at pp. 8, 13). The neuropsychologist noted that the student's quick wit, wry sense of humor, and level of intelligence appeared to surpass his performance on standardized measures of cognitive functioning (*id.* at p. 8). The neuropsychologist commented that previous assessments put the student's working memory skills in the below average to average range and on this assessment she found the student's more complex forms of attention (alternating, divided, sustained) to be weak (*id.*). The neuropsychologist noted agreement between the student, his mother, and his tutor on behavior rating scales showing that the student exhibited a significant number of inattentive symptoms, such as failure to closely attend to details, difficulty sustaining attention, appearing to not listen when spoken to directly, and difficulty organizing work tasks, among others (*id.*). The student was easily distracted and avoided tasks which required sustained mental effort; however, there was no evidence of clinically significant hyperactivity or impulsivity among the raters (*id.*).

According to the neuropsychologist, measures of processing speed suggested that the student exhibited general difficulties with slowness, slow motor and verbal processing, and slow academic fluency (Dist. Ex. 23 at pp. 8-9). Notably, the student's ability to rapidly sequence letters was in the average range; however, when numbers were substituted his performance declined to the profoundly impaired range (*id.* at pp. 9, 17). The neuropsychologist reported that consistent with previous assessments, she found the student's executive functioning skills to be variable and that, overall, the student's performance was stronger on verbally-mediated tasks (*id.* at p. 9). The neuropsychologist found evidence that the student's executive functioning skills were weaker in functional settings than on objective assessments (*id.*). According to the neuropsychologist, the student, his mother, and his English teacher completed the Behavior Rating Inventory of Executive Functioning, Second Edition (BRIEF-2) and were in agreement that the student exhibited significant weaknesses in global executive functioning at home and in school, including difficulty organizing his materials, independently generating ideas, getting started on tasks, staying focused, self-monitoring his work, and completing tasks (*id.*). Based on rater responses, the neuropsychologist reported that the student's ability to modulate and control his emotional responses was considered adequate and represented an improvement over time (*id.*).

With respect to the student's memory and learning, the neuropsychologist found significant weaknesses in aspects of the student's memory functioning which correlated with the student's

tendency to learn and retain new information at a slow pace (Dist. Ex. 23 at p. 10). The neuropsychologist found that the student's verbal memory abilities were below average for remembering details of a narrative story in immediate and delayed conditions; the student admitted that he was not able to listen consistently and was "terrible with details and explanations" (id.). The student's performance was reportedly better on a list learning task where the information was repeated multiple times (id.). According to the neuropsychologist, the student's performance suggested that he benefitted from repetition and rehearsal and that he was able to retain information once it was successfully encoded (id.). The neuropsychologist also noted weaknesses in the student's visual memory, for example the student had difficulty immediately recognizing a single abstract shape among distractor items (id.). Overall, the neuropsychologist concluded that the student's weaknesses in memory and learning were likely due to attention, motivational, and executive functioning weaknesses (id.).

The neuropsychologist characterized the student's verbal abilities as a relative strength and reported that the student's visual-spatial abilities were stronger than his nonverbal reasoning abilities (Dist. Ex. 23 at p. 10). She described the student's handwriting as notable for its small size, poor legibility, and unusual letter formation (id. at p. 11).

As measured by the Wechsler Individual Achievement Test, Third Edition (WIAT-III), the student's basic reading and writing abilities were found to be in the average range, while his written composition skills were weak and his math skills significantly delayed (Dist. Ex. 23 at p. 11). The neuropsychologist judged the student's silent reading comprehension to be average (id.). She reported that the student's basic writing skills and mechanics were strong, while higher-level written expression was more challenging (id.). The student's spelling skills were described as average and the neuropsychologist reported that the student's essay composition was in the low range characterized by low word count and below average grammar and mechanics, as well as theme development and organization (id.).

