



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 18-083

**Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Sayville Union Free School District**

### **Appearances:**

Gina DeCrescenzo, PC, attorneys for petitioners, by Gina M. DeCrescenzo, Esq.

Law Offices of Guercio & Guercio, LLP, attorneys for respondent, by Gary L. Steffanetta, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at The Kildonan School (Kildonan) for the 2015-16 and 2016-17 school years. Respondent (the district) cross-appeals to the extent that the IHO determined that it failed to offer the student an appropriate mathematics program. The appeal must be dismissed. 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 Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

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

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

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

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

The student in this case was initially referred for a neuropsychological evaluation by her pediatrician due to concerns about "possible learning problems" (Parent Ex. A at p. 1). At the time of the neuropsychological evaluation in October and November 2010 (November 2010 neuropsychological evaluation), the student was attending third grade (2010-11 school year) in a

general education setting at a district elementary school (*id.* at pp. 1-2; *see* Parent Ex. E at p. 2).<sup>1</sup> According to the evidence in the hearing record, the district began providing the student with academic intervention services (AIS) for reading during third grade (*see* Parent Exs. A at p. 2; E at p. 2). Near the conclusion of third grade in May 2011, the parents referred the student to the CSE and completed a social history (*see generally* Parent Ex. C). In June 2011, the district conducted a psychological evaluation, an educational evaluation, and a speech-language evaluation of the student (*see* Parent Exs. E at p. 2; G at p. 3).<sup>2, 3</sup> At that time, the CSE declined to find the student eligible to receive special education and related services (*see* Parent Ex. E at p. 2).

During fourth grade (2011-12 school year), the district continued to provide the student with AIS in reading and initiated the provision of AIS to the student for mathematics (*see* Parent Exs. A at p. 2; E at p. 2). In fourth grade, the student received grades characterized as "all working towards or meeting standards" with "[w]eaknesses" noted in "spelling, reading fluency, reading comprehension, and writing" (Parent Ex. E at p. 2). Numerically, the student's grades ranged from 80s to 90s in social studies and science, but fell into the 70s in mathematics (*id.*). Also, the student's fourth grade teachers reported issues with "organization, checking her work, staying on task, and independently implementing skills she had been taught and seemed to have learned," and further reported that the student demonstrated "inconsistent progress" in the second and third trimesters (*id.*). Near the conclusion of fourth grade, "it was decided that [the student] would receive resource room [four] days a week" while awaiting the results of an "independent neuropsychological [October 2012 neuropsychological evaluation] and reading evaluations [October 2012 reading evaluation]" (*id.* at pp. 1-2; *see generally* Parent Exs. E-F).

According to the October 2012 neuropsychological evaluation report, the student demonstrated "significant strengths" in several areas, as well as "three primary cognitive

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<sup>1</sup> According to the November 2010 neuropsychological evaluation report, the student's testing results were "most consistent" with a diagnosis of a "Reading Disorder (Dyslexia)" (Parent Ex. A t p. 6). In addition, the evaluator noted the need to rule out additional diagnoses of "Disorder of Written Expression (Dysgraphia)" and "Attention Deficit Hyperactivity Disorder [ADHD], Inattentive Type" (*id.*). The evaluator further noted that while the "diagnosis of Reading Disorder may [have] seem[ed] overwrought" in light of the fact that "most" of the student's testing results from an administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III or "WIAT-3") fell within "normal limits," the combination of her performance on certain subtests from two additional assessments "support[ed] the presence of significant problems in reading" (*id.*; *see generally* Parent Ex. B). To address the student's needs at that time, the evaluator recommended "[c]ontinued daily support in reading, with a combination of multisensory and guided oral reading approaches, both at school and at home" (Parent Ex. A at p. 7). The evaluator identified "Wilson and Lindamood Bell's Visualizing Verbalizing program" as two "[u]seful approaches" (*id.*). The evaluator also recommended that the student assist a "younger child to read," practice writing on a daily basis, receive continued monitoring for increasing difficulties in the areas of "attention and executive functions," and receive various accommodations (i.e., preferential seating in the classroom, extended time for tests and quizzes, a quiet place for testing) (*id.*).

<sup>2</sup> Although the district's evaluations from June 2011 were not submitted into the hearing record as evidence, the testing results were reported on the student's IEPs (*see, e.g.* Parent Exs. G at p. 3; H at p. 3; Dist. Ex. 3 at p. 3).

<sup>3</sup> The student reportedly received "private tutoring" two times per week at the "Sylvan Learning Center" from second grade (2009-10 school year) through fall of fourth grade (2011-12 school year), as well as "private speech/language services" during spring of fourth grade (March 2012 through June 2012) (Parent Ex. E at p. 2).

weaknesses, [in the areas of] rapid naming/lexical access, attention, and organization" (Parent Ex. E at p. 8). Academically, the student demonstrated "low average phonetic decoding skills and poor oral reading accuracy" (id. at p. 9). As a result, the evaluator found that the student met the criteria for a diagnosis of "Reading Disorder," but at that time, she did not meet the criteria for disorder diagnoses related to her weaknesses in mathematics or writing (id.). The evaluation report included several recommendations, including a notation that the student's "current placement with the additional support of resource room seem[ed] appropriate" (id.). With regard to reading, the evaluator recommended reviewing and practicing the student's "knowledge of phonetic decoding rules and principals . . . until they bec[a]me automatic" (id.). The evaluator explained that "[a]utomatic phonetic decoding and word recognition w[ould] improve [the student's] fluency and w[ould] free up resources which w[ould] then be available for processing text for meaning" (id.). According to the evaluator, the student required "more repetition than [was] typical" for her lexical access and rapid naming skills to "become automatic" (id. at pp. 9-10).

Next, the evaluator noted that while "less research on fluency interventions" existed, "studies suggest[ed] that procedures that le[d] to repeated exposures to words facilitate[d] rapid processing and consequently reading fluency" (Parent Ex. E at p. 10). As such, the evaluator identified "[t]wo fluency programs with a developing research base" to address the student's needs: "Reading Naturally" and "RAVE-O" (id.). The evaluator further recommended that the student "read aloud to an adult on a regular basis," that she select books at her "comprehension level but above her reading level" for exposure to age-appropriate text, and to read to the student to maintain her interest in reading (id.). To target the student's spelling and writing needs, the evaluator recommended teaching her keyboarding skills and for the student to "type writing assignments using a program with spell check" (id.).

To improve the student's fluency needs in the area of mathematics, the evaluator recommended drilling the student on mathematics facts, as well as using a program identified as "FASTT math by Scholastic" as a way to "supplement flash card practice" (Parent Ex. E at pp. 10-11; see also Parent Ex. E at p. 7 [noting that while the student exhibited "overall high average math skills," she also exhibited difficulty with "computational skills" and "fluency with math facts"]). Finally, to address the parents' concern that the student spent an "excessive amount of time on homework," the evaluator initially noted that the "excessive time reflect[ed] both an increase in the time necessary to complete the tasks, as well as poor time management" (Parent Ex. E at p. 11). The evaluator recommended teaching the student time management strategies and to provide her with a reward for "completing tasks efficiently" (id.). The evaluation report also included "Medical Recommendations" (pertaining to the student's "significant change in attention and function" during testing, as well as her "sensitivity to fatigue") and "Additional Recommendations" (addressing the student's "tendency to engage in negative self-talk, especially in math, an area of strength for her") (id. at pp. 11-12).

With regard to the October 2012 reading evaluation, the evaluator indicated that the student's "particular profile ha[d] proven difficult to specify," due, in part, because the student did not "present with a clear case of phonological weakness, which would typically [have] be[en] an identifying mark of dyslexia" (Parent Ex. F at p. 5). However, the evaluator further noted that the student presented "as an individual whose reading abilities may [have] be[en] compromised," and who demonstrated "significantly troublesome fluency" and "significantly weak encoding (spelling) skills" (id.). Given the student's difficulties, the evaluator indicated that the student

required "direct and explicit intervention" that offered a "balance between developing phonetic accuracy and automaticity while strengthening cognition and comprehension" (id. at p. 6). Noting that "it would be difficult to clearly identify [the student] as dyslexic" because she "demonstrated variable strengths in key areas (word recognition, phonology, vocabulary)," the evaluator nonetheless found it would be "appropriate to conclude that she ha[d] difficulty with accurate and/or fluent word recognition and spelling that ha[d] resulted in variably weak, or inconsistent comprehension" (id.). Therefore, the evaluator recommended targeting the student's "fluency while paying careful attention to her syntactic, semantic and expressive skills" (id.). Thereafter, the evaluator identified several programs to improve the student's areas of need, including "Great Leaps, Neuhaus' Reading Fluency and High Noon Reading Fluency," as well as "RAVE-O" and Lindamood Bell's "Seeing Stars program" (to address automaticity and word retrieval difficulties) (id.). The evaluation report also included additional recommendations for monitoring the student's work, curriculum based measures to assess the student's progress "(i.e. AIMSweb, DIBELS, et.al.)," providing her with exposure to "rich literature" through "recorded books and/or on-line literature" and daily or weekly practice in reading, and finally, identifying several programs to address the student's needs in writing (id. at pp. 6-8).

During fifth grade (2012-13 school year) in November 2012, a CSE convened to conduct an initial eligibility determination meeting (see Parent Ex. G at p. 1). The November 2012 CSE relied, in part, on the testing results obtained from the October 2012 neuropsychological evaluation and the October 2012 reading evaluation to create the student's November 2012 IEP (see Parent Ex. G at p. 2; see generally Parent Exs. E-F). Finding the student eligible to receive special education and related services as a student with a learning disability, the November 2012 CSE recommended three 40-minute sessions per week of specialized reading instruction in a small group to address the student's needs in the areas of reading fluency and accuracy (id. at pp. 1, 3, 6).<sup>4</sup> In addition, the November 2012 CSE recommended supports for school personnel on the student's IEP that were described as "Reading Consultant" to assist staff (up to 10 hours per year) in determining the "most effective instructional techniques and software" to assist the student with "fluency and comprehension" (id. at p. 7).<sup>5</sup> For the 2013-14 school year (sixth grade), a June 2013 CSE modified the student's IEP and recommended five 42-minute sessions per week of resource room services in a small group to address her needs (compare Parent Ex. H at pp. 6-7, with Parent Ex. G at pp. 6-7). The June 2013 CSE continued to recommend the "Reading Consultant" (up to 10 hours per year), but to assist staff in determining the "most effective instructional techniques and software" to assist the student with "reading and written expression skills" (compare Parent Ex. H at p. 7, with Parent Ex. G at p. 7).

A CSE next convened on May 8, 2014 to conduct the student's annual review and to develop an IEP for the 2014-15 school year (seventh grade) (see Dist. Ex. 3 at p. 1). Remaining eligible to receive special education and related services as a student with a learning disability, the May 2014 CSE recommended five 42-minute sessions per week of resource room services in a

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<sup>4</sup> The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute (see 34 CFR 300.8[a][10]; 8 NYCRR 200.1[zz][6]).

<sup>5</sup> Its unclear if the CSE was attempting to describe indirect consultant teacher services on the student's IEP or a different type of reading consultant to support staff working with the student (see 8 NYCRR 200.1[m][2]).

small group to address the student's needs (*id.* at pp. 1, 5-6). Given the student's progress in reading, the May 2014 CSE discontinued the recommendation for the Reading Consultant as a support for school personnel (*compare* Dist. Ex. 3 at pp. 3-4, 6, *with* Parent Ex. G at p. 7, *and* Parent Ex. H at p. 7; *see also* Dist. Exs. 29 at p. 1; 47 at pp. 1-2; 83 at pp. 1-3; *see generally* Dist. Exs. 119; 128).<sup>6</sup>

In mid-September 2014 during the 2014-15 school year, the parents sent an email to the district resource room teacher who provided services to the student in seventh grade (*see* Parent Ex. J at p. 2; *compare* Parent Ex. J at p. 2, *with* Tr. pp. 1066-67). The parents sought information about the "reading [and] writing programs" to be used with the student during the school year, as well as information about upcoming reading assessments to be administered to the student (Parent Ex. J at p. 2). The district resource room teacher responded to the parents via email on the same day, and she explained the testing to be conducted and how she anticipated working with the student on her annual goals during resource room (*id.* at pp. 1-2; *see* Dist. Ex. 3 at pp. 5-6). Specifically, the district resource room teacher advised that her work with the student would focus on "reading comprehension and written expression" (Parent Ex. J at p. 2; *see* Dist. Ex. 3 at p. 5-6). She further explained that the upcoming reading assessment would generate a "reading level" for the student, which she would receive and then use to "find stories on [the student's] level that incorporate[d] reading comprehension, inferencing and higher level thinking questions" (Parent Ex. J. at p. 2). The district resource room teacher indicated that, similar to the previous school year with the student, she also used "Action Magazine"—which "targeted middle school students"—to find stories that incorporated "vocabulary, reading comprehension and writing using text based evidence" (*id.*). To further address the student's "reading and writing goals on her IEP," the district resource room teacher pointed out that she used a "multifaceted approach to reading based on common core standards" and frequently communicated with the student's English teacher about "assignments, tests, quizzes, projects and any student concerns" (*id.* at p. 1; *see* Dist. Ex. 3 at pp. 5-6). In addition, she continued to use some of the same materials she had used with the student the previous school year, which the reading consultant provided to her (Parent Ex. J at p. 2).

