



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-073

Application of the BOARD OF EDUCATION OF THE PORT WASHINGTON 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:

Bond, Schoeneck, & King, PLLC, attorneys for petitioner, by Emily Iannucci, Esq. and Howard Miller, Esq.

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondents, by Sonia Mendez-Castro, Esq. and Linda A. Goldman, 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 determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2018-19 and 2019-20 school years were not appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student in this case has continuously attended the district public school since kindergarten (2012-13 school year) (see Tr. p. 425; Dist. Ex. 9 at p. 2; see generally Dist. Exs. 3; 5; 19-24). In early fall 2015 during third grade (2015-16 school year), the parents referred the student to the CSE for an initial determination of eligibility for special education due to concerns about the student's "reading and writing skills, and anxiety about school" (see Dist. Ex. 24 at p. 2). After completing an initial evaluation—consisting of an educational evaluation, a speech-language evaluation, a classroom observation, a psychological evaluation, and a social history—a CSE convened on October 27, 2015 and, upon review and discussion of the testing results,

ultimately concluded that the student was not eligible for special education (*id.* at pp. 2-4).¹ The October 2015 CSE noted however that, during the current school year, the student had been "screened for AIS reading and math," and "for the first time," the student "qualified for reading support" (*id.* at pp. 2, 5).² According to the evidence in the hearing record, the student's "[s]cores on the GRADE assessment"—which fell within the "lower end" of the "average" range—qualified him to receive AIS in reading, noting specifically that his "Total Composite on the GRADE [was] at the 37th percentile" and that students qualified for reading support with scores falling at the "40th percentile and below" (*id.* at pp. 2, 5).³ At the October 2015 CSE meeting, the parents requested an "Educational Evaluation-Neuropsychological evaluation" as an independent educational evaluation (IEE) (*id.* at p. 2). The CSE noted that the student would be "re-referred to the CSE upon receipt of the [] IEE" (*id.*).

Over the course of four days in December 2015 and January 2016, the student underwent the requested neuropsychological IEE, which resulted in an evaluation report dated February 2016 (February 2016 neuropsychological evaluation) (*see* Dist. Ex. 9 at p. 1). At that time, the parents expressed concerns about the student's "reading, handwriting, attention, and ability to complete math word problems" and referred him for the evaluation to "better understand his cognitive and academic functioning and assist in educational planning" (*id.*; *see* Dist. Ex. 9 at p. 2). In addition to reporting that the student was receiving "AIS services" during third grade, the parents also reported that the student had received "private tutoring for reading" on a weekly basis for "one year from the end of [k]indergarten to the end of [first] grade" (Dist. Ex. 9 at p. 2).

In conducting the evaluation, the evaluator administered several assessments to the student, interviewed the parents and student, and reviewed "records"—which included testing results from the "NWEA administered [to the student] multiple times across a span from 2013 [through] 2015"—as well as the district's educational, psychological, and speech-language evaluations conducted as part of the student's initial evaluation in fall 2015 (*compare* Dist. Ex. 9

¹ The hearing record does not include copies of any of the evaluations conducted as part of the student's initial evaluation in fall 2015 (*see generally* Tr. pp. 1-537; Parent Exs. A-K; Dist. Exs. 1-24; IHO Exs. I-VIII).

² At the impartial hearing, the district executive director of pupil personnel services (director) explained that "AIS" referred to "Academic Intervention Services" (Tr. pp. 24-25, 35). The director described AIS within the district as "Tier 2" of its "Response to Intervention" (RtI) model, which were services provided by a "specialist that might give some additional support to a student that [was] still struggling and not responding" to the "Tier 1" interventions (Tr. p. 35). According to the director, "Tier 3" interventions "mov[ed] into something like special education" (Tr. p. 35). Other than the director's brief testimony on the subject, the district did not proffer any other evidence at the impartial hearing about the RtI plan implemented by the district (*see generally* Tr. pp. 1-537; Parent Exs. A-K; Dist. Exs. 1-24; IHO Exs. I-VIII). State regulations define AIS—which are available to both disabled and nondisabled students—as "additional instruction which supplements the instruction provided in the general curriculum" (8 NYCRR 100.1[g]; *see* 8 NYCRR 100.2[ee]). State regulation specifically contemplates that AIS be made "available to students with disabilities" provided that such services are provided in a manner consistent with such students' IEPs (8 NYCRR 100.1[g]). According to State guidance, AIS are provided in addition to, and must not supplant, special education services (*see* "Academic Intervention Services: Questions and Answers," at p. 5, Office of P-12 Mem. [Jan. 2000] [emphasis added], available at <http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf>).

³ While not explained in the hearing record, the "GRADE" assessment typically refers to the Group Reading Assessment and Diagnostic Evaluation (*see, e.g., Application of a Student with a Disability*, Appeal No. 13-233).

at pp. 2-3, with Parent Ex. C at p. 1, and Dist. Ex. 24 at p. 3).^{4,5} With respect to reading, the evaluator found that the student's "overall decoding skills (tapping both sight word vocabulary and phonics knowledge) f[ell] in the mid average range at the 30th percentile" and his "phonetic decoding skills when considered in isolation also fell in the average range at the 37th percentile," which led to the conclusion that the student had an "average ability to identify words both by recognizing them as sight words as well as by applying phonics knowledge to sound them out" (Dist. Ex. 9 at p. 12). "Decoding" was described in the evaluation report as the "ability to identify what printed words [were] (i.e. the ability to read words)" based on both "sight vocabulary and phonics" (*id.*). Nevertheless, the evaluation results indicated that the student was "impaired in terms of his reading fluency, [meaning] the speed and automaticity with which he [was] able to identify words, apply phonics rules, and read text" (*id.*). Specifically, the student's "below average" performance on the reading fluency composite (14th percentile) was a result of the student's "difficulty recognizing the morphemes and other common letter combinations" (*id.*). According to the evaluation report, a "morpheme" was the "smallest meaningful unit of language, such as prefixes (e.g., 'un') and suffixes (e.g. 'ing), as well as letter strings that c[ould] stand on their own as a word or c[ould] be used as building blocks for other words (e.g. 'hall' which [was] a word by itself and c[ould] be used as a part of words such as in 'hallway.')" (*id.*). According to the evaluator, the student did "not easily recognize such parts of words, which interfere[d] with his ability to quickly break down words into syllables in order to decode them" and which, in turn, "slow[ed] down the speed with which he [was] able to identify multi-syllable words" (*id.*). The evaluator linked the student's "difficulty recognizing morphemes and other common letter combinations . . . , at least in significant part, [to] his deficit in memory for visual details" (*id.* at pp. 12-13). The evaluator indicated that "[m]emory for visual details [was] a necessary prerequisite skill for decoding as it allow[ed] the reader to recognize the 'parts' of words, such as prefixes (e.g. 'un'), suffixes (e.g. 'ing'), as well as other letter strings that [went] together as a unit to represent a sound(s) (e.g. -ight making an 'ite' sound, as in the words, light, night, right, etc.)" (*id.* at p. 13). In addition, the evaluator noted that visual memory was "especially important for learning irregular letter-sound correspondences, such as those that contain[ed] silent letters" (*id.*). Thus, at times, "one must recall what the words look[ed] like," which relied on the "task of visual memory" (*id.* [emphasis in original]). The evaluator explained that "neuropsychological research" supported the "conclusion that a deficit in visual memory caus[ed] an impairment in decoding" and that a "dysfunction in an area of the brain responsible for recognizing subtle visual distinction [was] responsible for certain forms of dyslexia" (*id.*). For this student, his "dyslexia involve[d] a deficit in visual recognition,

⁴ More specifically, the following assessments were administered to the student as part of the February 2016 neuropsychological evaluation: the Connors Continuous Performance Test, 3rd Edition (CPT-3); A Developmental Neuropsychological Assessment Test—Second Edition (NEPSY-2); the Wisconsin Card Sorting Test: Computer Version 4 (WCST); the Delis-Kaplan Executive Functioning System (D-KEFS); the California Verbal Learning Test—Children's Version (CVLT-C); the Differential Ability Scales—Second Edition (DAS-II); the Kaufman Tests of Educational Achievement—Third Edition (KTEA-3), Form A; and the Behavior Assessment System for Children, Third Edition, Self-Report of Personality—Child (BASC-3 SRP-C) (see Dist. Ex. 9 at p. 3).

⁵ The evaluator reported that the student's NWEA scores fell within the "average to above average" in mathematics and had received "adequate scores" in reading, "except for a performance that fell at the 20th percentile in the Fall of 2015" (Dist. Ex. 9 at p. 2; see Parent Ex. C at p. 1).

interfering with the speed with which he c[ould] syllabicate and thus interfering with his reading fluency" (id.).

With respect to reading comprehension, the evaluator explained that while the student's scores "fell in the middle of the average range at the 42nd percentile," it was "important to note that this score was obtained on an untimed measure of reading comprehension" (Dist. Ex. 9 at p. 13). Therefore, without demands present, the student could "comprehend what he read[] to an average degree"; however, the student—as demonstrated during the assessment of his executive functioning skills—tended to "initially provide impulsive answers that he was able to reflect on and self-correct" (id.).

With respect to writing, the student's "development in written expression fell below average at the 3rd percentile" (Dist. Ex. 9 at p. 13). According to the evaluator, his difficulties in written expression "parallel[ed] the difficulty he evidenced in oral expression" with "marked difficulty" in grammar, "trouble integrating information," and "difficulty writing grammatically correct sentences"—which, according to the evaluator, was consistent with information reported by his parents (id. at pp. 13-14). In addition, the student "struggled markedly in terms of writing mechanics," due, at times, to "attention lapses" and, at times, to the student's "poor understanding of sentence structure" (id. at p. 14). The evaluator noted that the student's coexisting difficulties with written and oral expression "indicate[d] an overall language processing disorder" (id.).

Based on the testing results, the evaluator diagnosed the student as having a language disorder; a specific learning disorder (dysgraphia) with "impairment in written expression, with impairment in spelling accuracy, grammar, and clarity and organization of written expression"; an attention deficit hyperactivity disorder (ADHD), "[p]redominantly inattentive presentation"; and a specific learning disorder (dyslexia) "with impairment in reading, [and] with impairment in reading fluency" (Dist. Ex. 9 at p. 15).

Thereafter, the evaluator summarized over eight pages of recommendations to address the student's needs, including, in relevant part, the following: the student should be found eligible for special education; an "Integrated Co-Teaching class" (ICT) was the student's "least restrictive environment" (LRE); the student required "one on one or small group (not greater than 3 total students) evidence based, multi-sensory, Orton-Gillingham based reading instruction (e.g. Preventing Academic Failure ((PAF)) three times per week for a full dedicated period"; and the reading instruction provided to the student "should focus on improving [the student's] ability to recognize morphemes and other commonly occurring letter strings in order to increase the speed with which he [was] able to syllabicate in order to improve his reading fluency" (Dist. Ex. 9 at pp. 16-24). According to the evaluator, the recommended reading instruction "should also" focus on improving the student's "ability to remember what words 'look like'"; incorporate "multi-sensory techniques," such as "skywriting" to "compensate for [the student's] weak visual memory"; "[u]se spoken (auditory) mnemonics to help [the student] recall letter sequences"; "[p]rovide explicit instruction on the six syllable types (i.e., closed, consonant-le, vowel consonant-e, r-controlled, open, and double vowel syllables)"; and use "read by analogy techniques to promote [the student's] ability to recognize commonly occurring letter strings" (id. at p. 16).

In addition to reading instruction, the evaluator recommended speech-language therapy that focused on improving the student's "understanding of sentence structure," including the

"knowledge of foundational language concepts" (i.e., subjects, predicates, and types of sentences); "[e]xplicit instruction on the parts of speech"; "[i]mproving [the student's] ability to speak and write in grammatically correct sentences, including using correct verb tense and pronouns"; "[i]mproving [the student's] ability to integrate clauses to produce grammatically correct, logical, and meaningful complex and compound sentences in spoken and written form"; and "[i]nstruction on comma usage" (Dist. Ex. 9 at pp. 16-17).