Due to the student's long-standing math difficulties, "which ha[d] not been effectively remediated through years of special education instruction," the neuropsychologist administered the Feifer Assessment of Mathematics (FAM) to the student "to better understand the cognitive processes which underlie his difficulties with math" (Dist. Ex. 23 at p. 11). She reported that the student's "overall score was significantly below average (1st percentile) and characterized by weaknesses across the procedural, verbal, and semantic aspects of math abilities"(id.). With respect to the procedural aspects of mathematics, the neuropsychologist noted weaknesses in the student's ability to count, order, and sequence numbers and mathematical procedures (id.). She identified weaknesses in the student's ability to provide the missing answer in a sequence and reported that the student was unable to tell time on an analog clock or measure (id.). With respect to the verbal aspects of mathematics, the neuropsychologist reported that the student demonstrated weaknesses in the ability to use language-based procedures to assist in arithmetic fact retrieval skills (id. at p. 12). She indicated that the student's understanding of linguistic math concepts was extremely weak and noted that the student struggled to understand response choices and often indicated that he did not understand the meaning of the terms (id.). According to the neuropsychologist, the student's math fluency was weak for simple addition, subtraction, multiplication and division and the student was cognizant that it took him longer than it should to perform basic math calculations (id.). The student's knowledge of multiplication facts was minimal and he was unable to solve division problems (id.). With respect to the semantic aspects of mathematics, the neuropsychologist reported that the student's skills were also significantly

below average and cited the student's difficulty choosing the correct equation to answer word problems, estimating the quantity of pictured items and providing the missing number in mathematical equations, among other things (id.). The neuropsychologist also noted some strengths in the student's performance, specifically in his numeric working memory, rapid number naming ability, and spatial memory for identifying an abstract shape (id. at pp. 11-12).

Based on the results of the FAM, the neuropsychologist concluded that the student was "able to initially register mathematical information through his senses as evidenced by intact symbolic working memory, naming speed, and spatial working memory, but that he ha[d] difficulty with the higher-order integration of information and quantitative knowledge and reasoning" (Dist. Ex. 23 at p. 12).

Turning to the student's emotional and behavioral functioning, the neuropsychologist found based on the completed behavior rating scales, that the student was experiencing significant emotional distress, but that he was not exhibiting behavioral or conduct problems (Dist. Ex. 23 at p. 12). She noted that the student was experiencing anxiety, mild obsessive/compulsive tendencies, and depression (id.). She further noted that the student felt "inadequate and different from his peers, without the ability to change his circumstances" (id.). The student's mother reported some weaknesses in the student's adaptive functioning related to leadership communication and communication skills; however, the student's English teacher indicated that the student's adaptive skills were in the average range (id. at p. 13).

The neuropsychologist offered the following diagnoses of the student: persistent depressive disorder; generalized anxiety disorder; specific learning disorder with impairment in mathematics, severe (number sense, automaticity, fluency, calculation, and reasoning); developmental coordination disorder; and attention deficit/hyperactivity disorder, severe (predominantly inattentive presentation) (Dist. Ex. 23 at p. 14). Notably, with respect to mathematics, the neuropsychologist stated that the evaluation provided "further evidence of a profound developmental dyscalculia which has proven difficult to remediate because it impacts almost all aspects of the higher order cognitive processes which underlie mathematical thinking" (id. at pp. 13-14). Among numerous other things, the neuropsychologist recommended that the student continue with his academic program at Fusion and that he be provided with intensive remedial math instruction, including individualized instruction that is structured and presented repeatedly (id. at p. 14). She also suggested that behavioral reinforcement strategies would be necessary to improve the student's level of emotional comfort and compliance with completing math activities (id.).

By letter dated August 17, 2016, the parent advised the district that the independent neuropsychological evaluation had been completed and that the district should receive the report shortly (Dist. Ex. 24). The parent requested a CSE meeting to review the evaluation and discuss the "next educational steps" for the student (id.).