Consistent with the district resource room teacher's email, the student underwent testing—through "Reading Plus"—on September 23, 2014 to assess her "Proficiency Index (Capacity & Efficiency)," "Comprehension Level," "Vocabulary Level," and "Reading Rate (w[ords] p[er] m[inute])" (*compare* Parent Ex. J at pp. 1-2, *with* Dist. Ex. 129).<sup>7</sup> In addition, on October 14, 2014, the district administered a "Scholastic Reading Inventory" assessment (SRI assessment) to the student and derived a "Lexile" score of 757—which, as a "Performance Standard," was

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<sup>6</sup> In a "Student Consultation Report" dated March 28, 2014, the reading consultant described the student's progress during the 2013-14 school year (Dist. Ex. 47 at pp. 1-2). The reading consultant noted that the student made "nice progress in her reading fluency, comprehension and written expression" (*id.* at p. 2). Based upon her "AIMSweb benchmark scores in fall and winter" (percentile ranks), the student's "oral reading fluency and reading comprehension" fell within the "average range in relation to her peers" (*id.*; *see generally* Dist. Ex. 83). At that time, the student also demonstrated "at least 80 [percent] accuracy in answering higher-level comprehension questions," and she continued to improve in the "revision and editing phase of the writing process with teacher support" (Dist. Ex. 47 at p. 2).

<sup>7</sup> The student had previously been assessed with the same test on June 13, 2014 (*compare* Dist. Ex. 128, *with* Dist. Ex. 129).

characterized as "Below Basic" and equated to a percentile rank of 22 in relation to "Normative Data" (Dist. Ex. 69 at p. 1). In a letter to the parents dated October 14, 2014, the district reading teacher indicated the student would be using "SRI College & Career"—a "classroom-based assessment designed to evaluate students' reading ability, monitor their reading progress, and match students to books at their reading level"—during the school year (Dist. Ex. 78 at p. 1; compare Dist. Ex. 78 at p. 1, with Tr. pp. 336-38, 341-42). The letter described how the student's SRI assessments would be used and included suggestions to help support the student at home (see Dist. Ex. 78 at p. 1). According to the letter, the student's "Grade 7 End-of-Year Proficiency Target Range" fell within the band of Lexile scores between "970-1120" (id.).

In a letter dated October 15, 2014, the district administrator of special education (administrator) responded to the parents' email, dated October 15, 2014, seeking further information about the student's Lexile score and copies of the student's testing from sixth grade (see Dist. Ex. 106; see also Dist. Ex. 95 at pp. 2-3). In the letter, the administrator explained the student's SRI assessment and Lexile score—a "norm referenced" score—to the parents and enclosed copies of the student's "SRI reports" (Dist. Ex. 106). In a follow-up email to the administrator dated October 30, 2014, the parents indicated that they had not yet received the information sought in their previous email, dated October 15, 2014, and included a copy of that email as an attachment (see Dist. Ex. 95 at p. 2-3). The administrator responded to the parents and asked if she could contact the student's mother via telephone later that day (id. at pp. 1-2). In addition, the administrator indicated to the student's mother that she had left the parents a "message along with the letter [she] sent" and she wished to "go through each piece of [their] request so [she] c[ould] best assist [them]" (id. at p. 1). The parents and administrator continued to communicate through the next day, and in a letter dated October 31, 2014, the administrator enclosed copies of several documents—including a "Consent for Additional Assessment"—as a follow-up to the conversation she had with the parents (id.; see Dist. Ex. 107; see also Dist. Exs. 30; 138).<sup>8</sup>

Shortly thereafter in a "Prior Written Notice" to the parents dated November 4, 2014, the district proposed amending the student's IEP without a meeting to include a recommendation for specialized reading instruction in a 12:1+1 special class (5 times per 10-day cycle) (Dist. Ex. 31 at p. 1; see Dist. Exs. 126-27).<sup>9</sup> On November 10, 2014, the district reading teacher discussed the "possible use of Read 180 to remediate [the student's] reading comprehension [and] fluency disabilities" with the parents (Dist. Ex. 96). In an email from the parents to the reading teacher memorializing that discussion, the parents questioned whether the "Read 180" program would

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<sup>8</sup> The parents did not return the "Consent for Additional Assessment" (see Tr. pp. 273-74; Dist. Exs. 30; 32; 138). At the impartial hearing, the administrator testified that the district sent the request to evaluate the student in October 2014 to assess "basic academic subject areas, specifically reading, mathematics and writing [and] to assess the student's overall achievement and functional performance" (Tr. p. 273). She also testified that the parents' concerns prompted the district to seek additional information about the student in order to "best meet the student's needs" (Tr. p. 274). Given the student's progress in reading as reported at the May 2014 CSE meeting, the administrator testified that the district "moved forward quickly" after the parents contacted them with concerns to conduct the "reading inventory" and to then recommend a "reading program every other day"—as well as seeking "updated evaluations" in order to continue to "make decisions" for the student (Tr. pp. 274-75).

<sup>9</sup> The parents did not return the form allowing the district to amend the student's IEP without a meeting to add specialized reading instruction (see Tr. pp. 147, 298-99; Dist. Ex. 126).

effectively remediate the student's needs in "reading, spelling and writing," but they agreed to "try the program out" until they received the student's "educational and testing records" (id.).<sup>10</sup>

On November 21, 2014, the parents met with the district administrator, the district assistant superintendent for curriculum and instruction, and the district director of special education services (director) to discuss their concerns about the student's "lack of educational progress" (see Dist. Ex. 99 at pp. 1-2; see also Tr. p. 144). Summarizing the meeting in an email to the district dated December 9, 2014, the parents indicated, among other things, that while uncertain as to whether the "Scholastic Read 180 program" was the "right read/write program" to address the student's needs, the parents "requested this [program] be done in combination with System 44 (Scholastic's phonological program), to help address [the student's] phonemic disability" (Dist. Ex. 99 at p. 1; see Tr. pp. 144-51; see generally Tr. pp. 151-66; Dist. Ex. 141). The parents emphasized that if the two programs were not used "together at this time," they did not "see how [the student could] progress in reading comprehension" (Dist. Ex. 99 at p. 1). In addition to recounting other aspects of the meeting, the parents confirmed their attendance at a CSE meeting scheduled for December 17, 2014 and clarified the purpose of that meeting (id. at pp. 1-2).<sup>11</sup>

On January 16, 2015, a CSE convened for a "[r]equested [r]eview (Dist. Exs. 4 at p. 1; 140 at p. 3).<sup>12</sup> At this time, the January 2015 CSE continued to recommend daily resource room services, but modified the student's IEP to include a recommendation for daily specialized reading instruction in 12:1 special class (compare Dist. Ex. 4 at pp. 1, 7-8, with Dist. Ex. 3 at pp. 1, 6-7; see generally Dist. Exs. 32-33 [providing parents with prior written notices and sending second requests for consent to evaluate the student]).<sup>13</sup> The student began receiving the specialized reading instruction services in February 2015 (see Tr. pp. 187, 191, 288-89, 298; Dist. Ex. 87).<sup>14</sup>

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<sup>10</sup> Around this same time period, the parents had also contacted the student's mathematics teacher with concerns about providing the student with copies of class notes and difficulties that she encountered with certain mathematics concepts (see generally Dist. Ex. 97).

<sup>11</sup> On December 16, 2014, the parents cancelled the CSE meeting due to illness and suggested additional dates in January 2015 to reschedule the meeting (see Dist. Exs. 100; 140 at p. 3). The CSE meeting was rescheduled for January 8, 2015, which the parents also cancelled (see Tr. pp. 169-70; Dist. Ex. 140 at p. 3).

<sup>12</sup> According to the January 2015 IEP, the CSE relied upon the following information: a December 2014 special education teacher report (compare Dist. Ex. 4 at p. 2, with Dist. Ex. 48 at p. 1), a December 2014 teacher report (compare Dist. Ex. 4 at p. 2, with Dist. Ex. 61 at p. 1), a November 2014 IEP progress report (see Dist. Ex. 4 at p. 2), and a November 2014 report card (compare Dist. Ex. 4 at p. 2, with Dist. Ex. 59). Although the hearing record only included a notice of mailing of the student's November 2014 IEP progress report, the hearing record did include a copy of the student's December 2014 IEP progress report (see Dist. Exs. 122-23). The student's November 2014 report card reflected the following grades: English, 87; social studies, 85; science, 70; mathematics, 67; Spanish, 93; art, 97; chorus, 100; health, 87; "tech," "P"; physical education, 95; and a cumulative grade point average, 86.778 (see Dist. Ex. 59).

<sup>13</sup> The January 2015 CSE also modified the student's IEP to include the following as a special alert: "The student has a learning disability in the area of reading" (compare Dist. Ex. 4 at p. 1, with Dist. Ex. 3 at p. 1).

<sup>14</sup> Prior to receiving the specialized reading instruction services, the student worked on her annual goals for reading during resource room (see Tr. pp. 190-92).

The student's specialized reading instruction consisted of receiving "one-on-one reading instruction . . . every other day" using the Wilson methodology beginning on February 13, 2014 (Dist. Ex. M at p. 1). On the alternate days, the student's specialized reading instruction consisted of instruction provided through the Read 180 and System 44 programs in a small group (i.e., no more than 12 students) (see Tr. p. 253; see also Tr. p. 172). At the impartial hearing, the administrator testified that the specialized reading class used "System 44 and Read 180 as a mixed model classroom," meaning that the class engaged in "small group instruction, large group instruction, direct instruction, which [was] individualized, and a computer-based portion" (Tr. p. 172).

After encountering some scheduling issues, a CSE convened on March 16, 2015, per "[p]arent [r]equest" (Dist. Exs. 5 at p. 1; 15 at p. 1; 16 at p. 1; 17 at p. 1; 140 at pp. 2-3). At that time, the March 2015 IEP reflected that the student made progress in reading fluency and "increased" her "Lexile level" in the specialized reading class (see Dist. Ex. 5 at p. 5; see generally Dist. Ex. 70 [reflecting that the student achieved a Lexile score of 821 on a March 2015 SRI assessment]). In addition, the IEP documented the student's most "recent standardized test results," which, overall, fell within the average range in the areas of reading comprehension, reading rate, and accuracy, and in the above average range in reading fluency (Dist. Ex. 5 at pp. 2-3, 5; Dist. Ex. 54 at pp. 2-3, 6).<sup>15</sup> The March 2015 CSE also documented that the student's needs in writing, and noted that recent standardized testing results demonstrated scores within the below average range in written expression and within the average range on the "Contextual Conventions and Story Composition subtest" (Dist. Ex. 5 at pp. 2, 5). In mathematics, the IEP noted a "weakness with word problems and multi-step problems," and recent standardized testing results revealed scores within the below average range for "math fluency for addition, subtraction and multiplication" (id. at pp. 3, 6). The March 2015 CSE continued to recommend daily resource room services and daily specialized reading instruction to address the student's needs, but modified the IEP to include annual goals targeting math fluency and word problems (compare Dist. Ex. 5 at pp. 1, 7-8, with Dist. Ex. 4 at pp. 1, 5, 7; see generally Dist. Ex. 34).

On May 27, 2015, a CSE convened to conduct the student's annual review and to develop an IEP for the 2015-16 school year (eighth grade) (see Dist. Ex. 6 at p. 1). Finding that the student remained eligible to receive special education and related services as a student with a learning disability, the May 2015 CSE recommended a 12-month school year program, which for July and August 2015 consisted of one 60-minute session per week of reading in a special class (5:1 student-to-teacher ratio); for the September 2015 through June 2016 portion of the school year, the CSE continued to recommend daily resource room services and daily specialized reading instruction in a 12:1 special class (id. at pp. 1, 8-10; see generally Dist. Ex. 35). The May 2015 CSE created annual goals to address the student's needs in reading, writing, and mathematics; in addition, the CSE recommended supplementary aids and services, program modifications, and

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<sup>15</sup> According to the March 2015 educational evaluation report, the student's reading fluency score fell within the "[a]verage" range, not in the "above average" range, as noted in the IEP (compare Dist. Ex. 54 at p. 2, with Dist. Ex. 5 at pp. 2-3, 5).

accommodations, as well as assistive technology devices and services (see Dist. Ex. 6 at pp. 7-9).<sup>16</sup>

During summer 2015, the student attended a summer camp program at Kildonan (see Tr. pp. 793-94; see generally Parent Ex. N).<sup>17</sup> The student returned to the district public school in September 2015 (see Tr. pp. 209, 214-15).<sup>18</sup> In an email dated September 22, 2015, the parents notified the district of their intentions to enroll the student at Kildonan for the remainder of the 2015-16 school year and to seek reimbursement of the student's tuition and transportation costs (see Parent Ex. O).<sup>19</sup> In response to the parents' notice of unilateral placement, a CSE convened on October 6, 2015 for a "[r]equested [r]eview"; ultimately, no modifications were made to the student's IEP at this meeting (see Tr. pp. 205-09; Dist. Exs. 8 at p. 1; 21 at p. 1; 38 at pp. 1-2; compare Dist. Ex. 8, with Dist. Ex. 7). In a letter dated October 13, 2015, the parents notified the district that the student's last day attending the district was October 9, 2015 (see Dist. Ex. 118 at p. 1).

