



The University of the State of New York

The State Education Department
State Review Officer
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No. 19-040

**Application of the BOARD OF EDUCATION OF THE
KATONAH-LEWISBORO UNION FREE SCHOOL
DISTRICT for review of a determination of a hearing officer
relating to the provision of educational services to a student with
a disability**

Appearances:

Thomas, Drohan, Waxman, Petigrow, & Mayle, LLP, attorneys for petitioner, by Daniel Petigrow, Esq., and Steven L. Banks, Esq.

The Law Offices of Gerry McMahon, LLC, attorneys for respondents, by Geraldine A. McMahon, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Fusion Academy (Fusion) for a portion of the 2016-17 school year, the 2017-18 school year, and future school years. The appeal must be sustained.

II. Overview—Administrative Procedures

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

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

This appeal arises from an IHO's decision issued after remand (see Application of the Bd. of Educ., Appeal No. 19-008). While the parties' familiarity with the facts and procedural history through the prior administrative appeal is presumed, the factual history will be repeated here in some detail in order to provide background for the issues presented in this appeal.

The student was first determined by a CSE to be eligible for special education as a student with an intellectual disability during the 2008-09 school year (first grade) (Parent Ex. H at p. 1).¹ Throughout elementary and middle school, the student remained eligible for special education and attended a special class (12:1+1 or 12:1+2) for a portion of the school day in a district public school and received speech-language therapy; further, for some of her elementary school years, the CSEs recommended counseling services, 12-month school year services, the support of a teaching assistant in an integrated class, and/or parent counseling and training (see Parent Exs. H at p. 1; L at pp. 1-2; M at pp. 1-2; P at pp. 1, 11-12, 14; W at pp. 1, 11-13; GG at pp. 1, 13-16; JJ at pp. 1, 15-17; Dist. Exs. 1 at pp. 1, 11, 13; 3 at pp. 1, 11-13; 5 at pp. 10-11, 13; see also Dist. Ex. 21 at p. 1).

During the 2015-16 school year, the parents were in contact with staff from the district high school for the purposes of learning about the high school and preparing for the student's transition to ninth grade (see Dist. Ex. 77; 79; 81; 82). On May 18, 2016, the CSE convened to conduct the student's annual review and develop an IEP for the 2016-17 school year (Dist. Ex. 8 at p. 3; see Parent Ex. WW). According to the CSE meeting information summary, the parents expressed concern that, among other things, the draft annual goals provided by the district "were too generic" and indicated their intent to obtain private testing of the student, upon which they wanted the goals to be based (Dist. Ex. 8 at p. 3). The CSE adjourned the meeting and agreed to reconvene to discuss goals and recommendations for the student (id.). According to the meeting summary, the parents requested that the reconvened "meeting be held with the high school team" (id.).

On June 8, 2016, the parents provided the district with a proposed agenda for the reconvene of the CSE, which included review of a private multidisciplinary evaluation of the student conducted in May 2016, discussion of the student's annual goals, discussion of the ratio of the recommended class placement, review of the classroom environment, review of the proposed "daily and weekly schedule" for the student, and a request for a date for the parents to visit the high school with the student (Dist. Ex. 83 at p. 1; see Dist. Ex. 23).

The CSE reconvened on June 9, 2016 and recommended that the student attend a 12:1+2 special class placement for English language arts (ELA) (twice daily), mathematics (once daily), social sciences (once daily), and a support and skills class (once on alternating days) (Dist. Ex. 8 at pp. 1, 17). The CSE also recommended that the student receive related services consisting of counseling once per week in a group (5:1) and once per week individually for 30 minutes per session as well as three sessions per week of individual speech-language therapy and two sessions per week in a group (3:1) for 40 minutes per session (id. at p. 17). For summer 2016, the CSE recommended that the student receive speech-language therapy twice per week individually and once per week in a group (3:1) for 30 minutes per session (id. at pp. 17-18). According to the meeting information summary, the CSE addressed many of the items set forth on the parents' proposed agenda (compare Dist. Ex. 8 at pp. 1-3, with Dist. Ex. 83 at pp. 1-2).

¹ For all school years, including those at issue in this matter, the student's eligibility for special education as a student with an intellectual disability is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

The CSE reconvened, at the parents' request, on August 25, 2016 in order to review additional testing conducted by a private speech-language pathologist and to review the student's annual goals (Dist. Exs. 11 at p. 1; 86).² As a result of this meeting, the CSE added five two-hour assistive technology consultation sessions per year to the student's IEP, in order "to identify software/hardware necessary to support [the student's] reading and writing needs," as well as to provide training for the student, parents, and teachers (Dist. Ex. 11 at p. 17). The student began attending the district high school on September 7, 2016 (see Tr. p. 1273; see also Dist. Ex. 136).

The CSE reconvened again on November 11, 2016 at the parents' request to review the student's annual goals (Dist. Exs. 13 at p. 1; 87 at pp. 1-2). The November 2016 CSE removed the once per week individual counseling session that was recommended on the August 2016 IEP and added access to a computing device at school and home (compare Dist. Ex. 13 at p. 19, with Dist. Ex. 11 at p. 17). The November 2016 CSE also made changes to the student's present levels of performance and annual goals (compare Dist. Ex. 13 at pp. 6-18, with Dist. Ex. 11 at pp. 5-10, 12-16).

During December 2016, the student attended a "trial week" at Fusion (Dist. Exs. 144-46).³

On February 2, 2017, the CSE reconvened at the parents' request (Dist. Ex. 15 at p. 1).⁴ The meeting information summary attached to the February 2017 IEP noted the parents' concerns about the student's progress, issues with specific annual goals, the benchmarks for determining goal achievement, and the strategies being utilized by district staff to help the student overcome learning difficulties, as well as the sufficiency of the student's integration into the high school community (id. at pp. 1-2). The CSE did not make any changes to the recommended program and related services (compare Dist. Ex. 15 at pp. 1, 20-21, with Dist. Ex. 13 at pp. 1, 19-20).

Before the meeting adjourned, the parents presented the February 2017 CSE with a letter dated February 2, 2017, in which the parents notified the district that they were rejecting the November 2016 IEP, including any proposed amendments made during the February 2017 CSE meeting, and that they were withdrawing the student from the district and unilaterally placing her at Fusion, starting February 6, 2017 (Parent Ex. TTT; Dist. Ex. 15 at p. 2). In the letter, the parents stated their concerns about the substance of the student's IEP and "the lack of consistent implementation of all the elements of the IEP" (Parent Ex. TTT). The parents further indicated that, since attending the district high school, the student had "regressed based, in part, on the District's own reporting of her levels of performance when she entered high school and her levels of performance" during the 2016-17 school year (id.).

² The parents shared a proposed meeting agenda with committee members at the beginning of the August 2016 CSE meeting (Dist. Ex. 11 at p. 1; see Parent Ex. EEEEEEE).

³ The Fusion school that the student attended is an out-of-state, nonpublic school, which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see Tr. pp. 2659, 2817-18; Dist. Exs. 144-45; see also 8 NYCRR 200.1[d]; 200.7).

⁴ The parents shared a proposed meeting agenda with committee members at the beginning of the February 2017 CSE meeting (Dist. Ex. 15 at p. 1; see Dist. Ex. 16).

On February 3, 2017, the parents executed an enrollment contract for the student's attendance at Fusion for the remainder of the 2016-17 school year (Dist. Ex. 147; see Parent Ex. IIIIII). The student began attending Fusion on February 6, 2017 (see Parent Ex. AAAAAAAA at p. 1).

The CSE convened on March 27, 2017 to conduct the student's annual review and to develop her IEP for the 2017-18 school year (Dist. Ex. 17 at p. 1). The March 2017 CSE recommended a 12:1+2 special class placement for ELA (twice daily), math (once daily), social sciences (once daily), and support and skills (once on alternating days) (id. at pp. 1, 17). The CSE recommended that the student receive the related services of counseling once per week for 30 minutes in a group and three individual and two group speech-language therapy sessions per week for 40 minutes per session (id. at p. 17). The CSE also continued its recommendation that the student and parents receive assistive technology services and access to a computing device at school and home (id.). For summer 2017, the CSE recommended that the student receive speech-language therapy twice per week individually and once per week in a group, for 30 minutes per session (id. at p. 18).

On June 2, 2017, the parents executed a contract with Fusion for 25 sessions of "[t]utoring and [m]entoring" services to be delivered starting approximately June 5, 2017 (Parent Ex. OOOOO).

The CSE reconvened on June 9, 2017, for a program review and to discuss the student's progress at Fusion (Dist. Ex. 19 at p. 1). The CSE made minor changes to the IEP present levels of performance to reflect the information gathered during the June 2017 CSE meeting (compare Dist. Ex. 19 at pp. 5-11, with Dist. Ex. 17 at pp. 4-10).

On July 7, 2017, the parents executed an enrollment contract for the student's attendance at Fusion for the first semester of the 2017-18 school year, starting September 5, 2017 (Parent Ex. PPPPP).⁵

By letter dated August 21, 2017, the parents notified the district that they disagreed with the program recommended in the June 2017 IEP, "in part," based on information provided by staff from Fusion during the CSE meeting, including that the student required a program "that provide[d] intensive, 1:1 instruction" and which "cater[ed] to her learning style at a pace that enable[d] her to access her education" (Parent Ex. DDDD at p. 1). Accordingly, the parents notified the district of their intent to place the student at Fusion for the 2017-18 school year and seek tuition reimbursement and related expenses from the district (id.).⁶

⁵ A subsequent agreement, signed by the parents on November 3, 2017, modified the student's mathematics course for the first semester (Parent Ex. YYYYYYYY). Also, on November 3, 2017, the parents signed an enrollment agreement for the student's attendance at Fusion for the second semester of the 2017-18 school year (Parent Ex. QQQQQ). On December 13, 2017, the parents signed a contract with Fusion for tutoring and mentoring services (Parent Ex. KKKKKKK).

⁶ In addition to the student's program at Fusion, during the 2017-18 school year, a speech-language pathologist from a private clinic went to Fusion two days per week to deliver instruction using the Visualizing and Verbalizing program; in addition, the student attended the private clinic one morning per week where she received social skills

A. Proceedings Prior to Remand and Remand Decision

By due process complaint notice dated August 30, 2017, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16, 2016-17, and 2017-18 school years (see Due Process Compl. Notice at p. 21). A detailed summary of the claims raised in the due process complaint notice was set forth in my decision remanding this matter and will not be repeated here in detail (see Application of the Bd. of Educ., Appeal No, 19-008). An impartial hearing convened on December 13, 2017 and concluded on September 13, 2018 after 19 days of hearing (see Tr. pp. 1-3277). In a decision dated December 14, 2018 (IHO Decision I), the IHO determined that: the parents' claims regarding the 2015-16 school year were barred by the statute of limitations; the district failed to offer the student a FAPE in the least restrictive environment (LRE) for the 2016-17 and 2017-18 school years; Fusion was an appropriate unilateral placement for the student; and equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision I at pp. 20-29).⁷ The IHO rested his determination that the district denied the student a FAPE in the LRE for the 2016-17 and 2017-18 school years on his findings that the location of the student's classroom in the district high school ran afoul of the purpose of the LRE provision, the conditions surrounding the classroom created an unsafe environment, and the age range of the students assigned to the classroom the student attended in the district high school during the 2016-17 school year and to which the district assigned the student to attend for the 2017-18 school year violated State regulation (id. at pp. 20-25).

In a decision dated March 11, 2019, the undersigned reversed that portion of the IHO's decision which found that the district failed to offer the student a FAPE due to the physical location of the classroom and the age grouping of the students in the special class and remanded the matter to the same IHO to determine whether the district offered the student a FAPE for the 2016-17 and 2017-18 school years based on the issues raised in the parents' August 30, 2017 due process complaint notice that remained unaddressed (see Application of the Bd. of Educ., Appeal No, 19-008). Specifically, the IHO was directed to render substantive determinations regarding the appropriateness of the student's IEPs for the school years at issue, and the undersigned noted that many of the parents' claims pertained "to a particular theme: that the district failed to monitor the student's progress or lack thereof and, therefore, continued to offer the same inappropriate special education program from year to year."

instruction with a psychologist and instruction using the Visualizing and Verbalizing program with a speech-language pathologist (Tr. pp. 1645-46, 2175-76; 2020; Parent Ex. KKKKKK; OOOOOO at pp. 33-34, 37-38, 47, 50-51, 55-58, 61-63, 65-66, 69-70, 73, 77; see also LLLLLL at p. 19). It appears that the student also received some services from the psychologist at the private clinic during summer 2017 (Parent Ex. OOOOOO at p. 24). According to the hearing record, the Visualizing and Verbalizing program is an evidence-based reading comprehension program developed by Lindamood-Bell that provides structure and strategies to support a student's needs relating to reading comprehension and oral and written expression (Tr. pp. 2130-31, 2185, 2196-97; Dist. Ex. 23 at p. 15).

⁷ The IHO's December 2018 decision was not paginated. For purposes of this decision, citations to the IHO's December 2018 decision shall refer to the consecutive pages, with the cover page as page one (see IHO Decision I at pp. 1-29).

B. Impartial Hearing Officer Decision After Remand

In a decision dated April 15, 2019 (IHO Decision II), the IHO determined that the district failed to offer or provide the student with a FAPE for the 2016-17 and 2017-18 school years (see IHO Decision II at pp. 7, 14-15).⁸ With respect to the student's IEPs for the 2016-17 school year and 2017-18 school years, the IHO summarized his findings "that the district failed to meet its responsibilities in that it prepared IEPs that were inconsistent and contradictory, containing goals and objectives that were highly questionable" and that the student "showed a lack of progress" (*id.* at pp. 7, 15). As an initial matter, the IHO noted that district witnesses who testified at the impartial hearing "admitted, directly or indirectly," that they did not have the necessary documentation needed to make valid and reliable recommendations (*id.* at p. 9). Specifically, the IHO noted the witnesses' failure to maintain records containing "data, notes, or other documentation" regarding the student's progress towards achieving her IEP annual goals (*id.* at pp. 9-10). The IHO also noted his overall impression that the district members of the CSEs tended to blame the student when she failed to demonstrate progress in the district program and that the district did not "accept[] its responsibility to develop new and innovative strategies to meet [the student's] unique needs" (*id.* at p. 12).

Specific to the 2016-17 school year, the IHO found that discrepancies in the descriptions of the student's needs in the November 2016 IEP compared to the June 2016 IEP (and the May 2016 private multidisciplinary evaluation report) demonstrated that the student "appeared to be regressing" (IHO Decision II at p. 8). The IHO also found no evidence in the hearing record that the CSE members "even recognized these discrepancies or devised new approaches to deal with [the student's] lack of progress" (*id.*). Further, relying on the testimony of the private psychologist, the IHO determined that the annual goals presented at the June 2016 CSE meeting could not be deemed appropriate because the goals did not state the level of prompting and support expected of the teacher or provider implementing the goal with the student (*id.* at pp. 10-11). The IHO also noted that the district "did not adopt or implement [the private speech-language pathologist's] recommended IEP goals" (*id.* at p. 10).

With respect to methodology, the IHO determined that, when the parents and the private psychologist attempted to discuss the student's need for evidence-based instruction, the CSE "listened to [the private psychologist's] presentation, did not discuss it, and simply moved on to another issue" (IHO Decision II at p. 11). Further, the IHO found that, while the parents advocated for a specific "evidence-based intervention program" called Visualizing and Verbalizing, the CSE rejected their plea and instead provided the "System 44" program, which the district staff conceded did not enable the student to achieve consistent progress (*id.*). In contrast, the IHO noted that the student made progress while attending Fusion with the Visualizing and Verbalizing program (*id.*).⁹

⁸ Upon remand, the parties participated in a prehearing conference, the contents of which the IHO summarized in his final decision (IHO Decision II at p. 2). According to the IHO, the parties and the IHO agreed that no additional evidence was required in order for the IHO to make the necessary findings of fact and conclusions of law (*id.*).

⁹ The IHO noted that "the CSE adopted 'System 44'" despite "warnings" regarding the student's struggles with the computer-based program and the use of prompts when the student was using the program (IHO Decision II at p.