A CSE convened on September 29, 2016 (Dist. Ex. 25 at p. 1). The neuropsychologist's diagnoses were reflected on the IEP summary sheet, including the diagnosis of dyscalculia, which was also reflected on the student's IEP (id. at pp. 1, 4). In addition, the IEP included the standardized testing results from the June 2016 neuropsychological evaluation (compare Dist. Ex. 23, with Dist. Ex. 25 at pp. 2-3). While the present levels of performance contained much of the same information that was included in the January 2016 IEP; the results of the neuropsychologist's

testing were woven into the narrative description of the student (compare Dist. Ex. 17 at pp. 3-4, with Dist. Ex. 25 at pp. 4-6). The physical development section of the IEP was modified to reflect the student's deficits in fine motor speed and coordination, as well as his handwriting irregularities (Dist. Ex. 25 at p. 6). The September 2016 IEP included the same goals as the November 2015 and January 2016 IEPs, with the addition of study goals that targeted the student's ability to maintain attention during class and complete assignments on time and transition with minimal assistance; and math goals that targeted the student's ability to correctly identify the operation needed to solve a problem and solving division problems with a single-digit divisor (id. at pp. 7-8).

For the 2016-17 school year, the September 2016 CSE recommended that the student be placed in a 15:1+1 special class for math, receive 5:1 resource room services five days per week and receive direct consultant teacher services three times per six-day cycle in English, science, and social studies (Dist. Ex. 25 at p. 9). The CSE also recommended that the student receive individual counseling one time per week (id.). The CSE also recommended an occupational therapy evaluation to assess the student's fine motor needs (id. at p.6). The recommended supplementary aids and services, program modifications, and accommodations were revised to include access to a computer for writing tasks and refocusing and redirection to keep on task (id. at pp. 9). In addition, access to a computer was added to the student's testing accommodations (id. at p. 10).

Two prior written notices were generated after the September 2016 CSE meeting (Dist. Exs. 26-28). The first memorialized the committee's review of the neuropsychological evaluation report and the resultant changes to the student's IEP (Dist. Exs. 26; 27).¹² With respect to other options considered and why they were rejected, the prior written notice indicated that the parent's stated intent was for the student to attend Fusion at district expense (id.). The prior written notice indicated that this request was denied and noted that Fusion was not an approved special education school in New York State (id. at p. 2). According to the prior written notice, the CSE chairperson discussed the implementation of differentiated instruction and compensatory learning strategies to provide the student with adequate access to instruction in the least restrictive setting (id.). The prior written notice indicated that the parent disagreed with the district's proposed program for the student for the 2016-17 school year (id.). The second prior written notice detailed the CSE's recommendation for an occupational therapy evaluation (Dist. Ex. 28).

Turning to her arguments on appeal, the parent asserts that the district failed to tailor the student's program to address his math needs and dyscalculia. The parent testified that during the CSE meeting district staff told her they believed they had the resources they felt could be appropriate for the student, but they did not know whether they could meet the student's needs (Tr. p. 747). After reviewing her notes from the meeting, the parent further testified that during the CSE meeting, the district's transition coordinator told her that she did not know if the recommended program was the right setting for the student and that they would have to try it to find out (Tr. pp. 749-51). While the parent's testimony that she knew the student, and "knew [the recommended program] would fail for him because [she] knew [him]" is influential, as discussed above, the CSEs reviewed substantial evaluative information regarding the student, including the June 2016 independent neuropsychological evaluation, met multiple times to address the parent's

¹² District Exhibits 26 and 27 are copies of the same prior written notice mailed to different addresses (Dist. Exs. 26; 27).

concerns, and made recommendations based on the available information which, as discussed below, were reasonably calculated to enable the student to make progress appropriate in light of his circumstances (see Endrew F., 137 S. Ct. at 999 [crafting an appropriate program reasonably calculated to enable a student to make progress requires a prospective judgment informed by the expertise of school officials combined with the input of the student's parents or guardians]).