Next, the evaluator made specific recommendations for "[i]nstruction in reading comprehension"; to assist the student when he worked on "multi-step tasks, projects, etc. that require[d] planning"; and strategies targeting the student's difficulty "regulating the pace and intensity of his responses" and his impulsivity when "directly instructed to work quickly" or when inferring that he was "'supposed' to work quickly", which resulted in "working frantically, carelessly, and hence inefficiently" (Dist. Ex. 9 at pp. 17-18). In addition, the evaluator recommended the following as "instructional modifications/accommodations": preferential seating; refocusing and redirection; directions repeated; checking for understanding; providing a copy of class notes; extended time for all examinations (1.5); a "[p]rivate, quiet, and distraction minimized location for all examinations"; refocusing and redirection during examinations; no use of scantrons or recording answers in a test booklet; and waiving spelling and punctuation requirements (except when those explicit skills were being measured, i.e. a spelling test)" (*id.* at pp. 18-19). Finally, the evaluator included a list of "Supplemental Strategies and Exercises" that were "intended as a 'menu of options' for those working with [the student] to adopt and adapt as they f[oun]d most useful" with regard to the student's needs in the areas of attention, mathematics, memory, reading comprehension, reading decoding, and writing (*id.* at pp. 19-24).

On April 5, 2016, a "CSE reconvened to review the [February 2016 neuropsychological]" and to conduct an initial eligibility meeting (*see* Dist. Ex. 24 at p. 1; *see generally* Dist. Ex. 9). Based upon the "information reviewed," the April 2016 CSE found the student eligible to receive special education and related services as a student with an other health-impairment (OHI) and developed an IEP for the remainder of the 2015-16 school year (Dist. Ex. 24 at pp. 1-2).⁶ As reflected in the comments section of the IEP, "[d]ifferences were noted between the prior testing and this current evaluation" (Dist. Ex. 24 at p. 1). The CSE also noted the evaluator's "diagnostic impression" of the student in the comments, including language disorder, specific learning disability "(reading and writing)," and "ADHD (inattentive type)" (*id.*).⁷

⁶ The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute (*see* 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]). At the impartial hearing, the director testified that the April 2016 CSE's decision to find the student eligible for special education, at that time, was based upon a review of the February 2016 neuropsychological evaluation report and discussions "about what was going on in the classroom since the previous [CSE] meeting" (Tr. pp. 49, 51; *see* Dist. Ex. 24 at pp. 1-5). Although she could not recall what information the April 2016 CSE specifically discussed from the February 2016 neuropsychological evaluation report, the director testified that the CSE "acknowledged [the evaluator's] recommendations" (Tr. p. 52). A review of the April 2016 IEP reflects that while the February 2016 neuropsychological evaluation relied upon approximately eight assessments to evaluate the student, the IEP only documented the results of the DAS-II gleaned from the report (general conceptual ability, nonverbal reasoning ability, spatial ability, and verbal ability) (*compare* Dist. Ex. 24 at pp. 3-4, *with* Dist. Ex. 9 at pp. 3, 7-9).

⁷ With respect to the diagnoses the student received as a result of the neuropsychological evaluation, the director

At the April 2016 CSE meeting, the student's "reading teacher" reported that she worked with him "twice weekly for 45-minutes" (Dist. Ex. 24 at p. 1).⁸ As reflected in the comments, the reading teacher's "focus of service ha[d] been on comprehension strategies," and "[m]ore recently, [she and the student] ha[d] moved to essay writing" (*id.*). The reading teacher also noted that the student "rushe[d] through his work and w[ould] make careless errors," and she worked with the student on the "spelling of his sight words" (*id.*). According to the comments, the student's "response to this intervention appear[ed] to be positive," although a "common theme" of "his inconsistency, impulsivity, and tendency to rush through work" had been noted by the student's classroom teacher and the student's reading teacher (*id.*). The parents expressed that the student's "homework [was] extremely frustrating for him," and he "often comment[ed] about his abilities and how school [was] difficult" (*id.*).⁹

According to the comments, the CSE then turned its discussion to the "level of service to provide" to the student, noting that he "appear[ed] to be doing well with reading support but consideration was given to providing some level of special education based on the [February 2016 neuropsychological evaluation]" (Dist. Ex. 24 at p. 1). As a result, the April 2016 CSE recommended that the student receive three 40-minute sessions per week of direct consultant teacher services (delivered in the classroom) for the remainder of the 2015-16 school year and that the "[b]uilding w[ould] consider the continuation of the building level reading services" (*id.* at pp. 1-2, 7).¹⁰ The April 2016 CSE also developed annual goals (one for study skills, two for

testified at the impartial hearing that she could not "say" whether she "agree[d] or disagree[d]," but that the CSE "took into consideration" the information presented by this "outside evaluator" even though "[s]ome of it [was] contradictory to what the school was saying" (Tr. pp. 52-53; *see* Tr. pp. 53-54 [reflecting the director's testimony that she "[p]ersonally" did not believe the evaluator's diagnosis of "language disorder" because it "was not something that we were seeing in school"]). When asked whether the April 2016 CSE believed the three sessions per week of reading instruction recommended in the February 2016 neuropsychological evaluation report was appropriate for the student, the director responded by stating that the student "was receiving reading intervention at the building" (Tr. p. 55; *see* Dist. Ex. 9 at p. 16).

⁸ The hearing record does not clarify whether the services provided by the reading teacher were considered to be the AIS the student qualified to receive based upon his scores on the GRADE assessment and as reported at the October 2015 CSE meeting (*see* Dist. Ex. 24 at p. 2; *see generally* Tr. pp. 1-537; Parent Exs. A-K; Dist. Exs. 1-24; IHO Exs. I-VIII). The hearing record also fails to clarify when the reading teacher began providing services to the student (*see generally* Tr. pp. 1-537; Parent Exs. A-K; Dist. Exs. 1-24; IHO Exs. I-VIII).

⁹ In the area of reading, the April 2016 CSE described the student's present levels of academic performance in the IEP as follows: "[The student] used the skill of going back into the passage to help obtain some comprehension questions. He would first give general answers but ask[ed] for more time and g[ave] more detailed answers. He used decoding skills but seemed concerned on any timed test." (Dist. Ex. 24 at p. 5). In addition, the present levels of performance reflected the student's performance on the GRADE assessment, that the student qualified to receive "AIS reading," and that "his skills appear[ed] to be appropriately developed, but he require[d] assurance" (*id.*). For writing, the April 2016 CSE described the student's present levels of academic performance in the IEP as follows: "[The student] generally applied capitalization and punctuation rules consistently. Adding detail and elaboration [were] skills that w[ould] be worked on in 3rd grade. [The student] demonstrate[d] weaknesses in grammar and sentence structure. His essay writing skills [were] emerging." (*id.*).

¹⁰ State regulations define consultant teacher services as "direct or indirect services, . . . , provided to a student with a disability in the student's regular education classes and/or to such student's regular education teachers" (8 NYCRR 200.1[m]; *see* 8 NYCRR 200.6[d]). State regulation also defines direct consultant teacher services, to wit, as "specially designed individualized or group instruction provided by a certified special education teacher,

reading, and two for writing); recommended the daily use of refocusing and redirection, as well as directions explained, on an as needed basis in the classroom; and recommended testing accommodations ("1.5 Times" for all tests, use of "[o]n-task [f]ocusing [p]rompts") (id. at pp. 6-9). In addition, the April 2016 CSE indicated that a CSE would convene in June 2016 for the student's annual review (id.).

On June 21, 2016, a CSE convened to conduct the student's annual review and to develop an IEP for the 2016-17 school year (fourth grade) (see Dist. Ex. 23 at p. 1). Finding that the student remained eligible for special education as a student with an OHI, the June 2016 CSE recommended the same frequency and duration of direct consultant teacher services—namely, three 40-minute sessions per week delivered in the classroom—as recommended by the April 2016 CSE, and similarly noted in the comments section of the IEP that the "[b]uilding w[ould] consider building level supports" (id. at pp. 2, 7; compare Dist. Ex. 23 at p. 7, with Dist. Ex. 24 at pp. 2, 7).¹¹ The IEP included annual goals in the areas of study skills (one goal), reading (three goals), writing (four goals), and mathematics (one goal) (see Dist. Ex. 23 at pp. 6-7).^{12,13}

A CSE next convened on April 26, 2017 to conduct the student's annual review and to develop an IEP for the 2017-18 school year (fifth grade) (see Dist. Ex. 22 at p. 1).¹⁴ Finding that

. . . , to a student with a disability to aid such student to benefit from the student's regular education classes" (8 NYCRR 200.1[m][1]).

¹¹ The June 2016 IEP included the same description of the student's reading and writing needs in the present levels of performance as set forth in the April 2016 IEP (compare Dist. Ex. 23 at p. 4, with Dist. Ex. 24 at p. 5). In addition, the June 2016 IEP carried over the same testing accommodations and supplementary aids and services as recommended in the April 2016 IEP (compare Dist. Ex. 23 at pp. 7-8, with Dist. Ex. 24 at pp. 8-9).

¹² According to the comments in the June 2016 IEP, the student "participate[d] in class and in his reading group"; he "appear[ed] capable of the grade level work" and could "follow directions independently"; he had a "difficult time with starting assignments and organizing himself independently"; he struggled with homework; he could not "start many writing assignments independently"; and he "need[ed] consistent support to complete open-ended assignments" (Dist. Ex. 23 at p. 1). In addition, the comments reflected that the student did not "like to read" and could not "independently edit writing assignments" (id.).

¹³ When asked at the impartial hearing about the recommendation to provide the student with speech-language therapy in the February 2016 neuropsychological evaluation report, the director testified that the June 2016 IEP did not "indicate any information" as to why the CSE did not adopt this recommendation (Tr. p. 57; see Dist. Ex. 23 at p. 1). The director noted, however, that a district speech-language provider attended the June 2016 CSE meeting (Tr. p. 57; see Dist. Ex. 23 at p. 1).

¹⁴ An "Educational Update Report," dated April 4, 2017, was documented in the evaluation section of the April 2017 IEP; the same section of the IEP reflected testing results (i.e., scores) from the "Wechsler Individual Achievement Test—III" (reading comprehension, dated March 30, 2017) and the "Woodcock-Johnson IV Tests of Achievement Form A" (applied problems, calculation, math fluency, spelling, and writing samples; dated March 24, 2017) (Dist. Ex. 22 at pp. 1, 3-4). The hearing record does not include a copy of the "Educational Update Report," dated April 4, 2017 (see generally Tr. pp. 1-537; Parent Exs. A-K; Dist. Exs. 1-24; IHO Exs. I-VIII). The comments section of the April 2017 IEP reflects that the updated educational testing "revealed average skills in most areas," with "weaknesses in math facts fluency" that presumably arose from the student quickly working on that particular subtest and "often did not notice the change in operation that was required" (Dist. Ex. 22 at p. 1). The comments also reflected that on a "writing samples subtest," the student made "errors in spelling and punctuation" (id.). In addition, the CSE noted in the comments that the student would "seek out support from the Special Education Teacher/Consultant Teacher when she [was] in the room," he participated in AIS reading, he had become "more engaged in learning this year," and his "confidence and attitude toward

the student remained eligible for special education as a student with an OHI, the April 2017 CSE recommended the same frequency and duration of direct consultant teacher services—namely, three 40-minute sessions per week delivered in the classroom—as recommended by the April 2016 and June 2016 CSEs, and noted in the comments section of the IEP that "his need for building level AIS reading w[ould] be monitored by the building team" (id. at pp. 1-2, 7; compare Dist. Ex. 22 at pp. 2, 8, with Dist. Ex. 23 at p. 7, and Dist. Ex. 24 at pp. 2, 7).¹⁵ With respect to annual goals, the April 2017 IEP included one annual goal for reading and three annual goals for writing (see Dist. Ex. 22 at pp. 7-8).¹⁶

On April 18, 2018, a CSE convened to conduct the student's annual review and to develop an IEP for the 2018-19 school year (sixth grade) (see Dist. Ex. 21 at p. 1).¹⁷ Finding that the student remained eligible for special education as a student with an OHI, the April 2018 CSE modified the previous recommendations for direct consultant teacher services to a recommendation for the student to receive one period of resource room services (delivered in the resource room) and one period of direct and indirect consultant teacher services (delivered in the classroom) on an alternating, daily basis throughout the week (id. at pp. 1, 7; compare Dist. Ex. 21 at pp. 2, 7, with Dist. Ex. 22 at pp. 2, 8, and Dist. Ex. 23 at p. 7, and Dist. Ex. 24 at pp. 2, 7).¹⁸

attending the group ha[d] improved" (id.). According to his then-current classroom teacher, the student "seem[ed] happy" but would "avoid tasks," he was "involved in the classroom lessons and want[ed] to improve his work," and "[m]any of his errors [were] the result of him being careless" (id.). The classroom teacher also reported that the student had "taken a recent interest in his writing and expanding his writing" (id.). The parents' concerns included that the student had "great difficulty with homework and retaining information" and that "[d]irections c[ould] be confusing" (id.).