On October 17, 2015, the parents executed an enrollment contract with Kildonan for the student's attendance as a "boarding student" for the 2015-16 school year (Parent Ex. P at p. 1-2; see generally Parent Ex. Q). The student began attending Kildonan on or about October 19, 2015,

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<sup>16</sup> After the May 2015 CSE meeting, the district administered another SRI assessment to the student on June 1, 2015; the student achieved a Lexile score of 920—which, as a "Performance Standard," was characterized as "Basic" and equated to a percentile rank of 44 in relation to "Normative Data" (Dist. Ex. 71 at p. 1).

<sup>17</sup> On July 22, 2015, a CSE convened for a "[r]eevaluation [r]eview" (Dist. Ex. 7 at p. 1). At that meeting, the CSE reviewed the student's occupational therapy (OT) and physical therapy (PT) evaluations, which the district conducted in February and March 2015 (id. at pp. 1-2, 6; see generally Dist. Exs. 49-52). The July 2015 CSE modified the student's IEP to include a recommendation for OT consultation services (compare Dist. Ex. 7 at p. 9, with Dist. Ex. 6 at p. 9; see generally Dist. Ex. 36). In a prior written notice dated August 6, 2015, the district proposed a reevaluation of the student and requested the parents' consent for additional testing (see Dist. Ex. 37 at p. 1). The parents, on September 8, 2015, provided consent for the district to conduct a psychological evaluation of the student, but limited their consent with respect to the remaining evaluations sought by the district (id. at p. 3; see also Dist. Ex. 102).

<sup>18</sup> On September 22, 2015, the district administered another SRI assessment to the student; at that time, the student achieved a Lexile score of 840—which, as a "Performance Standard," was characterized as "Basic" and equated to a percentile rank of 32 in relation to "Normative Data" (Dist. Ex. 72 at p. 1). The district reading teacher provided the parents with a copy of the SRI assessment report on or about September 24, 2015 (see Dist. Ex. 103 at p. 1).

<sup>19</sup> The Commissioner of Education has not approved Kildonan as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

and she remained at Kildonan through the conclusion of the 2015-16 school year (see Tr. p. 794; see generally Parent Exs. R-S).<sup>20</sup>

On June 13, 2016, a CSE convened to conduct the student's annual review and to develop an IEP for the 2016-17 school year (ninth grade) (see Dist. Ex. 10 at p. 1; see also Dist. Exs. 25-26; 105).<sup>21</sup> Remaining eligible to receive special education and related services as a student with a learning disability, the June 2016 CSE recommended a 12-month school year program, which for July and August 2016 consisted of three 60-minute session per week of reading in a special class (5:1 student-to-teacher ratio); for the September 2016 through June 2017 portion of the school year, the CSE continued to recommend daily resource room services and daily specialized reading instruction in a 12:1 special class (see Dist. Ex. 10 at pp. 1, 9-11; see generally Dist. Ex. 41). The June 2016 CSE created annual goals to address the student's needs in reading, writing, and mathematics; in addition, the CSE recommended supplementary aids and services, program modifications, and accommodations, as well as assistive technology devices and services (see Dist. Ex. 10 at pp. 8-9).

For summer 2016, the student received her 12-month school year services at the district (see 115; Tr. p. 213). On August 25, 2016, a CSE convened for a "[r]equested [r]eview" (Dist. Ex. 11 at p. 1; see generally Dist. Ex. 27). At this meeting, the CSE reviewed an independent educational evaluation (IEE) obtained by the parents at district expense: an August 2016 neuropsychological evaluation of the student that took place over the course of four dates in June 2016 (see Dist. Exs. 11 at pp. 1-2; 58 at p. 1; see generally Dist. Exs. 110-14; 116).<sup>22</sup> As a result, the August 2016 CSE recommended a 12-month school year program, which for July and August 2016 consisted of three 60-minute session per week of reading in a special class (5:1 student-to-teacher ratio) (compare Dist. Ex. 11 at pp. 1, 10, with Dist. Ex. 10 at pp. 1, 10-11). However, for the September 2016 through June 2017 portion of the school year, the August 2016 CSE modified the student's IEP and recommended the following: five 40-minute sessions per 10 day cycle of direct consultant teacher services to be provided to the student in her mathematics class, science class, ELA class, and social studies class; and daily specialized reading instruction in a 12:1 special class (compare Dist. Ex. 11 at pp. 1, 8-9, with Dist. Ex. 10 at pp. 1, 9-10; see generally Dist. Ex.

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<sup>20</sup> On February 23, 2016, a CSE convened to review the district's updated testing of the student completed in October 2015 (see Dist. Ex. 9 at p. 1-2; see generally Dist. Exs. 22; 56-57; 104; 108-09). Both the district's attorney and the parents' attorney attended the February 2016 CSE meeting (see Dist. Ex. 9 at p. 1; see generally Dist. Exs. 23-24; 39-40). Other than modifying the present levels of performance, the February 2016 CSE made no changes to the student's IEP (compare Dist. Ex. 9 at pp. 2, 5, with Dist. Ex. 8 at pp. 2, 5). At the February 2016 CSE meeting, information provided to the district indicated that the student was "currently parentally placed" at Kildonan for the 2015-16 school year, but according to the parents' attorney, the student would return to the district for the 2016-17 school year (see Dist. Ex. 40 at p. 1; see also Tr. pp. 209, 213-16).

<sup>21</sup> The parents' attorney attended the June 2016 CSE meeting (see Dist. Ex. 10 at p. 1).

<sup>22</sup> The psychologist who conducted the neuropsychological evaluation of the student attended the August 2016 CSE meeting via teleconference; the parents' attorney also attended the CSE meeting (see Dist. Exs. 11 at p. 1; compare Dist. Ex. 11 at p. 1, with Dist. Ex. 58 at p. 1).

42).<sup>23</sup> In addition, the August 2016 CSE modified the IEP by adding two annual goals to address the student's time management and executive functioning skills and adding one other annual goal targeting the student's ability to use basic operations to solve mathematics problems (compare Dist. Ex. 11 at pp. 7-8, with Dist. Ex. 10 at pp. 8-9). The August 2016 CSE also modified the IEP recommendations for supplementary aids and services, program modifications, and accommodations, as well as testing accommodations (compare Dist. Ex. 11 at pp. 9-10, with Dist. Ex. 10 at pp. 9-11).

In an email dated August 25, 2016, the parents notified the district of their intentions to enroll the student at Kildonan for the 2016-17 school year and to seek reimbursement of the student's tuition and transportation costs (see Parent Ex. T).<sup>24</sup> In response to the parents' notice of unilateral placement, a CSE convened on September 7, 2016; no modifications were made to the student's IEP (see Dist. Ex. 12 at p. 1; compare Dist. Ex. 12, with Dist. Ex. 11).<sup>25</sup> The student attended Kildonan from September 2016 through June 2017 (see generally Parent Exs. X-Z; AA).

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

By due process complaint notice dated May 25, 2017, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16 and 2016-17 school years (see Dist. Ex. 1 at pp. 1, 8-9). With regard to the 2015-16 school year, the parents asserted that despite the student's failure to make any "meaningful progress in reading, writing, or mathematics" in the 2014-15 school year, the May 2015 CSE recommended the "same services and programming" as in the student's previous IEP: resource room, specialized reading instruction, and "essentially the same annual goals" (id. at p. 4).<sup>26</sup> The parents also noted that the student failed to achieve a "single IEP goal" during the 2014-15 school year (id.). According to the parents, the student experienced increasing "frustration with school and school work" during the 2014-15 school year and her "sense of self-esteem had significantly decreased due to her academic struggles" (id.). More specifically, the parents asserted that although the May 2015 CSE identified the student's needs in mathematics, the CSE failed to "recommend anything" to address the

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<sup>23</sup> State regulation defines direct consultant teacher services as "specially designed individualized or group instruction provided by a certified special education teacher . . . , to a student with a disability to aid such student to benefit from the student's regular education classes" (8 NYCRR 200.1[m][1]; see also 8 NYCRR 200.6[d][1]-[3]).

<sup>24</sup> The evidence in the hearing record includes an unexecuted enrollment contract for the student's attendance as a "boarding student" at Kildonan for the 2016-17 school year (Parent Ex. V at pp. 1-2; see generally Parent Ex. Q).

<sup>25</sup> According to the prior written notice dated September 8, 2016, although the September 2016 CSE was "willing to discuss [the parent's] concerns in the areas of written expression, math, and electives," the parent "chose not to continue the discussion about concerns in those areas" when the CSE "did not recommend a specific reading methodology" (Dist. Ex. 46 at p. 1; see generally Dist. Exs. 44-45). The prior written notice further revealed that the CSE was "willing to discuss and consider [a] smaller class size for daily reading," but the parent was "not willing to discuss this unless a specific reading methodology of her choice was first agreed to by the CSE" (Dist. Ex. 46 at p. 1).

<sup>26</sup> The parents further noted that the May 2015 CSE also recommended reading services for summer 2015 (see Dist. Ex. 1 at p. 4 n.4).

student's needs (id.). Next, the parents alleged that the May 2015 IEP failed to include a "meaningful discussion about [the student's] reading disorder" and failed to include any "information as to what, if any, progress" the student made in reading (id.). Finally, the parents asserted that although the CSE convened in July 2015 for a program review, the CSE failed to make any "meaningful alterations" to the May 2015 IEP (id. at p. 5).

Turning to the 2016-17 school year, the parents alleged that despite documenting the continued concerns reported about the student's executive functioning in the June 2016 IEP, the IEP failed to include any "executive function coaching or other meaningful alternative to address this deficit" (Dist. Ex. 1 at p. 5). Next, the parents asserted that although the student made progress at Kildonan during the 2015-16 school year and notwithstanding the "severity of her continued reading, writing, and math deficits," the June 2016 CSE recommended "essentially the same ineffective program:" resource room, specialized reading instruction, and "no specific math, writing, or executive functioning support" (id.). In addition, the parents asserted that while an August 2016 CSE convened to review a neuropsychological evaluation report of the student, the CSE "effectively ignore[d]" it (id. at p. 7). More specifically, the parents asserted that the August 2016 IEP did not "in any meaningful way discuss any of [the student's] learning disabilities," the IEP "selectively highlight[ed] or omit[ted] certain scores from a variety of standardized tests, . . . , to create an illusion that [the student's] reading, writing, and math deficits seem[ed] minor" (id.). The parents contended that the August 2016 CSE—despite being provided with recommendations in the neuropsychological evaluation report—recommended direct consultant teacher services for the student's core academic courses (mathematics, science, English language arts [ELA], and social studies), together with specialized reading instruction, the "same annual goals [the student] has had since 2013," and reading services for summer 2016 (id. at pp. 7-8).

In summarizing their "[l]egal [c]laims," the parents alleged that the district failed to recommend an "appropriate program and placement" that adequately addressed the student's "academic, physical, social, and emotional needs" for the 2015-16 and 2016-17 school years (see Dist. Ex. 1 at pp. 8-9). The parents reiterated that despite the student's "minimal progress and increasing struggles," the district recommended the "same ineffective program and placement" to the student "year after year" (id. at p. 8). Additionally, the parents contended that the district failed to address the "detrimental impact" the student's "academic difficulties" had on her "self-esteem" (id.). Next, the parents asserted that the "team" failed to offer the student a "homogenous group of students with similar learning profiles, of average intelligence, and small student:teacher ratio" (id.).

The parents further alleged that the district failed to provide the student with appropriate reading services (see Dist. Ex. 1 at p. 8). More specifically, the parents asserted that the district "admitted in writing" that it did not provide "Wilson or Read 180 [to the student] with fidelity" (id.). Next the parents alleged that the district failed to provide the student with "appropriate writing services" and "appropriate math services," and failed to recommend any services to address the student's "needs in the areas of organization, speed, fluency, and attention" (id.). The parents also alleged that the district failed to "accurately or sufficiently" describe the student's "strengths and deficits" in the present levels of performance (id. at pp. 8-9). Finally, the parents asserted that the district failed to recommend "appropriate annual goals," and failed to provide the student with "appropriate" 12-month services during summer 2016 (id. at p. 9).