Pertinent to the parent's allegation that the district did not have sufficient information regarding the student, the January 2016 prior written notice noted that the student had not received formal math instruction in a school setting in several years (Dist. Ex. 19 at p. 2). The hearing record also shows that the student has attended a number of different schools and received home schooling and special education services intermittently since kindergarten (Dist. Ex. 8; 23 at pp. 3-6). However, the student appears to have received math tutoring during the 2014-15 and 2015-16 school years (Tr. pp. 633-35; Parent Exs. 19-20; Dist. Ex. 19 at p. 2). The student then began receiving instruction in math at Fusion in January 2016 (Tr. pp. 643-44; Parent Ex. 23 at p. 3, 4). The district director of special education testified that it was important to note as part of the January 2016 prior written notice that the student had not received formal math instruction in a school setting in several years (Tr. pp. 427-28). She explained that "part of the charge of the CSE is to consider any lack of adequate instruction" and stated that the CSE did not know what kind of instruction the student had previously received in math (Tr. p. 428). Understandably, one of the difficulties in developing a program to address the student's needs was that he had not been receiving consistent instruction, and reports from the student's math tutor do not appear to have been available to the CSE.¹³ Nevertheless, the various CSEs did have a wealth of evaluative data.

The hearing record shows that the student has historically struggled with math (Parent Ex. 31 at pp. 7-8; Dist. Exs. 9 at p. 2; 23 at p. 21). Notably, standardized testing administered since 2011 has consistently shown that the majority of the student's math skills are below the 2nd percentile and the student's evaluators have consistently identified him as having a learning disability in math or needing support in this area (Parent Ex. 31 at pp. 1, 7-8, 12; Dist. Exs. 8 at p. 8; 23 at p. 14).

Although the parent asserts that dyscalculia is a neurological disorder and suggests that the interventions required to address dyscalculia are different than those used to address a learning disability, the hearing record does not support their claim.

While the parent challenges the district's failure to include the diagnosis of dyscalculia on the student's earlier IEPs, any such violation was rectified by the inclusion of the diagnosis on the September 2016 IEP (Dist. Ex. 25 at pp. 1, 4). Additionally, although the body of the neuropsychological evaluation report describes the student's math needs and abilities in detail, and uses the phrase "profound developmental dyscalculia," the actual documented diagnosis the student received was specific learning disability with impairments in math rather than a diagnosis of dyscalculia (Dist. Ex. 23 at pp. 13-14). Further, the United States Department of Education has explained in a policy guidance letter that there is nothing in the IDEA that prohibits or requires the

¹³ The hearing record includes an end of the year assessment from the student's math tutor for the 2014-15 school year (seventh grade) as well as an October 2015 report; however, there is no indication that either of them were provided to the district for review at any of the CSE meetings (Parent Exs. 19; 20).

use of the terms dyslexia, dyscalculia, or dysgraphia in IDEA evaluations, eligibility determinations, or IEP documents (Dear Colleague, 66 IDELR 188 [OSEP 2015]).

Turning to the substantive part of the parent's claim, the strategies recommended by the independent neuropsychologist to address the student's math disability are consistent with the strategies available to address the needs of a student in a special class setting. The strategies recommended by the neuropsychologist include providing the student with intensive remedial math instruction that is "individualized," "structured," and "presented repeatedly" (Dist. Ex. 23 at p. 14). The neuropsychologist recommended the following math strategies: use of manipulatives, the use of spatial strategies such as forward and backward number sequencing to encode and retrieve overlearned math facts, building and instilling number sense, developing pattern recognition skills and teaching math within a meaningful context (id.). She also recommended the following modifications: access to electronic math aids, a digital math dictionary and a calculator; brief, modified assignments; constant 1:1 support while performing math tasks; copies of math class notes; daily homework that is related to that day's class instruction; simplified visual presentation of math problems; use of language cues to capitalize on relatively stronger language than math skills; practical applications of math to maximize relevance; multisensory instruction methods; and repetition, rehearsal and scaffolding (id. at pp. 14-15).

The director of special education testified that the purpose of a special education class was to differentiate instruction (Tr. pp. 430-31). She opined that students similar to the student in the instant case had been appropriately educated in math in the special class program (Dist. Ex. 431). She did not believe that there was anything unique about the student's math deficit (Tr. p. 432). Although the director of special education agreed that dyscalculia was a neurological condition, she did not agree that the interventions used to address dyscalculia would be different than those used to address a learning disability (Tr. pp. 440-42).