¹⁵ In the area of reading, the April 2017 IEP described the student's present levels of academic performance as follows: "[The student] [was] slowly gaining more confidence in his reading skills. When he [was] interested in a story, he [was] able to participate in meaningful discussion[s] about it with his teacher and his peers. [The student] [was] able to decode words but he [was] not careful recognizing end punctuation." (id. at p. 5). The present levels of performance also included information from previous IEPs regarding the student's GRADE assessment and qualifying to receive AIS in reading (id.; compare Dist. Ex. 22 at p. 5, with Dist. Ex. 23 at p. 4, and Dist. Ex. 24 at p. 5). The April 2017 CSE added information reflecting that the student had "participate[d] in AIS reading this school year" and, at that point in fourth grade, was "reading on an instruction Level R (beginning fourth grade level)" (Dist. Ex. 22 at p. 5). For writing, the April 2017 CSE described the student's present levels of academic performance as follows: "[The student] [was] able to write complete sentences. However, he d[id] not elaborate independently. [The student] need[ed] to work on expanding his ideas when he wr[ote]" and "need[ed] to check his work for grammatical and spelling errors." (Dist. Ex. 22 at p. 5). The April 2017 IEP modified the testing accommodations to add "Tests Administered in a Location with Minimal Distractions," but otherwise carried over the same testing accommodations and supplementary aids and services as recommended in the April and June 2016 IEPs (compare Dist. Ex. 22 at pp. 8-9, with Dist. Ex. 23 at pp. 7-8, and Dist. Ex. 24 at pp. 8-9).

¹⁶ The April 2017 IEP was the first IEP to include a special alert, which indicated that the student had received a diagnosis of "ADHD-Inattentive type" (compare Dist. Ex. 22 at p. 1, with Dist. Ex. 23 at p. 1, and Dist. Ex. 24 at p. 1).

¹⁷ The evidence in the hearing record indicated that the student would transition to a district middle school for sixth grade (see Dist. Ex. 21 at p. 1; see also Tr. p. 426).

¹⁸ The April 2018 IEP documented an "Educational Evaluation," dated February 7, 2018, which appeared to include the administration of the "Wechsler Individual Achievement Test-III" (subtests in essay composition; math fluency for addition, multiplication, and subtraction; math problem solving; numerical operations; pseudoword decoding; reading comprehension; sentence composition; spelling; and word reading) (Dist. Ex. 21

With respect to annual goals, the April 2018 IEP included one annual goal for study skills, two annual goals for reading, and four annual goals for writing (see Dist. Ex. 21 at pp. 6-7).¹⁹

At the impartial hearing, the student's mother testified that, "almost immediately" in sixth grade—or at the latest, by September 27th—she "asked for an immediate CSE meeting" because the student was "drowning," and she also requested a "comprehensive reading eval[uation]" of the student (Tr. pp. 448, 463; see Tr. p. 68; Parent Ex. I at p. 1). In response, the district indicated that since the student's "3-year mandated review" was approaching, the two meetings would be combined (Tr. p. 448). In September and October 2018, the district completed the reevaluation of the student—which consisted of an educational evaluation, a psychological evaluation, and a social history update (see Dist. Ex. 20 at p. 3; see generally Dist. Exs. 7-8). On or about October 18, 2018, a district "reading specialist" completed a "diagnostic reading assessment" through the administration of the "Burns/Roe Informal Reading Inventory" to the student (October 2018 reading assessment) (Dist. Ex. 10 at p. 1).²⁰ The student's mother testified

at pp. 2-3; see generally Dist. Ex. 7 at pp. 5-6). However, the April 2018 IEP no longer included the testing results related to the "Educational Update Report," dated April 4, 2017, documented within the April 2017 IEP (compare Dist. Ex. 21 at pp. 2-3, with Dist. Ex. 22 at pp. 1, 3-4). While not explained in the hearing record, it appears that the April 2018 CSE modified the student's present levels of academic performance in the areas of reading, writing, and mathematics based upon the "Educational Evaluation," as the test results (i.e., scores) were interspersed within the narrative descriptions of the student's needs in reading and mathematics respectively (compare Dist. Ex. 21 at pp. 2-3, with Dist. Ex. 21 at pp. 4-5). In reading, the April 2018 CSE reported the student's scores that fell within the average range on the word reading, pseudoword decoding, and reading comprehension subtests, and identified "irregular vowels" as an "area of weakness" for the student (Dist. Ex. 21 at p. 4). In mathematics, the CSE reported the student's scores that fell within the average range on the numerical operations, math problem solving, and math fluency (subtraction, multiplication) subtests; noted that he "made several errors due to computation, lack of neatness/ organization and a rapid work pace"; and indicated that "math fact fluency remain[ed] a weakness" (id.). Finally, in writing, the CSE reported, verbatim, the narrative description in the "Educational Evaluation," which noted that the student's scores fell within the average range or higher on the sentence composition, sentence combining, sentence building, and spelling subtests, and that the student demonstrated an "area of weakness . . . in schwa vowel sounds" (compare Dist. Ex. 21 at p. 4, with Dist. Ex. 7 at p. 6). The April 2018 IEP modified the testing accommodations by removing the recommendation for "Tests Administered in a Location with Minimal Distractions," and replacing it with a recommendation for "Directions Read to Student," but otherwise carried over the same testing accommodations from the April 2017 IEP (compare Dist. Ex. 21 at p. 8, with Dist. Ex. 22 at p. 8). The April 2018 IEP also modified the supplementary aids and services recommendations by adding the use of a graphic organizer, and carried over the remaining recommendations from the April 2017 IEP (compare Dist. Ex. 21 at p. 7, with Dist. Ex. 22 at p. 9).

¹⁹ In the comments section of the April 2018 IEP, the CSE noted that the student's consultant teacher had "seen growth" over the year, with "[n]ice progress" in reading and mathematics, but that "[w]riting" remained an "area of weakness" (Dist. Ex. 21 at p. 1). The April 2018 CSE also noted in the comments that the student was a "reluctant writer" and would "rush, which then impact[ed] his spelling" (id.). The student's reading teacher reported that the student had been "benchmarked at a Level T (which [was] in the 5th grade range)," and he scored "low on the NWEA" after completing the test quickly in "33 minutes" (id.). According to the student's classroom teacher, the student had "matured this year" and exhibited "more effort and confidence" (id.). The April 2018 CSE further noted in the comments the parents' concerns about the student's "transition to middle school," his improvement "with completing homework," and that he could "easily [become] overwhelmed by homework" (id.). A final note indicated that the CSE would "reconvene after the first marking period to review progress" (id.).

²⁰ Testimony at the impartial hearing established that the summary of the October 2018 reading assessment—while dated "October 19, 2018," the day after the October 18, 2018 CSE meeting—was actually completed on

that she received copies of "all of the reports" by the time the CSE convened on October 18, 2018 to review the evaluative information—"except for the reading eval[uation]" (Tr. p. 463; see Tr. pp. 64-67).²¹

On October 18, 2018, a CSE conducted a "reevaluation review meeting" (Dist. Ex. 20 at p. 1).²² Finding that the student remained eligible for special education as a student with an OHI, the October 2018 CSE modified the previous recommendations for direct consultant teacher services and resource room services to a recommendation for five 42-minute sessions per week of resource room services (i.e., daily resource room for one period per day) (id. at pp. 1, 9; compare Dist. Ex. 20 at p. 9, with Dist. Ex. 21 at pp. 2, 7).²³ With respect to annual goals, the

the morning of the October 2018 CSE meeting (compare Dist. Ex. 10 at p. 1, with Tr. pp. 64-67, 504-05). According to the summary of the October 2018 reading assessment, the student was "currently enrolled in an AIS/ELA Workshop reading support class that [met] every other day for 40 minutes" (Dist. Ex. 10 at p. 1). The director explained in testimony that the "ELA workshop" offered at the district middle school was an "AIS program" and was "considered [a] Tier 2" intervention within the district's RtI plan (Tr. pp. 35-36). The director also testified that that "would be the next appropriate step for a student that [was] not benefitting or [was] benefitting but not improving, solely based on the classroom instruction," and the student would get "some additional support with a specialist in that area" (Tr. p. 36).

²¹ At the impartial hearing, the director admitted that a copy of the October 2018 reading assessment had not been provided to the parents in preparation for the October 2018 CSE meeting, even though she was admittedly also aware that the parents were "concerned about reading specifically" at the time of the meeting (Tr. pp. 66-67).

²² The district "reading specialist" who conducted the October 2018 reading assessment of the student did not attend the October 2018 CSE meeting (compare Dist. Ex. 20 at p. 1, with Dist. Ex. 10 at p. 1).

²³ The October 2018 IEP documented the reevaluation testing results for the administration of the "Woodcock-Johnson IV Tests of Achievement Form A" (subtests in academic applications, academic skills, applied problems, basic reading, brief achievement, broad reading, calculation, letter-word identification, passage comprehension, spelling, and writing samples); the "Bender-Gestalt Visual Motor Test-II" (subtests in copy and recall); and the "Wechsler Intelligence Scale for Children-V" (subtests in block design, coding, digit span, figure weights, fluid reasoning, full scale, matrix reasoning, similarities, verbal comprehension, and vocabulary) (Dist. Ex. 20 at pp. 3-4). While not explained in the hearing record, it appears that the October 2018 CSE modified the student's present levels of academic performance in the areas of reading, writing, and mathematics based upon the reevaluation testing results (compare Dist. Ex. 20 at pp. 3-4, with Dist. Ex. 20 at p. 6). For example, in reading the present levels of performance reflected the student's scores on certain subtests of the "Woodcock Johnson IV," such as broad reading, which fell within the "limited range" in measures of oral sight word reading skills, silent reading comprehension speed, and passage comprehension when reading silently (Dist. Ex. 20 at p. 6). In addition, the present levels of performance reflected that the student performed within the average range on the basic reading skills subtest (id.). According to the IEP, the student could "decode words and [was] able to fluently read a passage" in class, but "struggle[d] with comprehending what he ha[d] read" (id.). The IEP also reflected that the student had been "successful when a reading ha[d] been read aloud, breaking the reading up into smaller sections and asking questions throughout" (id.). The student also had difficulty when "identifying text evidence within a reading" (id.). The October 2018 CSE described the student's present levels of performance in mathematics, again, by reporting his scores on the "Woodcock Johnson IV," which fell within the "low to average range" (id.). In addition, the IEP reflected that the student could "follow the lesson and complete the task with minimal assistance from the teacher" in the classroom, and that "[r]e-teaching and step by step instruction [were] beneficial" for the student (id.). In regard to writing, the October 2018 CSE reported the student's present levels of performance with reevaluation testing scores, while noting that "[s]pelling was an area of challenge" for the student, "written expression" was an "area of strength," and the student struggled with "putting his thoughts on to paper" in the classroom and had difficulty writing a "paragraph or essay about a specific topic" (id.). The IEP also noted that "[p]lanning" was "beneficial" to the

October 2018 IEP included two annual goals for study skills, four annual goals for reading, four annual goals for writing, and one annual goal for mathematics (see Dist. Ex. 20 at pp. 8-9).²⁴

In a letter to the director dated November 5, 2018, the parents acknowledged receipt of the October 2018 IEP and that, having read the IEP and "recent evaluations," the parents noted "many inconsistencies in the areas of reading and writing" (Parent Ex. I at p. 1). As an example, the parents pointed out that on "one page it [was] indicated that writing [was] a 'strength' and a 'need' for [the student]" (id.). The parents expressed that the annual goals and "proposed program" were not "sufficient to meet [the student's] learning needs," and the annual goals were "not measurable" and that the schedule for measurement "at the end of the marking period" was too long (id.). In addition, the parents noted that, "in the beginning of the school year," a reading evaluation had been requested (id.). According to the letter, the parents had been "interested in a reading evaluation that would use a normed instrument that would be diagnostic and help[ed] the school team craft an appropriate reading program that [was] research based and target[ed] [the student's] specific reading and writing deficits" (id.). The parents also noted that they "had requested, several times, that this evaluation be available to [them] before the CSE and then discussed at the meeting"; however, they "did not receive this evaluation," but instead, were provided with a "reading inventory" at the CSE meeting (id.). Next, the parents indicated that they had requested a "research based reading program during [the] school day" for the student, but had been "told that this [was] not possible" and "arrangements would be made for reading support" (id.). At that time, a "reading teacher" had contacted the parents and "offered to work with [the student] twice a week, for an hour, after 6:00 p.m.," and the parents "explained that [the student] [was] available after school or during his daily core class (7th period)" (id.). Concerned with the passage of time and that the student had "not received adequate reading remediation," the parents requested that the district "immediately" put a "reading program" in place for the student, and, at the same time, that the "CSE approve an IEE reading evaluation as well as an

student in his writing success (id.). Finally, the October 2018 CSE also modified the supplementary aids and services recommendations by adding the provision of a copy of class notes, checking for understanding, and special seating arrangements, and carried over the remaining recommendations from the April 2018 IEP (compare Dist. Ex. 20 at p. 10, with Dist. Ex. 21 at p. 7). The October 2018 CSE continued to recommend the same testing accommodations as reflected in the April 2018 IEP (compare Dist. Ex. 20 at p. 11, with Dist. Ex. 21 at p. 8).