Finally, the IHO also determined that the district failed to implement the student's IEPs in a manner that would allow her to achieve her social/emotional goals and develop appropriate "peer relationships" (IHO Decision II at pp. 12-13). The IHO found that this was demonstrated by the number and ages of students assigned to the student's classroom and the amount of time the student spent alone with adults during the school day (id.). In this context, the IHO also reiterated his concerns about the location of the classroom in the lower level of the school building (id. at p. 13).

With respect to the 2017-18 school year, the IHO noted that "[d]espite the contradictions, discrepancies and highly questionable goals and objectives, the CSE met [on March 27, 2017] to plan for the 2017-2018 school year and adopted what amounts to the same failed IEP of the year before, including "all of the academic IEP goals from the [November 2016] IEP" (IHO Decision II at p. 11). The IHO noted that, while the June 2017 CSE meeting information comments stated that the CSE would update the IEP to reflect new information that was garnered at the June 2017 CSE meeting, it failed to do so (id. at pp. 11-12). The IHO also found that evidence of the student's "success" at Fusion provided "further evidence that the district failed to meet its obligations" (id. at p. 14).

In conclusion, the IHO reiterated his prior determinations that Fusion was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parents' request for tuition reimbursement (IHO Decision II at p. 15). To remedy the district's failure to provide a FAPE for the 2016-17 and 2017-18 school years, the IHO ordered the district to reimburse the parents for the costs of tuition and related expenses at Fusion from February 6, 2017 through the 2017-2018 school year (id.). The IHO also ordered the district to fund the costs of the student's tuition at Fusion for "subsequent (years limited by graduation or age twenty-one) necessary to bring [the student] to the functioning level she would have achieved had the district provided appropriate services and supports" (id.).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in his determination that the district failed to offer and provide the student a FAPE for the 2016-17 and 2017-18 school years.¹⁰ More

10). Further, the IHO indicated that "[o]ne of the reasons that this program turned out to be ineffective" was that the microphone had been broken (id.).

¹⁰ While the district's request for review includes three general headings (the district's provision of FAPE, the appropriateness of the unilateral placement, and equitable considerations), this is insufficient to satisfy the requirement that the request for review set forth "a clear and concise statement of the issue 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]). Generally, 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]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; 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

particularly, the district alleges that the IHO erred in finding that the CSEs failed to keep documentation regarding the student's receipt of services or devise new approaches to address the student's lack of progress. Instead, the district asserts that the student made academic progress during the 2015-16 and 2016-17 school years. The district also alleges that the IHO erred in finding that the CSEs failed to craft clear annual goals and objectives and states, instead, that the goals were informed by the student's needs and progress with input from the student's teacher and providers. As to methodology, the district argues that the IHO erred in finding that the CSEs failed to recommend that the student receive instruction using either the Visualizing and Verbalizing or Wilson programs and notes that the May 2016 private multidisciplinary evaluation report did not state that the student needed a specific program. As to the IHO's finding that the district failed to implement the student's IEPs in a manner that provided the student with opportunities to engage with peers, the district asserts that the IHO erred and that the hearing record shows that the student had opportunities to interact with peers in her general education classes, during field trips, at lunch, in student clubs, and in group counseling.

The district also appeals the IHO's determinations that Fusion was an appropriate unilateral placement for the student and that equitable considerations weigh in favor of the parents' request for tuition reimbursement. With respect to the unilateral placement, the district alleges: that the parents presented insufficient evidence that Fusion provided the student with specially designed instruction to meet her unique needs (such as testimony from the student's regular teachers and evidence that instruction was modified); that the IHO failed to take into account the reduction in related services received by the student while at Fusion compared to when she attended the district program or the lack of opportunities at Fusion for interaction with nondisabled peers; and that the evidence in the hearing record reflected that the student did not make progress academically at Fusion. For equitable considerations, the district asserts that the IHO disregarded evidence that the parents failed to provide the district with timely notice of their intent to unilaterally place the student at Fusion. Finally, the district argues that the IHO lacked the legal authority to order the district to prospectively fund the student's attendance at Fusion for future school years.

In their answer, the parents generally respond to the district's allegations and argue that the IHO's decision should be upheld in its entirety.

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

[S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]). In this instance, given that the parents were able to respond to the allegations raised in the request for a review in an answer and there is no indication that the parents otherwise suffered any prejudice, I decline to dismiss the request for review on these grounds (see Application of a Student with a Disability, Appeal No. 18-053; Application of a Student with a Disability, Appeal No. 17-101). However, counsel for the district is reminded to review the requirements of Part 279 as amended and effective January 1, 2017 and is 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. 19-021).

independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere

'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see 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]).¹¹

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

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

VI. Discussion

A. 2016-17 School Year

At times, both the IHO and the parties have examined the IEPs developed for the student for the 2016-17 school year in total. While it is difficult in some instances to parse out whether

¹¹ 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).

the IHO's findings and the parties' arguments are intended to apply to all or only one of the IEPs developed, generally, the crux of the issues on appeal pertain to the evidence about the student's progress available to the CSEs (and the CSEs' response to such information in terms of adjusting the student's programming) and the appropriateness of the student's annual goals.

In examining the evidence in the hearing record relating to these issues, two generally distinct time frames emerge, the first consisting of the May, June, and August 2016 CSEs' initial planning for the student for the 2016-17 school year (resulting in the June and August 2016 IEPs), and the second consisting of the November 2016 and February 2017 CSEs' review of the student's programming in light of the student's attendance in the district program during the course of the 2016-17 school year. Accordingly, the foregoing discussion will address these timeframes in turn.

1. June and August 2016 IEPs

a. Present Levels of Performance

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

A review of the hearing record indicates that, in addition to teacher, parent, and related service provider reports, the May 2016 CSE had available to it and considered an April 2015 district psychological evaluation report, the results from January 2016 i-Ready assessments in math and reading, and results of a limited speech-language assessment (compare Dist. Exs. 8 at pp. 1-10, with Dist. Exs. 21; 28; 29).^{12, 13}

Review of the May 2016 meeting information summary attached to the June 2016 IEP indicated that the student was "having a great year" and had "come a long way in all academic areas" (Dist. Ex. 8 at p. 3). Specifically, it was reported that the student could read multi-paragraph pieces aloud and identify the main idea and details (id.). In writing, the meeting information summary indicated that the student "offer[ed] a lot of information about topics but need[ed] teacher support for writing" (id.). In math, the special education teacher reported that the student was reading numbers better and solving problems more accurately and was working hard to understand concepts (id.). The student's speech-language pathologist reported during the May 2016 meeting

¹² The hearing record indicates that the May 2016 CSE developed the student's present levels of performance but that an IEP was not generated until after the June 2016 CSE (see Dist. Ex. 8); accordingly, even where the contents were developed during the May 2016 CSE meeting, the June 2016 IEP will be the document referenced.

¹³ The first page of the district's psychological evaluation report is dated January 30, 2015; however, it is signed and dated April 8, 2015 on the last page of the report (Dist. Ex. 21 at pp. 1, 8). For the purposes of this decision, the evaluation will be referred to as the April 2015 psychological evaluation report.

that the student had demonstrated growth in the areas of formulating sentences, using adverbs in sentences and independent use of conjunctions but that , while the student's vocabulary had also improved, she continued to need more development (id.). The parents informed the CSE that they believed the draft annual goals were "too generic" and, given that the student was undergoing a private evaluation, requested that the results be used to develop annual goals for the student (id.). At the conclusion of the meeting, the CSE agreed to reconvene to discuss the private evaluation results, and annual goals and recommendations (id.).

According to the hearing record, the CSE reconvened in June 2016 as a continuation of the student's annual review meeting and to review the results of a May 2016 private multidisciplinary evaluation, as well as to have members of the student's high school team attend (Tr. pp. 142, 380-81, 421; Dist. Exs. 8 at pp. 1-3; 23). The private psychologist who completed portions of the multidisciplinary evaluation attended the June 2016 CSE meeting to discuss the evaluation results and her observations, and, according to the meeting information summary attached to the June 2016 IEP, she opined that the scores from the evaluation did not "tell a lot about who the student is as a learner" (Dist. Ex. 8 at pp. 1-2; see Dist. Ex. 23 at p. 16).

The meeting information summary indicated that the CSE then turned to developing the annual goals and the student's special education teacher reported that the student was reading text up to a fifth-grade level with support (Dist. Ex. 8 at p. 2). The private speech-language pathologist who participated in the multidisciplinary evaluation of the student inquired about goals for decoding and implementation of the Wilson reading program (id. at pp. 1-2; see Dist. Ex. 23 at p. 16). She further suggested that she could administer the Wilson Assessment for Decoding and Encoding (WADE) and would develop goals for consideration including appropriate methods to instruct the student (Dist. Ex. 8 at p. 2).

In the area of mathematics, the meeting information summary indicated that the student needed consistent practice in math and that she used a calculator but had difficulty understanding problem solving (Dist. Ex. 8 at p. 2). Additionally, in writing, the meeting summary reflected reports from the student's special education teacher that she was writing a "good paragraph" but needed assistance to sequence her ideas and that she generated closing sentences on her own (id.).

The high school speech-language pathologist indicated that the student needed to improve her ability to give a verbal narrative and stated that she would like to write a goal to address this skill (Dist. Ex. 8 at p. 2). According to the meeting information summary, the middle school, high school, and private speech-language pathologists discussed the student's goals and noted the student's need to improve her ability to provide a verbal narrative and her vocabulary skills (id.).

The meeting information summary reflected the school social worker's report that social nuance was challenging for the student but that he did not see the student as being "overwhelmed with anxiety" (Dist. Ex. 8 at p. 2). In response to the parents' expressed concerns about socialization and the need for the student to have a peer she recognized as being a support to her, the social worker described the peer leadership program offered at the high school and the CSE described the teen lounge after school club as possible programs to address the student's social needs (id.). The parents then stated that they did not feel the student needed a specific peer in her peer group and expressed concern about students ages 18 to 21 being in the club (id.).

Turning to the June 2016 IEP, the present levels of cognitive performance reflected results from the April 2015 psychological evaluation that the student demonstrated cognitive skills within the moderately delayed range as measured by the Stanford-Binet, 5th Edition (SB-5) (compare Dist. Ex. 8 at p. 9, with Dist. Ex. 21 at pp. 2-5).¹⁴ Additionally, the June 2016 IEP reported that the student's nonverbal and verbal IQs were similarly developed, that she performed best on tasks that required her to non-verbally problem solve, and that she was most challenged by tasks that required her to store, retrieve, and manipulate information in her short-term memory (Dist. Ex. 8 at p. 9). The present levels of performance also reflected results and statements from the multidisciplinary evaluation report, which indicated that the student's performance on cognitive, attention, and academic-based measures was consistent with her history and supported her special education classification, but that "throughout observations made across settings and data collected based on qualitative information, [the student's] presentation [wa]s marked by several areas of particular strength" (compare Dist. Ex. 8 at p. 9, with Dist. Ex. 23 at p. 13). Furthermore, the June 2016 IEP reflected results from the April 2015 psychological evaluation that the student's adaptive behavior skills, assessed using the Vineland Adaptive Behavior Scales, were within the adequate range (Dist. Ex. 8 at p. 9). However, the student's middle school special education teacher reported areas of weakness in the student's ability to understand time, money, and math and to effectively use free time, and the parents reported that the student exhibited difficulty with receptive and written communication at home (id.).

With regard to the development of the IEP, the student's middle school special education teacher testified that she used i-Ready assessments, classroom observations and portfolio materials, work sheets, and projects to develop the June 2016 IEP reading, writing, mathematics, and study skills present levels of performance (Tr. pp. 143-48; see Dist. Exs. 28; 29). The special education teacher testified that, by the end of eighth grade, the student "grew into this really confident learner" who had begun to understand her strengths and skills, who was more prepared for learning, and whose stamina increased, as did her ability to focus on tasks longer without breaks (Tr. pp. 46-48).¹⁵

Specific to the student's reading skills, the middle school special education teacher stated that by the end of eighth grade the student was able to read longer texts, she was reading independently at "about" a third-grade reading level, and, with the special education teacher providing "guided instruction," the student was reading fifth-grade level text (Tr. pp. 47-48). The special education teacher further specified that the student needed to improve in her ability to answer questions and make inferences, build on her background knowledge, and demonstrate an understanding of words and content (Tr. p. 72). The June 2016 IEP present levels of reading performance reflected that the i-Ready assessment results indicated the student's overall performance was "more than one level below," and specifically indicated that phonics, vocabulary, comprehension of literature, and comprehension of informational text skills were "more than one level below" (Dist. Ex. 8 at p. 8). According to the IEP, in the classroom the student was reading multiple paragraphs from nonfiction and informational texts aloud to her teacher (id.). The June

¹⁴ The April 2015 psychological evaluation report stated that test results reflecting the student's moderately delayed cognitive skills were consistent with prior evaluations (Dist. Ex. 21 at p. 8).

¹⁵ The hearing record indicates that the middle school special education teacher was the student's teacher for four school years ending with the 2015-16 school year (eighth grade) (Tr. p. 40).

2016 IEP indicated that the student was reading informational texts with guided reading instruction and was able to draw conclusions and make inferences with some support (id.). However, the student needed instruction and practice using vocabulary across all academic subjects, to increase her knowledge of prefixes, suffixes, synonyms, and antonyms, to improve her ability to identify the main idea and details in more complex texts, and to analyze cause and effect (id.).

In writing, the middle school special education teacher testified that she used the student's portfolio materials to develop the June 2016 IEP present levels of performance, noting that the student's work showed she could write a paragraph with a topic sentence, details, and a closing sentence with moderate support from graphic organizers, conference with the teacher, and revise work during a conference with the teacher (Tr. pp. 64-67). The special education teacher testified that, by the end of eighth grade, the student was able to write longer pieces of text about what she had read, develop a draft of her work, and conference with the teacher to make sure her writing was coherent and organized (Tr. pp. 50-51). She further testified that the student was working on developing her writing using more details, substance, and relevant information and that the student was a visual learner and benefitted from having "things broken down for her" using graphic organizers and time to process information (Tr. pp. 65-66). The June 2016 IEP present levels of performance indicated that, with support, the student was able to write short responses to questions by recalling information from the text and going back into the text to retrieve it (Dist. Ex. 8 at p. 8). Additionally, the IEP indicated that testing showed the student: understood and used prefixes and suffixes; was able to sort words into categories; understood multiple meaning words; defined words by category; and identified real-life connections between words (id.). The present levels of performance further indicated that the student used details to describe characters, setting, and events in a story using both fiction and nonfiction texts (id.). The IEP reflected reports that the student had improved her ability to write sentences that supported a topic and that she was writing paragraphs about topics after reading informational texts with her teacher (id.). The IEP further described that the student benefitted from reviewing her draft and paragraph graphic organizers with her teacher to make sure the content was coherent and organized (id.). Additionally, the June 2016 IEP described that the student was learning how to retrieve evidence from the text to write sentences that included details and was working with her teacher to revise and edit her work (id.).

The middle school special education teacher testified that she developed the student's present level of performance in mathematics using class work and teacher observations, and noted that over time the student showed improved ability to independently multiply up to four-by-one digits and divide single digit numbers using a fact chart (Tr. pp. 66-68). She testified that, during guided mathematics instruction, the student read and wrote numbers with visual supports including place value charts, which were necessary due to the student's difficulty with sequencing, reading, and understanding numbers (Tr. pp. 68-69). The special education teacher further testified that although the student had become more independent in her ability to add mixed coins she needed to continue to work on these skills (Tr. pp. 69-71). Finally, the special education teacher testified that the student had a poor "understanding of number sense" and required daily reteaching and modeling (Tr. p. 71). In mathematics, the June 2016 IEP present levels of performance reported the results from a January 2016 administration of the i-Ready math diagnostic assessment, which indicated that the student was performing "well below average," the student could compare and order two-digit numbers and add two-digit numbers without regrouping, and also could compare the length of two objects and organize, represent, and interpret several categories of data on a

picture graph (Dist. Ex. 8 at p. 9). In the classroom, the special education teacher described and the present levels of performance reflected that the student: added multi-digit numbers with regrouping using a number line and mental math; subtracted with regrouping using graph paper and given verbal cues; both multiplied double-digit numbers by a single digit and divided single digit numbers using a fact sheet; and had improved in her ability to read multi-digit numbers (id.). Additionally, the special education teacher reported that in the classroom the student read bar graphs and pictographs with minimal support, and that she improved her ability to count pennies, nickels, and dimes combined, and mixed bills of ones, fives, and tens with "some support" (id.). The June 2016 IEP indicated that the student needed to improve her knowledge of place value and computation skills involving all operations, as well as her ability to read and write multi-digit numbers and identify and compare the value of mixed coins and bills (id.).