As noted above, to address the student's math deficits, the September 2016 CSE recommended that he be placed in a 15:1+1 special class for math instruction and also recommended daily resource room services to address the student's academic weaknesses (Dist. Ex. 25 at p. 9). State regulation provides that a 15:1 special class placement is intended to address the needs of students "whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]).¹⁴

¹⁴ The evidence in the hearing record does not clarify whether the CSE, in recommending a 15:1+1 special class for the student for math, believed the student's management needs interfered with the instructional process to the extent an additional adult was needed in the classroom, or whether the additional staff was added by the district in order to enhance the learning experience for all of the students within the class. The significance of that distinction is found in State regulation, which provides that "[t]he maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist with the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]). However, according to State regulation, a 15:1 special class placement derives from the provision which states that "[t]he maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting shall not exceed 15 students, or 12 students in a State-operated or State-supported school" (8 NYCRR 200.6[h][4]). Nevertheless, as the parties' arguments center on the appropriateness of the supports to address the student's needs, the decision will only address the substantive question of whether a 15:1+1 special class for math viewed as a whole with the supports available in the class and throughout the rest of the IEP, was reasonably calculated to enable the student to make progress appropriate in light of his circumstances (Andrew F., 137 S. Ct. 988, 1002).

The CSE chairperson, from the November 2015 and September 2016 CSE meetings, testified that the program and placement recommendations made during the November 2015 CSE meeting were based upon the student's learning profile, parent input, the student's strengths and weaknesses, and consideration of the LRE that the student could be appropriately placed in (Tr. p. 46, 53-55). The CSE chairperson testified that there was nothing within the student's learning profile that precluded him from receiving an education within the district (Tr. pp. 56-57). The school psychologist testified that the student had a profile that was aligned with the recommendation for a special class in math and that his profile was like other students in the areas of math who have been successful in a special class for math (Tr. p. 321; see Tr. pp. 54-55). The district director of special education testified that she believed the recommendations made by the January 2016 CSE were appropriate because of the nature or level of support provided within the special education program and based on her knowledge of students who had gone through the program (Tr. p. 429).

With respect to the September 28, 2016 CSE meeting, the CSE chairperson testified that the CSE reviewed the results of the neuropsychological evaluation, which suggested the student's cognitive abilities were in the "low end of the average range" and revealed deficits in math, written expression, fine motor skills, weak attending skills, and executive functioning difficulties (Tr. pp. 75-76). The CSE chairperson opined that in her recommendations, the neuropsychologist was looking for intensive remedial math instruction and the district's recommendation for placement in a self-contained math setting provided the opportunity for differentiated instruction to "teach to the individual's needs" (Tr. p. 79). The neurological report recommended the student remain in his current placement at Fusion based upon concerns that the student would not be able to function in a general education setting given his cognitive skills and emotional functioning, noting that it was unlikely that the student would be able to function in a general education environment (Dist. Ex. 23 at p. 14). The assistant director of Fusion, who did not attend any of the CSE meetings, testified that she would have been concerned with placing the student in a math class with 15 students because the student had difficulty expressing himself, and opined that the student could not learn in a class of 15 students (Tr. pp. 607-08, 663). However, the student's cognitive needs align with a special class setting and the teaching strategies recommended by the neuropsychologist, including the use of manipulatives, access to a calculator and electronic math aids, and brief, modified assignments, among others, could be implemented by a teacher in a 15:1+1 special class for math, within a public school (see Dist. Ex. 23 at pp. 14-15).

In addition, the recommendation of resource room provided more opportunities for individualized and one-to-one instruction to assist the student with his math and executive function needs (Dist. Exs. 13; 17; 25). The CSE chairperson, who attended the November 2015 and September 2016 CSE meetings, testified that the resource room was "another small environment" where the teacher could work on executive functioning, preteaching of math, reteaching of math strategies, and generally, remediating the student's areas of deficits (Tr. p. 49).