²⁴ In the comments section of the October 2018 IEP, the summary of the meeting mirrored much of what was then reported in the present levels of performance, and in addition, reflected the student's performance within the classroom (compare Dist. Ex. 20 at pp. 1-2, with Dist. Ex. 20 at p. 6). With respect to reading, the comments section reflected that a "reading assessment" had been conducted, which demonstrated that the student's reading comprehension fell within the average range, but that he "demonstrated difficulty with answering cause and effect questions, inference questions and finding evidence in the text" (Dist. Ex. 20 at p. 1). The comments also reflected that "[t]esting revealed reading of multisyllabic words in context and in isolation as an area of weakness" (id.). As a final point, the comments reported that the student's performance in "ELA workshop . . . ha[d] improved since the beginning of the year," and he went to "class prepared and on time" (id. at p. 2). However, at some point in the 2018-19 school year, "some schedule changes . . . required [the student] to drop the ELA workshop" (Dist. Ex. 13 at p. 1). At the impartial hearing, the student's mother testified that the decision to remove the student from the ELA workshop was made at the October 2018 CSE meeting "based on [the student's] needs at that time," noting further that the "ELA workshop at that time was not working for him" and that the student had been receiving the "building level reading program from the time he was in third grade" (Tr. pp. 448-49, 452-53, 455-58).

assistive technology evaluation" (id.).²⁵ According to the parents, the student was "having difficulty accessing the curriculum due to his reading and writing deficits" and they thought that an assistive technology evaluation "might help give him the tools to succeed in the 6th grade curriculum" (id. at pp. 1-2).

Over the course of two days in December 2018, the student underwent a "Reading Evaluation," resulting in an evaluation report dated January 21, 2019 (January 2019 reading evaluation) (Dist. Ex. 11 at p. 1).²⁶ The evaluation report indicated that the student had been "seen for an educational evaluation in order to determine his current functioning and to develop an instructional plan to address his educational needs specifically in reading" and due to his parents' concerns with regard to his "reading, writing, spelling, and vocabulary" (id.). In conducting the reading evaluation, the evaluator reviewed the February 2016 neuropsychological evaluation report, the student's most recent IEP, the testing results from the district's most recent evaluations as reflected in the October 2018 IEP, the October 2018 reading assessment conducted by the district, as well as "[r]eports from the school district and outside providers" (id. at pp. 1-3). According to the evaluation report, the student was administered "several formal reading assessments most closely associated with decoding, encoding, reading fluency, comprehension, vocabulary, and writing" (id. at p. 2).²⁷

After providing a brief explanation of each assessment, the evaluator reported the student's testing results (i.e., scores) (see Dist. Ex. 11 at pp. 3-6). Overall, the evaluator indicated that the student's performance in "each of the overarching concepts of reading,

²⁵ At the impartial hearing, the student's mother testified that at the October 2018 CSE meeting, neither the "ELA workshop teacher" nor any other "reading teacher" was present at the meeting (Tr. p. 458). The student's mother further testified that she "asked for, kept asking for specialized reading instruction and [she] was told that can't happen at the CSE meeting, that [she] needed to talk" to the director "separately" (Tr. pp. 458-59). Consistent with that information, the student's mother spoke to the director, who "said she would be willing to provide reading instruction after school" (Tr. p. 459). The student's mother, however, reiterated to the director that she "wanted [the specialized reading]" in school, but the director remained steadfast that "she couldn't provide it in school" (Tr. p. 459). Although the student's mother did not agree with providing the student with reading support outside of school, she was "open to anything [she] could get" for the student and agreed to "try the reading tutor after school" (Tr. pp. 459-61).

²⁶ Evidence in the hearing record reflects that the student began receiving two hours per week of "Reading support since December" (Dist. Ex. 13 at p. 1; see Tr. pp.). The district reading teacher providing the reading support initially worked with the student on "his reading comprehension skills and different strategies he c[ould] use for reading comprehension" (id.; compare Dist. Ex. 13 at p. 1, with Tr. pp. 344-46). By March 2019, the district teacher "shifted [her focus] to spelling and writing, both of which present[ed] as challenges" for the student (Dist. Ex. 13 at p. 1). According to the evidence, the district teacher had occasionally "scribed for [the student] to assist in getting his thoughts out and working on spelling/written expression" (id.). The evidence further reflects that the reading support that began in December 2018 was, by March 2019, "drawing to a close," and the student had been receiving the reading support in a 1:1 setting after school (id.; see Tr. pp. 359-60). At the impartial hearing, the district reading teacher who worked with the student testified that, when she was asked to provide these services, she had been told that the district had a student "who need[ed] reading instruction after school" (Tr. p. 361-62).

²⁷ Specifically, the January 2019 reading evaluation consisted of the administration of the following: the Comprehensive Test of Phonological Processing (CTOPP-2), the Gray Oral Reading Test (GORT-5), the Word Identification and Spelling Test (WIST), the Gray Silent Reading Test (GSRT), the Test of Written Language (TOWL-4), and the Test of Word Reading Efficiency (TOWRE-2) (see Dist. Ex. 11 at p. 3).

language and expression including; phonological awareness, phonics, spelling, vocabulary, fluency, comprehension and writing" fell within the "very poor to superior range" (*id.* at p. 6 [emphasis in original]). With regard to more specific findings, the evaluator initially described the student's performance related to phonological and phonemic awareness (*id.* at p. 6). Here, the evaluator indicated that the student demonstrated—"on most tasks both quantitatively and qualitatively"—that he had "awareness and ability in the phonological arena despite two measures scoring in the below average range" (*id.*). According to the evaluator, the student "put great effort into the Elison task that require[d] him to manipulate and repeat words with specific sounds removed," he expressed "having trouble hearing the sounds as the phoneme strings became longer" on the blending words task, and he performed within the "below average" range for rapid letter naming (*id.*). The evaluator explained that the student's "overall 'weakness' in the area of rapid naming may manifest and be contributing to a deficiency in reading fluency" as discussed later in the report (*id.*). With respect to phonics skills, the student could "read words, identify sight words and apply word attack skills such as breaking longer words into syllables, however, [the student's] skills deteriorate[d] when efficiency [was] required" (*id.*). Notably, while the student did not exhibit "noticeable difficulty reading the regular and sight word lists" on the WIST, the student's "performance significantly decreased" on the TOWRE-2—which required the student to "read words under timed conditions" (*id.*). On the GORT-5, which measured the student's "decoding skills . . . in passage form," the evaluator noted that the student's "accuracy was again weak but was largely related to pausing and repeating phrases rather than word reading errors" (*id.*). In addition, the evaluator found that the student's performance on the "irregular or pseudo-word decoding tasks of the WIST and TOWRE-2" fell within the "below average" range—further noting that "[b]oth sub-tests measure[d] his application of sound/symbol knowledge, one for accuracy, one for efficiency and on each he fell short" (*id.*).

Next, the evaluator found that spelling "in both word and sentence form was a particular weakness" for the student (Dist. Ex. 11 at p. 6). On WIST subtests for "spelling regular and sight words," the student's scores fell in the "below average range" (*id.*). The evaluator indicated that although the student exhibited "decent orthographic recall for many typical words he tended to make sound substitutions for unfamiliar ones," and when the "multisyllabic word construction became more sophisticated [the student's] performance deteriorated and the application of orthographic rules was difficult for him" (*id.*). The evaluator also noted that "[s]ight word recall was difficult as well" for the student and that he made "errors that were close representations of actual words" (*id.* at pp. 6-7). When assessing spelling on the TOWL-4—which "required [the student] to apply encoding skills in sentence and essay form"—the student's "[e]rrors in spelling form were similar to his performance on the WIST in that he substituted sound options and omitted or misapplied orthographic rules" (*id.* at p. 7). However, the evaluator noted that the student "was able to convey his message [on the essay] with relative clarity" despite misspellings (*id.*).

Turning to the area of fluency "for both oral and silent reading," the evaluator indicated that the student's "rapid naming skills for letter naming, [which was] a precursor to reading fluency, were below average" (Dist Ex. 11 at p. 7). In addition, the student performed in the "poor to below average range" on the TOWRE-2 assessment that measured the student's ability to "accurately and efficiently read single words" (*id.*). The evaluator also administered the GORT-5 to evaluate the student's "reading performance within text, for word reading accuracy,

fluency and comprehension" (id.). According to the evaluator, the student's "deficiencies in the aforementioned skills greatly affected his fluency, rate, automaticity and prosody (flow of reading)" (id.). Notably, the evaluator indicated that the student's "reading fluency within text was below average largely due to his flow of reading, he paused frequently, taking time to parse through the text and repeat phrases for accuracy and comprehension" (id. [emphasis in original]). In addition, the evaluator noted that the student, at times, "skipped whole lines of text, did not acknowledge punctuation and, as the incidents increased, he became more disconnected with the text" (id.). The student's "most deficient performance of the entire battery," however, occurred on the GSRT, which required the student to "read passages to himself then answer five multiple choice questions related to the passage" (id.). Here, the student performed in the "very poor range" (less than the 1st percentile) (id.). The evaluator opined that although "we cannot determine whether [the student's] reading fluency explicitly affected his performance on this task, it [was] important to note that his reading comprehension on the oral reading task was within normal limits and [the student] did comment that reading in his head was harder to keep his place than when he read out loud" (id.).

Next, the evaluator reported on the student's vocabulary skills (see Dist. Ex. 11 at p. 7). When asked to "construct meaningful sentences from word prompts" on the TOWL-4, the student's sentences were "simple and basic which may [have] indicate[d] either lack of comprehensive understanding of the word or weak effort/ability to construct meaningful, complex sentences" (id.). In addition, the evaluator indicated that the student "did not attempt creating sentences" for certain words, which "ultimately rendered him a scores for vocabulary knowledge in the below average range" (id.).

Next, the evaluator turned to the area of comprehension as measured in "both oral and silent reading tasks" (Dist. Ex. 11 at p. 8). On the GORT-5, the student scored in the "average range" when required to "read passage and answer five literal and implicit questions that followed in [an] open ended fashion" (id.). However, the evaluator noted that "as [the student's] fluency waned he appeared more and more disconnected to the text and at times had trouble recalling literal details from the passage" (id.). According to the evaluator, the student could "answer some more complex questions further on, perhaps indicating that his correct or incorrect responses were more likely related to his cognitive attention to task rather than cognitive understanding" (id.). The evaluator also reflected that the student's performance fell in the "very poor range" on the "silent reading task, where the questions were presented in multiple choice form" (id.).

Finally, in regard to writing, the evaluator administered the TOWL-4 to measure the student's "discreet [sic] writing skills as well as story composition and structure" (Dist. Ex. 11 at p. 8). Overall, the evaluator found that the student "wrote a very interesting story based on the provided picture prompt that had appropriate sequence and organization," while also noting that the student "may have interpreted and connected some of the elements of the picture a bit askew" (id.). In addition, the evaluator noted that the student demonstrated "some vocabulary challenges," he "used several words in the wrong tense," his "sentences were not consistently well constructed," and his sentences were "fragmented or poorly punctuated" at times (id.). However, the student corrected "illogical sentences into logical form and combine[d] simple sentences into complex form" (id.). According to the evaluator, "[i]solating and measuring these tasks in writing provide[d] further insight into [the student's] cognitive ability in the form of thinking and analyzing skills" (id.). The evaluator found that the student's spelling on the

"Combining Sentences subtest" was "weak, even when copying words onto the line below" (id.). And as a final point, the evaluator indicated that the student's "handwriting appeared more scribbled and unclear when he wasn't confident in the spelling of a word" (id.).