The June 2016 IEP speech-language present levels of performance indicated that the student had improved her ability to formulate sentences containing adverbs and conjunctions and that she benefitted from prompts and models when expanding sentences and when asked to develop and support conclusions (Dist. Ex. 8 at p. 8). The IEP described that the student could accurately identify main ideas and details given multiple choices, and with prompts she could define words by function, form, and place (id.). The IEP also noted that the student demonstrated progress answering what, who, where, and when ("wh") inference questions when provided multiple choices and that her ability to answer how and why inference questions continued to emerge with scaffolded support (id.). According to the IEP, defining vocabulary by category and independently synthesizing definitions into sentences was challenging for the student (id.). Information from the May 2016 multidisciplinary evaluation report included in the IEP speech-language present levels of performance indicated that the student met the criteria for a language disorder "as evidenced by: receptive and expressive language development profoundly below age expectations, historical weakness in decoding and encoding written language, and auditory memory profoundly below age expectations" (compare Dist. Ex. 8 at p. 8, with Dist. Ex. 23 at p. 13).¹⁶

In addition to the information reflected in the June 2016 IEP, the May 2016 multidisciplinary evaluation report indicated that throughout the evaluation the student demonstrated several areas of particular strength and that she was "highly socially motivated and curious about her surroundings" (Dist. Ex. 23 at p. 13). The evaluators described that while the student's testing suggested poor working memory and encoding of factual knowledge, she evidenced strong "experiential learning" and the "ability to build upon newly acquired knowledge of others," she demonstrated characteristics of resilience, and "throughout difficult tasks her tenacity and frustration tolerance were exemplary given the rigorous nature of the evaluation process" (id.). However, the evaluators continued that, in an unstructured setting with competing demands, the student's ability to understand peers' intent was unclear (id.). The evaluators explained that the student's communication deficits impacted her functional performance and her limited memory for language and delayed processing of verbal information limited her ability to efficiently process language in order to follow directions, comprehend academic instruction, and organize her own verbal and written expression (id.). The evaluators further indicated that the

¹⁶ The private psychologist testified that her diagnosis was "consistent with [the student's] history of intellectual disability" (Tr. p. 1753).

student's ability to recall linguistic information "diminishe[d] significantly" as the length and complexity of verbal information increased (id.). Finally, the May 2016 multidisciplinary evaluation report provided the results of behavioral rating scales, which indicated that the student's behavior was "largely within expectations" with the exception of attention vulnerabilities at home and tendencies towards anxiety and withdrawal at school (id. at p. 11).

The private psychologist who conducted portions of the multidisciplinary evaluation and attended the June 2016 CSE meeting opined during the hearing that her interpretation of the student's cognitive assessment scores, which were in the first to second percentile, were "more process oriented in nature" meaning she did not feel that the numbers were representative of the student's capacity and "in some regards, under-estimated what [the student] could do" (Tr. pp. 1767-68; see Dist. Exs. 8 at p. 1; 23 at p. 16). She further testified that the student's approach to academic tasks was "striking" because she could take learned strategies and generalize them to novel settings but that, as evidenced by her scores, she did not always execute that accurately (Tr. p. 1775). The private psychologist also testified that the results of one of the behavioral rating scales indicated that the student's "social role [wa]s rather well developed" (Tr. pp. 1778-79).

The May 2016 multidisciplinary evaluation report also included results from an administration of the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5), which indicated that the student's general language ability was in the "profoundly below average range" (Dist. Ex. 23 at p. 8). The evaluators explained that the student struggled to interpret spoken language and to hold on to verbal information in order to follow directions, repeat information verbatim, and answer factual and inferential comprehension questions (id. at p. 9). The evaluators further described that the student exhibited "severe listening comprehension deficits with limited ability to retain, recall and manipulate verbal information," and opined that these weaknesses likely compromised her ability to follow directions, understand academic instructions, and learn subject content at school (id.). Expressively, the May 2016 multidisciplinary evaluation report indicated that the student struggled to formulate and assemble sentences as well as answer listening comprehension questions from short passages and noted that the CELF-5 structured writing portion could not be scored because the student could not complete the assignment (id. at pp. 9-10). The multidisciplinary evaluation report also contained results from an administration of the CELF-5 metalinguistics assessments, which measured the student's ability to make inferences, construct conversationally appropriate sentences, and understand non-literal messages such as multiple meanings, ambiguous sentences, and figurative language (id. at p. 10). The results indicated the student achieved below average scores in the areas of abstract language, idiomatic expressions, and multiple meaning words (id. at pp. 10-11). The evaluators opined that, because the student struggled with many aspects of concrete language, she could not effectively "bridge the gap between explicit and nonliteral language" (id. at p. 11). In pragmatics, the report indicated that at school the student was demonstrating age appropriate social language skills; however, at home, the parent ratings indicated a below average score (id.).

The private speech-language pathologist, who conducted portions of the multidisciplinary evaluation and also attended the June 2016 CSE meeting, testified that the student's test numbers were "extremely low in terms of her level of functioning," representing "very delayed" receptive and expressive language skills which also encompassed a "cognitive element" due to her "working memory and processing weaknesses" (Tr. pp. 2098-99; see Dist. Exs. 8 at p. 1; 23 at p. 16). The private speech-language pathologist testified that test results showed that there were "massive

areas of need" that the student had with regard to basic concepts, and that she did not have a lot of the concrete language skills firmly embedded in order for her to be able to demonstrate what she had retained (Tr. pp. 2100-01). The private speech-language pathologist further testified that, even though the results of the assessments showed the student had significant delays in her language skills, she showed "strength of social salience" and was "very much engaged" and responsive to language with a desire to understand (Tr. pp. 2099-100).

The May 2016 multidisciplinary evaluation report provided recommendations designed to address the student's needs as identified in the assessments, which included: adding a paraprofessional to assist with the transition to high school and to help with breakdowns in peer interactions; preparing the student for potential opportunities in vocational and skill based training; and increasing service hours to implement social/emotional goals and objectives to address needs in an individual and group setting (Dist. Ex. 23 at p. 14). Furthermore, the recommendations to address the student's language needs included consistent, daily academic supports that utilized evidence-based intervention programs with daily speech-language services to support verbal and reading comprehension and oral and written expression (*id.*). To improve the student's auditory and reading comprehension skills, the May 2016 multidisciplinary evaluation report recommendations included: implementing an evidence-based reading comprehension program that would provide structure and strategies to create visual imagery as a means of remembering and comprehending verbal and written language, such as Visualizing and Verbalizing; teaching the student specific memory strategies using visual concept and auditory cues to help maximize her ability to internalize information; using graphic organizers; activating prior knowledge; developing identification and interpretation of non-literal, figurative language such as multiple meaning words, metaphors, similes, and idioms; and developing inference skills (*id.* at pp. 15-16). The evaluators also recommended strategies to improve the student's word retrieval for verbal and written expression including: the provision of vocabulary instruction with a dual focus **by** teaching word meanings via morphology (i.e. prefixes, suffixes, root words etc.) and applying word retrieval strategies to those words; the use of word retrieval strategies that consist of metalinguistic reinforcement (i.e. syllable dividing, mnemonic cues, and rehearsal); and the provision of direct, explicit writing instruction using a specific basic writing skills program (*id.* at p. 16).

To address the student's identified needs, the June 2016 CSE recommended a 12:1+2 special class placement for language arts, mathematics, social science, and supports and skills, with one 30-minute session per week of individual counseling, one 30-minute session per week of counseling in a group of 5, three 40-minute sessions per week of individual speech-language therapy, and two 40-minute sessions per week of speech-language therapy in a group of three (Dist. Ex. 8 at pp. 1; 16-17). Additionally, the June 2016 CSE recommended the student receive 12-month services consisting of two 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of speech-language therapy in a small group (3:1) (*id.* at pp. 1; 17-18).

According to the hearing record the CSE reconvened for a program review in August 2016 at the parents' request to discuss results of additional testing completed by the private speech-language pathologist, the annual goals, and concerns about the student's progress in light of "discrepancies between private and school-based testing" results (Tr. p. 400; Dist. Exs. 11 at p. 1; 86). The parents provided a meeting agenda to the CSE laying out their requests for: the use of "an intensive, scientific and evidence-based reading program (Wilson)," amended and updated

reading goals per the goals provided by the private evaluator, an assistive technology assessment, the addition of a memory indexing goal, a weekly schedule, and home/school communication (Parent Ex. EEEEEEE).

A review of the meeting information summary attached to the August 2016 IEP indicated the CSE discussed the System 44 reading program, the 2016-17 school year schedule, annual goals, an application to determine eligibility for services through the Office of People With Developmental Disabilities (OPWDD), and an assistive technology consultation (Dist. Ex. 11 at p. 2).¹⁷ The hearing record contains the results of the private speech-language pathologist's June 2016 administration of the WADE, which indicated that the student demonstrated difficulty with nonsense words (8 percent correct) and spelling in sentences (2 percent correct) (Dist. Ex. 30). The student scored 33 percent or better on all but two of the 14 subtests and scored above 86 percent on 8 out of the 14 subtests (id.).¹⁸

It appears that the August 2016 CSE did not make substantial changes from the June 2016 IEP, with the exception of adding to the August 2016 IEP that assistive technology be incorporated into the student's writing program, and indicating that the student needed an assistive technology device and services (Dist. Ex. 11 at pp. 10-11, 17; compare Dist. Ex. 8, with Dist. Ex. 11). According to the meeting information summary, "[a]ll members of the CSE, including the parents, agree[d] with the changes" (Dist. Ex. 11 at p. 2).¹⁹

The hearing record shows that the present levels of performance for the student's 2016-17 IEP were developed over the course of the May and June 2016 CSE meetings. The CSEs utilized multiple sources of information, including prior evaluations, input from the parents, the student's middle school special education teacher, as well as both district and private service providers and the May 2016 multidisciplinary evaluation report, all of which were accurately reflected in the present levels of performance. New information about the student's performance on the WADE considered by the August 2016 CSE did not show any significant discrepancy or change in the student's present levels of reading performance as identified in the June 2016 IEP, but rather was specific to her performance with respect to the Wilson Reading Program. Although the IHO determined that the private multidisciplinary evaluation results showing that the student's reading skills were at a second to third grade level was discrepant from the fifth-grade reading level with "guided instruction" the middle school special education teacher reported, the special education teacher testified that the student's "independent" reading level in eighth grade was "about a third

¹⁷ A June 2016 reading evaluation is listed in the evaluation results section of the August 2016 IEP; however, the results of this evaluation are not listed nor are the results discussed in the present levels of performance (see Dist. Ex. 11 at pp. 5-8).

¹⁸ The private speech-language pathologist testified that the WADE is "the diagnostic test that tied in with the Wilson Reading Program," a program consisting of 13 levels (Tr. pp. 2140-41). She further testified that the WADE results informed providers such as special education teachers of a student's exact Wilson level, so the teacher "could hit the ground running and starting the program at the right level" (Tr. pp. 2141, 2156). According to the private speech-language pathologist, although the CSE was willing to consider implementing the Wilson Reading Program with the student, "they decided to go with a different reading program," namely, System 44 (Tr. pp. 2143-44, 2147).

¹⁹ The parents attended the August 2016 CSE meeting accompanied by an advocate (Dist. Ex. 11 at p. 1).

grade" level, or much closer to the private reading assessment results (compare Tr. p. 48, with Dist. Ex. 23 at p. 8).

Therefore, based upon review of the information discussed in detail above, I find that the June and August 2016 IEP present levels of performance adequately reflected the student's strengths and weaknesses at that time and provided sufficient information upon which to develop the student's IEP for the 2016-17 school year.

b. Annual Goals

Turning next to the appropriateness of the annual goals, the IHO determined that the annual goals and objectives were "highly questionable." The district argues that the annual goals were clear and informed by the student's individual needs. Additionally, the district asserts that the finding that the goals were deficient because they did not specify the prompts and supports that would be given imposes obligations on the district beyond those required by the IDEA. Further with respect to the August 2016 CSE, the district asserts that the evidence in the hearing record does not support finding that it was necessary to include the annual goals proposed by the private speech-language pathologist in the IEP in order to offer the student a FAPE.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (see 8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).

The hearing record indicates that during the May 2016 CSE meeting the CSE discussed proposed IEP annual goals and agreed to reconvene to discuss them further after private testing was completed (Tr. pp. 139-41; see Dist. Ex. 8 at p. 3). The middle school special education teacher testified that she developed the student's reading, mathematics, writing, and study skill annual goals based upon the student's present levels of performance at that time (Tr. pp. 148-55; see Dist. Exs. 8 at pp. 11-12, 14-16; 11 at pp. 12, 15-16). Specifically, she testified that the student's reading annual goals were based upon the student's need to improve her ability to read informational text to gain knowledge, make inferences, and identify the main idea, and also increase vocabulary skills to improve her understanding of words (Tr. pp. 148-50). The special education teacher stated that she based the student's mathematics annual goals on the results of testing, her observation of the student, and the work the student completed in the classroom; determining that she needed to continue to work on money skills, improve her number sense and solve problems using all four operations, and tell time accurately (Tr. pp. 150-51). Regarding the annual goal for writing, the special education teacher testified that she discussed the student's

written work with a high school special education teacher, and how the student could write more independently at the high school (Tr. p. 152; see Dist. Ex. 8 at p. 1). The middle school special education teacher stated the "big goal" was for the student to write two paragraphs, but with scaffolding and assistance when needed that could gradually be pulled away (Tr. pp. 152-53). She further testified that the study skill goal for following a written schedule was based upon the student being in a new school for the upcoming year, and her need to identify the time and relate the time of day to a new schedule of classes (Tr. pp. 153-54). The high school speech-language pathologist testified that the speaking and listening and speech-language annual goals and short-term objectives developed by the June 2016 CSE were based on results of the end-of-year evaluation completed by the student's middle school speech-language pathologist or the May 2016 private multidisciplinary evaluation (Tr. pp. 427-28).

According to the high school special education teacher who attended the August 2016 CSE meeting, the CSE reviewed the reading annual goals based on the System 44 program the student would be using at the high school (Tr. pp. 791-92). Comparison of the annual goals contained in the August 2016 IEP to the June 2016 IEP showed that the CSE did not make changes to the goals developed by the June 2016 CSE (compare Dist. Ex. 11 at pp. 12-16, with Dist. Ex. 8 at pp. 11-16).²⁰

Turning to the annual goals themselves, the June and August 2016 IEPs included approximately 18 annual goals with 25 corresponding short-term objectives that were aligned with, and designed to address, the student's identified needs in the areas of study skills, speaking and listening, speech and language, social/emotional, pragmatics, reading, mathematics, and writing (see Dist. Exs. 8 at pp. 11-16; 11 at pp. 12-16). A careful review of the annual goals reveals that, consistent with State regulations, each annual goal included the requisite evaluative criteria (i.e., 75 percent success over 2 weeks, 80 percent success with moderate assistance over 4 weeks), evaluation procedures (i.e., structured interview, portfolio materials, observation checklists), and schedules to measure progress (i.e., every 4 weeks, by end of each marking period) (Dist. Exs. 8 at pp. 11-16; 11 at pp. 12-16). For example, one annual goal targeted the student's verbal memory by improving her ability to demonstrate verbal memory of a verbal prompt to follow a complex two-step direction with 50 percent success over two weeks, with a short-term objective criterion of 50 percent accuracy with moderate assistance (Dist. Exs. 8 at p. 12; 11 at p. 12). Another annual goal was designed to improve the student's pragmatic skills by improving her knowledge of social customs/mores and applying them to real life situations with 70 percent success over one month, with a short-term objective to identify three types of unacceptable behavior and/or language that should not be used in social interactions (Dist. Exs. 8 at p. 14; 11 at pp. 14-15).