With regard to Kildonan, the parents alleged that it was an appropriate program that met the student's unique education needs (see Dist. Ex. 1 at p. 9). More specifically, the parents contended that Kildonan's "academic program incorporate[d] Orton-Gillingham, multisensory instruction," which allowed the student to make "meaningful progress in language-based learning" (id.). According to the parents, Kildonan also addressed the student's executive function deficits (id.). Next, the parents alleged that the "residential component" of Kildonan was appropriate and necessary, as it consisted of a "proctored study hall every evening by staff" trained in Orton Gillingham and an opportunity to discuss 'issues that ar[o]se as a result of having dyslexia" (id. at pp. 9-10).

Turning to equitable considerations, the parents asserted that they cooperated with the district, and "timely expressed [their] dissatisfaction with the [d]istrict's recommendations" for the 2015-16 and 2016-17 school years (Dist. Ex. 1 at p. 10). In addition, the parents noted that they attempted to "work with the CSE" but the district "refused to acknowledge" their concerns or "amend" the student's 2015-16 or 2016-17 IEPs (id.).

As relief, the parents requested reimbursement for the costs of the student's tuition and transportation expenses for her attendance at Kildonan for the 2015-16 and 2-16-17 school years (see Dist. Ex. 1 at p. 10). In addition, the parents requested reimbursement for the costs of Kildonan's summer camp that the student attended during summer 2015 (id.). Finally, the parents requested compensatory educational services consisting of "1:1 tutoring with an Orton-Gillingham tutor for hours spent in the inappropriate [d]istrict's summer services" during summer 2016 (id. at p. 11).

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

An IHO was appointed to hear the matter and on July 10, 2017 he conducted a prehearing conference (see July 10, 2017 Tr. pp. 1-40).<sup>27</sup> The parties and IHO met next on July 28, 2017, to address issues related to subpoenas (see July 28, 2017 Tr. pp. 1-34). On September 18, 2017, the parties returned to take evidence at the impartial hearing, which concluded on April 18, 2018, after 10 days of proceedings (see July 10, 2017 Tr. pp. 1-40; July 28, 2017 Tr. pp. 1-34; Tr. pp. 1-1434). In a decision dated June 11, 2018, the IHO concluded that the district offered the student a FAPE for the 2015-16 and 2016-17 school years and denied the parents' request to be reimbursed for the costs of the student's tuition and transportation expenses related to Kildonan, as well as the parents' request for compensatory educational services (see IHO Decision at pp. 62-69). In reaching these conclusions, the IHO relied upon the parents' closing brief to identify the issues to be resolved: namely, whether the district failed to provide the student with an appropriate mathematics program, whether the district failed to provide the student with an appropriate reading program, and whether the district adequately addressed the student's social/emotional "well-being" (id. at p. 63).

As to the first issue, the IHO initially noted that at the impartial hearing neither party devoted much attention, via testimony or otherwise, to the appropriateness of the student's

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<sup>27</sup> The transcripts generated for the July 10 and July 28, 2017 impartial hearing dates were not consecutively paginated with the transcripts generated for the subsequent impartial hearing dates beginning in September 2017. For ease of reference, only citations to the July 2017 transcripts will include the date of the transcript.

mathematics program (see IHO Decision at pp. 63-64). Nevertheless, the IHO indicated that while mathematics was "[i]nitially perceived as an area of strength" for the student, she "struggled increasingly" in this area as she "matured" (*id.*). However, the IHO also noted that "once the district received clinical information that reflected delays in basic math computational skills," the district responded by "adding specific math goals to the IEP and refocusing the Resource Room services" the student already received to include "work targeting those goals" (*id.*).<sup>28</sup> The IHO did, however, question the efficacy of the district's efforts to address the student's needs in the area of math fluency, but further noted that by the time the district learned about the "slow pace of her progress" through test scores, the "responsibility for those methodological choices had moved away from the district and to the unilateral placement" (*id.* at p. 64). Nonetheless, the IHO determined that "nothing of consequence appear[ed] in the clinical reports that should have led the district to modify the basic recommended program of Resource Room, but rather the record perhaps provide[d] some very modest basis for making somewhat different methodology choices within that program's delivery" (*id.*).

Given the student's "testing history," the IHO acknowledged that a legitimate question existed concerning "whether the district's IEP and its implementation of that IEP adequately understood or addressed the significance of the student's math disability" (IHO Decision at p. 65). Noting the "possibil[ity]" that the district's "program [in this specific area] fell below the Andrew standard for FAPE," the IHO also noted that he need not reach this question because "even if the district did partially fall below the provision of Andrew FAPE in this regard the [parents] failed to meet its own burden, . . . , to demonstrate the appropriateness of the unilateral placement" (*id.*). On this point, the IHO found that the hearing record contained "absolutely no witnesses and no testimony address[ing] anything about the unilateral placement's efforts [to meet the student's needs in this area] beyond having a skills-level-based class profile for the small math classes to which [the student] was assigned" (*id.*). In addition, the IHO found that while the July 2016 neuropsychological evaluation of the student identified "math needs," the evaluation report failed to include any "concrete programmatic recommendations" to address those needs, and rather, recommended that the student be provided with a "calculator" (*id.*). Moreover, the IHO noted that the recommendation made in the July 2016 neuropsychological evaluation report for the student to "continue in a program like that of the private school [was] surely inapposite with respect to math skills," especially since neither the evaluator nor the Kildonan witness—nor the "test results"—demonstrated "either that [Kildonan] presented a focused remedial program for math or that the student was making consistent math progress while attending" Kildonan (*id.*). Overall, the IHO concluded that "even if" the district did not address the student's "math disability as fully as it might, the family's program did no better and d[id] not meet their burden to justify a reimbursement remedy" (*id.* at pp. 65-66).

Next, the IHO turned to the question of whether the district provided the student with "appropriate language disability instruction" (IHO Decision at pp. 66-68). After rearticulating the legal standard as a backdrop for this analysis, the IHO determined that the evidence reflected the district's efforts in taking "significant, increasingly intensive and restrictive, steps to address the

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<sup>28</sup> Based upon the student's own testimony at the impartial hearing, the IHO found that while she possessed a "strong understanding of math word problems," her "poor basic arithmetic skills slowed her down and left her confused" (IHO Decision at pp. 63-64).

student's language disability" (id.). Notably, the IHO found that the district's efforts reflected the "availability of new clinical information" as well as its own increasing awareness of the student's "significant burden of dyslexia (to some degree masked by her intellect and capacity to compensate with respect to comprehension)" (id.). More specifically, the IHO noted the district's initial efforts to address the student's needs through resource room services and "relatively generic goals," and thereafter, the decision in January 2015—based upon the parents' concerns and "new clinical reports"—to recommend "specialized reading instruction every other day, utilizing the two curricula adopted by the district for students with language disabilities" (id. at pp. 66-67). The IHO also noted that, in the district's "view," the programmatic changes were "successful and significant documented progress was made" (id. at p. 67). In addition, the IHO indicated that the student's "initial progress in the district program followed by regression upon commencing the private program [was] consistent across all the witness testimony and the various evaluations" (id.).

According to the IHO, the district's specialized reading instruction added to the student's program in January 2015 consisted of the "two curricula, which were computer-based and which the student shared with others in the reading instruction group," as well as individual (1:1) reading instruction provided to the student by a teacher "trained in the Wilson methodology" (see IHO Decision at p. 67). The IHO also noted that, at the impartial hearing, a great deal of "time and energy" was spent on the parents' "belief that only an Orton-Gillingham-based program (like Wilson) could meaningfully address the student's needs, and that the district's program was somewhere between poor Wilson instruction and no Wilson at all" (id.). While acknowledging that that "may indeed [have] be[en] the case," the IHO also acknowledged that the district teacher—who was "Wilson-certified and trained"—did not claim at the impartial hearing that she was "following the Wilson program as such," but rather, she drew upon the Wilson program "as part of a mixed curriculum that she deemed appropriate to the individual student's needs and she believed she was successful in addressing those needs" (id.).

In order to determine whether the district provided the student with "appropriate language disability instruction," the IHO found, however, that the question was "not whether the district's program adhered to the technical guidelines of the Wilson methodology, or whether the student required a particular methodology for the years in question, but whether the district was reasonable in believing its program would address the student's needs" (IHO Decision at p. 67). Based upon the evidence in the hearing record, the IHO answered that question in the affirmative (id.). In addition, the IHO indicated that not only was it "reasonable to expect that the student would be challenged by the program and be able to make meaningful progress within its bounds, over and over again, based on the testimony from all witnesses and the testing reported by both sides," but moreover, the evidence revealed that it was "clear that the student made significant progress during the relatively short period when she actually received the district's instructional model, and that she regressed, at least for some significant period of time, when she started to attend" Kildonan (id.).

Next, the IHO explained how this conclusion affected the entire legal analysis of the case (see IHO Decision at p. 68). First, the IHO indicated that the student's progress during the "relatively intensive intervention provided by the district (and supported at length by her family's homework efforts in the evenings) ratifie[d] the Andrew-appropriateness of the district's program" (id.). Second, the IHO noted that while the student's "regression d[id] not necessarily prove that

[Kildonan] was inappropriate," there was no reason to address the "various arguments" proffered to explain the student's regression "at least initially, while being placed in the seemingly excellent academic program" at Kildonan, which, according to the IHO, the student "swiftly came to thrive under and to love and that changed her entire attitude towards instruction" (*id.*). The IHO continued, however, and noted that although there was no legal basis to reach the question of whether Kildonan was an appropriate unilateral placement, the "clinical material, at best, [was] equivocal in this regard" (*id.*).

In balancing the equitable considerations, the IHO weighed the "program that was achieving measurable and significant short-term progress" in the district with an "idyllic and engaging program that for better or worse fostered regression" at Kildonan and found that "Andrew's scale d[id] not tilt away from the district's appropriate placement" (IHO Decision at p. 68).

As a final matter, the IHO addressed whether the district adequately addressed the student's social/emotional needs (*see* IHO Decision at pp. 68-69). On this point, the IHO concluded that while the parents fervently argued that the district failed in this regard and that the "evidence presented to [the IHO] strongly support[ed] that conclusion," ultimately, the "clinical evidence repeatedly conclude[d] that these needs did not rise to the level of a disability requiring special education intervention" (*id.* at p. 68).

In reaching this conclusion, the IHO noted that, based upon the student's own testimony, she was "utterly miserable" at the district but was "swiftly reborn upon enrolling" at Kildonan (IHO Decision at p. 68). Testimony further revealed the family's nightly struggle with homework, "engulfing all capacity for extra-curricular activities or friends," and only then to "face grimly each morning a return to a school program that felt harsh and laden with failure" at the district (*id.*). The IHO opined that the student may have suffered from "self-inflicted emotional wounds of early adolescence," as well as a sense of being "singled-out in a general education setting as someone in need of remediation and intervention" (*id.* at pp. 68-69). According to the IHO, these "feelings of self-doubt and shame, appear[ed] to have amounted to a kind of self-administered bullying" (*id.* at p. 69). And while "fully convinced" that Kildonan was an "excellent setting for this student," the IHO reiterated that the question to be answered in this analysis was whether the student's "unhappiness arose from an affective disability, whether it amounted to a discriminatorily hostile environment, [or] whether it impacted on her capacity to benefit from instruction" (*id.*). Giving full weight to the parents' concerns, the IHO relied upon the parents' privately obtained July 2016 neuropsychological evaluation, which unequivocally noted in resulting report that "'there [were] no emotional barriers to [the student's] learning'" (*id.*).

In light of the foregoing, and having found that the district offered the student a FAPE for the 2015-16 and 2016-17 school years, the IHO dismissed the matter.

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

The parents appeal, arguing that the IHO misinterpreted and misapplied mandates regarding "[g]rade-[l]evel [a]dvancement" set forth in Andrew F. v. Douglas County School District RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988 (2017). Relatedly, the parents argue that the IHO ignored or misinterpreted evidence regarding the student's lack of grade-level advancement, and

thus, the student's IEP was not "reasonably calculated to allow her to achieve the same." In addition, the parents assert that the district failed to sustain its burden of proof under State statute to demonstrate that it provided the student with a program of "[s]pecially [d]esigned [i]nstruction" to meet her unique needs, and the district's recommended program was not reasonably calculated to allow the student to make "[a]ppropriately [a]mbitious" or meaningful educational progress. Next, the parents contend that the IHO erred in failing to "enforce" the IDEA's requirement that the student's program must be based upon peer-reviewed research to the extent practicable. The parents also argue that the IHO erred in failing to issue a ruling regarding whether the district's program met the student's social/emotional needs. Finally, the parents assert that the IHO ignored evidence that the district "[i]ntentionally [d]isregarded the [n]ature and [s]everity" of the student's disability.