As part of the evaluation summary, the evaluator incorporated information from the February 2016 neuropsychological evaluation (see Dist. Ex. 11 at pp. 8-9). In part, the evaluator noted the diagnoses of a language disorder, and specific learning disorders of dyslexia, dysgraphia, and an ADHD (inattentive type), and further noted the student's "intact cognitive flexibility and metacognition with poor planning skills, poor inhibition, accelerated tempo (goes too fast), and challenges with sustained attention" as reported by the previous evaluator (id. at p. 9). Notably, the evaluator concluded that the "[previous evaluator's] findings remain[ed] consistent with the results of the current evaluation," and moreover, the "brief educational testing done by the school district in October of this school year [2018-19] for [the student's] reevaluation [were] also consistent with his performance on the current battery" (id.). And the evaluator pointed specifically to the student's performance in the "areas of ability in word identification, applied problems and writing, low average calculation, passage comprehension and spelling and deficits in fluency for both reading and math" (id.).

In addition, the evaluator indicated that the student's "performance on the current battery further validate[d] [the previous evaluator's] interpretations and conclusions" in regard to reading and reading comprehension skills (Dist. Ex. 11 at p. 9). Here, the evaluator referred to how the previous evaluator "specifically outline[d] the manifestation of [the student's] dyslexia involving visual recognition of words and morphemes that interfere[d] with and inhibit[ed] his reading fluency" (id.). The evaluator also acknowledged that, with respect to reading comprehension, the student's "abilities, while they were found to be fundamentally intact, m[ight] be at times compromised by his aforementioned executive functioning challenges" (id.). In addition, the evaluator indicated that while the student could "read words and apply word attack strategies," he had "difficulty with the automaticity in which he recognize[d] words and/or applie[d] decoding strategies"; moreover, he "demonstrated notable weaknesses in fluency, not only in word reading but also in reading rate, prosody and regulation" (id.).

With this as backdrop, the evaluator explained that the "ability to read text accurately and fluidly, with appropriate inflection and prosody, [was] critical to comprehension" (Dist. Ex. 11 at p. 9). She noted that "[f]luent readers ha[d] learned to recognize printed words automatically, without requiring the use of significant cognitive resources, freeing up these critical resources for use in the application of specific comprehension strategies such as drawing inferences" (id.). In contrast, "[d]isfluent readers lack[ed] this automaticity with decoding, and therefore must devote so much of their attention to the word identification process that little or no capacity [was] available for the attention-demanding process of comprehending [and] they c[ould not] perform word recognition and comprehension tasks simultaneously, as both tasks require[d] significant cognitive demands" (id.). In further support of fluency's role in reading ability, the evaluator quoted language from the "Yale Center of Dyslexia & Creativity," which, in part, noted that "[w]e used to think reading was about reading words accurately and comprehending what was read," but now, "[m]odern science ha[d] alerted us to the importance of reading fluency" and the understanding that "if reading accuracy and comprehension [were] the pillars of the arch of reading, fluency [was] the keystone" (id.). Essentially, "[r]eading fluency" was the ability to read "effortlessly" (id.).

Prior to making recommendations for the student, the evaluator noted that the "nature of [the student's] dyslexia in combination with a diagnosis of ADHD, while not uncommon, d[id] present a profile for him that would require careful crafting of an intervention plan to suit his needs" (Dist. Ex. 11 at p. 9). Here, the evaluator, again, referred to the previous evaluator, and noted that he had "laid out [a] very comprehensive and specific prescription and treatment plan that remain[ed] appropriate in light of the current findings" (*id.*). Thereafter, the evaluator provided additional recommendations—over four pages' worth—for consideration by the student's "support team" (*id.* at pp. 10-14). In part, the evaluator recommended a "specific approach" to address the student's "language development, as it pertain[ed] to reading," because, to date, the "'conventional' [approach] ha[d] not succeeded to an adequate level" (*id.* at p. 10). More specifically, the evaluator recommended that "instruction in all areas should provide opportunities to learn through a 'multisensory' approach with focus on kinesthetic and tactile manipulation as well as visual and auditory connections" (*id.*). To specifically target the student's "deficient" word recognition skills, which "ma[de] it difficult for accurate and fluent reading," the evaluator referred specifically to the recommendations made by the previous evaluator in the February 2016 neuropsychological evaluation for the student's "participation in an Orton Gillingham-based (O-G) program" together with additional programs (i.e., "Morgan Dynamic Roots," "Wilson Reading System-4th Edition") to "specifically address roots, prefixes, suffixes and vocabulary as well" (*id.* at p. 11).²⁸ In addition, the evaluator included a multitude of specific drills and tools to address the student's needs as reflected in the testing results (*id.* at pp. 10-14).

In an email to the parents dated March 21, 2019, the director followed up with the parents after meeting with them that week, indicating that she had spoken to the student's "team" and had "given considerable consideration to [the parents'] requests" (Dist. Ex. 13 at p. 1).²⁹ In the email, the director addressed topics including homework (how the student's resource room teacher, and his reading teacher, assisted him), the availability of "voice-to-text" technology in the resource room and that the student had "not taken advantage of the devices" since finding it "difficult to use," and advising the parents to contact her if they were interested in "continuing the support [from the student's reading teacher] for the balance of the school year" (*id.*).

According to the director's email, the parents had requested "Summer reading" for the student, as well as an assistive technology evaluation (Dist. Ex. 13 at p. 1). The director explained that 12-month services or programs were "recommended by a CSE and [were] provided to students to prevent 'substantial regression'" and that the parents request for summer services and the assistive technology evaluation could "be discussed in further detail at [the

²⁸ Within the evaluation report, it was clearly noted that "specific program names [were used] as a reference," and it was not "our philosophy that any one program work[ed] for all be [sic] students" (Dist. Ex. 11 at p. 10). In addition, it was noted within the report that "multiple sources [were] provided so that school districts m[ight] explore more than one research-based option" (*id.*).

²⁹ At the impartial hearing, the student's mother testified that she met with the director after the March 2019 CSE meeting (see Tr. pp. 477-78). However, based upon the director's email—dated March 21, 2019, *prior* to the CSE meeting held on March 26, 2019—it appears that the student's mother may have been confused about the timing of the meeting with the director (*compare* Dist. Ex. 13 at p. 1 [emphasis added], *with* Tr. pp. 477-78). When referred to the director's March 21, 2019 email, the student's mother acknowledged that she received it after her meeting with the director (*see* Tr. pp. 477-78; Dist. Ex. 13 at p. 1 Tr. pp. 477-78).

student's] Annual Review meeting" (id.). The director indicated that she advised the anticipated chairperson of that meeting of the parents' requests (id.).

Next, the director indicated that, as explained to the parents previously, "reading services [were] available to the student with Reading Specialists through ELA Workshop at [the middle school], and it [was] considered a[n] AIS program" (Dist. Ex. 13 at p. 1). The director noted that the student had participated in the ELA workshop during that school year, but "schedule changes" resulted in the student dropping the ELA workshop (id.). The director also noted that if the parents were "interested in having [the student] participate in the ELA workshop next year," then they should advise the "guidance counselor as soon as possible so that it c[ould] be included in his schedule" (id.).

The last point addressed by the director in the March 21, 2019 email dealt with the parents' request for the district to "cover the full cost of the [January 2019] reading evaluation" (Dist. Ex. 13 at pp. 1-2). After reciting a purported timeline of events leading up to the parents' request to be reimbursed for the January 2019 reading evaluation, the director declined the request (id. at pp. 1-2). The director explained that—having reviewed the February 2016 neuropsychological evaluation, an educational evaluation (October 2018), the October 2018 reading assessment, and the January 2019 reading evaluation—as well as the student's "current progress in his classes and on his IEP goals," the January 2019 reading evaluation did "not provide any substantially new and/or different information than what [the district's] evaluations show[ed] and what his current providers indicate[d] about his functioning" (id. at p. 2). As a result, the director informed the parents that she could not "authorize additional funding for this evaluation," beyond the \$450.00 limit established by the district's policy, which the district had agreed to pay towards the evaluation in December 2018 (id.).

On March 26, 2019, a CSE convened to conduct the student's annual review and to develop an IEP for the 2019-20 school year (seventh grade) (see Dist. Ex. 19 at p. 1).^{30, 31} Finding that the student remained eligible for special education as a student with an OHI, the

³⁰ According to the comments section of the IEP, the March 2019 CSE reviewed a "reading evaluation" (Dist. Ex. 19 at p. 1). Although not described, or otherwise reflected, within the March 2019 IEP, evidence in the hearing record reflects that the January 2019 reading evaluation was the "reading evaluation" reviewed by the March 2019 CSE (compare Dist. Ex. 19 at pp. 1-4, with Tr. p. 28). In addition, the evidence reflects that the evaluator who conducted the January 2019 reading evaluation attended the March 2019 CSE meeting (compare Dist. Ex. 19 at p. 1, with Dist. Ex. 11 at p. 1). As further noted in the comments section of the March 2019 IEP, the parents "expressed the need for a research based reading program to address [the student's] difficulties with sight word efficiency, rapid letter naming, spelling and reading comprehension" (Dist. Ex. 19 at p. 1). In addition, the comments noted that the student's "reading teacher reported that text to speech [technology] [was] always available to him in the classroom, but he [chose] not to utilize it at times" (id.).

³¹ At the impartial hearing, the student's mother testified that, at the March 2019 CSE meeting, the evaluator who conducted the January 2019 reading evaluation discussed the testing results with the CSE and recommended that the student receive a "specialized reading program"—such as an "Orton Gillingham based specialized reading program" (Tr. pp. 475-76). She further testified that the March 2019 CSE informed her that "they could not discuss it at the meeting and [she] must speak to [the director]," indicating that the director was the "only person [the parents] could talk to, . . . about specialized reading" (Tr. pp. 476-77). The student's mother also testified that the March 2019 CSE meeting met for approximately 35 minutes, and the CSE did not review the student's present levels of performance or the annual goals because the CSE was "out of time" (Tr. p. 477).

March 2019 CSE recommended five 42-minute sessions per week of resource room services (i.e., daily resource room for one period per day)—the same frequency and duration of special education services recommended in the October 2018 IEP (id. at pp. 1, 8; compare Dist. Ex. 19 at p. 8, with Dist. Ex. 20 at p. 9).³² With respect to annual goals, the March 2019 IEP included two annual goals for study skills, three annual goals for reading, and three annual goals for writing (see Dist. Ex. 19 at pp. 7-8). The March 2019 CSE also recommended an assistive technology evaluation of the student, and holding a meeting in June to "discuss the results" of that evaluation, as well as "recommendations for the annual review" (id. at p. 1).³³

After the March 2019 CSE meeting, the parents met with the director (see Parent Ex. I at p. 3). As a follow up to that meeting, the director sent the parents an email dated April 8, 2019 (id.). Initially, the director informed the parents that two providers "may have availability" and she awaited more information from them (id.). Next, the director informed the parents that she could "provide reading support for 6 weeks of the summer," but not as a 12-month school year program or service because "there [was] no evidence of significant regression" (id.). However, the director indicated that she understood their "concern with compensatory time and wish[ed] to work with [them] toward that end" (id.). With respect to the parents' request to provide the student with "individualized reading during the school day next year," the director explained that the "ELA workshop program [offered by the district was] designed to provide reading support" to middle school students (id.). While acknowledging that the parents did "not want this service," the director advised the parents to contact her should they change their minds (id.). In addition, the director indicated that she would "continue to offer [the student] individual reading services 2 hours per week after school for next school year" (id.).