Next, contrary to the IHO's determination and testimony from the private psychologist that the goals were not appropriate because they did not state the level of prompting or support expected of the special education teacher (see IHO Decision II at pp. 10-11; Tr. pp. 1905-07), all of the academic, study skill, and speaking and listening annual goals and/or short-term objectives contained in the June and August 2016 IEPs provided some guidance as to the level of prompting

²⁰ The hearing record reflects that the August 2016 CSE decided to review the goals after the start of the 2016-17 school year, and meet again to make any necessary changes to the goals in the August 2016 IEP (Tr. pp. 791-92, 797, 954-55; see Dist. Ex. 11 at p. 2).

or support the student required (i.e., "with moderate assistance," "with prompting and support") (see Dist. Exs. 8 at pp. 11-16; 11 at pp. 12-16). The middle school special education teacher testified that she added the accuracy levels and benchmarking to the student's goals and short-term objectives at the June 2016 CSE meeting and included "gradually faded" assistance to each of the goals she developed; for example, she explained that the CSE discussed scaffolding the short-term objectives in a writing goal in order to give the student the assistance when she needed it then "pull away" so she could become more independent as a high school student (Tr. pp. 152-54). She further testified that, while discussing the annual goals and short-term objectives, the June 2016 CSE considered what the student needed in order to function more independently at the high school level (Tr. pp. 153-55).

Finally, to the extent the IHO determined that the August 2016 CSE's failure to include privately recommended goals contributed to a denial of a FAPE, the hearing record shows that the private speech-language pathologist who completed the WADE—a Wilson Reading Program-based assessment—with the student during summer 2016 recommended two annual goals with corresponding short-term objectives to the August 2016 CSE based on the assessment results (Tr. pp. 398, 1268-71; Dist. Exs. 30; 46). The first proposed goal required the use of "a systematic, explicit, multisensory structured reading program" to improve the student's ability to apply word analysis skills in decoding and encoding multisyllabic words (Dist. Ex. 46 at p. 1). The second proposed goal was designed to increase the student's fluency rate while retaining the ability to give comprehension details regarding main idea, characters, setting and three passage details (*id.* at p. 2). The student's mother testified that she discussed with the other August 2016 CSE members her opinion that the privately developed reading goals "would be very important" for the student, to which the CSE chairperson responded the CSE was not required to include a particular methodology or a private evaluator's goals in the IEP (Tr. pp. 1259, 1268-71). The student's father testified that the August 2016 CSE discussed the System 44 reading program, which the parents "were certainly glad" addressed their request for a scientifically-based program (Tr. pp. 1566, 1570-72). He further testified that the high school special education teacher expressed that she wanted to review the goals in light of System 44, and that she and the private speech-language pathologist had "worked on amending the reading goals or a portion thereof" (Tr. pp. 1572, 1577).

The evidence in the hearing record indicates that the August 2016 CSE considered the goals recommended by the private speech-language pathologist, and as permitted under the IDEA—did not adopt them (see J.D. v. New York City Dep't of Educ., 2015 WL 7288647, at *14 [S.D.N.Y. Nov. 17, 2015]; T.G., 973 F. Supp. 2d at 340 [stating that "'although a CSE is required to consider reports from private experts, it is not required to follow all of their recommendations'"], quoting M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *12 [S.D.N.Y. Feb. 16, 2011]; J.C.S. v. Blink Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 13, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). In light of the testimony from the middle school special education teacher that the student's reading goals were developed based on her needs at the time, the projected use of a research-based program for decoding, encoding, and comprehension (System 44), and the agreement to continue discussions about the student's reading goals after the start of the school year, the hearing record does not support a finding that the decision not to include the private speech-language pathologist's recommended

reading goals in the August 2016 IEP resulted in a denial of a FAPE (Tr. pp. 148-55, 791-92; Dist. Ex. 11 at p. 2). Rather, an overall review of the present levels of performance and the annual goals and corresponding short-term objectives in the June and August 2016 IEPs shows that they are sufficient to guide an educator in providing instruction to the student, and any deficiencies do not rise to the level of denial of a FAPE.²¹

2. November 2016 and February 2017 IEPs

a. Present Levels of Performance and Progress

Before moving on to discuss the student's progress and the contents of the November 2016 and February 2017 CSE meetings and resultant IEPs, a discussion of the IHO's determination relating to documentation of the student's progress is warranted. The IHO took issue with the purported failures of the district members of the CSEs to document the student's progress towards her IEP goals and objectives during the 2016-17 school year (IHO Decision II at p. 9). The district argues that there was no reason to believe that more extensive documentation would have changed the CSEs' recommendations.

The IEP is required to "identify when periodic reports on the progress the student is making toward the annual goals (such as through the use of quarterly or other periodic reports that are concurrent with the issuance of report cards) will be provided to the student's parents" (8 NYCRR 200.4[d][2][iii][c]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3][ii]). State guidance elaborates that each teacher and provider that delivers instruction to a student to help that student meet a goal should have a responsibility for monitoring the student's progress towards the annual goal ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at p. 22, Office of Special Ed. [Apr. 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). There is no requirement pertaining to the means by which the student's progress towards achieving goals must be reported to parents, but State guidance indicates that:

There are many ways a student's parents can be informed of their child's progress, including, but not limited to periodic parent-teacher conferences, written progress reports and student-parent-teacher conferences. The reports to the parent do not need to be lengthy or burdensome, but they need to be informative. For

²¹ State guidance describes short-term instructional objectives as the "intermediate knowledge and skills that must be learned in order for the student to reach the annual goal" ("Guide to Quality [IEP] Development and Implementation," at p. 34, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). According to the same State guidance, short-term instructional objectives break down the skills or steps necessary for a student to accomplish an annual goal into discrete components (id.). Benchmarks are described as "major milestones that the student will demonstrate that will lead to the annual goal"; benchmarks "usually designate a target time period for a behavior to occur" and generally establish "expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents" of progress toward the annual goals (id.). "Short-term instructional objectives and benchmarks should be general indicators of progress, not detailed instructional plans, that provide the basis to determine how well the student is progressing toward his or her annual goal and which serve as the basis for reporting to parents" (id.).

example, the report to parents could include a statement of the goals with a written report of where the student is currently functioning in that goal area and/or a rating of progress to indicate whether the student's progress to date will likely result in the student reaching the goal by the end of the year. The progress report to parents should be in addition to the student's regular report cards that provide grades for courses or subject areas.

("Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 36, Office of Special Ed. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>; see also "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at p. 24). Further, State guidance indicates that at the next CSE meeting, "the present levels of performance and/or evaluation results should reflect the progress made during the previous year" ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at p. 24).

Contrary to the IHO's finding, and as summarized in detail below, the hearing record includes sufficient documentation regarding the student's progress towards achieving her annual goals during the 2016-17 school year, including in progress reports and in updates to subsequent IEPs, as well as evidence that the district high school staff met with the parents (and the private speech-language pathologist) on multiple occasions to discuss the student's progress (see Tr. pp. 457-58, 810-11, 1305-20, 1801-05, 2145-46; Parent Exs. HHHH; RRRR; SSSS; Dist. Exs. 13; 15).

Moreover, the specific examples cited by the IHO do not support his conclusion (see IHO Decision II at pp. 9-10). The district social worker was questioned about the records she maintained and, more specifically, about service delivery records (there was no inquiry about goal progress data or reports in the portion of testimony referenced by the IHO), and, as a result, the records were placed into evidence (Tr. pp. 3132-38; Parent Ex. GGGGGGGG).²² On the page cited by the IHO for the proposition that the high school special education teacher didn't collect formal data on the student's writing and only took "notes to [her]self," the teacher was discussing the student's progress on a goal to follow a written schedule and the "checklists" she kept to track how the student was doing (Tr. pp. 955-57; Parent Ex. SSSS at p. 2). Checklists, in turn, are exactly the method of measuring progress contemplated by the student's IEP for this goal (Dist. Ex. 13 at p. 13). As for the district speech-language pathologist, while the IHO took issue with inconsistency and a lack of specificity on "exit tickets" kept by the speech-language pathologist to document what the student worked on in her therapy session on a particular day and provide "immediate feedback to the parents" (Tr. pp. 438-39; Parent Ex. TTTT; Dist. Ex. 92; see Tr. pp. 482, 489), the speech-language pathologist communicated with the parents extensively by email, detailing the student's progress and sharing with the parents the exit summaries, as well as what "rubrics" and words the student was working on, and providing the parents with ideas for working

²² As discussed in greater detail below, the district social worker discussed the goals that she worked on with the student in group and individual counseling during the 2016-17 school year and she explained that although there should have been progress reports for the social/emotional goals included in the June 2016 IEP, the student's November 2016 progress report only indicated that those goals were recently changed (Tr. pp. 3174-77; see Parent Ex. RRRR at p. 7).

on the student's speech-language skills in the home environment (see, e.g., Dist. Exs. 93; 96; 97; 102; 103; 104; 105; 106; 107; see also Parent Ex. PPP; UUUU; Dist. Ex. 99). At one point, the student's mother described the communications from the district speech-language pathologist as providing "the most detailed information [they] ha[d] ever received about [the student's] speech" (Dist. Ex. 105 at p. 1). In sum, the IHO's findings on this point are not supported by the evidence in the hearing record.

Turning to the IEP, the CSE reconvened on November 14, 2016 and, according to the meeting information summary attached to the resultant IEP, it was at the parents' request to review the student's program including updated annual goals (Dist. Ex. 13 at p. 1). The high school special education teacher testified that the student's present levels of performance in the August 2016 IEP were based on the work that the previous special education teacher had completed with the student (Tr. p. 986). At the time of the August 2016 CSE meeting, the CSE decided that the student's goals needed to be reviewed and changes made because the academic goals were beyond the student's present levels of performance and the criteria for mastery was based upon what the student could do with teacher support versus independently (Tr. pp. 954-55, 966, 985, 993-94).²³ The high school special education teacher further testified that it was apparent to her that the student had been getting support in order to complete the work that was described in the August 2016 present levels of performance (Tr. pp. 986-89; see Dist. Ex. 11 at p. 9). Despite this, the special education teacher stated that she attempted to implement the study skill, reading, writing, and mathematics annual goals contained in the August 2016 IEP with the student (Tr. pp. 790-92, 941-42; see Dist. Ex. 11 at pp. 12, 15-16). She further testified that the student "required a lot of support" to work on the goals due to deficits in working memory and processing speed (Tr. pp. 792-93). According to the special education teacher, during fall 2016 members of the student's "team" including herself, the speech-language pathologist, the CSE chairperson, the social worker, and school psychologist met with the parents outside of CSE meetings and discussed "academics" (Tr. pp. 810-11).

The November 2016 CSE meeting information summary indicated that, at the start of the meeting, the special education teacher provided an overview of the student's schedule, highlighted areas she had been addressing with the student, and discussed specific strategies and areas of focus (Dist. Ex. 13 at p. 1). The CSE discussed the evidenced-based System 44 reading program, which the student used on a 1:1 basis for 15-20 minutes per day (*id.*). The meeting information summary also indicated that the student's speech-language pathologist provided an overview of the areas of focus and the student's progress to date (*id.* at p. 2). The physical education teacher reported that the student was adjusting well to the smaller class setting and participating in activities (*id.*). According to the summary, "[a]ll teachers working with the student" relayed that she appeared to have made "positive adjustments" to the high school and confirmed that she was "hard-working and want[ed] to be successful" (*id.*). The social worker who provided the student's counseling services provided an update to the CSE, and the student's guidance counselor indicated she was working on facilitating interactions between the student and the "peer group" (*id.*). In response to the parents' interest in seeing the student socially integrate into clubs, trips, and assemblies, the

²³ In September 2016, the middle and high school special education teachers discussed the student's eighth grade work, what modifications were made, and what supports the student received in order to "achieve" the work (Tr. p. 964).

school psychologist reported that the student was a member of the "[t]een [l]ounge" and had attended the first two meetings (id.). The meeting information summary reflected discussion that the guidance counselor, speech-language pathologist, and social worker saw the student on a regular basis and were in close proximity to each other and therefore able to share information with each other (id.). The student's private speech-language pathologist provided input and offered ongoing support and collaboration to the school team's efforts (id.). According to the meeting information summary, team members, including the special education teacher and speech-language pathologist, would provide "regular feedback to the parents" regarding the student's progress (id.).

Review of the November 2016 IEP shows that the CSE made some changes to the student's reading, writing, math, speech-language, and social development present levels of performance as compared to the August 2016 IEP (compare Dist. Ex. 11 at pp. 8-10, with Dist. Ex. 13 at pp. 9-12). The student's high school special education teacher testified that she based the revised present levels of reading and writing performance found in the November 2016 IEP on the System 44 reading assessment results, a specific basic writing skills program, and her work with the student up until that point (Tr. pp. 797-98, 803-04; see Dist. Ex. 13 at pp. 10-12). For mathematics, the special education teacher indicated that the student's processing speed and working memory weaknesses presented challenges related to her present levels of performance (Tr. pp. 805-06, 814-15).

In reading, the November 2016 IEP present levels of performance indicated that results of the "System 44 Reading Inventory, SRI, and the Developmental Reading Assessment, DRA" yielded a lexile range of 180-250, and a reading level of first grade (fiction) to lower second grade (nonfiction) (Dist. Ex. 13 at p. 10).²⁴ The IEP noted that, at that time, the student did not consistently answer literal questions and that her cognitive, memory processing, and working memory levels "hinder[ed] short term and long term access to information/text just read" (id.). The student did not provide complete sentences to literal questions, required teacher prompting/scaffolding of questions to form an answer, and often "shut down" when her memory processing was "overloaded" (id.). The special education teacher reported that delivery of "[i]nstruction must adjust" to those difficulties and that she worked "congruously with System 44" to provide "personalized direct, guided, and independent decoding and comprehension instruction" (id.).

In writing, the November 2016 IEP indicated that the student was working on expanding sentences and using her current reading level texts to distinguish the "wh" questions of material she had read in order to apply that information to simple sentences to expand them (Dist. Ex. 13 at p. 10). The special education teacher reported that, due to the student's weak memory and processing skills, she required "systematic and repetitive instruction for written expression" and that a basic writing skills program in conjunction with System 44 provided opportunities for "direct, explicit instruction in expository writing" and were effective methods for the student at that time (id.).

²⁴ According to the hearing record SRI stands for "student reading inventory" and is an assessment administered as part of the System 44 program (Tr. pp. 859-61). The high school special education teacher testified that she modified her administration of the DRA to the student (Tr. p. 944).

According to the November 2016 IEP, in mathematics the student's skills were "well below average and in the K-1 grade level range" and her cognitive, working memory, and processing speed deficits affected her ability to consistently store and manipulate numbers (Dist. Ex. 13 at p. 11). The present levels of performance indicated that the student presented "regression with basic math skills in addition, subtraction, coins, number comparisons, in addition to, before and after" (id.). To add and subtract accurately, the student required a number line for numbers above 10, and she used her fingers for numbers below 10 (id.). The student also required a calculator to add coins consistently and accurately, and, with teacher prompting and guidance, she was achieving calculator skills for multiplication and division (id.). According to the IEP, the student required "continued direct instruction with all basic math skills and 2 step life skill word problems" (id.).