With regard to the appropriateness of the student's unilateral placement, the parents request a determination that Kildonan was an appropriate placement because—having found that the district offered the student a FAPE—the IHO did not reach this issue. Similarly, the parents request a finding that equitable considerations weighed in favor of their requested relief. As relief, the parents seek an order directing the district to reimburse them for the costs of the student's tuition and transportation expenses at Kildonan for the 2015-16 and 2016-17 school years, the costs of the summer camp the student attended during summer 2015 at Kildonan, and to provide compensatory educational services ("1:1 Orton-Gillingham tutoring") for the "time [the student] spent in the inappropriate district program" during summer 2016.

In its answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision. In addition, the district asserts that the request for review must be dismissed for failing to comply with regulations governing practice before the Office of State Review. The district also asserts that the parents improperly raised new allegations concerning the student's social/emotional needs for the first time on appeal. More generally, the district contends that the IHO properly concluded that it offered the student a FAPE for the 2015-16 and 2016-17 school years, the parents were not entitled to tuition reimbursement, and the IHO reached the proper conclusion regarding equitable considerations. The district also argues that the parents are not entitled to reimbursement for the costs associated with the student's attendance at Kildonan's camp during summer 2015, or compensatory educational services for the student's attendance at the district's summer program during summer 2016.

As a cross-appeal, the district argues that the IHO erred when indicating in dicta that the district "'possibly'" did not provide the student with an appropriate mathematics program. The district also argues that the IHO erred when he "commented" on the appropriateness of Kildonan without allowing the district to fully develop the hearing record on this issue. Finally, the district contends that the IHO erred in referring to Kildonan as "'quite simply, the right school for this student'" when the parents failed to present evidence that Kildonan offered the student a program and services "specially designed" to address her needs.

In a reply to the district's answer, the parents respond to the alleged procedural violations and generally argue to dismiss these claims. In an answer to the district's cross-appeal, the parents

generally argue that the IHO made findings in the district's favor; thus, to the extent that the district was not aggrieved, the district is not entitled to interpose a cross-appeal.<sup>29</sup>

## V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F., 137 S. Ct. at 999). 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];

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<sup>29</sup> On August 9, 2018, the district served the parents with a reply to the parents' answer to the district's cross-appeal in this matter; however, State regulations required the district to serve the reply upon the parents no later than August 8, 2018—six calendar days from the completed service by mail of the parents' answer to the cross-appeal, which occurred on August 2, 2018 (see 8 NYCRR 279.6[a], 279.11[a]-[b]). Consequently, the district's reply was not timely served upon the parents and, therefore, it will not be considered on appeal. Additionally, although the district sought an extension of time within which to submit its reply, the district's request for the extension—dated August 8, 2018—was untimely as well (see 8 NYCRR 279.10[e][requiring that requests for extensions of time to answer or reply "must be postmarked no later than one business day prior to the date on which the time to answer or reply will expire"])).

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" (Andrew 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 Andrew 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]).<sup>30</sup>

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

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<sup>30</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

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

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

## **VI. Discussion**

### **A. Preliminary Matters—Compliance with Practice Regulations**

#### **1. Service of the Notice of Intention to Seek Review**

The district argues to dismiss the parents' request for review because the parents failed to properly and timely serve the Notice of Intention to Seek Review. State regulation requires that any party "who intends to seek review by [an SRO] of the decision of an [IHO] shall personally serve upon the opposing party, . . . , a notice of intention to seek review" in the form described therein (8 NYCRR 279.2[a]).<sup>31</sup> The notice of intention to seek review must be personally served upon the school district not less than 10 days before service of a copy of the request for review upon such school district, and within 25 days from the date of the IHO's decision sought to be reviewed (see 8 NYCRR 279.2[b]). Among other things, [t]he service of a notice of intention to seek review upon a school district serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review (see Application of a Student with a Disability, Appeal No. 16-040; Application of a Student Suspected of Having a Disability, Appeal No. 12-014; Application of a Student with a Disability, Appeal No. 11-162; Application of a Student with a Disability, Appeal No. 10-038).

Here, even if the district correctly argues that the parents failed to properly, and thus, timely, serve the notice of intention to seek review, the district was provided the opportunity to file the hearing record—which the Office of State Review received in a timely manner on July 12, 2018—the purpose of the parents' notice of intention to seek review (i.e. to ensure timely filing of the hearing record) was met (see 8 NYCRR 279.2[a]; 279.9[a]), and there was no prejudice to the district resulting from the improper or untimely served notice of intention to seek review (see Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-096). Therefore, the district's request to dismiss the request for review on this basis is denied.

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<sup>31</sup> The Notice of Intention to Seek Review is a filing separate and apart from the "Notice of Request for Review" (compare 8 NYCRR 279.2, with 8 NYCRR 279.3).

## 2. Form Requirements of Pleadings

The district contends that the request for review must be dismissed for failing to comply with the form requirements for pleading. Specifically, the district asserts that the request for review does not include a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]). In response, the parents deny the district's allegations and affirmatively assert that the district failed to properly verify its answer.

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; 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 [1962]).

Upon review and notwithstanding the relative accuracy of the district's contentions relative to the form and content of the parents' request for review, I decline to dismiss the request for review on these grounds given that the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that the district suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058). In this instance, although the parents' failure to comply with the practice regulations will not ultimately result in a dismissal of their appeal, the parents—and their attorney—are cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). However, in light of the foregoing, the district's arguments regarding the form of the parents' request for review are dismissed.

With respect to the parents' contention, form requirements necessitate, in part, that "[a]ll pleadings shall be verified" (8 NYCRR 279.7[b]). However, the same State regulation specifically allows pleadings filed by the "trustees, the board of trustees, or the board of education of a school district"—i.e., the district—to be verified by "any person who is familiar with the facts underlying the appeal" (8 NYCRR 279.7[b]). Other than arguing a general sense of unfairness in allowing a school district's pleadings to be verified by its attorney—but not pleadings filed by parents—the parents do not point to any legal authority, or facts, to support their contention that the district's attorney is not sufficiently familiar with the facts of the underlying appeal that would otherwise

preclude the district's attorney from verifying the district's answer. As such, the parents' contention is dismissed.

### 3. Scope of Review

Next, a determination must be made regarding which claims are properly before me on appeal. The parents assert that the IHO failed to rule on their claim the district's program did not meet the student's social/emotional needs. In response, the district characterizes the parents' argument in the request for review—set forth in section "IV"—as raising new allegations concerning the student's social/emotional needs, and thus, seeks to dismiss such claims for being improperly raised for the first time on appeal.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b], 300.508[a]; 8 NYCRR 200.5[j][1]; Application of a Student with a Disability, Appeal No. 17-008; Application of a Student with a Disability, Appeal No. 13-151). However, a party requesting an impartial hearing may not raise issues at the impartial hearing, or for the first time on appeal, that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

In this instance, the parents—as the party requesting the impartial hearing—had the first opportunity to identify the range of issues to be addressed at the impartial hearing. Here, the parents did allege in the due process complaint notice that the district failed to address the student's "academic, physical, social, and emotional needs" as one issue upon which to conclude that the district failed to offer the student a FAPE (Dist. Ex. 1 at p. 8 [¶44]). In support of this claim in their closing brief to the IHO, the parents argued that "[d]yslexia ha[d] a serious psychological fallout that in many ways [was] worse than the practical limitations caused by poor reading ability" (Parent Ex. CC at p. 24; compare Parent Ex. CC at pp. 7, 24-27, with Dist. ex. 1 at p. 8 [¶44]). The parents further argued that dyslexia could evolve into a loss of self-worth, self-esteem, and confidence, and that the information the district relied upon to develop the student's IEPs for the 2015-16 and 2016-17 "heavily indicated that [the student] was subject to this risk" (Parent Ex. CC at pp. 24-25). Consequently, the parents alleged that the district's failure to "offer a program that mitigated and managed this risk to [the student's] social and emotional well-being was a factor [they] validly took into consideration when they elected to place [the student] at Kildonan" (id. at p. 25). In addition, the parents pointed to paragraph 44 in the due process complaint notice as proof that they had "specifically raised this issue" (id.; see Parent Ex. A at p. 8 [¶44][alleging that the district "did nothing to address the detrimental impact [the student's] academic difficulties had on her self-esteem"). In their closing brief, the parents then went on to argue that the "greatest indicator of the presence of this risk was that [the student] was an intelligent, motivated student with dyslexia who was going through extreme academic struggle" (Parent Ex. CC at pp. 25-27).

Turning to the IHO's decision, the IHO included a section to explain to the parties about certain matters not decided in the order, but what the IHO nonetheless characterized as what "may be consequential to this student's education" (see IHO Decision at pp. 5-7). For example, the IHO

noted that the 2017-18 school year was not addressed in the parents' due process complaint notice, thus, the "matter was not within the scope of [the IHO's] jurisdiction" (*id.* at p. 5). As a final point, the IHO noted difficulty in rendering a decision in this case, noting that although the evidence demonstrated that the district offered the student a FAPE, the evidence also revealed that the "program was one that made the student miserably unhappy" and in stark contrast to the "engaged, happy, and dedicated" student who was now attending Kildonan (*id.* at p. 6). Notwithstanding these observations, the IHO found that the parents neither raised the issues of "whether the student's anomie created a toxic educational setting that had an impact on her learning during these two years" or "whether the district bore any accountability for that impact" in the due process complaint notice nor were these issues addressed in the hearing record, and therefore, they were issues outside the scope of the IHO's jurisdiction (*id.* at p. 7).

Thereafter, and consistent with the issues in dispute as summarized in the parents' closing brief, the IHO characterized his analysis as addressing three issues, which specifically included whether the district failed to adequately address the student's social/emotional well-being (*see* IHO Decision at pp. 63-69; *see also* Parent Ex. CC at pp. 7, 24-27).<sup>32</sup> On this particular issue, the IHO noted that the parents "urgently" argued in their closing brief that the district's program did not address the student's social/emotional needs (IHO Decision at p. 68; *see* Parent Ex. CC at pp. 7, 24-27). The IHO found, however, that while the evidence "strongly support[ed] that conclusion," the "clinical evidence repeatedly conclude[d] that these needs did not rise to the level of a disability requiring special education intervention" (IHO Decision at p. 68). Giving "full weight to the family's concerns"—notably, the difficulty and frustration with nightly homework, returning to a "school program that felt harsh and laden with failure," and the "attendant feelings of self-doubt and shame"—the IHO turned to the neuropsychological evaluation report, which the IHO found unequivocal in stating that "'there [were] no emotional barriers to learning'" and which the IHO also found was consistent with findings from an October 2015 psychological evaluation of the student (*id.* at pp. 68-69; *see* Dist. Exs. 56 at p. 4; 58 at p. 24).

Thus the parents have misread the IHO's decision and, contrary to their contention on appeal, the IHO did address the issue of whether the district failed to meet the student's social/emotional needs, but for reasons unexplained, the parents overlooked or discounted the IHO's conclusions as described above and do not make any challenges to those findings on appeal. On this basis, not only must the parents' contentions on appeal be dismissed, but since neither party

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<sup>32</sup> Similarly, the IHO relied upon the parents' closing brief to identify the following as the two remaining issues to be resolved at the impartial hearing: whether the district failed to provide the student with an appropriate mathematics program and whether the district failed to provide the student with an appropriate reading program (*compare* Parent Ex. CC at pp. 4-5, *with* IHO Decision at p. 63). To be clear, the parents' due process complaint notice raised additional issues—such as the district failed to provide the student with "appropriate writing services," the district failed to recommend any services to address the student's "needs in the areas of organization," the district failed to "accurately or sufficiently" describe the student's "strengths and deficits" in the present levels of performance, the district failed to recommend "appropriate annual goals," and the district failed to provide the student with "appropriate" 12-month services during summer 2016 (*see* Dist. Ex. 1 at pp. 8-9)—and the IHO did not address these issues in the decision (*see generally* IHO Decision at pp. 62-69). However, because the parents do not challenge the IHO's failure to reach determinations on these issues raised in the due process complaint notice, these issues are now deemed abandoned, per State regulation, and will not be reviewed on appeal (*see* 8 NYCRR 279.8[c][4]; *compare* Dist. Ex. 1 at pp. 8-9, *with* IHO Decision at pp. 662-69, *and* Req. for Rev. at pp. 1-10).

appealed the IHO's findings that the student had no social/emotional needs that rose to the "level of a disability requiring special education intervention" and "no emotional barriers to learning," these determinations have become final and binding on the parties and will not be further reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

Nonetheless, the parents now allege on appeal that the IHO failed to address whether the district's program met the student's social/emotional needs. More specifically, the parents argue that the evidence in the hearing record revealed that the student expended an "enormous effort" on homework and "re-learning," which resulted in little "academic success" and which put the student at "very substantial risk of burnout, psychological distress, disengagement, and loss of motivation" (Req. for Rev. at p. 6). The parents assert that the IHO, while crediting this evidence, misinterpreted its legal import and erroneously reasoned that this evidence was only relevant to the issue of "whether or not [the student] had 'emotional or affective issues that contributed to an inability or diminished ability to benefit from instruction'" (id. at pp. 6-7). However, the parents affirmatively state in the request for review that they "had not claimed [the student] had such an emotional or affective impairment," but instead, the parents "simply argued that the program was inappropriate because its nature was so unusually grinding and onerous that it gratuitously put [the student] at risk of substantial psychological harm" (id. at p. 7). And in support of this interpretation of their argument, the parents point to specific paragraphs in the due process complaint notice—"¶¶ 9, 15, 23, 44, 57-58"—as well as specific pages of their closing brief submitted to the IHO (id.). The parents then point to that portion of the IHO's decision wherein the IHO discussed issues that were beyond the scope of his jurisdiction, arguing that the IHO erroneously determined that "whether the student's anomie created a toxic educational setting that had an impact on her learning during these two years" or "whether the district bore any accountability for that impact" were issues beyond his jurisdiction even when weighed within the "liberal standards of notice pleading" espoused by the IHO (id.).