According to the evidence in the hearing record, the student began receiving two hours per week of individual reading instruction on or about May 9, 2019, with a private reading

³² The March 2019 IEP did not include any documentation reflecting the January 2019 reading evaluation, other than noting that the CSE reviewed a "reading evaluation" (see Dist. Ex. 19 at p. 1; see generally Dist. Ex. 19). While not explained in the hearing record, the March 2019 CSE modified the student's present levels of academic performance in the areas of reading and writing (compare Dist. Ex. 19 at p. 5, with Dist. Ex. 20 at p. 6). For example, in reading the March 2019 CSE added the following to the present levels of performance: "Breaking the text down into smaller parts and skimming the reading for unfamiliar words prior to reading ha[d] been beneficial" to the student; and "[The student] also benefit[ed] from taking notes on who, what, when, and where, as he read[]" (compare Dist. Ex. 19 at p. 5, with Dist. Ex. 20 at p. 6). In writing, the March 2019 CSE added the following to the student's present levels of performance: "With planning, [the student was] able to break the assignment down, focusing on one part at a time" and that the student was "able to organize his thoughts before he beg[an] writing" (compare Dist. Ex. 19 at p. 5, with Dist. Ex. 20 at p. 6). Finally, the March 2019 IEP carried over the same recommendations for the supplementary aids and services and testing recommendations from the October 2018 IEP (compare Dist. Ex. 19 at pp. 8-9, with Dist. Ex. 20 at pp. 10-11).

³³ The hearing record contains an undated document, captioned as "[The Student's] Write Up," which included two bulleted lists: one with the heading "Reading" and one with the heading "Writing" (Dist. Ex. 14). At the impartial hearing, the district submitted the document into evidence as having been prepared by the student's then-current reading teacher and dated as "March 25, 2019" (see Tr. p. 10). The hearing record fails to include any evidence that, while this document may have been available at the time of the March 2019 CSE meeting, that the CSE had the document or considered it during that meeting (see generally Tr. pp. 1-537; Parent Exs. A-K; Dist. Exs. 1-24; IHO Exs. I-VIII). Moreover, the district reading teacher—who prepared the document and who had been providing services to the student since December 2018—did not attend the March 2019 CSE meeting (see Dist. Ex. 19 at p. 1).

specialist hired and funded by the district (see Dist. Ex. 15 at p. 1; see also Tr. pp. 33, 39-40, 94, 472-73, 491-93). The reading instruction occurred after school and outside the school at another location, with the parents providing the transportation (see Tr. pp. 33, 39-40, 94, 472-73, 491-93). On May 9, 2019, the private reading specialist conducted a "Diagnostic Evaluation" (May 2019 diagnostic evaluation) of the student to "determine a baseline of literacy instruction" and to develop "goals for multi-sensory instruction while addressing his difficulties with attention and retention" (Dist. Ex. 15 at p. 1). As part of the evaluation, the private reading specialist administered the "Upper Level Spelling Inventory of Words Their Way" to the student, which yielded correct spellings of 8 out of 31 words (26 percent) (id. [emphasis in original]). According to the evaluation report, the student's spelling errors resulted from the student "not knowing": "when to double the final consonant when adding the inflectional endings to the root word"; "when to use -ible or -able"; "the concept of hard and soft c and g"; "when to use -ge or -dge"; "words with diphthongs"; "syllabication of multi-syllable words"; and "when to use double consonants" (id.). On the "Elementary Level of the same inventory," the student spelled 16 out of 25 words correctly (64 percent) (id.). According to the private reading specialist, the student's "errors were similar to those in the upper level placing him in the middle of the 'within word pattern' of spelling," which reflected that the student could "spell correctly one-syllable words with short vowels as well as digraphs, blends, and trigraphs" (id. at pp. 1-2). However, the student was "unaware of spelling rules and generalizations," and only spelled words correctly that he had "memorized"—"not because he underst[oo]d the WHY or the pattern" (id. at p. 2). In addition, the private reading specialist noted that the student tended to "hide his spelling errors with very poor letter formation" (id.).

With respect to phonetic and structural analysis, the evaluation revealed that the student did "not rely on his auditory ability to listen for the vowel sounds in words and when determining the number of syllables" (Dist. Ex. 15 at p. 2). The student also demonstrated insecurity in his "ability to determine if he hear[d] a long or short vowel" (id.). In addition, the student could not "determine when vowel teams to use in the CVVC pattern even when he hear[d] the word used in context, (pair, pear, pare)" (id.). Moreover, the student demonstrated "little or no knowledge of diphthongs when attempting to sound out a word," he could not hear sounds in the middle of words (but could hear sounds at the beginning and end), and he found "syllabication words difficult" (id.).

As for structural analysis, the student had "difficulty adding inflectional endings to root words and forming plurals" (Dist. Ex. 15 at p. 2). The private reading specialist noted that while the student had "no difficulty reading compound words, he was not as successful with contractions"; he did not "understand the concept of what a syllable [was], if it [was] open or closed"; and he did not "know what a prefix and suffix [was] and how to extract the base word from a multi-syllable word" (id.).

An administration of the "Roe and Burns Informal Inventory" to the student to assess "his ability to read word with automaticity" showed that the student "read words fluently up to the 5th grade level" and began making "errors on the 6th grade level where he left off suffixes and did not syllabicate words correctly" (Dist. Ex. 15 at p. 2). The private reading specialist noted that the student "mispronounced vowels in absurd, crucial and eternal and made no attempt to read words that were unfamiliar to him" (id.). In addition, some of the student's "reading errors were directly related to his spelling errors such as words with hard or soft g or c as in placid, tangible, and agile" (id.).

With regard to comprehension, the student read "several passages" and achieved an "instructional level" within the sixth grade (90 percent) and "frustrated" at the seventh grade (60 percent) (Dist. Ex. 15 at p. 2). The private reading specialist noted that the student "read fluently at levels 5, 6 and 7," and used "context clues to determine how to read the word" (id.). Any errors made by the student "did not appear to affect comprehension" (id.). In addition, the student had "difficulty with questions that required determining cause and effect and making inferences" and he demonstrated "some issues with vocabulary development and academic vocabulary at his grade level" (id.).

With respect to written expression, the student selected "his favorite sport" to write about, and while he "stayed on the topic, he need[ed] to learn how to develop his writing with greater detail, organize his work and use language that [was] age and grade appropriate" (Dist. Ex. 15 at p. 2). In addition, the student needed to "develop the pre-writing steps which he [was] very resistant to do because he d[id] not like to write and take the time to edit and revise" (id. at p. 3). The private reading specialist also noted that "[m]echanics [were] an issue between the handwriting and capitalization and spelling errors" (id.).

Thereafter, the private reading specialist included recommendations to address the student's needs (see Dist. Ex. 15 at pp. 3-6). First, the private reading specialist indicated that a "MULTI-SENSORY APPROACH TO LANGUAGE LEARNING [WAS] ESSENTIAL FOR [THE STUDENT] TO ADDRESS THE DIFFICULTIES HE [WAS] EXPERIENCING WITH DECODING AND ENCODING" (Dist. Ex. 15 at p. 3 [emphasis in original]). In addition, the private reading specialist recommended that the student's initial instruction must include: a review of blend and digraphs, specific spelling generalizations, vowel digraphs and diphthongs, inflectional endings, forming plurals, spelling and pronunciation of soft and hard g and c words with -cle patterns, reading and spelling of words with prefixes and suffixes, concept of syllables (open and closed), syllabication, use of diacritical markings for correct pronunciation, vocabulary development including academic vocabulary, how to use a thesaurus for expanding vocabulary, and grammar instruction for expanding sentences (id.). In addition, the private reading specialist included an appendix with suggestions to improve the student's writing (id. at pp. 3-6). And finally, the last three pages of the evaluation report included annual goals for the student: approximately 25 goals to improve his ability to read and spell words using decoding and encoding skills and approximately 16 goals to improve the quality of the student's grammar skills and writing ability (id. at pp. 7-9).³⁴

On May 31, 2019, a CSE convened to conduct the student's annual review and to develop an IEP for the 2019-20 school year (seventh grade) (see Dist. Ex. 3 at p. 1).³⁵ Finding that the student remained eligible for special education as a student with an OHI, the May 2019 CSE

³⁴ On May 15 and 28, 2019, the district conducted an "Educational & Assistive Technology Evaluation for Computer/Tablet Access & Software," resulting in an evaluation report dated May 29, 2019 (Dist. Ex. 16 at p. 1).

³⁵ The individual who conducted the May 2019 assistive technology evaluation of the student attended the May 2019 CSE meeting; however, the private reading specialist who conducted the May 2019 diagnostic evaluation and who had been providing reading instruction to the student since May 9, 2019, did not attend the meeting (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 15 at p. 1, and Dist. Ex. 16 at p. 1).

recommended five 42-minute sessions per week of resource room services (i.e., daily resource room for one period per day)—the same frequency and duration of special education services recommended in the March 2019 and October 2018 IEPs (id. at pp. 1, 9; compare Dist. Ex. 3 at p. 9, with Dist. Ex. 19 at p. 8, with Dist. Ex. 20 at p. 9).³⁶ In addition, the May 2019 CSE recommended two 60-minute sessions per week of direct consultant teacher services (at a location arranged by the parents), as well as assistive technology devices and services consisting of access to a computer (Chromebook) and 25 hours per year of assistive technology services (at home and school) (see Dist. Ex. 3 at pp. 1, 9-10).³⁷ With respect to annual goals, the May 2019 IEP included two annual goals for study skills, three annual goals for reading, three annual goals for writing, one annual goal for mathematics, and four annual goals related to the recommended assistive technology devices and services (id. at pp. 8-9).³⁸

In a prior written notice dated May 31, 2019, the district noted that the CSE continued to recommend that the student receive special education services, including resource room and consultant teacher services (provided by the private reading specialist) (see Dist. Ex. 4 at p. 1). The district also noted that the CSE recommended the use of a Chromebook, "along with a bank of [assistive technology] consultation hours" (id.). According to the prior written notice, the CSE also reviewed the annual goals, modifications, and accommodations in the IEP, and "considered the reports and evaluations listed under the Evaluations/Reports section of the IEP" (id.). The prior written notice further documented that the parents "requested individualized 1:1

³⁶ While the May 2019 IEP reflected that the CSE reviewed the assistive technology evaluation of the student, the IEP did not otherwise document the May 2019 assistive technology evaluation in the IEP (see Dist. Ex. 3 at pp. 1-5). The May 2019 CSE did not modify the student's present levels of academic performance, but carried over the descriptions of the student's present levels of performance from the March 2019 IEP in the areas of reading, mathematics, and writing—which mirrored, to a great extent, the present levels of performance from the October 2018 IEP (compare Dist. Ex. 3 at p. 6, with Dist. Ex. 19 at p. 5, and Dist. Ex. 20 at p. 6). Finally, the May 2019 IEP carried over the same recommendations for the supplementary aids and services and testing recommendations from the March 2019 and October 2018 IEPs (compare Dist. Ex. 3 at pp. 9-11, with Dist. Ex. 19 at pp. 8-9, and Dist. Ex. 20 at pp. 10-11).

³⁷ It was noted in the comments section of the May 2019 IEP that the consultant teacher services would be provided by the private reading specialist (see Dist. Ex. 3 at p. 2).

³⁸ As reflected in the comments in the May 2019 IEP, the CSE reviewed the assistive technology evaluation report, which assessed the student in "reading, writing, and math" (Dist. Ex. 3 at p. 1). According to the comments, "[m]isspellings and reversals were noted in his writing," and his reading comprehension "improved when using assistive technology" (id.). In addition, the student's resource room teacher reported that the "focus [was] on writing and reading as it connect[ed] to his core classes," the student had difficulty "typing and answering questions at the same time," the student used "quizlet as a study tool," and he needed "support breaking assignments apart and determin[ing] the steps to follow for longer assignments" (id.). It was also noted in the comments that "[p]reviewing assignments [was] helpful" to the student "in finding unfamiliar words before reading the entire passage" (id.). At that time, mathematics was reported as a "strength" for the student, although he required "support for multi-step word problems" (id.). In writing, the comments reflected the student's difficulty "picking out details that supported the main idea that [was] being discussed," as well as his "poor" handwriting (id.). Next, the comments reflected the student's scores on the "Spring Math NWEA" of 51 percent and that his "report card show[ed] grades ranging from C+ (first quarter English) to A," as well as other grades earned in social studies, mathematics, and science (id. at pp. 1-2). The comments also noted that the student began "working" with the private reading specialist for reading, and he had worked with a "district reading specialist after school" earlier (id. at p. 2). The comments further reflected concerns about "compensatory time for reading and requiring an individual, specialized reading class" for the student (id.).

reading be provided during the school day," and the CSE "rejected [the request] as [the student's] needs c[ould] be met in a less restrictive setting" (id.). Finally, the prior written notice reflected that the district "offered reading with a reading specialist outside of the school day as a compromise to the parents" (id.).