The parent expressed concern that the student would not be able to make progress in a "grade level" math course, and she testified that in the district program the student would be taught using an 8th grade curriculum (Tr. pp. 793-97, 802). The parent confirmed that her "entire disagreement" with the math recommendation was based on her understanding that the student was going to be taught at an eighth-grade level (Tr. p. 802). However, a review of the math goals on the September 2016 IEP reveals that the skills to be addressed in the student's special class for math align with the specific deficits and current abilities the student possessed at the time, as shown in the evaluations (compare Dist. Ex. 25 at p. 7, with Dist. Exs. 8 at pp.7-8; 9 at p. 3; 23 at p. 11-

12). The evaluations collectively reveal that the student struggled with math concepts and word problems, could calculate single digit addition, subtraction and multiplication problems but needed to work on single digit division, was beginning to master operations in single digit problems, and preferred the use of a calculator (id.). The IEP math goals, that targeted the student's ability to identify the correct operation needed to solve a problem; solve division problems with a single divisor; solve two-step word problems using all four operations and use all four operations with whole numbers to solve problems and the accommodation of allowing the student to use a calculator as needed, were specifically tailored to both the needs and concurrent abilities in math the student possessed.¹⁵

Regarding the parent's contention that the consultant teacher pushing into a student's regular education class would exacerbate the student's self-esteem issues, the evidence in the hearing record does not support this. With respect to the student's social development, the student demonstrated clinically significant needs in the areas of hyperactivity, anxiety, somatization, and internalizing problems (Dist. Exs. 17 at p. 4; 25 at pp. 5-6). The student often acted without thinking, had poor self-control, and interrupted others—and he also had anxiety, oral sensitivities, and extreme sleeping difficulties (id.). The IEPs indicated the student was easy to talk to and very respectful with adults and that he worried when he upset others and was exceptionally intuitive (Dist. Exs. 17 at p. 4; 25 at p. 5). The IEPs also indicated the student needed to relate appropriately to peers and adults within the classroom and increase his ability to cope frustration, and that the student needed to decrease his anxiety (id.). The description of the student as contained in the IEP does not indicate the student's self-esteem would be affected by a consultant teacher providing instruction. The CSE also recommended counseling to address the student's social/emotional needs (see Dist. Exs. 23 at p. 1; 25 at p. 1). Moreover, the student's deficits in social/emotional functioning and difficulties with self-esteem are identified in the hearing record but there is a lack of evidence showing that the provision of consultant teacher services would negatively affect the student's learning experience.

The hearing record reflects that the proposed program was individualized to address the student's math needs and provided a small structured setting and sufficient support within a special class. The parent has expressed sympathetic concerns about moving the student from the 1:1 instructional setting he was provided at Fusion and remediating the student's complex and severe math deficits in the district. Uncertainties regarding the consistency and effectiveness of the instruction the student had received in math over prior years made the identification of an appropriate program going forward a difficult process and a challenging task for the district. However, by taking into account both the impact of the student's dyscalculia on his present performance and the lack of consistent special education intervention provided to the student over multiple years, the CSE's recommendation for placement in a 15:1+1 special class with daily

¹⁵ Although not available at the CSE meetings, the 2014-15 end of year assessment completed by the student's math tutor indicated the goals were consistent with the student's needs (compare Parent Ex. 19 at pp. 1-2, with Dist. Ex. 25 at p. 7). The assessment indicated the student had a good grasp of when to use addition and subtraction and was successful using a calculator for some numbers; the student needed to work on reading large numbers, rounding and estimating; the student was successful using a calculator for most problems but sometimes confused multiplication with other operations; the student needed to work on estimation, exponents, and order of operations; the student was good at reading many different types of charts and graphs and did very well using a number line; and the student worked on the language for algebraic expressions and equations, but not on solving algebraic problems (Parent Ex. 19 at pp. 1-2).

resource room services represented a reasonable attempt by the district, based upon all available data including comprehensive and largely consistent evaluative information gleaned over the course of several years, to address the student's academic and social emotional needs with a program that was reasonably calculated to provide him with educational benefit. In addition, based on the student's needs the recommendations for direct consultant teacher services and counseling were also appropriate. In light of the above, I find that the IHO correctly determined that the district offered the student a FAPE for the 2016-17 school year.

VII. Conclusion

Having found that the IHO correctly determined that the district offered the student a FAPE for the 2016-17 school year, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 29, 2017**

**CAROL H. HAUGE
STATE REVIEW OFFICER**