Regarding communication skills, in the area of expressive communication the November 2016 present levels of speech-language performance indicated that the student formulated simple sentence structures and her ability to generate syntactically-organized sentences was in the "developing" range (Dist. Ex. 13 at p. 10). With prompting and support, the student expressed herself demonstrating an increased sentence length, although at times errors were evident in syntax and word-finding (id.). Additionally, she demonstrated inconsistent awareness of her audience and required prompting to communicate to both peers and adults (id.). However, the IEP indicated that "all of the aforementioned levels [were] improvements from unsatisfactory skills in these areas in September" (id.). The student improved into the "developing" range from the "unsatisfactory" range in her ability to participate and occasionally take an active role in her learning, and—albeit hesitantly—contribute and share ideas (id.). The student's cooperative listening skills were in the "commendable" range, indicating that she listened respectfully to classmates and teachers (id.). According to the IEP, she continued to need occasional reminders to stay on task and increase her level of commitment to the small group (id.). The present levels of performance reflected reports that the student's vocabulary skills were consistently at a second-grade level with moderate support; with "significant" support, the student demonstrated understanding of concrete functions of vocabulary terms and stated two attributes of the vocabulary word (id.). The student's language processing skills were in the "developing" range as she demonstrated partial understanding of the main idea of a given passage with significant support, basic understanding of concrete ideas, and limited understanding of abstract ideas (id.). Although the student did not make predictions or inferences based on text, she demonstrated growth in her ability to make connections to text and previously learned knowledge when prompted and supported (id.). The student evidenced improvement in her ability to "generate and express many more components" of "working vocabulary" including definitions, attributes, functions, and similarities/differences, which "elongated" her language skills and "facilitated movements in expressive language and idea generation" (id.).²⁵

²⁵ The district speech-language pathologist testified that she met with the parents, the special education teacher, and the private speech-language pathologist four or five times over the course of the fall to review the student's progress prior to the November 2016 CSE meeting and that she did not report any areas of concern at these meetings because she felt the student was progressing satisfactorily (Tr. pp. 457-58). In a November 1, 2016 email to the parents, the district speech-language pathologist indicated that, while the student had remained at the same second grade vocabulary levels, she had made some progress, especially when presented with visual information (Dist. Ex. 97 at p. 1; see Tr. p. 447). The November 2016 email indicated that the student had difficulty providing definitions, attributes, or functions of vocabulary when presented orally but that once

Socially, the student's present levels of performance indicated that she enjoyed socializing with peers and responded well to positive feedback from both adults and peers (Dist. Ex. 13 at p. 11). The social worker reported that the student's transition to the district high school "thus far, ha[d] been positive" (*id.*). In addition, the IEP indicated that the student was "polite, respectful, and caring" and that she enjoyed helping others, games, animals, and talking with peers (*id.*). The IEP referenced that the student needed counseling specifically in a group setting, to address social skills and to practice expressing her feelings verbally (*id.* at p. 12).

Regarding the student's management needs, the November 2016 IEP indicated that, in addition to an academic learning environment that provided direct and differentiated instruction, the student required "that a teacher frequently check for understanding," and "a structured academic learning environment that allows for the use of notes, texts, and teacher review to help with the retention of content and skills" (Dist. Ex. 13 at p. 12).

Before moving on to review the February 2017 IEP, further discussion of the November 2016 IEP present levels of performance is warranted since the IHO appeared to rest heavily on the purportedly inconsistent descriptions of the student's needs in the November 2016 IEP compared to the May 2016 multidisciplinary evaluation report and the June 2016 IEP, which the IHO found demonstrated the student's lack of progress in the district high school (IHO Decision II at p. 8).²⁶

A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (*see H.C. v. Katonah-Lewisboro Union Free Sch. Dist.*, 528 Fed. App'x 64, 66 [2d Cir. Jun. 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]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how a subsequent 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]).

presented with pictures she was able to categorize and describe functions and attributes with minimal support (Dist. Ex. 97 at p. 1). Additionally, she was able to take the vocabulary and identify same or different attributes when given picture cards, which she was unable to accomplish when presented orally (*id.*). The email further described that the student had required a significant amount of support to sequence a five-part story with visual cards but that she progressed enough to be able to complete most of the story independently and her stories became more elaborate with embedded syntax and a good vocabulary (*id.*). The speech language-pathologist also reported that the student had not made gains in pragmatics during her group speech-language therapy sessions during the first marking period and opined that one reason might have been the lack of shared interests amongst the group (*id.* at pp. 1-2).

²⁶ In my decision remanding this matter, I recognized that the parents set forth allegations in their due process complaint notice regarding the same apparent inconsistencies on which the IHO relied, and indicated that "on remand the IHO should assess the evidence in the hearing record regarding the student's progress or lack thereof and the appropriateness of the CSEs' recommendations to meet her special education needs" (*Application of the Bd. of Educ.*, Appeal No. 19-008).

The student's mother testified that, in or around fall 2016, the high school special education teacher informed the parents that the student was functioning at a first to second grade level, which was in contrast to reports that the student was functioning at a fifth grade level during the 2015-16 school year (Tr. pp. 1307; see Tr. pp. 1305-06). As alluded to above, although the June 2018 CSE meeting information summary reflects that the middle school special education teacher characterized that the student was reading texts "up to [a] fifth grade level with support" (Dist. Ex. 8 at p. 2), she testified that the student's "independent" reading level (without "guided instruction") in eighth grade was "about a third grade" level (Tr. p. 48). In contrast to the report of the student's level recorded in the June 2016 CSE meeting information summary, the November 2016 IEP present levels of performance indicated that results of the SRI and DRA revealed the student's reading level to be at first grade (fiction) to lower second grade (nonfiction) (Dist. Ex. 13 at p. 10). Given the different sources of this information (i-Ready assessments, classroom observations and portfolio materials, work sheets, and projects versus System 44 and modified DRA results) and the varying degrees of support delivered to the student to achieve the grade level functioning reported, it does not seem appropriate to compare the reported levels as a means to determine the student's progress, or lack thereof (see Mr. and Mrs. G. v. Canton Bd. of Educ., 2019 WL 1118094, at *14 [D. Conn. Mar. 11, 2019] [acknowledging the difficulty of comparing results of assessments from one year to the next given the different manner in which some tests are updated or normed, as well as the complex profile and inconsistent performance of the student at issue]).

Further, the description of the student's functioning in math in the June 2016 and the November 2016 IEP are consistent and, while the hearing record does not reflect that the student made a great amount of progress in this area leading up to the November 2016 CSE meeting, it does not reflect that this lack of progress alone was inconsistent with the student's abilities in math such that the November 2016 CSE would have been obligated to adjust its recommendations for the student. For example, both the June 2016 and November 2016 IEPs described the student's performance in math as "well below average" (compare Dist. Ex. 8 at p. 9, with Dist. Ex. 13 at p. 11). Further, although the November 2016 IEP indicated that the student "present[ed] with regression with basic math facts," this is consistent with the student's struggles during the 2015-16 school year, as the student's middle school special education teacher testified that the student had "difficulty with sequencing and reading numbers" as well as "understanding numbers" and a poor "understanding of number sense" for which she required daily reteaching and modeling (Tr. pp. 69, 71). Additionally, the high school special education teacher described that mathematics was more of a challenge for the student and her "[p]rocessing speed and the working memory really cause[d] her weaknesses in those areas" (Tr. pp. 805-06). She further testified that those weaknesses "were a huge ingredient to [the student's] inability to remember" (Tr. p. 806). According to the high school special education teacher "it was clear that keeping and retaining information especially in mathematics in numbers was very difficult for [the student] and I thought it would be and was unfair for her to be expected to perform calculations without a calculator" (Tr. p. 815). Further, as with the student's reading levels, the June 2016 IEP described the student's skills in addition with regrouping, subtraction with regrouping, and multiplication and division with reference to the support the student received in order to achieve them, such as the use of a number line, graph paper, and a fact sheet, and the provision of verbal cues (Dist. Ex. 8 at p. 9). Overall, the evidence in the hearing record does not support that a comparison of the descriptions in the June and November 2016 IEPs, on its own, warrants a finding that the student did not make progress in the district program at the beginning of the 2016-17 school year.

As the 2016-17 school year continued, still further documentation about the student's progress was compiled by district staff. The November 2016 IEP progress report set forth 16 annual goals, of which the student: achieved one goal; was progressing satisfactorily toward achieving four of the goals; was progressing gradually toward achieving six goals; and was progressing inconsistently toward achieving three goals (Parent Ex. RRRR at pp. 2-12). The progress report also reflected (as discussed further below) that two of the student's goals had been changed and that new goals had been developed (id. at p. 7). The special education teacher testified that between November 2016 and February 2017 (when the student left the district high school), the student's progress toward her IEP goals was "inconsistent" (Tr. pp. 815-17). The February 2017 IEP annual goals progress report measured the student's progress made toward the academic goals developed at the November 2016 CSE meeting through January 31, 2017 (Tr. pp. 958-59; Parent Ex. SSSS; compare Dist. Ex. 13 at pp. 13-18, with Dist. Ex. 15 at pp. 14-19). According to the report, in writing, the student was progressing inconsistently and had not achieved the January benchmarks toward goals related to writing a one paragraph summary (Parent Ex. SSSS at pp. 2-3). In reading, the student was progressing gradually towards goals designed to improve the student's ability to use context clues to understand unfamiliar words and answer text-based questions using outlines to demonstrate understanding of "wh" questions (id. at pp. 8-10).²⁷ The student was progressing satisfactorily and achieved the January benchmark for a goal measuring her ability to create an outline that summarized information read (id.). In math, the student was progressing satisfactorily toward and had achieved the January benchmarks for goals to improve her ability to identify, assign value to, and count mixed coins, and become fluent in using a calculator to compute real-world, one-step math problems (id. at pp. 10-12).

On February 2, 2017 the CSE reconvened (Dist. Ex. 15 at p. 1).²⁸ The meeting information summary attached to the resultant IEP reflects the special education teacher's report regarding the student's ongoing difficulties and the progress she had made since November 2016 (id. at p. 2). Specifically, the special education teacher indicated that the student required "a great deal of prompting" to reinforce what had been taught, that regression can be an issue, and that the student worked hard but was "inconsistent" and had difficulty recalling information and "constantly need[ed] cues and prompts to look back at what has been taught" (id.).²⁹ The special education teacher discussed the progress the student made with the reading program, despite her need for "[c]onstant repetition" and frequent re-reading in order to recall basic information (id.). The special education teacher further indicated that, in writing, the student was working on developing sentences but was not at that time successfully using conjunctions or writing full sentences (id.). Although the special education teacher opined that the student was learning how to create a topic

²⁷ For these goals, the special education teacher testified that she used the comment feature of the report to define the student's progress (Tr. pp. 959-60; see Parent Ex. SSSS at pp. 8, 10).

²⁸ Participants at the February 2017 CSE meeting included the CSE chairperson, the school psychologist, the student's special education teacher and social worker, a guidance counselor, the parents, and by telephone, the district speech-language pathologist (Dist. Ex. 15 at pp. 1-2). The parents reviewed an agenda they had prepared, which outlined their concerns about the student's lack of progress toward her IEP annual goals, lack of "more expansive" use of assistive technology, lack of science and history instruction, and lack of communication with the special education teacher and district speech-language pathologist (id. at p. 1; 16).

²⁹ Both the district speech-language pathologist and school psychologist discussed that the student's "retention" skills related to her cognitive profile (Dist. Ex. 15 at p. 2).

sentence, she did not do it independently and reported that the student had a difficult time "extending her thoughts" (id.). In mathematics, the special education teacher indicated that the student knew how to count by five, but she had difficulty consistently applying what she had learned (id.). The student had "made much progress" in recognizing coins and basic counting skills but at times needed reminders (id.). When the parents commented that the student had been working on those skills for years and questioned why she had not made more progress, the special education teacher replied that the student "has a very difficult time retaining information" but reported that the student had made progress since the beginning of the school year in that area (id.). Additionally, the special education teacher indicated that the student had "made very good progress" in identifying coins, adding combinations of money, and demonstrating enhanced calculator skills (id.). The social worker reported that the student's eye contact was usually good, she usually sat with a group in the cafeteria, and she was making progress in counseling group, although at times seemed "a bit lost" due to issues with vocabulary (id.).

The February 2017 IEP listed a November 21, 2016 report card and a December 23, 2016 interim report as "evaluation results" prepared since the November 2016 CSE meeting (compare Dist. Ex. 13 at pp. 6-9, with Dist. Ex. 15 at pp. 7-10). The hearing record contains progress reports from both the first and second quarters of the 2016-17 school year (see Dist. Exs. 35; 37), and a report card reflecting the grades the student received during the first quarter of the 2016-17 school year (Dist. Ex. 36), all of which are undated.³⁰ The progress reports and report cards reflect that the student was "[p]assing" all of her classes, with the exception of physical education during the second quarter due to the student's nonparticipation in four classes (Dist. Exs. 35-37).

The hearing record contains several documents that report the student's lexile scores for each book she read, and results of her reading inventory testing throughout her time using the System 44 program (see Parent Exs. ZZZZ; AAAAA; BBBB; CCCC; BBBB; Dist. Exs. 35; 36; 111). Specifically, the student's reading inventory test history reports show that the student achieved lexile scores of: 87 in September 2016; 204 and 268 in November 2016; 158 and 231 in December 2016; and 157 and 179 at the beginning of February 2017; all scores were at a percentile rank of 1 and reflected "[b]elow [b]asic performance standard" (Parent Ex. CCCC; Dist. Ex. 111).³¹ In reading, the special education teacher stated the student made progress as shown in the increase in her lexile scores from September 2016 to November 2016 and "reflected a great deal of reading by the student" (Tr. p. 802). However, she further testified that the student's lexile scores "sort of peaked and started to go down, that reflected a bit of a change in [the student's] performance" (Tr. p. 817). According to the special education teacher, towards the end of 2016 the student had "some issues with attendance" that affected her progress, because given the

³⁰ Due to the lack of dates on these documents, it is not entirely clear from the hearing record that these were the documents considered by the February 2017 CSE.

³¹ Additional information from the student action report noted that a lexile range of 57 to 207 indicated that the student could read text "with a high level of engagement and with appropriate levels of challenge," and that she had "sufficient control over vocabulary and syntax to work on applying reading skills" (Dist. Ex. 111). A lexile reading level of 207-407 indicated that the student was "motivated or ha[d] background knowledge on the content" and she "should be encouraged and supported to read texts on this level" and that "[w]ith support, reading text at this level will build [the student's] reading capacity for increasingly more complex texts" (id.). The student action report also recommended that the student read books within the target lexile range of 50 lexiles above and 100 below the lexile measure (id.).

student's "profile" it was "not helpful for any interruptions in her studies" and the absences would cause the special education teacher to rereview and reteach material "many times" (Tr. pp. 817-18).

The hearing record also contains a student mastery report that detailed the "student's response to the System 44 Next Generation Instruction" from September 22, 2016 through February 1, 2017 (Tr. pp. 922-25; Parent Ex. BBBB). The report indicated that it was used to "evaluate the student's progress over time" through the software's scope and sequence, and the special education teacher testified that she used this report for progress monitoring (Tr. p. 922; Parent Ex. BBBB). Specifically, the mastery report indicated that in September 2016, the student began working on consonants and syllables, and had mastered 91 percent (30 out of 33) and 38 percent (8 out of 21) of the topics in those categories, respectively (Parent Ex. BBBB). In October 2016, the student began working on sight words and "[s]uccess," and had mastered 52 percent (11 out of 21) and 44 percent (11 out of 25) topics, respectively (*id.*).³² She began working on word parts in November 2016 and had mastered 32 percent (9 out of 28 topics); and in December 2016 she began working on vowels and had mastered 31 percent (10 out of 32) topics in that category (*id.*).