In an email to the director dated June 19, 2019, the parents indicated that they had "clearly stated" their concerns at the CSE meeting, and were "requesting that specialized reading be provided during the school day" (Parent Ex. I at p. 4). The parents also indicated that the May 2019 CSE "never discussed consultant teacher" services and that those services would not meet the student's "specific reading needs" because he required a "specialized reading program, as part of his special education service, during his school day" (id.). The parents explained that this would allow for "collaboration to occur" among the student's providers (id.).

In an email of the same date, the director responded to the parents (see Parent Ex. I at p. 4). The director indicated that she had "previously explained to [them] how [the district's] reading program work[ed] and reiterated the availability of the ELA workshop" at the middle school (id.). The director also indicated that she had "previously sent [them] an email describing [the district's] reading program as well" (id.). In addition, the director admitted that she stated at their meeting that she could provide "after school reading" and it could be listed as "Consultant Teacher services"—referring to the services provided by the private reading specialist (id.). The director continued to offer the parents the option of the "ELA workshop" at the middle school as a reading program, and that if the parents wanted a "different reading teacher," to forward that information to her so she could "arrange that time after school" (id.).

A. Due Process Complaint Notice

By due process complaint notice dated July 18, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 and 2019-20 school years (see Parent Ex. A at p. 1). As relevant to this appeal, the parents alleged that the district failed to recommend educational programs reasonably calculated to enable the student to receive educational benefits (id. at p. 5).³⁹ In support of this general allegation, the parents contended that the district failed to appropriately and comprehensively evaluate the student, noting specifically, the district's failure to "conduct a sound, comprehensive reading evaluation" of the student and characterizing the district's October 2018 reading evaluation as a "cursory, subjective review of [the student's] reading skills" (Parent Ex. A at p. 9). The parents also contended that the district failed to "comprehensively evaluate [the student] in all areas of suspected disability," which resulted in the failure to "provide a specific, accurate description of [the student's] learning strengths and weaknesses, failed to address each of [the student's] documented deficits, and deprived the May 31, 2019 [CSE] of the information necessary to develop an appropriate IEP" (id. at pp. 9-10).

Next, the parents contended that the October 2018 CSE and the May 2019 CSE failed to "appropriately consider the results of independent evaluations"—noting the October 2018 CSE's

³⁹ Generally, the allegations in the due process complaint notice referred to both the 2018-19 and 2019-20 school years (see Parent Ex. A at pp. 5-13). Therefore, unless otherwise specified, the allegations outlined herein continue to refer to collectively to the 2018-19 and 2019-20 school years.

failure to "consider the recommendations of outside evaluators" in the February 2016 neuropsychological evaluation and that the May 2019 CSE "completely ignored the entire [January 2019] reading evaluations and its agreements with [the February 2016 neuropsychological evaluation] regarding the appropriateness and urgent necessity for [the student] to receive 1:1 Orton-Gillingham instruction" (*id.* at pp. 10-11). In addition, the parents asserted that the October 2018 CSE and the May 2019 CSE based recommendations on "what programs were available" and not on the student's needs, thereby impermissibly engaging in predetermination (*id.* at pp. 11-12). As a result, the parents alleged that the district significantly impeded their right to meaningful participation in the development of the student's IEPs (*id.* at pp. 10-12).

In light of the district's alleged failure to fully evaluate the student, the parents contended that the October 2018 and May 2019 IEPs lacked "adequate descriptions of [the student's] present levels of performance" and thus, rendered the IEPs "defective" (Parent Ex. A at p. 12). With respect to the May 2019 IEP, the parents alleged that the district failed to consider the January 2019 reading evaluation and instead, "relied upon its own vague, subjective, and less recent information" to develop the IEP (*id.*). Relatedly, the parents asserted that the October 2018 and May 2019 IEPs failed to include "meaningful, measurable goals" (*id.*). In addition, the parents alleged that the annual goals included on the IEPs failed to "address every area of [the student's] deficits"; and "failed to specify a baseline of functioning, actual targets to be achieved, or detail by what means the goal would be consider[ed] achieved" (*id.*).

In further support of their contention that the district failed to offer the student a FAPE, the parents asserted that the district failed to recommend a "specific methodology" to address the student's reading and writing deficits notwithstanding the "clear consensus"—as evidenced by the February 2016 neuropsychological evaluation and the January 2019 neuropsychological evaluation—that the student required an "Orton-Gillingham-based reading instruction" and the absence of "any specific academic interventions" within district evaluations of the student (*id.* at pp. 5-6). By failing to recommend "this specific reading intervention" for the student, the parents contend that the district "deprived him of necessary support in his greatest area of need" (*id.* at p. 6). Next, the parents alleged that the district's recommendation for "1:1 reading instruction available to [the student] only after the school day" denied the student services (*id.*). Moreover, the district's failure to provide reading instruction during the school day deprived the student of educational opportunities and resulted in the failure to offer a FAPE (*id.* at pp. 6-7).

Finally, the parents alleged that the district failed to "timely respond" to their request for an assistive technology evaluation and an independent reading evaluation (Parent Ex. A at p. 10). As a result, the parents asserted that the district's failure to fund the January 2019 neuropsychological evaluation and the district's failure to conduct the assistive technology evaluation for approximately seven months following the request significantly impeded their right to meaningful participation in the development of the student's IEP and deprived the CSE of "crucial information regarding [the student's] learning needs" (*id.*).

As relief for the foregoing violations, the parents sought an order directing the district to "fund 5 one-hour sessions per week of 1:1 Orton-Gillingham instruction by a reading specialist trained in Orton-Gillingham for a total bank of 200 hours to be implemented during the school day" (Parent Ex. A at p. 13). In addition, the parents requested reimbursement for the costs of the January 2019 reading evaluation (*id.*).

B. Impartial Hearing Officer Decision

On November 26, 2019, the parties proceeded to an impartial hearing, which concluded on January 7, 2020, after two days of proceedings (see Tr. pp. 1-537). In a decision dated March 11, 2020, the IHO found that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years (see IHO Decision at pp. 42-62). As background, the IHO provided a lengthy recitation of documentary evidence from the hearing record, which included, in part, a review of evaluative information of the student and IEPs generated for the student (*id.* at pp. 4-23). Next, the IHO recapped the district's case as presented through its witnesses' respective testimony (*id.* at pp. 23-36). Thereafter, the IHO similarly reflected the parents' case (*id.* at pp. 36-41).

Turning to the findings of fact and conclusions of law, the IHO described the applicable legal standard regarding the district's obligation to offer the student a FAPE, noting specifically that the district "'must offer an IEP reasonably calculated to enable a child to make progress in light of the child's circumstances'" and that an "'educational program providing 'merely more than de minimis progress' from year to year can hardly be said to have been offered an education at all'" (IHO Decision at p. 42 [citing *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]]). In addition, the IHO explained the necessary components of an "appropriate educational program"—meaning that an IEP must "accurately reflect[] the results of evaluations to identify the student's needs, establishe[d] annual goals related to those needs, and provide[d] for the use of appropriate special education services" (*id.* at p. 43 [citing federal and State regulations]). Finally, the IHO reflected that the burden of proof to establish that it offered the student a FAPE rested with the district (*id.*).

With this as backdrop, the IHO first addressed the parents' claims—and the district's arguments—regarding the 2018-19 school year (see IHO Decision at pp. 43-55). As for the parents' "[c]laims concerning the failure to recommend an education program reasonably calculated to confer a benefit," the IHO found the district's arguments, which focused on the student's progress and achievement of passing marks and advancement from grade to grade as the sole benchmark to establishing the appropriateness of the student's IEPs for the 2018-19 school year, was not supported by the evidence in the hearing record (*id.* at pp. 43-46). While noting that it was undisputed that the student "achieved passing grades during the 6th grade" as reflected in the student's report card, the IHO recited evidence from the hearing record documenting the student's continued "struggles with reading, writing and attention" as reflected in the student's evaluative information and IEPs from 2016 through 2019 (*id.* at pp. 44-46). Based upon the foregoing, the IHO ultimately found that "passing grades alone did not establish that the IEP was 'reasonably calculated to enable a child to make progress'" and noted "all the extra work and instruction" provided by his parents at home (*id.* at p. 46).

With respect to the parents' "[c]laims concerning insufficient evaluations and [an] inappropriate and insufficient IEP," the IHO found that the district failed to present evidence to establish that its own recommendations for the 2018-19 school year "would have met [the student's] unique special education needs" for an ICT classroom and for the provision of an "evidence-based, multi-sensory Orton-Gillingham reading instruction program three period per week" (individual or small group), as recommended in the February 2016 neuropsychological evaluation (IHO Decision at p. 46). Essentially, the IHO determined that the district failed to sustain its burden of proof by failing to "offer testimony" on this point (*id.* [citing *L.O. v. New*

York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016]). The IHO also noted that the parents had argued that the "CSE did not consider [the February 2016] neuropsychological evaluation and the IEPs did not reflect [the evaluator's] recommendation for an ICT classroom," individual or small group reading (Orton-Gillingham) instruction, "instruction in reading comprehension, extra support in tasks that require[d] planning and prompting to regulate his pace" (id. at p. 46). Relatedly, while crediting the director's testimony explaining that the district middle school the student would attend for sixth grade (2018-19 school year) "did not have any ICT classrooms" and "that [the student's] reading, writing and math skills were too high to consider placing him in an inclusion class," the IHO found that the October 2018 IEP "did not meet the [student's] needs and was predetermined" because it had been based on programs the district had available and "not on the student's unique needs" (id.).⁴⁰ Overall, the IHO noted that the district failed to present any witnesses "to establish why an ICT classroom would not have been appropriate and why 1:1 or small group [Orton-Gillingham] instruction not larger than 3 was not appropriate" (id. at p. 47).

Next, the IHO noted that a "CSE team was required to conduct an adequate assessment, and 'use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information" about the student (IHO Decision at p. 47 [citing 20 U.S.C. §1414[b][2][A]). Here, the IHO found that the it was "undisputed that no evaluation supported the general education program with a period of [daily] [r]esource [r]oom" as recommended in the October 2018 IEP, and the IEP did not include a recommendation for an ICT classroom or reading (Orton-Gillingham) instruction, which had been recommended in the February 2016 neuropsychological evaluation report (id. at p. 47). The IHO also determined that the district "was aware of the parents' request for additional testing as early as" October 2015, and moreover, the parents requested an IEE in reading in a November 2018 email to the director (id.). In addition, the IHO noted that, within the district's "'Reading Analysis'" of the student completed on the same day of the October 2018 CSE meeting, it indicated that the student's "resource room teacher had, along with his parents, requested that a diagnostic reading assessment be conducted" (id.).

After reciting the legal standard supporting a district's obligation to reevaluate a student pursuant to federal and State regulations, the IHO concluded that the "IEP team must review and consider all of the [student's] most recent evaluations" (IHO Decision at pp. 47-48). In so finding, the IHO rejected the district's argument from its closing brief, which "asserted that [the February 2016 neuropsychological evaluation] report was conducted when [the student] 'was in elementary school and could not, then, take into account the progress [the student] made in middle school, particularly with the benefit of [r]esource [r]oom'" (id. at p. 48).⁴¹ As a result, the

⁴⁰ Within the same section of the decision, the IHO also concluded that the October 2018 IEP "did not meet the LRE mandate" (IHO Decision at pp. 46-47). Pointing to the parents' arguments presented in the closing brief, the IHO pointed found that, as part of an LRE analysis, consideration must be given to whether the "special education program/service be 'as close as possible to the student's home'" (id. [citing IHO Ex. VII at pp. 24-25]). However, this analysis appears somewhat misplaced in the decision, as a review of the parents' closing brief reflects that this LRE argument related to the recommendation for direct consultant teacher services in the May 2019 IEP for the 2019-20 school year, which were to be delivered outside of the school day and in a location to be determined by the parents rather than the recommendations in the October 2018 IEP for the 2018-19 school year (compare IHO Decision at pp. 46-47, with IHO Ex. VII at pp. 22-26).