Based upon these arguments, the parents "ask the SRO to find, that a program that risks causing such a significant amount of psychological harm to a child, and that seriously risks destroying that child's desire to learn, should be deemed not to provide FAPE, where there is a reasonable means to produce the same or a greater level of progress while avoiding the risks" (Req. for Rev. at p. 7). The parents contend that "these risks could have been avoided by providing [the student] an individualized, structured and research-based program to remediate dyslexia" (id.).

In response to the parents' contention on appeal, the district agrees that although the parents did include an "unsupported and conclusory allegation" in the due process complaint notice concerning the student's social/emotional needs—namely, that the district failed to address the student's "academic, physical, social, and emotional needs"—the parents did not allege that the student's "social/emotional needs impacted her ability to learn," and therefore, the IHO properly concluded that this issue was beyond the IHO's jurisdiction (Dist. Mem. of Law at pp. 11-12). The district also argues that the parents now impermissibly raise for the first time on appeal, and without the district's agreement to expand the scope of the impartial hearing to include as an issue to be resolved, that an SRO should find that "'a program that risks causing . . . psychological harm to a child . . . should be deemed not to provide FAPE'" (see Answer & Cr. App. at pp. 6-7; Dist. Mem. of Law at pp. 11-12).

Upon review, I find that the parents' due process complaint notice cannot reasonably be read—even when read with the most liberal standards of notice pleading—to include the issue as the parents now frame it in the request for review: that a "program that risks causing such a significant amount of psychological harm to a child, and that seriously risks destroying that child's desire to learn, should be deemed not to provide FAPE, where there is a reasonable means to produce the same or a greater level of progress while avoiding the risks" as an issue to be resolved at the impartial hearing (*see* Dist. Ex. 1 at pp. 2-4, 8-10 [¶¶ 9, 15, 23, 44, 57-58]). In other words, to the extent that the parents now contend that the allegedly inappropriate instruction offered by the district may become the cause of an as yet undetermined amount of psychological harm to the student, such a speculative claim of future harm was not in the due process complaint notice before the IHO. Moreover, a review of the hearing record shows that the district did not agree to expand the scope of the impartial hearing, and the parents did not attempt to amend the due process complaint notice to include this issue. Instead, the hearing record reveals that the parents generally argued many of the same facts in their closing brief to the IHO in support of their allegation that the district "failed to offer a program that adequately safeguarded [the student's] social and emotional well-being," which the parents specifically indicated in the closing brief as arising from a single paragraph in the due process complaint notice (paragraph 44) (*compare* Req. for Rev. at pp. 6-7, *with* Parent Ex. CC at pp. 22-25). The social/emotional needs of the student were considered and ruled upon by the IHO and, will not be disturbed for the reasons discussed above.

#### **4. IHO's Standard of Review**

The parents first challenge to the IHO's findings that the district offered the student a FAPE for the 2015-16 and 2016-17 school years focuses on the IHO's interpretation and application of the Andrew F. decision. The parents argue that the IHO failed to impose a duty upon the district to assist the student in meeting "academic standards for her grade level as measured by Common Core State Assessments and normed, standardized tests," which, according to the parents, violates a grade-level advancement mandate imposed by Andrew F. In support of their position, the parents contend that they demonstrated the unreliability of the student's classroom grades and that the State assessments and standardized testing reflected that the student did not "meet minimum standards set by the State." Given the student's lack of grade-level advancement, the parents argue that the district did not establish that the recommended programs were "reasonably calculated to remediate the critical skill deficits that would have allowed [the student] to perform on grade level," and thus, the district failed to offer the student a FAPE. Relatedly, the parents argue that the IHO ignored or misinterpreted evidence demonstrating the student's lack of grade level knowledge and skill when examining whether the district offered the student a FAPE. As explained below, however, the parents' assertions are not supported by the evidence in the hearing record and must be dismissed.

While the parents argue a select portion of the Andrew F. legal standard, the Second Circuit observed that the "Supreme Court's recent clarification of the FAPE standard buttressed [its] view that the preeminent requirement of the IDEA [was] that the District individually tailor a program that [was] sufficiently challenging for the unique needs of each child" (F.L. v. Bd. of Educ. of the Great Neck Union Free Sch. Dist., 2018 WL 4049074, \*3 [2d Cir. Aug. 24, 2018] [summary order]). The Court further noted that the "IDEA 'require[d] an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances'" (F.L., 2018 WL 4049074, \*3, citing Andrew F., 137 S. Ct. at 1001).

Consistent with these holdings, the IHO's decision included a summary of the applicable legal standard and pointed directly to that standard as most recently interpreted by the Andrew F. decision, as well the guiding principles of the Rowley decision (see IHO Decision at pp. 4-5, 17-21). The IHO's decision also demonstrates that the IHO analyzed the facts of this case to the applicable legal standard when he considered whether the district offered the student appropriate reading and mathematics programs (id. at pp. 65-66). In reaching his conclusions, the IHO properly focused on whether the "education program [was] reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (id. at pp. 62-68).

Furthermore, while the evidence in the hearing record reveals that the student did not perform well on State assessments in particular (see generally Parent Ex. U) and standardized testing in March 2015 revealed that the student was performing below grade level and thus had a weakness in the area of math fluency (see Dist. Ex. 54 at p. 2), these facts, alone, are not sufficient to establish that the other evidence of the student's grades were unreliable or inflated, or that the student's advancement from grade to grade resulted from the district "pushing the child through." This is especially true, whereas here, the hearing record included a multitude of documents reflecting the student's grades for the 2014-15 school year: for example, her report cards; summary reports for social studies, science, and health showing her grade distributions among homework, tests, and quizzes and the relative weight afforded to those categories when determining the student's overall grades; and classroom teacher reports describing not only the student's estimated grade in each class, but also reporting on the student's classroom functioning (see generally Dist. Exs. 59-64; 80-82).

## **5. Burden of Proof**

The parents next challenge to the IHO's findings that the district failed to offer the student a FAPE for the 2015-16 and 2016-17 school years focuses on the IHO's application of the burden of proof under the State statute in light of the Andrew F. decision. Here, the parents assert that the district witnesses failed to provide consistent testimony about what special education services the student received and the witnesses' description of the services "did not conform to the written IEP." Without a sufficient description of the services, the parents argue that the IHO was deprived of the "opportunity to assess the adequacy of the program." As a result, the parents allege that the IHO should have determined that the district failed to sustain its burden of proof, and consequently, that the district did not offer the student a FAPE. In addition, the parents assert that because the district's "explanation of [the student's] education program was unclear, inconsistent, ambiguous, and not supported by a comprehensible rationale, the district fell short of the requirement [in Andrew F.] to give a 'cogent and responsive explanation' of its program."

Similar to setting forth the applicable legal standard in the decision, the IHO's decision included an explanation of the district's and the parents' respective burden of proof, as well as an explanation of both the burden of persuasion and the burden of production (see IHO Decision at pp. 33-44). Notably, the parents do not disagree with the IHO's recitation of the legal standards regarding the burden of proof, but instead, appear to challenge the sufficiency and the persuasiveness of the evidence presented by the district. However, regardless of whether the parents' arguments focus primarily on the district's burden of production or persuasion, the hearing record contains both sufficient and persuasive evidence of the special education services the

district provided to the student to address her needs in reading and mathematics as described in the section below, and therefore, the parents' arguments must be dismissed.

## **6. Programs and Services Based on Peer-Reviewed Research**

Next, the parents assert that they presented evidence at the impartial hearing that demonstrated that the district failed to implement "any intervention that had been validated by research," violating both the IDEA and State regulations. The parents also assert that the district's failure to comply with State regulation resulted in a deprivation of educational benefit to the student and denied the student a FAPE.

State and federal regulations require, in part, that an IEP must include a "statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child" (34 CFR 300.320[a][4]; see 8 NYCRR 200.4[d][2][v][b]). According to the Official Analysis of Comments to the federal regulations, the IDEA

requires special education and related services, and supplementary aids and services, to be based on peer-reviewed research to the extent practicable. States, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child's IEP Team based on the child's individual needs.

(Statement of Special Education and Related Services, 71 Fed. Reg. 46664-65 [Aug. 14, 2006]; see 20 U.S.C. § 1414[d][1][A][i][IV]).

While recognizing the IDEA's requirements regarding peer-reviewed research, courts have generally declined to find an IEP or a recommended program was not appropriate on the sole basis that it violated this provision of the IDEA (see Ridley Sch. Dist. v. M.R., 680 F.3d 260, 275-79 [3d Cir. 2012]; Joshua A. v. Rocklin Unified Sch. Dist., 319 Fed. App'x 692, 695 [9th Cir. Mar. 19, 2009] [finding that "[t]his eclectic approach, while not itself peer-reviewed, was based on 'peer-reviewed research to the extent practicable'"]; A.G. v. Bd. of Educ. of Arlington Cent. Sch. Dist., 2017 WL 1200906, at \*9 [S.D.N.Y. Mar. 29, 2017] [rejecting the parents' arguments that the Wilson Reading System must be used "with fidelity" or exclusively in order to provide a FAPE and finding that the incorporation of aspects of Wilson instruction as part of a balanced literacy program was permissible]; see also Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F. Supp. 2d 1213, 1230-32 [D. Or. 2001] [rejecting an argument that a district's proposed IEP was not

appropriate because it provided for an eclectic program and holding that the district's offer of FAPE was appropriate notwithstanding its refusal to offer an ABA approach]).

Generally, the parents' arguments on this point allege that the district failed to implement the Wilson reading program with "fidelity," and furthermore, the district's decision to use the Wilson reading program, together with the System 44 and Read 180 programs, constituted a "hybrid" reading program that was not based upon peer-reviewed research (see Parent Ex. CC at pp. 16-18). According to the evidence in the hearing record, the reading programs used with the student—Wilson, System 44, and Read 180—are peer-reviewed and research-based programs (see Tr. pp. 148-49, 151-53, 835-36; see generally Dist. Ex. 141). And regardless of whether the district implemented the Wilson program in a way that fully comported with the Wilson program director's testimony at the impartial hearing (see Tr. pp. 824-28, 832-34, 862-66),<sup>33</sup> or whether it was used in conjunction with the System 44 and Read 180 programs, the evidence in the hearing record conclusively establishes that the student made progress in reading with this "hybrid"—or "eclectic"—approach (see generally Parent Ex. M; Dist. Exs. 59-64; 69-72; 74-79; 84-85). Therefore, in this case I find that any lack of peer-reviewed research supporting the "hybrid" approach used in the implementation of the student's reading programs is not a sufficient basis for finding a violation of the IDEA or attendant State regulations. Consequently, the parents' argument must be dismissed.