Overall, the evidence in the hearing record shows that, while the student made inconsistent progress during the beginning of the 2016-17 school year, the November 2016 and February 2017 CSEs appropriately continued the recommendation that the student attend the 12:1+2 special class with the related services of speech-language therapy and counseling. As described above, the CSEs modified the student's present levels of performance to reflect the skill levels that the student's special education teacher and providers observed once they began working with the student. And, although the student had not met all of her annual goals, the year allotted for the student to achieve them had not yet elapsed and, in any event, the student was making progress, as outlined above, and the student's achievement of the goals "is not the controlling issue; rather, it is her progress toward achieving them" (*C.S. v. Yorktown Cent. Sch. Dist.*, 2018 WL 1627262, at *21 [S.D.N.Y. Mar. 30, 2018]; see also *Gavriety v. New Lebanon Cent. Sch. Dist.*, 2009 WL 3164435, at *31, *36 [N.D.N.Y. Sept. 29, 2009] [noting the student's progress despite not meeting some goals and explaining that the CSE was obligated to provide the student the opportunity to make meaningful progress in the LRE]). In light of the evidence before the CSE, the November 2016 IEP is not inappropriate "simply because it did not change significantly" compared to the August 2016 IEP (*J.G. v. Brewster Cent. Sch. Dist.*, 2018 WL 749010, at *12 [S.D.N.Y. Feb. 7, 2018], quoting *P.C. v. Rye City Sch. Dist.*, 232 F Supp 3d 394, 414 [S.D.N.Y. 2017]).

b. Annual Goals

Turning to the annual goals developed at November 2016 and February 2017 CSE meetings, the IHO generally noted inconsistencies in the annual goals between the IEPs, seeming to glean evidence of the student's regression based on the CSEs' modifications of the goals. For example—albeit in the context of the IHO's review of the sufficiency of the documentation maintained by district staff regarding the student's progress towards achieving annual goals—the

³² The high school special education teacher testified that the "success" aspect of the System 44 program "incorporate[ed] many of the different skills that were developed in a particular topic," and was "generally where some of the comprehension questions c[a]me into play" (Tr. pp. 928-29).

IHO noted that the CSE revised the student's writing goal, "lowering the requirement to one paragraph and reducing the mastery criteria" without any data to support the change (IHO Decision II at p. 9). On appeal, the district generally asserts that the CSEs developed appropriate annual goals.

Careful comparison between the annual goals contained in the August 2016 and November 2016 IEPs shows that while the study skills, speaking/listening, and speech-language goals and short-term objectives remained the same, the November 2016 CSE developed new annual goals and corresponding short-term objectives for the student in the areas of reading, writing, mathematics, and social/emotional development (compare Dist. Ex. 11 at pp. 12-16, with Dist. Ex. 13 at pp. 13-18).³³

As noted above, the special education teacher testified that several annual goals were changed during the November 2016 CSE meeting to reflect the student's present levels of performance based on observations from September 2016 to November 2016 (Tr. pp. 814, 945-46). For example, the CSE changed an annual goal in math to include learning how to use a calculator because the student experienced a lot of difficulty retaining information and the special education teacher felt it was unfair to expect the student to perform calculations without a calculator (Tr. pp. 814-15). Further, the November 2016 CSE revised several annual goals to reflect the use of the System 44 program and based all of the student's reading goals on her then-current lexile level (Tr. pp. 808, 942-44). Writing goals were revised because the student was not able to write an organized paragraph and several accuracy levels were decreased because the rate was too high, about which the special education teacher opined that "it was asking too much" of the student (Tr. pp. 814, 942). Finally, the special education teacher testified that the November 2016 CSE added a goal to work on the student's ability to understand her own weaknesses and develop strategies to help her with holding on to information and when answering questions (Tr. p. 811). The special education teacher testified that she provided draft reading goals to the parents in advance of the November 2016 CSE meeting at their request, which gave them time to "reflect" on the goals, and that by the time of the meeting they were "versed" in what she had presented and commented on and suggested changes to the goals at the meeting (Tr. pp. 809-10, 989-90; see Dist. Ex. 13 at p. 2).

Changes to the student's reading goals made at the November 2016 CSE meeting were a result of "the agreement of the team," including the parents, that the student would use the System 44 program which assessed and provided data about the student's "levels" (Tr. pp. 808-09, 858-61, 943-45, 989; see Parent Ex. CCCCC; Dist. Exs. 13 at pp. 1, 16-18; 111). The special education teacher testified specifically that the reading goals were developed as outcomes from discussion about the student's weaknesses, namely, her need to use context clues to understand unfamiliar word meanings, create an outline to help her retain the information she has read, and answer text-based "wh" questions (Tr. pp. 808-13; see Dist. Ex. 13 at pp. 16-18).³⁴ Two of the three reading

³³ The criteria for the short-term objective related to the student's verbal narrative annual goal was modified from 80 percent to 60 percent (compare Dist. Ex. 11 at p. 12, with Dist. Ex. 13 at p. 14).

³⁴ The special education teacher testified that references to "grade level text" in the student's annual reading goals referred to the level at which the student could read without frustration (Tr. pp. 943-44).

goals required the student to develop an outline, which the special education teacher testified was designed to improve the student's ability to summarize the information read in a sequential order, based on the levels generated from the System 44 program (Tr. pp. 811-12; see Dist. Ex. 13 at pp. 17-18).³⁵ The high school special education teacher testified that she changed the student's writing annual goal based upon the updated present levels of performance; specifically, that "outlining was a focus for [the student] to help her overcome her weakness in memory and processing (Tr. pp. 940-41; see Dist. Ex. 13 at pp. 10, 14). She further indicated that an outline and notes looked "at the who, the what, the when, the where on any given topic," and that the student would then be able to apply that information she had just recorded to create a paragraph (Tr. p. 941). That process, in conjunction with a specific basic writing skills program was used to teach the student how to develop and outline and expand her sentences (Tr. p. 941; see Dist. Ex. 13 at p. 14).

Regarding mathematics, the special education teacher testified that, due to the student's weaknesses in working memory and processing, she modified the success rate from 80 percent to 70 percent for the annual goal related to identifying, assigning value to, and counting bills and coins (Tr. pp. 813-14, 945; compare Dist. Ex. 11 at pp. 15-16, with Dist. Ex. 13 at p. 18). Based on the student's assessment results and her experience with the student, the special education teacher stated that she added a new mathematics annual goal designed to improve the student's ability to use a calculator (Tr. pp. 815, 945-47, 990-91; see Dist. Ex. 13 at p. 18).

Turning to the student's social/emotional development, according to the social worker who provided the student's counseling services during the 2016-17 school year, the student's social/emotional annual goals were originally worked on in both individual and group sessions due to their "overlap" in addressing concepts such as personal qualities, hypothetical social situations and how to handle them, coping strategies, and high school social norms (Tr. pp. 3174-75). She testified that in November 2016 she made changes to the student's social/emotional annual goals to make them "more specific to group counseling" and to better align with the goals the group was working on (Tr. pp. 3175-76).

A comparison of the present levels of academic, social development, and physical development and annual goals in the November 2016 IEP and the February 2017 IEP shows that no changes were made at the February 2017 CSE meeting (compare Dist. Ex. 13 at pp. 9-18, with Dist. Ex. 15 at pp. 10-19).

To the extent the IHO found or that the parents argue the changes made to the student's academic annual goals suggest that her skills "regressed" and the lower criteria for mastery was inappropriate, as described above, changes made to the present levels of performance and annual goals in November 2016 were based upon a different method used to measure the student's skill levels (System 44) and a lesser amount of adult support in order to achieve the goals. Moreover, the special education teacher testified that the parents agreed with the changes made to the goals in November 2016 (Tr. pp. 989-90). Also, modifications made to the student's social/emotional annual goals were made to be more directly in line with her need to improve social and peer interaction skills. Therefore, review of the hearing record supports a finding that the November

³⁵ According to the special education teacher, all of the student's November 2016 IEP reading annual goals were based upon her lexile level (Tr. p. 944).

2016 CSE revised the present levels of performance based upon the student's then-current abilities and needs as identified by the providers working with the student, and modified/developed new annual goals to meet those needs (see M.B. v. City Sch. Dist. of New Rochelle, 2018 WL 1609266, at *15 [S.D.N.Y. Mar. 29, 2018] [finding that, despite "some carry-over" between goals for the years at issue, "each of the disputed IEPs contained a number of new goals and objectives that appropriately reflected [the student'] progress and updated evaluative information"]).

3. Methodology

The district asserts that the IHO erred in finding that the CSEs should have recommended that the student receive instruction in reading using the Visualizing and Verbalizing or a Wilson evidence-based program.³⁶

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including in a special class or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>). In addition, the guidance specifies that the CSE should "consider what prior instructional methods and strategies have been utilized with the student to avoid reinstating programs that have not proven effective in the past" and further indicates that "[i]nstructional methodology may be discussed at the [CSE] but is not specified on an IEP" (id.).

Further, in general a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g 2011 WL 12882793, at *16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [indicating the district's "broad discretion

³⁶ In its memorandum of law, the district asserts that the parents' due process complaint notice did not raise a claim regarding the district's failure to recommend the Visualizing and Verbalizing program (Dist. Mem. of Law at p. 16). First, the district did not allege in its request for review that the IHO exceeded the scope of the impartial hearing by reaching the methodology issue (compare Req. for Rev. with Dist. Mem. Of Law at p. 16). It is well settled that a memorandum of law is not a substitute for a pleading, which is expected to set forth the petitioner's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (see 8 NYCRR 279.8[c]-[d]; see, e.g., Application of a Student with a Disability, Appeal No. 15-070). Second, even if the district had raised the issue properly, a fair reading of the due process complaint notice shows that the parents did assert that the district failed to provide the student with evidence-based reading instruction (see Due Process Compl. Notice at p. 10). Therefore, the district's assertion that the issue was beyond the scope of the impartial hearing is without merit.

to adopt programs that, in its educational judgment, are most pedagogically effective"). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.B., 589 Fed. App'x at 576; R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]; R.B., 589 Fed. App'x at 576; A.S., 573 Fed. App'x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"]).

The May 2016 private multidisciplinary evaluation report included a recommendation that the student receive instruction using "an evidence based reading comprehension program that w[ould] provide the structure and strategies to create visual imagery as a means of remembering and comprehending verbal and written language" and specified that a program "such as Visualizing and Verbalizing would provide the structure, repetition, and strategies that would support several [of the student's areas of need, including] auditory and reading comprehension as well as her oral and written expression" (Dist. Ex. 23 at pp. 14-15).

The private psychologist and speech-language pathologist who conducted the May 2016 private multidisciplinary evaluation attended the June 2016 CSE meeting (Dist. Exs. 8 at p. 1; 23 at p. 1). According to the student's father, the private psychologist presented her recommendations, including the student's need for an evidence-based reading program such as the Visualizing and Verbalizing program (Tr. pp. 1544-47). Further, according to the evidence in the hearing record, the private speech-language pathologist informed the CSE that she recommended the Wilson reading program for the student and that the CSE discussed that recommendation (Tr. p. 1559; Dist. Ex. 8 at p. 2).^{37, 38} The student's father testified that the parents "were very concerned about the methodologies because [they] were tired of seeing teacher-devised work sheets and tests and portfolio materials [as] the only things listed" as the means by which the student's progress towards her annual goals would be measured (Tr. pp. 1549-50). According to the meeting information summary, the June 2016 CSE informed the parents that the CSE did not specify methodologies used to instruct students in the goal area but that, upon the student's attendance at the district high school, the communication between the high school team and the parents would be "constant" (Dist. Ex. 8 at p. 2; see Tr. p. 1559).³⁹

³⁷ The parents testified that the CSE listened to the recommendations of the private psychologist and speech-language pathologist but did not engage in meaningful discussion thereof (Tr. pp. 1204, 1544-46).

³⁸ According to the June 2016 CSE meeting information summary, the private speech-language pathologist also informed the CSE that she could administer the WADE and would suggest goals for the student, as well as appropriate methods to instruct the student (Dist. Ex. 8 at p. 2).

³⁹ The reference to communication between the parents and the high school team as it relates to the parents' request for a recommendation for a specific methodology appears to have come about because the parents emphasized to

Subsequently, the parents' proposed agenda for the August 2016 CSE meetings set forth as the first suggested topic the student's need "for an intensive, scientific, and evidence based reading program (WILSON) by a certified instructor to address decoding, encoding, functional comprehension and functional expression" (Parent Ex. EEEEEEE at p. 1). Further, available to the August 2016 CSE was the IEP goal addendum to the private multidisciplinary evaluation report, which suggested an annual goal that contemplated use of "a systematic, explicit, multidisciplinary structured reading program" in order for the student to "know and apply phonics and word analysis skills in decoding and encoding multisyllabic words" (Dist. Ex. 46 at p. 1). The student's mother testified that the August 2016 CSE "continued th[e] conversation about [the Visualizing and Verbalizing program], but . . . also discussed the Wilson program" (Tr. pp. 1259-60). In addition, according to the parents' testimony and the meeting information summary, the district members of the committee "suggested the System 44 program" for the student and that the CSE chairperson stated that the district "would be providing the System 44 reading program, and that [this] would address [the parents'] request" for an evidence-based reading program (Tr. pp. 1260, 1570-71; Dist. Ex. 11 at p. 2). According to the student's mother, "System 44 was described as a comprehensive reading program for [the student] to encode and decode words, [and] help[] with her expressive and receptive language" (Tr. p. 1266).⁴⁰ The student's father testified that the parents wanted to learn more about the System 44 program but were "glad there was a program that was addressing the[ir] request" for an evidence-based reading program (Tr. pp. 1571-72).

The private speech-language pathologist testified about her concerns about the System 44 program, including that it was "automated on a computer" and that the student "need[ed] things very explicitly done," with someone guiding her instruction and collecting data on the amount of prompting (Tr. p. 2148). She also characterized the System 44 program as a "decent program" that "work[ed] with children of [the student's] profile" but indicated that, like any program, its success would be dependent on "the fidelity with which it's used" and noted that it would only be "as good as the person who [wa]s implementing [it]" (Tr. pp. 2147-49).⁴¹ She stated her concern that "there might have been a degree of prompting" while the student was using the System 44 program, which could have inflated the student's scores (Tr. pp. 2149-50). The private speech-

the CSE their reasonable desire to "understand" the methodologies used with the student and receive education on how the student's progress would be measured (see Tr. pp. 391-92, 1550-52; see also Tr. pp. 1500, 1531). As indicated above, while methodology is a valid point of discussion during a CSE meeting, the parents' desire for a particular program does not overcome the broad discretion accorded teachers and providers when it comes to determining the methodology to use with a student (see "Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>).

⁴⁰ The high school special education teacher described System 44 as "a research-based program that involves decoding, encoding and comprehension" (Tr. pp. 789, 893). She explained that the encoding and decoding portion of the program was computer-based and that she worked with the student 1:1 on the comprehension portion, as well as on the "modules that [we]re incorporated in this program that deal with social studies and science and current events" and the writing aspect (Tr. pp. 790, 893-97). The teacher described the program as "very interactive" (Tr. p. 894).

⁴¹ The high school special education teacher testified that she had been trained in using System 44 for three years prior to the 2016-17 school year (Tr. p. 789).

language pathologist testified that the need to keep track of the prompting was discussed at a meeting with the parents and district staff in fall 2016 outside of the CSE (Tr. p. 2150; see Tr. pp. 2145-46).

At the November 2016 CSE meeting, the CSE discussed the student's use of the System 44 program during the 2016-17 school year thus far (see Tr. p. 1360; Dist. Ex. 13 at p. 1). The student's mother testified that the CSE discussed, among other things, that the parents did not see the student progressing with the System 44 program (Tr. p. 1360). The student's mother also testified that the parents asked the committee, among other things, "if the methodologies could be written on that IEP which would be the System 44" but that the outcome of the meeting was that "[t]he IEP was basically going to stay the same" (Tr. p. 1369). According to the November 2016 CSE meeting information summary, the "[p]arents expressed their support for this evidence-based reading program and also stated that this type of program had not been offered in the past with their daughter" (Dist. Ex. 13 at p. 1).⁴²

Leading up to the February 2017 CSE meeting, the parent again raised the topic of the Visualizing and Verbalizing program with the district speech-language pathologist and, according to a summary of the conversation documented by the student's mother, the speech-language pathologist explained to the mother that a lot of programs such as the Visualizing and Verbalizing program require that a student possess a minimum level of cognitive potential in order to access the program and that some programs required higher potential than the student demonstrated (Parent Ex. OOO). It does not appear from the hearing record that the methodology issue was again discussed at the February 2017 CSE meeting.

Based on the foregoing, the hearing record indicates that the CSEs convened to develop and review the student's IEPs for the 2016-17 school year discussed methodologies to be used for instruction in reading and that the student did not require a specific methodology in order to receive a FAPE. The recommendation in the May 2016 private multidisciplinary evaluation report for an evidence-based program set forth the Visualizing and Verbalizing program as one example of the sort of program from which the student might benefit (Dist. Ex. 23 at p. 15). This is not the sort of recommendation that would reflect "a clear consensus" regarding the student's need for a particular methodology (see A.M., 845 F.3d at 544-45 [finding an IEP substantively inadequate "when the reports and evaluative materials present at the CSE meeting yield a clear consensus" regarding methodology, and the CSE did not sufficiently explain why the recommended program would be appropriate absent the designation of that methodology on the IEP]; R.E., 694 F.3d at 194). Moreover, the student's IEPs for the 2016-17 school year described the supports and strategies from which the student benefited in a manner that echoed aspects of the type of methodology implemented with the student—i.e., a methodology that provided for instruction that was structured and utilized visual imagery (Dist. Ex. 23 at p. 15). For example, the IEPs described the student's need for a structured academic learning environment, as well as "direct instruction, verbal cues paired with visuals specific to the task and modeling when learning new material," and

⁴² Although the November 2016 CSE meeting information summary referenced the use of the System 44 program with the student for 15 to 20 minutes per day (Dist. Ex. 13 at p. 1), the high school special education teacher clarified that the 15 to 20 minutes per day referred to the "computer aspect of the program" (Tr. pp. 899-900).

"preview and review of new material, group discussion, visual supports, and organizers" (Dist. Exs. 8 at pp. 9, 10; 11 at p. 10; 13 at pp. 11, 12; 15 at pp. 12, 13). Additionally, the IEP annual goals referenced the use of visual supports such as written schedules, picture cards, notes, and outlines (Dist. Exs. 8 at pp. 11-12; 11 at pp. 12-13; 13 at pp. 13-14, 17; 15 at pp. 14-15, 18).⁴³

Further, the CSEs discussed different programs and methodologies for the student and, although the district ultimately decided to use the System 44 program, which was not the methodology suggested by the private evaluators or preferred by the parent, this does not support a finding that the district denied the student a FAPE. In his analysis, the IHO evaluated the parents' preferred program, the Visualizing and Verbalizing program (and "was most impressed") and compared it to the program ultimately utilized with the student during the 2016-17 school year, the System 44 program (IHO Decision at p. 11); however, this is not the relevant inquiry. Rather, the relevant inquiry is whether the IEPs developed for the student for the 2016-17 school year were reasonably calculated to enable the student to make progress in light of her circumstances (see Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 759 [2d Cir. 2018] [finding a comparison of the parent's preferred program to that recommended by the district was not the relevant inquiry], cert denied, 139 S. Ct. 322 [2018]).

Moreover, the IHO relied upon testimony of the high school special education teacher that the student "struggled with the computer-based program and her ability to maintain attention" (IHO Decision at p. 10). However, while the high school special education teacher's testimony cited by the IHO discusses the student's inconsistent attention while taking computer-based assessments that were administered as part of the System 44 program, this testimony does not indicate that the computer-based program was the cause of the student's struggles or inattention as the IHO implied (Tr. pp. 862-66; IHO Decision at p. 10).⁴⁴ Further, the IHO did not point to where in the hearing record the CSEs were purportedly "warn[ed]" about System 44 (IHO Decision at p. 10). As noted above, the private speech-language pathologist testified that she met with district staff and discussed the need to keep track of the prompting that was delivered to the student while she used the program (Tr. p. 2150; see Tr. pp. 2145-46); however, this does not reflect a warning about appropriateness of the program for the student.⁴⁵ Finally, the IHO noted evidence about the

⁴³ The high school special education teacher also testified that that the student made progress in learning to use an outline, taking notes in the form of outlines and drawings, and keeping a memory book (Tr. pp. 997-99).

⁴⁴ The special education teacher stated that she set up two System 44 accounts for the student because at one point she "had performed in a way I thought was inaccurate of her" and was "very distracted" (Tr. pp. 862-63). The special education teacher indicated that two accounts provided the student "with the opportunity to be assessed with optimal attention," and the special education teacher's desire to have the opportunity to reassess the student "in the event that I wasn't happy with how she was focusing" (Tr. p. 865).

⁴⁵ The IHO also noted that one of the reasons the System 44 program proved to be ineffective was that the microphone had been broken and not functioning properly (IHO Decision at pp. 10, 11). The student utilized a headset with a microphone in order to listen to and speak to the System 44 program, which in turn allowed her to hear what she spoke (Tr. pp. 893-94). The student's mother testified that, at some point, the parents were informed by the high school special education teacher that the student "couldn't speak into [the microphone] loud enough" (Tr. pp. 1370-71, 1386-87). However, according to the September 2016 assistive technology consultation report, the occupational therapist who completed the consultation solved the microphone issue, noting that, while the microphone port did not work, the USB microphone worked and she loaned a microphone to the student's teacher to use with the computer reading programs (Dist. Ex. 25). The hearing record does not indicate any microphone

student's lack of consistent progress using System 44 compared to the student's success with the Visualizing and Verbalizing program while attending Fusion during the 2017-18 school year (see IHO Decision at p 11). However, except to the extent evidence of progress was reported to the CSEs that met during the 2016-17 school year (discussed at length above), testimony or evidence pertaining to the student's progress or lack thereof with the System 44 program during the 2016-17 school year or the Visualizing and Verbalizing program while the student was attending Fusion during the 2017-18 school year may not be relied upon to retrospectively evaluate the sufficiency of the programs offered by the district in the IEPs developed for the 2016-17 school year (see R.E., 694 F.3d at 186-88). What's more, even assuming that the System 44 program did not prove to be the best methodology for the student, such evidence may not be relied upon to retrospectively determine that the CSEs should have recommended a different methodology for the student in order to offer a FAPE. That is, again, the CSE did not have information before it that the student needed the Visualizing and Verbalizing methodology in order to receive educational benefit.

4. Implementation

On appeal, the district asserts that the IHO erred in his determination that the student could not achieve her social/emotional goals in the 12:1+2 special class due in large part to the lack of other students and opportunities for peer interaction in the special class. The district opines that "the problem for the IHO" was not the CSEs' recommendation for a 12:1+2 special class, but rather "the departure of the other ninth grade students" and the lack of "the opportunity for the student to develop positive relationships with peers" (Dist. Mem. of Law at p. 17). The district asserts that, in any event, it was not required to ensure that the student's class had a minimum number of students assigned to it. Further, the district asserts that the student had opportunities to interact with typically-developing peers and with other students with disabilities.⁴⁶

The IHO did not articulate what legal standard he applied in determining that the district failed to ensure the student had access to an environment and peers necessary for the student to achieve her social/emotional goals (see IHO Decision II at pp. 12-13). Generally, however, while the IHO seemed to have LRE-related considerations in mind—similar to the concerns at issue in this matter prior to remand (see Application of the Bd. of Educ., Appeal No. 19-008)—the crux of the issue as it presents in this appeal pertains to the district's implementation of the student's IEP. Indeed, as the IHO's main concern appeared tethered to the student's receipt of instruction in the

problems after the occupational therapist remedied the issue, meaning that the time frame during which the student did not have access to a working microphone was limited to the first two weeks of the 2016-17 school year. This is insufficient to support a finding that the System 44 program, as a whole, was ineffective for the student.

⁴⁶ The district also asserts that the IHO erred in reaching the issue of implementation because the parents' due process complaint notice did not challenge the district's implementation of the 12:1+2 special class due to the "low number of students in [the student's] special education class" (Dist. Mem. of Law at p. 17). First, as with its similar assertion pertaining to the methodology issue, the district did not allege in its request for review that the IHO exceeded the scope of the impartial hearing by reaching the implementation issue and the memorandum of law is not a proper substitute for a pleading (compare Req. for Rev. with Dist. Mem. Of Law at p. 17; see 8 NYCRR 279.8[c]-[d]; see, e.g., Application of a Student with a Disability, Appeal No. 15-070). Second, even if the district had raised the issue properly, a fair reading of the due process complaint notice shows that the parents did assert that they had concerns about the student's access to peers, and the district's plan to aid her in developing positive peer relationships (see Due Process Compl. Notice at p. 12). Therefore, the district's assertion that the issue was beyond the scope of the impartial hearing is without merit.

special class, LRE is not implicated because the composition of the special class presents no difference in the degree of the student's access to nondisabled peers (see 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2]; 300.116[b], [c]; 300.117; 8 NYCRR 200.1[cc]; 200.6[a][1]). As described by the Second Circuit, LRE determinations are made by considering the extent to which the student has been placed with nondisabled peers; that is, "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child,' and, if not, then 'whether the school has mainstreamed the child to the maximum extent appropriate" (Newington, 546 F.3d at 120, quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 [5th Cir. 1989]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 639 [S.D.N.Y. 2011]).

The parents' post-hearing brief reflects the most direct articulation of the issue: whether the district "was obligated to develop an appropriate special class cohort in accordance with [the student's] IEP, which mandated placement in a 12:1+2 Special Class" for academic subjects (Parent Post-Hr'g Br. at p. 20). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

Recently, the Fourth Circuit Court of Appeals considered a similar issue, wherein, due to a lack of enrollment in the special class at issue, a student received 1:1 instruction in that class, in addition to joining nondisabled students for specials and other classes (R.F. v. Cecil County Pub. Schs., 919 F.3d 237, 241-42 [4th Cir. 2019]). Taking into account LRE requirements, the Court in that case found that the district could not "be said to have denied [the student] a FAPE merely because fewer students with disabilities enrolled at [the student's] school than [the district] anticipated" (R.F., 919 F.3d at 247; see also Application of the Dep't of Educ., Appeal No. 11-050).

Nevertheless, the district is still responsible for implementing the student's IEP and the question raised by the IHO with respect to how the student could be expected to achieve her

social/emotional goals when she was "confined to a single room with three adults and no other students" must be addressed.

The answer to this question begins with a review of the student's schedule during the 2016-17 school year. As discussed in my prior decision, the hearing record reveals that, at the beginning of the 2016-17 school year, the student's special class consisted of six students, three of whom were in ninth grade and three older students who spent the majority of the school day in outside programs (Tr. pp. 771, 773, 776-78). One of the ninth grade students moved out of the school district in September or October 2016, and the other ninth grade student left each morning at 9:30 a.m. (mid second period) to attend a Board of Cooperative Educational Services (BOCES) culinary class, returning at 12:30 p.m. (mid sixth period/lunch) (Tr. pp. 780-81, 841-42). Therefore, according to the student's schedule, the special education teacher provided instruction to the student without other students present during social science, English, and math classes (compare Tr. pp. 780-81, 841-42, 848, 850-51, with Dist. Ex. 136).

However, the hearing record indicates that, with the exception of those three academic classes, the student received instruction with other students during the school day. For example, the student's schedule reflects that during the first period of the school day the student attended a general education physical education class with 14 to 15 other students on three days out of a six-day cycle, and on two days per week during second period she received speech-language therapy in a group of three (Tr. pp. 444, 783, 842-43, 857; see Dist. Ex. 136).⁴⁷ The special education teacher testified that during seventh and ninth periods she provided English and learning lab instruction to the student and the other ninth grade student in the special class (Tr. pp. 854-57).

The student's schedule also included lunch, one session of "peer group" lunch per six-day cycle, and a daily studio art and design class (Tr. pp. 783-84, 788, 828, 830, 835, 853-54, 3242; see Dist. Ex. 136).⁴⁸ Additionally, the evidence in the hearing record shows that the student was further provided with the opportunity to be involved with other students through the "teen lounge" after-school program, field trips, and in-house special events (Tr. pp. 828-30; Dist. Exs. 11 at p. 3; 13 at p. 2). According to the school psychologist, the teen lounge was an extracurricular club, the goal of which was to promote socialization between both students with disabilities and nondisabled students (Tr. pp. 3202-03). The teen lounge club typically met every other week for approximately one hour and included "close to 30" students (Tr. pp. 3203, 3240). The school psychologist testified that from September 2016 until January 2017 the student "was a consistent member of the

⁴⁷ During the 2016-17 school year, the student received two 40-minute sessions per week of group (3:1) speech-language therapy (Tr. p. 444; Dist. Exs. 11 at p. 17; 13 at p. 19). According to the speech-language pathologist who provided the student's speech-language therapy during ninth grade, she purposefully selected the other two students in the group because "pragmatically" they were "at a higher level" than the student (Tr. pp. 444-45). She opined that having students with higher level skills in the group brought "the lower level skills up," and that the other students were appropriately placed in the group with the student (Tr. p. 455).

⁴⁸ The student's special education teacher testified that the "peer group" was a group of about 10 students, with the "leaders" being a tenth or eleventh grader and the remaining students being ninth graders, not all of whom were students with IEPs (Tr. pp. 830, 854). According to the school psychologist, the upperclassmen lead conversations about "typical teenage" topics and situations that might come up and how to navigate them to build comradery (Tr. p. 3242).

club," who spent time with other students and participated in the club (Tr. pp. 3203-05). The hearing record also shows that the student was assigned to different classrooms throughout the day, enabling her to transit between classes alongside the other students (Tr. pp. 786-88, 849, 1301-03; see Dist. Ex. 136). The special education teacher described that "[t]he bell would ring and [the student] would go to class like all the other students," allowing the student to "socialize" and "be out in the hallways like everyone else" (Tr. pp. 849-50).

Further, during the 2016-17 school year the student initially received both individual and group (5:1) counseling services (Parent Ex. SSSS; Dist. Ex. 11 at p. 17). The social worker who provided the student's counseling services during the 2016-17 school year testified that, because the student received "a lot of 1:1 time with adults" and according to her IEP she needed to improve her social interaction with groups and peers, she determined that the student would benefit from more group interaction with other students (Tr. pp. 3126-27).⁴⁹ After discussion with the parents, the social worker requested, and the November 2016 CSE agreed, to change the student's counseling services from both individual and group counseling to only group services (compare Dist. Ex. 11 at p. 17, with Dist. Ex. 13 at p. 19). The social worker testified that one session of group counseling per week was sufficient and that the group session offered the student opportunities to interact and role play with other students (Tr. pp. 3161-62). Additionally, the social worker opined that the group setting was "more comfortable" for the student, she had the opportunity to practice interactions collaboratively, and that the student was "more engaged in that setting" than during individual sessions (Tr. pp. 3162-63). During observations of the student outside of counseling sessions, the social worker testified that the student sat with other students in the cafeteria and that other students stopped and interacted with the student in the hallway at which time she "always smiled" and "interacted with students well" (Tr. p. 3129).

With the foregoing evidence regarding the student's schedule and the manner in which the student received instruction and related serves in mind, I turn next to whether the manner in which the district implemented the student's IEP affected the district's ability to effectively work on the student's social/emotional goals during the 2016-17 school year. As noted above, the IHO questioned the district's ability to implement the student's annual goals (see IHO Decision II at pp. 12-14); however, the IHO did not examine evidence in the hearing record about the student's actual achievement of or progress towards the social/emotional goals. Review of the August 2016 IEP speech-language and counseling annual goals shows that for the 2016-17 school year the CSE had developed goals to improve the student's ability to: initiate and participate in collaborative conversations or discussions with gradually fading prompting and support; state three personal qualities and verbalize how those qualities affect her interactions with others; identify three response options, the possible consequences of each, and the option with the most favorable outcome when presented with simulated/hypothetical social situations; and display knowledge of social customs and apply them to three daily life situations (Dist. Ex. 11 at pp. 12-15). The November 2016 IEP annual goals progress report indicated that the student was "[p]rogressing [g]radually" toward the annual goal related to initiating and participating in collaborative conversations but that she had not achieved the November 2016 benchmark (Parent Ex. RRRR at

⁴⁹ This testimony is in contradiction to the IHO's finding that "[o]bviously, [the district social worker] did not know that, in truth, [the student] had little opportunity to spend time with peers and, in fact, spent most of her time alone in a room with three adults and no peers" (IHO Decision II at p. 13).

p. 4). The IEP goals progress report also indicated that the student's social/emotional annual goals and short-term objectives had "recently changed" and that during group counseling sessions the student was working on improving her ability to: communicate and interact in a positive manner with peers; identify and discuss examples of socially acceptable behavior during social situations; interact in a socially acceptable manner with adults and peers; and initiate conversations or social interactions with adults and peers using appropriate behaviors (*id.* at p. 7; *compare* Dist. Ex. 11 at pp. 12-15, *with* Dist. Ex. 13 at p. 16).⁵⁰ The November 2016 IEP specified that the student would work on these annual goals during her group counseling sessions (Dist. Ex. 13 at p. 16).