## **B. 2014-15 School Year Progress and the Student's 2015-16 and 2016-17 IEPs**

While discussed more individually above, the parents' arguments on appeal when read together focus overall on whether the student made progress in reading and mathematics during the 2014-15 school year sufficient to justify the district's decision to continue to recommend a similar special education program for the 2015-16 school year, and to a lesser extent as discussed below, for the 2016-17 school year. In response, the district contends that the hearing record contains sufficient evidence—including Lexile scores, clinical assessments, district evaluations, the student's functional performance in class, and the student's ability to meet substantive academic standards—of the student's progress during the 2014-15 school year to conclude that the IEPs for

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<sup>33</sup> The Wilson program director testified that the Wilson reading program was "generally accepted by reading specialists and by doctors in the field as an effective method of teaching students with dyslexia" (Tr. pp. 834-35; see Tr. pp. 839-43). She also testified that an "extensive list" of published research existed that demonstrated the effectiveness of the Wilson reading program (Tr. pp. 835-36). The Wilson program director was not, however, a certified teacher (see Tr. pp. 837-38). According to the third edition of the Wilson reading program, "small group instruction" referred to a group of "three to six students"; in addition, Wilson could also be delivered in a one-to-one setting (Tr. pp. 864-65). With regard to the "frequency and duration" of implementing the Wilson reading program, the Wilson program director testified that "[i]ntensity [was] critical" (Tr. pp. 865-66). In order to implement the "program in a high quality way and with fidelity," the Wilson program director explained that "you need to be able to complete at least two full Wilson lessons or Wilson Reading System lessons per week" (Tr. pp. 864-65). To accomplish this, the Wilson program director clarified that it required meeting with a student for two 60-minute sessions or 75-minute sessions per week if delivered in a "one-on-one setting"; if delivered in a small group setting, it required meeting with that group for 45 minutes per day or two 90-minute sessions per week (Tr. pp. 865-66). During a nine-month school year, the Wilson program director testified that, according to "research on Wilson," "most teachers, . . . , c[ould] complete about three to four steps of the curriculum per school year if it [was] being schedule and implemented appropriately" (Tr. pp. 866-67). In this case, the student progressed from a Wilson level 6.1 in February 2015 to a Wilson level 7.1 in April 2015, and thereafter progressed to a Wilson level 8.2 (see Tr. pp. 350-51, 354-59; Parent Ex. M at p. 1; Dist. Exs. 84 at p. 1).

the 2015-16 and 2016-17 school years were appropriate. Upon review, the evidence in the hearing record does not support the parents' arguments.

A student's progress under a prior IEP may be a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. June 24, 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]). 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]). Here, the hearing record as a whole (including both objective and subjective descriptors of the student's progress) 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"]; C.S. v. Yorktown Cent. Sch. Dist., 2018 WL 1627262, at \*19-\*24 [S.D.N.Y. Mar. 30, 2018] [finding various sources of evidence about a student's progress (including testimony of the student's teacher, evidence of progress on annual goals, and other measures) sufficient despite standardized test scores]; A.G., 2017 WL 1200906, at \*10-\*11 [finding that the student made progress in reading as evidenced by teacher reports, promotion from grade to grade (even when the student performed below grade level in reading), and through advancement in text levels measured through Fountas & Pinnell]; M.H. v Pelham Union Free Sch. Dist., 168 F. Supp. 3d 667, 676-77 [S.D.N.Y. 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 noted previously, during the 2014-15 school year the district modified the student's May 2014 IEP in January 2015 to include to include a recommendation for daily specialized reading instruction in 12:1 special class (compare Dist. Ex. 4 at pp. 1, 7-8, with Dist. Ex. 3 at pp. 1, 6-7). The student began receiving the daily specialized reading instruction in February 2015, and previously worked on her annual goals for reading during daily resource room services (see Tr. pp. 187, 190-92, 288-89, 298; Dist. Ex. 87). At the impartial hearing, the district administrator testified that the district initially informed the parents about the "four programs available to [provide] specialized reading" to students, which included System 44, Read 180, Wilson, and "Reading Plus," at a meeting held on November 21, 2014 (see Tr. pp. 147-49). The administrator further testified that the district, at that time, considered providing the student with a "mixed model classroom of Read 180 and System 44" and that Wilson was also being considered (Tr. p. 149).

At the impartial hearing, the district administrator described System 44 as a program "based on the 44 sounds in the English language" that offered students a "phonics-based program" to address "decoding issues" (Tr. p. 152). She further testified that Read 180 comprised the "comprehension piece" of the reading program, and the district used a "mixed model classroom for children who may be having decoding and comprehension issues so both c[ould] be addressed simultaneously" (id.). According to the administrator, both System 44 and Read 180 used "direct

instruction," "individualized instruction," "small group instruction," and a "software computer-based piece . . . on the child's level" (*id.*). In this instance, the student's specialized reading instruction incorporated the Wilson reading program, along with the System 44 and Read 180 programs (*see* Tr. p. 173). The administrator testified that all three programs used with the student offered a multisensory approach to reading instruction (*see* Tr. pp. 197-98). For example, both System 44 and Read 180 included a "video component," where a student watched the video, listened, and spoke into it (Tr. pp. 282-83). With respect to Wilson, the administrator explained that it involved "movement and tactile movement of letters on a board" (Tr. p. 283).

The district reading teacher also testified at the impartial hearing, and explained that System 44 was the "beginning of the program for a more foundational reader and it address[ed] the needs of students who need[ed] to build skills in the area of phonemic awareness and phonics and decoding skills" (Tr. p. 341). According to the reading teacher, Read 180 was the "next step after System 44," and both programs included a "software program, as well as a textbook" (*id.*). She also testified about the similarities between the System 44 program and Wilson, noting that the programs provided a "systematic sequential multi-sensory approach to reading instruction that focuse[d] on decoding[,] phonemic awareness[,] and fluency," while also noting that the Read 180 program—which also provided a "systematic sequential structure multisensory approach"—incorporated "fluency" and focused on "higher level skills like reading comprehension, [and] inferencing" (Tr. p. 423).

In implementing the daily specialized reading instruction recommended in the January 2015 IEP, the district reading teacher testified that she "started" working with Wilson reading program with the student, then continued with System 44, and eventually, the Read 180 program (Tr. pp. 345-46).<sup>34</sup> On the alternate days when she provided the student with direct one-to-one instruction using the Wilson reading program, the reading teacher did not "use the other programs" (Tr. p. 374-75). When using the Wilson reading program, the reading teacher would "weave in concepts or the skills" taught from a previous level and "use it as a cumulative type of approach" (*id.*). The reading teacher also testified that while the district typically used the System 44 and Read 180 programs for "[m]ost everybody" who required specialized reading instruction, the decision was made to use those two programs plus the Wilson reading program for this student based "on her phonemic awareness needs, [and] based on the need to strengthen decoding skills" (Tr. pp. 375-83).

In March 2015, the district—in direct response to recently administered standardized assessment results—modified the student's January 2015 IEP to include annual goals targeting the student's needs in the areas of math fluency and word problems (*compare* Dist. Ex. 5 at pp. 1-3, 6-8, *with* Dist. Ex. 4 at pp. 1, 5, 7; *see generally* Dist. Ex. 34). The hearing record also reflects that the district used a "FASTT Math" program with the student (Dist. Ex. 73 at p. 1). The district administrator testified that the annual goals added to the student's IEP "directly related to increasing math fluency, and the other two goals refer[red] to math deficits" (Tr. pp. 182-83; Dist. Ex. 5 at pp. 6, 8). She explained that there were concerns about the student's ability to "complete

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<sup>34</sup> The student testified at the impartial hearing, and she recalled using the System 44 and Read 180 computer-based instruction, but she could not recall using materials with "Wilson" printed on them and it was unclear to her if she was receiving Wilson reading instruction (*see, e.g.*, Tr. pp. 1074-75, 1077, 1079, 1091-92).

all necessary work to obtain her answers and using basic operations to, again, solve problems and increase fluency" (Tr. pp. 182-83; Dist. Ex. 5 at pp. 6, 8).

Throughout the implementation of the daily specialized reading program and annual goals for mathematics, the district relied upon a variety of measures—including SRI assessments and Lexile scores, Scholastic Phonics Inventory (SPI) assessments, teacher reports, and her IEP annual goals—as well as the administration of standardized assessments to evaluate the student's progress and continued needs in these areas (see generally Dist. Exs. 48; 53-64; 69-79; 123; 125; Parent Ex. M). Based upon the SRI assessments in the hearing record, the student initially achieved a Lexile score of 757 in October 2014; after approximately one month of daily specialized reading instruction in March 2015, an administration of an SRI assessment revealed that the student's Lexile score increased to 821 (compare Dist. Ex. 69 at p. 1, with Dist. Ex. 70 at p. 1). In providing the parents with the student's updated SRI results, the notice indicated that the "test results [were] used in a number of ways," which included determining the student's reading ability compared to grade-level performance standards, tailoring appropriate reading instruction, and using the results to "set goals and monitor progress over time" (Dist. Ex. 79 at p. 1). The results also helped "match student to texts at their reading level" (id.). At the impartial hearing, the district administrator testified that the "program [was] developed so that students make 75 to 100 Lexile growth in a year" and a "Lexile" score was a "measure of reading ability" (Tr. pp. 185-88). She further testified that Lexile scores were a "good way to measure growth on how well a student [was] able to read different text complexities" and that Lexile scores were "very widely used" across a curriculum (Tr. pp. 188-89).

At the impartial hearing, the parents presented the psychologist who conducted the student's August 2016 neuropsychological evaluation as a witness (see generally Tr. pp. 562-816). The psychologist testified that, in order to determine whether a "specific intervention [was] working for a child with dyslexia," "literature" as well as federal and State law required students with disabilities to be "evaluated at various points using a variety of different measures to look at progress, whether they're reading goals, whether or not the interventions [were] correct, whether or not the progress [was] acceptable, based on the goals" (Tr. p. 606). She further testified that there were a "variety of different ways to asses this and you have to look at the whole child" (Tr. p. 607). With specific regard to Lexile scores, the psychologist testified about her understanding of the term "to provide [a] grade level for text that [were] available in the world" but noted that she did not "believe" that a Lexile score was used as a "diagnostic tool for identifying reading disabilities" (Tr. pp. 607-08). The psychologist also testified that she thought a "company" spoke about Lexile scores, and about having a "tool to help assign a reading level and then you could look at progress along those lines" (Tr. p. 608). However, the psychologist testified that in the "scientific literature," Lexile scores were not an appropriate way to measure whether an "intervention [was] working or [whether] a child with dyslexia [was] making progress" (Tr. pp. 608-09).

In addition to the psychologist, the parents also presented a Wilson program director as a witness at the impartial hearing (see generally Tr. pp. 824-85, 1200-41). Similar to the psychologist, the Wilson program director testified about her understanding of a Lexile score, noting that it could provide information about the student's "overall ability" to read text and it could be used to "assess whether a text [was] appropriate for a student" (Tr. pp. 847-48). However, according to the program director, "Wilson" did not consider Lexile scores an appropriate way to

"measure a dyslexic student's progress" because it was not a "test for that," meaning that Lexile scores did not provide information about "pseudoword reading," "word attack skills" or "word identification skills" (Tr. pp. 848-49). The Wilson program director continued, and noted that Lexile scores were "more informative for instruction" but were not—based upon her knowledge—recommended or generally used to measure progress (Tr. p. 849). The program director also testified that although she never used an SPI assessment, she understood that it "look[ed] at what does a student know," such as "sound-symbol association, sound-and-letter correspondence in English" and a "student's ability to know the symbols and sounds of our language" (Tr. pp. 849-50). Thus, for a student with a disability, the Wilson program director testified that to measure progress, or to "measure progress looking at those IEP goals over time, . . . , [you would] want to get a standardized comprehensive reading test, not an inventory" (Tr. p. 850). She also testified that "Wilson" did not consider an SPI an appropriate way to "measure a dyslexic student's progress" and "Wilson Language Training" did not recommend the use of Lexile scores or an SPI to measure a student's progress (Tr. pp. 850-53).<sup>35</sup>

According to the hearing record, an SPI assessment administered to the student in November 2014 and again in March 2015 showed the student's progress, albeit inconsistent, across several subtests: letter names accuracy, sight words accuracy, sight words fluency, nonsense words accuracy, nonsense words fluency, and an overall fluency score (see Dist. Ex. 77 at pp. 2-3).

Next, the hearing record includes an April 2015 secondary classroom teacher report (April 2015 teacher report), which indicated that for mathematics class the student "usually" had homework completed, she demonstrated a "slow" and "inconsistent" rate of progress, and she did not use class time effectively (Dist. Ex. 63 at p. 5).<sup>36</sup> In addition, the teacher report noted that the student "struggle[d] with concepts and application of skills" in mathematics class (*id.*). As areas of weakness, the teacher report indicated that the student had "difficulty with complex word problems and directions"; she had "difficulty explaining in written form how answers [were]

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<sup>35</sup> The State Education Department recently issued guidance explaining that "[t]he terms dyslexia, dysgraphia, and dyscalculia refer to specific learning challenges related to reading, writing, and mathematics. However, dyslexia, dysgraphia, and dyscalculia do not imply that a student cannot read, write, or develop math skills. Students with these learning challenges can develop such skills given appropriate instruction, supports and accommodations" ("Meeting the Needs of Students with Dyslexia, Dysgraphia, and Dyscalculia," Office of Special Educ. [Aug. 2018] available at <http://www.p12.nysed.gov/specialed/publications/documents/meeting-the-needs-of-students-with-dyslexia-dysgraphia-dyscalculia.pdf>). State guidance further adopted a "working definition" of the term dyslexia, meaning "a learning disorder affecting a student's reading skills. It is often characterized by difficulties in areas including (but not limited to) phonological processing (e.g., the ability to efficiently identify, blend, and manipulate speech sounds and syllables in words), decoding, reading fluency, and/or spelling. Reading for a student with dyslexia may be inaccurate and/or slow and effortful. Many students with dyslexia perform better on tasks involving listening comprehension than tasks involving reading comprehension. Dyslexia is associated with brain-based phonological impairments, not intellectual functioning or visual problems" ("Students with Disabilities Resulting from Dyslexia, Dysgraphia, and Dyscalculia: Questions and Answers" Office of Special Educ. [Aug. 2018] available at <http://www.p12.nysed.gov/specialed/publications/documents/q-and-a-students-with-dyslexia-dysgraphia-dyscalculia.pdf>).