According to the February 2017 IEP annual goal progress report, the student continued to progress gradually toward but had not achieved the benchmark for her annual goal of initiating and participating in collaborative conversation and discussions (Parent Ex. SSSS at p. 4). Also at that time, the student was progressing gradually toward the social/emotional goals of communicating and interacting in a positive manner with peers and interacting in a socially acceptable manner with adults and peers (*id.* at p. 7). The student had achieved the annual goals related to identifying and discussing examples of socially acceptable behavior, and initiating conversations or social interactions with adults and peers using appropriate behaviors (*id.*).

In consideration of the foregoing, although it was not ideal to provide instruction to the student in a 1:1 setting for a portion of the school day, given the opportunities provided at other times within the special class, general education classes, lunch, peer groups/club, and related service group sessions addressing peer and social interactions, as well as the progress made toward the student's annual goals related to that need, the hearing record supports a finding that the district did not materially or substantially deviate from the IEP and this implementation the student's IEP did not rise to the level of a denial of a FAPE (*A.P.*, 370 Fed. App'x at 205; *see Van Duyn*, 502 F.3d at 822; *see also Catalan*, 478 F. Supp. 2d at 75-76).⁵¹

B. 2017-18 School Year

In finding that the district denied the student a FAPE for the 2017-18 school year, the IHO based his decision on his finding that the district had not offered the student a FAPE for the 2016-17 school year, determining that the March 2017 CSE adopted "the same failed IEP of the year before," including "all of the academic IEP goals from the [November 2016] IEP," and that the June 2017 CSE did not update the student's present levels of performance or make any changes

⁵⁰ The district social worker who worked on these goals with the student testified that in November 2016 she made changes to the student's social/emotional annual goals to make them "more specific to group counseling" (Tr. pp. 3175-76).

⁵¹ Assuming that the implementation of some of the student's instruction in a 1:1 setting formed the sole basis for a finding that the district denied the student a FAPE, the parents would be hard-pressed to establish the appropriateness of Fusion as a unilateral placement since the student also received instruction at Fusion in a 1:1 setting (Tr. pp. 1024-25, 2800-01, 2805; *see Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523 [6th Cir. 2003] [indicating that a "unilateral placement cannot be regarded as 'proper under the Act' when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient"]; *A.S. v. Bd. of Educ. Shenendehowa Cent. Sch. Dist.*, 2019 WL 719833, at *9 [N.D.N.Y. Feb. 20, 2019] [finding that the unilateral placement could only be regarded as proper if it addressed the LRE deficiency in the district program]).

(IHO Decision II at pp. 11-12). Having determined that the district offered the student a FAPE for the 2016-17 school year, I cannot follow the IHO's reasoning with respect to the 2017-18 school year and assess the appropriateness of the March 2017 and June 2017 IEPs based on the parents' allegations, which include that at the March 2017 CSE meeting the speech-language pathologist, without any updated documentation, reported progress in areas that had previously been reported as areas of regression and that the June 2017 CSE acknowledged the student had made progress at Fusion and that Fusion was an appropriate model for the student (Due Process Compl. Notice at pp. 18-19). In addition to generally asserting that the CSEs continued appropriate recommendations over to the March and June 2017 IEPs, the district notes that the CSEs appropriately transferred some goals which the student had not yet achieved and modified or added other goals.

The CSE convened on March 27, 2017 to conduct the student's annual review and to develop her IEP for the 2017-18 school year (Dist. Ex. 17 at p. 1). Finding the student eligible to continue receiving special education and related services, the March 2017 CSE recommended a 12:1+2 special class placement with the related service of counseling in a small group (5:1) once per week for 30 minutes and speech-language therapy three times per week individually and twice per week in a small group (3:1) for 40 minutes (id. at p. 17).

The meeting information summary attached to the March 2017 IEP indicated that the student was parentally placed at Fusion on February 6, 2017 (Dist. Ex. 17 at p. 1). The parents reported that the student was happy, had a "full and varied curriculum" and that they felt the program was meeting the student's needs (id. at pp. 1-2). The meeting information summary noted that the student's progress towards the IEP goals for the 2016-17 school year and her adjustment to the life skills program at the district's school had been discussed in detail at the February 2017 CSE program review meeting, and the summary also noted that the CSE had not received any formal reports regarding the student's progress at Fusion (id. at p. 2).⁵²

The meeting information summary attached to the March 2017 IEP reflected information provided by the district staff who worked with the student prior to her leaving to attend Fusion (Dist. Ex. 17 at pp. 2-3). Specifically, the special education teacher offered the parents more information about the student's progress with the System 44 program and reported that the student had completed 61 percent of the decoding/spelling program at her level (id. at p. 2). The parents then questioned the student's lexile levels and discussed their concerns with the initial gains based upon data that seemed to be declining with more recent scores (id.). The district speech-language pathologist recommended that the student continue to receive speech-language therapy on a daily basis and further recommended that many of the goals the student had been working on be continued with some changes in criteria for success (id.). When the parents questioned the need to continue the annual goals from the 2016-17 school year, the speech-language pathologist indicated that she wanted to see the student accomplish the goals "on a more consistent basis with a higher frequency of success" (id.). The speech-language pathologist also noted the progress the student had made in identifying the main idea and detail, and that improving her inferential and reasoning skills was important and reflected in the adjusted goals for the 2017-18 school year (id.).

⁵² The March 2017 IEP meeting information summary also noted that the student had only been at Fusion for approximately one month (Dist. Ex. 17 at p. 2).

The social worker opined that the student should continue to have counseling in a group and that the goals should remain the same because she felt she did not have enough time to fully address the goals during the 2016-17 school year (id.).

With regard to the student's program, the meeting information summary reflected the special education teacher's report that the academic courses would continue in the 12:1+2 special class life skills program and would incorporate reading, writing, math, science, social studies, and learning lab (Dist. Ex. 17 at pp. 2, 17). The special education teacher further explained that, should the student return to the district, she would be assessed using System 44 to determine where she would resume and that in learning lab there would be a writing component allowing the student to continue to work on outlining and using information from the text to answer questions (id. at p. 2). In math, the annual goals were reviewed, and the special education teacher opined that it was important for the student to continue to become more fluent in using a calculator and handling money (id.). She further indicated that the student had made progress with recognizing coins, adding coins using a calculator, and using a decimal point appropriately (id.). The parents questioned why the student needed to continue to work on money goals when she had worked on it in the past, and the special education teacher replied that the student was inconsistent in retaining learned information but that with repetition and review the student would be able to "get back on track" (id. at pp. 2-3). The parents requested more information about the science class in 10th grade and were informed that the focus would be on biology and the corresponding reading materials would be on the student's instructional level (id. at p. 3).

According to the meeting information summary, transitional activities were also discussed as well as the student's integration into the school community as a 10th grader (Dist. Ex 17 at p. 3). The guidance counselor indicated that she would facilitate research into various BOCES programs, post-high school options, and clubs that might interest the student (id.).

The March 2017 IEP listed a March 2017 teacher verbal report and observations, and a March 2017 speech-language pathologist verbal report and observations as the newest "evaluations/reports" reviewed by the CSE since the February 2017 CSE program review meeting (compare Dist. Ex. 17 at p. 4 with Dist. Ex. 15 at p. 7).

Comparison of the cognitive and academic present levels of performance and annual goals contained in the March 2017 IEP with the February 2017 IEP showed that no changes were made during the March 2017 CSE meeting (compare Dist. Ex. 17 at pp. 8-9, 12, 14-16 with Dist. Ex. 15 at pp. 11-12, 15, 17-19). The special education teacher testified that because the student left in the middle of the year she felt the levels of performance had remained the same, and that even though the student had made progress towards the goals developed during the November 2016 CSE meeting, she had not achieved any of them (Tr. pp. 827-28).

Review of the February and March 2017 IEP present levels of speech-language, study skills, and adaptive functioning shows that the March 2017 CSE made updates to these areas (compare Dist. Ex. 15 at pp. 10-12, with Dist. Ex. 17 at pp. 8-9). The present level of speech-language performance in the March 2017 IEP indicated that the student had demonstrated significant growth in using neurolinguistic programming to assist in auditory processing skill development, and that utilizing this approach allowed her to achieve her goal of 70 percent accuracy with recall of main idea, details, vocabulary and conclusions (Dist. Ex. 17 at p. 8). The

IEP further indicated that the student was at a second grade "story level" when the stories were presented orally without visual aids to facilitate programming (id.). Utilizing the same strategy and story content, the student achieved her goals at 75 percent accuracy for expressing answers to inferential questions and "wh" questions, and formulating sentences (id.). The speech-language pathologist specified that "due to the success of this programming" this strategy would allow for the increase in grade level texts and level of accuracy in her goals for the 2017-18 school year (id.). The present level of performance also indicated that the student continued to struggle with maintaining a collaborative conversation with moderate assistance, pragmatic language skills, and vocabulary development (id.). Comparison of the speaking/listening and speech-language annual goals in the February and March 2017 IEPs shows that the basic skill addressed remained the same, but with modifications made to some of the specific language of the goal, the prompt levels, and/or the criteria for mastery (compare Dist. Ex. 15 at pp. 15-17, with Dist. Ex. 17 at pp. 12-14). The speech-language pathologist testified that she updated the present level of performance based on her therapy notes and standardized benchmarks, and adjusted the student's annual goals in the March 2017 IEP because the student needed a higher level of achievement, level of complexity, or a lower level of support (Tr. pp. 468-69).

In the area of study skills, the March 2017 IEP reflected reports that the student "work[ed] diligently in all subjects" and that, although she liked to learn, she at times became overwhelmed if the information was not scaffolded (Dist. Ex. 17 at p. 9). The IEP further indicated that the student benefitted from taking notes and using them to support comprehension (id.). Additionally, the special education teacher reported that the student's working memory, attention, and processing speed deficits limited her ability to work independently for sustained periods of time (id.). The study skill annual goal was removed, as according to the special education teacher, the student "was successful in following the schedules and routines of the building and overall had made a nice adjustment to [the high school]" (compare Dist. Ex. 15 at pp. 14-15, with Dist. Ex. 17 at pp. 2, 12-16). The March 2017 CSE updated the adaptive functioning present levels of performance to reflect that the student enjoyed socializing with peers and responded well to positive feedback (compare Dist. Ex. 15 at p. 12, with Dist. Ex. 17 at p. 9). According to the special education teacher, the student had demonstrated progress in money skills; an area that continued to require reinforcement (Dist. Ex. 17 at p. 9). The March 2017 CSE further updated the academic, developmental, and functional needs of the student and determined that the student needed: modified academic work that provided an appropriate level of challenge; direct instruction, verbal cues paired with visuals, and models when learning new material; differentiated instruction in a small group for all academic areas; ongoing reinforcement for previously learned material; facilitation, scaffolding, repetition, clarification, modification of language levels; brain breaks, and visual cueing for vocabulary acquisition (compare Dist. Ex. 15 at p. 12, with Dist. Ex. 17 at p. 9).

The CSE reconvened on June 9, 2017 for a program review to discuss the student's progress at Fusion (Dist. Ex. 19 at p. 1). According to the meeting information summary attached to the June 2017 IEP, the director of student development at Fusion (director) reported that the student had "progressed immensely in a short period of time" (id.). The director opined that the 1:1 instruction had been effective and allowed the teachers to directly accommodate and modify to meet the student's needs, her math skills had increased, and she was doing well socially (id.). He further explained that the student was advocating for herself when there were issues in the classroom, confusion about assignments, etc., and that she was learning to be more independent

(id. at p. 2). The parents shared that the student had made friends at Fusion, she enjoyed going to school, the teachers were motivating, and visual supports were incorporated into every lesson (id.).

According to the meeting information summary, the director explained the student's daily schedule, and that all classes were provided on a 1:1 basis (Dist. Ex. 19 at p. 2). He further explained that the school day was from 8:30 a.m. to 2:30 p.m., Monday through Thursday, and that the school year ended when the student's classes ended, specifying that all classes are 30 sessions per semester; however, he also noted that the teacher does not move ahead until there is mastery of the material (id.). The director explained that the student had a number of opportunities for social interaction including the 10 minutes in between classes, homework café and lunch, as well as events like skating parties, picnics, movies, etc. (id.).

The meeting information summary indicated that the student was not receiving speech-language therapy at Fusion (Dist. Ex. 19 at p. 2). Additionally, the director indicated that while she was not receiving counseling services, the teachers were considered tutors and mentors, so the student could seek out any of them if she was having an issue (id.).

The meeting information summary reflected the June 2017 CSE chairperson's statement that speech-language services would be available to the student for the 12-month school year should the parents choose to participate (Dist. Ex. 19 at p. 2). The parents indicated that they would consider the 12-month services and reported that the student would be participating in summer coursework at Fusion in math and language arts in order to prepare for the 2017-18 school year (id.).

The June 2017 IEP indicated that new information considered since the March 2017 CSE meeting included Fusion progress reports from March, April, and May 2017, Fusion daily summaries dated June 8, 2017, and director and parent verbal reports/observations (Dist. Ex. 19 at p. 5).⁵³ The CSE did not make changes to the student's present levels of performance from the March 2017 IEP, with the exception of adding the parents' report that the student was a visual learner who benefited from visualization techniques in all subjects, and that she had become a better self-advocate who was more willing to seek help or ask for clarification (compare Dist. Ex. 17 at pp. 8-10, with Dist. Ex. 19 at pp. 9-11). It does not appear any additional changes were made to the speech-language and counseling related services or the 12:1+2 special class placement recommendations or the annual goals (compare Dist. Ex. 17 at pp. 12-20 with Dist. Ex. 19 at pp. 12-21).

Review of the information available to the June 2017 CSE shows that, while attending Fusion during the remainder of the 2016-17 school year, at times the student continued to exhibit recall, attention, academic, and language difficulties similar to those she exhibited while attending the district, and the reports, including those from the Fusion director, do not support a finding that the district was required to have made alternative or additional recommendations in order to offer the student a FAPE for the 2017-18 school year (compare Dist. Exs. 13 at pp. 9-12, and Dist. Ex.

⁵³ Although not identified specifically, the hearing record includes documents that appear to have been available to the June 2017 CSE (Dist. Ex. 19 at p. 5; see Parent Exs. LLL at pp. 1-37; RRRRR; MMMMMM at pp. 1-52). The Fusion monthly progress reports provided the student's grades in each course at the beginning of the month, and the daily summaries provided narrative information about what the student had worked on and how she performed in each class on a given day (see Parent Exs. LLLLL; RRRRR; MMMMMM).

19 at pp. 9-11, with Parent Ex. MMMMMMMM at pp. 28, 41, 43-44, 47-49, 51). The hearing record shows that the June 2017 IEP continued to reflect the student's needs as consistent with the discussions held and the information available to the CSEs in March and June 2017, including the participation of the parents and Fusion director. Therefore, in light of the above, while it is understandable for the parents to want to continue the student in a placement where she is happy and reportedly making progress, the hearing record reflects that the district offered the student an appropriate special education program and placement for the 2017-18 school year.

VII. Conclusion

Based on the foregoing, I find that the district identified the student's needs and developed appropriately ambitious annual goals for the student during the 2016-17 and 2017-18 school years and that based on the IEPs developed for the student, it was reasonably expected that the student would make progress under those programs (see Andrew F., 137 S. Ct. at 1001; Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]). Accordingly, the district offered the student a FAPE for the 2016-17 and 2017-18 school years.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision dated April 15, 2019 is modified by reversing those portions which found that the district failed to offer the student a free appropriate public education for the 2016-17 and 2017-18 school years and ordered the district to pay tuition reimbursement and fund the costs of the student's tuition at Fusion.

**Dated: Albany, New York
June 27, 2019**

**STEVEN KROLAK
STATE REVIEW OFFICER**