<sup>36</sup> While much of the information contained in the April 2015 teacher report was also reported in a May 2015 "Reevaluation/Annual Review Report to Committee on Special Education," both sets of documents were before the May 2015 CSE for consideration (compare Dist. Ex. 63, with Dist. Ex. 55; see also Dist. Ex. 6 at p. 2).

obtained"; and she had "difficulty with computation, operations, concepts, reasoning, word problems, and application of skills" (id. at p. 6).

According to the April 2015 teacher report, the student demonstrated "consistent" progress in reading (Dist. Ex. 63 at p. 13). As areas of strength in reading, the teacher report indicated that the student showed "improvement' in her reading comprehension score," she used "more precision when reading and slow[ed] down when something [was] unclear," her handwriting was "controlled and neat," and her "[w]ritten expression [was] fluent and organized" (id. at p. 14). As areas of weakness, the student needed to "continue to read slowly and carefully so that she [did not] miss important detail in reading selections," and she needed to "continue to practice the skill of including text-based details in written responses" (id.).

Finally, the April 2015 teacher report revealed that in English class, the student "usually" had completed homework, and she was making "consistent" progress (Dist. Ex. 63 at p. 9). As areas of strength, the teacher report noted that the student "successfully identifie[d] the gist of a text and ma[d]e valuable connections between texts," and she "successfully identifie[d] and interpret[ed] the purpose of a writing task and communicate[d] the main idea effectively" (id. at p. 10). As areas of weakness, the student continued to "develop close reading skills [and] skills related to making inferences and identifying details in a text," and the student continued to "work on incorporating details and elaborating upon those details in her writing" (id.).

An April 2015 summary of Wilson reading progress indicated that the student's "one-on-one reading instruction" consisted of "direct, interactive, multisensory instruction in the areas of decoding/encoding, and reading fluency practice" (see Parent Ex. M at p. 1). According to the summary report, the student began the Wilson program on "Step 6.1" and had mastered the program through "Step 7.1" (id. at pp. 1-2). The reading teacher who prepared the summary report indicated that the student "steadily made progress with sound segmentation, reading and spelling of controlled text, and multisensory tasks such as tapping sounds and using syllable cards to form words" (id. at p. 1). Furthermore, the summary report noted that the student "responded well to the sequential nature of each lesson, including continuation of subsequent lessons with a review of previous concepts taught, known as 'weaving'" (id.). At the impartial hearing, the reading teacher testified that the student's performance in the Wilson reading program from February 2015 to April 2015 ("less than three months") represented "meaningful progress" (Tr. pp. 355-56).

The hearing record also included a copy of the student's April 2015 progress report for her IEP annual goals (see generally Dist. Ex. 125). At that time, more time was needed in order to assess the student's progress with regard to the mathematics annual goals that had just been added to the student's IEP in March 2015 (id. at pp. 2-3). However, the progress report indicated that the student was "[p]rogressing [g]radually" with respect to achieving the first annual goal in reading (answering reading comprehension questions based on a passage), and she was "[p]rogressing [s]atisfactorily" on a newly added annual goal in reading (applying phonic skills and word analysis skills to correctly decode the words) (id. at p. 2). The student was also "[p]rogressing [s]atisfactorily" on her annual goals in writing (id.). Notwithstanding the inability to assess the student's progress on her annual goals in mathematics, the student's report card revealed that her overall grade in mathematics rose from a 70 in the second marking quarter to a 78 in the third marking quarter (see Dist. Ex. 62 at p. 1).

With the foregoing in mind, the next issue to address is whether the educational program offered to the student in the IEPs developed for the 2015-16 school year—which continued the daily specialized reading instruction and daily resource room services the student received beginning in February 2015 during the 2014-15 school year—were reasonably calculated to enable the student to receive educational benefits.

"Although past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011], citing Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153 [10th Cir. 2008]; see also F.L. v. Bd. of Educ. of Great Neck U.F.S.D., 274 F Supp 3d 94, [E.D.N.Y. 2017] [finding a substantially similar program appropriate in light of the student's progress in the preceding school year]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 413-15 [S.D.N.Y. 2017] [examining carryover of goals and services from a student's IEP from a previous school year and noting that, "[w]here a student's needs and objectives remain substantially the same, '[i]t is especially sensible that [an IEP] would reflect continuity with [a student's] needs and objectives as of [previous years.]'", quoting L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at \*11 [S.D.N.Y. Sept. 27, 2016]; D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*12 [E.D.N.Y. Sept. 2, 2011] [determining that evidence of likely progress was "the fact that the [challenged IEP] was similar to a prior IEP that generated some progress", aff'd, 506 Fed. Appx. 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011] [finding that when the student made some progress under a previous IEP, it was not unreasonable for the CSE to propose an IEP "virtually identical to" the previous one]; M.C., 2008 WL 4449338, at \*16 [determining that when the IEP at issue mirrored a past IEP under which the student "demonstrated significant progress," the IEP at issue was reasonably calculated to afford the student educational benefit]; see generally Application of a Student with a Disability, Appeal No. 12-064; Application of the Bd. of Educ., Appeal No. 11-128).<sup>37</sup>

A review of the evidence in the hearing record demonstrates that the May 2015 CSE, which created the student's initial IEP for the 2015-16 school year, relied upon the preceding information about the student's progress to frame its understanding of her strengths and needs during the 2014-15 school year—and in particular, after receiving daily specialized reading instruction and daily resource room services to address those needs (see Dist. Ex. 6 at p. 2; see generally Dist. Exs. 55; 62-63; 125).<sup>38</sup> Here, the gravamen of the parents' complaints focuses precisely on the principle described above: namely, that the district recommended the same daily specialized reading instruction in a 12:1 special class and daily resource room services for the 2015-16 school year that the student received during the latter portion of the 2014-15 school year (compare Dist. Ex. 6

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<sup>37</sup> At least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

<sup>38</sup> The May 2015 CSE included both the student's resource room teacher and her reading teacher as attendees (see Dist. Ex. 6 at p. 1; see also Tr. pp. 344-45).

at pp. 1, 8-10, with Dist. Ex. 4 at pp. 1, and Dist. Ex. 5 at p. 1).<sup>39</sup> In light of the progress detailed above and the absence of evidence to support the parents' contention that the student did not make progress in the 2014-15 school year, there is no reason to disturb the IHO's conclusion that the educational program recommended by the district for the 2015-16 school year offered the student a FAPE (see Andrew F., 137 S. Ct. at 999 [noting that "the essential function of an IEP is to set out a plan for pursuing academic and functional advancement"]; see also Questions and Answers on U. S. Supreme Court Case Decision Andrew F. v. Douglas County School District Re-1, 71 IDELR 68 [OSEP 2017] [advising that "[p]arents and other [CSE] members should collaborate and partner to track progress appropriate to the child's circumstances" and that a CSE should "revise, as appropriate, the IEP to address the lack of progress," if any]).

In addition to the foregoing evidence of the student's progress, the evidence in the hearing record demonstrates that the student continued to make progress after the May 2015 CSE meeting through the conclusion of the 2014-15 school year and when she returned to the district for the start of the 2015-16 school year. For example, an SRI assessment administered to the student in June 2015 yielded a Lexile score of 920—showing a 99 point increase since the March 2015 SRI assessment testing (see Dist. Ex. 71 at p. 1). At that point, the student, with approximately four months of specialized reading instruction interventions, had almost achieved the grade 7 end-of-year proficiency target range of a "970-1120" Lexile score (compare Dist. Ex. 71 at p. 1, with Dist. Ex. 78 at p. 1). Similarly, an SPI assessment administered in June 2015 yielded improved scores, or scores that remained the same, across all subtests, including: letter names accuracy, sight words accuracy, sight words fluency, nonsense words accuracy, nonsense words fluency, and her overall fluency score (see Dist. Ex. 77 at p. 1). In light of the student's scores on the June 2015 SPI, the student's "decoding status" improved from "[d]eveloping" in November 2014 and March 2015, to "[a]dvancing" in June 2015 (id.).

The hearing record also included the student's final report card for the 2014-15 school year (see generally Dist. Ex. 64). With the exception of science, mathematics, and physical education, all of the student's fourth quarter grades improved (id. at pp. 1-2). Moreover, the student received passing final grades in all subjects notwithstanding the fact that she did not achieve passing grades on her final exams in social studies, science, and mathematics (id.).

In addition, the hearing record includes an October 2015 progress report created by the district reading teacher who taught the student's specialized reading instruction (see generally Dist. Ex. 84). By that time, the student had mastered several skills in "Step 8.1" and "Step 8.2" of the Wilson reading program (id. at p. 1). The student also showed "mastery" of previously taught concepts "through repetition and review" (id.). According to the report, the student's fluency skills were also addressed (id.). The student continued to receive reading instruction using the Read 180 program for "reading comprehension and fluency" (id. at p. 2). At that time, the student's "written responses" were characterized as "appropriate and clear, but sometimes reflect[ed] only a basic

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<sup>39</sup> The July 2015 CSE did modify the student's 2015-16 IEP to include OT consultation services, but it did not disturb the previously made recommendations for daily specialized reading instruction and daily resource room services (compare Dist. Ex. 7 at pp. 1, 9, with Dist. Ex. 6 at pp. 1, 9). Similarly, neither the October 2015 CSE, nor the February 2016 CSE, modified the student's 2015-16 IEP recommendations for daily specialized reading instruction and daily resource room services (compare Dist. Ex. 9 at pp. 1, 9-10, and Dist. Ex. 8 at pp. 1, 8-9, with Dist. Ex. 7 at pp. 1, 9, and Dist. Ex. 6 at pp. 1, 9).

understanding of the text" (*id.*). The progress report noted that the student required "promoting to further develop written responses, at times, and ha[d] to be reminded to slow down her pace" (*id.*).

Turning to the IEPs created for the 2016-17 school year, the evidence in the hearing record demonstrates that the June 2016 CSE continued to recommend daily specialized reading instruction in a 12:1 special class, as well as daily resource room services, for the student based upon a review of the available evaluative information: a "[v]erbal report" from a Kildonan administrator; November 2015, February 2016, and April 2016 Kildonan report cards; and the student's February 2016 IEP (compare Dist. Ex. 10 at pp. 1, 9-10, with Dist. Ex. 9 at pp. 1, 9-10, and Dist. Ex. 8 at pp. 1, 8-9; see generally Dist. Exs. 9; 65-67). The June 2016 CSE did, however, modify the recommendation for summer 2016 services to three 60-minute sessions per weeks in a 5:1 special class for reading (compare Dist. Ex. 10 at pp. 1, 9-10, with Dist. Ex. 6 at pp. 1, 9-10).

At the August 2016 CSE meeting, and based upon a review of the August 2016 neuropsychological evaluation report and an April 2016 teacher report, although the CSE continued to recommend daily specialized reading instruction in a 12:1 special class, the August 2016 CSE modified the June 2016 IEP to include the following recommendations: five 40-minute sessions per 10 day cycle of direct consultant teacher services to be provided to the student in her mathematics class, science class, ELA class, and social studies class (compare Dist. Ex. 11 at pp. 1, 8-9, with Dist. Ex. 10 at pp. 1, 9-10; see generally Dist. Ex. 42). Thus, for the 2016-17 school year, the district recommended the same daily specialized reading instruction for the student, but modified the student's IEP to include additional special education teacher support in her core academic classes. In light of the above, the student's progress under similar recommendations in the 2014-15 school year strongly suggest that the 2016-17 IEPs—modeled, in part, on those similar IEPs that generated some progress—were 'reasonably calculated to continue that trend'" (*S.H.*, 2011 WL 6108523, at \*10) and there is no reason to disturb the IHO's conclusion that the district offered the student a FAPE for the 2016-17 school year.

## **VII. Conclusion**

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2015-16 and 2016-17 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether Kildonan was an appropriate unilateral placement for the student (*Burlington*, 471 U.S. at 370).

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated: Albany, New York  
September 10, 2018**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**