⁴¹ A review of the district's closing brief reflects that the argument rejected by the IHO was more specifically

IHO determined that the failure to consider the February 2016 neuropsychological evaluation report "significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student" (*id.*). Additionally, the IHO found that the district "refused" to provide the student with a "specialized reading program and failed to evaluate him in all suspected areas of disability" (*id.* at pp. 47-48). Turning to the recommendations in the student's IEPs, the IHO determined that the "alternating days" of direct consultant teacher services and resource room services in the April 2018 IEP did not meet the student's "unique special education needs" for individual or small group Orton-Gillingham instruction, or, for that matter, for an "ICT placement" (*id.* at p. 48). Similarly, the IHO found that the October 2018 IEP—which included a recommendation for daily resource room services—failed to meet the student's "unique special education needs" and furthermore, that the CSE was "on notice of the Educational Evaluation dated October 11, 2018, that indicated limited academic skills even when [the student] was not penalized for spelling and punctuation" (*id.* at pp. 48-49). The IHO also credited the parents' testimony reflecting concerns expressed to the April 2018 CSE, as well as testimony reflecting the need for an immediate CSE meeting when the student began sixth grade, and noted that when the CSE convened in October 2018, the CSE increased the recommendation for resource room and removed the recommendation for consultant teacher services (*id.*). The IHO concluded the analysis with findings that the district "refused" to provide the student with a "specialized reading program," the district failed to evaluate the student in "all suspected areas of disability," and the recommendations in the April 2018 IEP and the October 2018 IEP were "not specialized to meet [the student's] unique needs" (*id.*).

Next, the IHO addressed the "[c]laims concerning methodology" (IHO Decision at pp. 49-50). First, the IHO summarized the district's arguments from its closing brief, which contended that, under the IDEA, the district need not "'maximize the potential of a handicapped child' or provide 'everything that might be thought desirable by loving parents'" (*id.* at p. 49 [collecting caselaw]; *see* IHO Ex. VIII at pp. 11-12). In analyzing this issue, the IHO relied upon Second Circuit precedent—which "addressed the important of considering methodology"—and her agreement with the parents' argument that "there [was] a 'clear consensus' that require[d] that the methodology be placed on the IEP" as opposed to "leaving the methodological questions to the discretion of the teacher impl[emen]ting the IEP" (*id.* at pp. 49-50). Accordingly, the IHO concluded that the February 2016 neuropsychological evaluation report found that the student "required an [Orton-Gillingham] based multi-sensory reading program to address his deficits" and that this finding was "uncontested" (*id.*). The IHO also found that the district's decision to recommend two hours per week of direct consultant teacher services in the May 2019 IEP, to be "provided by an [Orton-Gillingham] based reading instruction specialist," as an acknowledgment by the district that the student required "specialized reading services per [the February 2016 neuropsychological evaluation report] recommendation for specialized reading instruction" (*id.* at p. 50). The IHO further noted that she "credit[ed] [the director] who stated that [the student] was able to receive these services outside of the school setting" (*id.*).

directed at defending the district's position that it was not required to adopt the recommendation for 1:1 reading instruction from either the February 2016 neuropsychological evaluation or the January 2019 reading evaluation to address the student's needs, rather than, as relied upon by the IHO, to conclude that the district failed to consider these evaluations (*compare* IHO Decision at p. 48, *with* IHO Ex. VII at pp. 10-13).

As for the parents' "[c]laims concerning [the] specialized reading program of [Orton-Gillingham] in the LRE," the IHO identified one factor of the LRE analysis to include consideration of whether the "special education program/service be 'as close as possible to the student's home'" (IHO Decision at p. 50 [citing IHO Ex. VII at pp. 24-25]). Based upon the evidence, the IHO determined that the reading specialist "was unable to collaborate with [the student's] regular education teachers . . . and to provide the [Orton-Gillingham] instruction to [the student] during regular hours as required" (id.).

Next, the IHO turned to the "[c]laims concerning AIS/ELA workshop," and rejected the district's argument that "even though the [d]istrict satisfied its FAPE obligations" by recommending daily resource room for the 2019-20 school year, the district had also "offered to place [the student] in the ELA Workshop" (IHO Decision at p. 50 [citing IHO Ex. VIII at p. 16]). While "credit[ing]" the director's testimony, the IHO agreed with the parents' assertion that the "ELA [workshop] was a form of AIS and was not special education support," and thus, "was not adequate to meet [the student's] special education needs" (id.). Specifically, the IHO noted that the "offer of the ELA workshop was not a substitute for the obligation to provide specialized [Orton-Gillingham] reading instruction to [the student]" notwithstanding that the evidence in the hearing record indicated that the district could implement "recommendations in the [January 2019 reading evaluation]" within the ELA workshop (id. at pp. 51-52). Notably, the IHO determined that the student improved and made progress "after [he] began to work with '[the reading specialist] who [was] certified in Orton-Gillingham reading methodology" (id. at p. 52).

Moving on, the IHO addressed "[c]laims concerning [the] failure to provide specialized reading" (IHO Decision at pp. 52-53). Here, the IHO focused on evidence from the latter half of the 2018-19 school year, as well as evidence obtained subsequent to the parents' due process complaint notice, to identify the student's needs in reading during that time frame and any progress the student made after the May 2019 CSE meeting and after he began receiving reading instruction from the reading specialist (id.). In addition, the IHO noted that the evaluator who completed the January 2019 reading evaluation of the student continued to recommend "[Orton-Gillingham] based instruction to improve all areas of deficits," especially in light of the fact that the student's "fluency and comprehension broke down with complex reading material" (id. at p. 53). Moreover, the IHO noted that the evidence reflected that the district "did not have a specialized reading program" (id.). The IHO concluded that the "lack of specialized reading instruction such as [Orton-Gillingham] was required to address the student's deficits in reading and writing" (id.).

With regard to "[c]laims concerning lack of parent participation," the IHO found that the parents "participated" in the April 2018 CSE meeting, and prior to that meeting, the parents asked the director about an ICT placement for sixth grade (district middle school) (IHO Decision at p. 53). The IHO noted that the director advised the parents that the student was "too high functioning" for an ICT placement (id.). In addition, the IHO found that the parents communicated with the student's resource room teacher and his consultant teacher about his progress during fifth grade (2017-18 school year), "but opined that the support they provided was not specialized to his needs" (id.). According to the IHO, the evidence reflected that the student had a growing awareness of his learning differences compared to his peers (id.). The IHO also noted that the parents "maintained that the IEP did not provide sufficient supports and strategies to address [the student's] distraction as noted in the IEP" (id. [citing to the May 2019 IEP]). Ultimately, the IHO agreed with the parents' assertion that the district "refused to consider the

request for specialized reading instruction such as [Orton-Gillingham]" (id.). In support of this conclusion, the IHO noted the director's testimony acknowledging that "she and the CSE were aware that [the February 2016 neuropsychological evaluation] recommended [Orton-Gillingham, a specialized reading program] for the student, as well as an "ICT class as the LRE," but instead, the October 2018 CSE increased the recommendation for resource room to "daily services to address reading deficits" (id.). In addition, the IHO pointed to the director's testimony wherein she admitted that the parents "requested a specialized reading instruction program as recommended [in the February 2016 neuropsychological evaluation report]," and explained that the "CSE was unable to take all the recommendations in a single IEP" (id.).⁴² The IHO "credit[ed]" the director's testimony that the October 2018 CSE discussed the "reading assessment" conducted by the district, noting "misspellings and reversals" made by the student; however, notwithstanding this evidence, the IHO found that the "refusal to consider the request for specialized reading instruction such as [Orton-Gillingham] or to place [Orton-Gillingham] instruction on the IEP denied the parents a meaningful opportunity to participate" (id. at pp. 53-54).⁴³

Next, the IHO addressed the parents' "[c]laims concerning [the] present levels of performance" (IHO Decision at p. 54). Reviewing the October 2018 IEP, the IHO initially reflected some of the information describing the student's present levels of social and physical development in the IEP (id. [citing Dist. Ex. 20 at p. 7]). The IHO specifically noted information reported in that portion of the IEP used to describe how the student's disability effected his progress in the general education curriculum, noting that the student had "'a significant delay in reading comprehension, written expression' which inhibited progress" (id. at p. 54). Next, the IHO described information in the October 2018 IEP that was "inconsistent" with information in the April 2017 IEP regarding whether the student sought out assistance from his consultant teacher or his resource room teacher (id.). The IHO also noted the parents' contention that the IEP failed to "mention the diagnosis of a Specific Learning Disorder, Dysgraphia, ADHD and Dyslexia" (id. [citing Parent Ex. A at p. 12]). According to the IHO, the October 2018 IEP reflected the "evaluative data in terms" of the scores, "but did not mention specific diagnoses" and moreover, the student's "severe deficits in reading and writing were not addressed in the present levels of performance" (id. at p. 54).

Addressing the parents' "[c]laims concerning inappropriate goals," the IHO—noting the specific allegation that the annual goals "failed to address every area of [the student's] deficits"—initially found that while the annual goals for study skills, reading, and writing were "specific," the annual goals "did not contain baseline functioning and did not address the errors in writing and spelling and punctuation noted in the Educational evaluation" (IHO Decision at p. 54 [citing Dist. Ex. 7 at p. 2]). The IHO also found that the annual goals in the October 2018 IEP

⁴² At the impartial hearing, when asked whether the October 2018 CSE used the February 2016 neuropsychological evaluation at that meeting, the director agreed and stated: "We used it" (Tr. pp. 79-80). She then added: "We don't take all of the recommendations, every single CSE" (Tr. p. 80).

⁴³ At the impartial hearing, when asked to identify the specific evaluations reviewed by the October 2018 CSE, the director initially responded that "[w]e went through the psychological report that was done, the educational report that was done and the reading evaluation that had been done" (Tr. p. 78). But then, without prompting, the director corrected her testimony, stating: "I take back the reading, I am sorry, just the educational and the psychological" (id.).

pertaining to spelling and writing paragraphs "did not address the specific diagnosis of Dyslexia and Dysgraphia" and moreover, the student required "more than a single goal to address spelling" (*id.* at pp. 54-55). In addition, the IHO noted that the October 2018 IEP failed to include any annual goals to "assist [the student] to physically write and the IEP failed to include a focusing goal" (*id.* at p. 55). The IHO also found that the October 2018 IEP—as argued by the parents—failed to include a "specific reading protocol or program" (*id.*). In summary, the IHO found that the annual goals in the October 2018 IEP were not "personalized and tailored to [the student's] unique needs" (*id.*).

Based upon the foregoing, the IHO concluded that the district failed to sustain its burden to establish that the student's "IEP and program were appropriate for the 2018-2019 school year" (IHO Decision at p. 55).

Next, the IHO turned to the 2019-20 school year and first addressed the parents' "[c]laims concerning the failure to recommend an education program reasonably calculated to confer a benefit" (IHO Decision at p. 55). After reciting the district's position regarding the applicable legal standard, the IHO pointed to the parents' argument, which emphasized that the district "finally (and belatedly) recognized the need for [the student] to have a specialized Orton-Gillingham based reading program, as recommended by both [the February 2016 neuropsychological evaluation] and the [January 2019 reading evaluation]" (*id.* at pp. 55-56). However, while recognizing this need, the IHO agreed with the parents' assertion that the May 2019 CSE "did not provide specialized instruction at school, as part of [the student's] school day" and, in recommending direct consultant teacher services outside school, shifted the responsibility to the parents to provide these services to the student (*id.* at p. 56). The IHO indicated that the May 2019 CSE made this recommendation despite the parents' request to the CSE that the "direct services must be provided in school" (*id.*). Additionally, the IHO found that the district failed to present any "witness to explain" how offering the direct consultant teacher services "after school was 'reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances'" (*id.*). After summarizing additional evidence, the IHO concluded that the district "should have acquired an [Orton-Gillingham] trained instructor to provide the [Orton-Gillingham] instruction recommended by [the February 2016 neuropsychological evaluation report], the [January 2019 reading evaluation] reports and [the reading specialist] during the school day" (*id.* at p. 57).

Turning to the "[c]laims concerning lack of parent participation," the IHO concluded that the May 2019 CSE "ignored the parent[s]' request for [Orton-Gillingham] instructions," as well as the parents' "expressed concerns regarding the slow progress of reading and writing" (IHO Decision at p. 57). Specifically, the IHO noted that when the parents asked for Orton-Gillingham instruction "during the school day" at the May 2019 and September 2019 CSE meetings, they were "told that only ELA workshop was available" (*id.*). The IHO determined that the CSE's "refusal to consider the request for specialized reading instruction" deprived the parents of a meaningful opportunity to participate (*id.* at pp. 57-58).

Regarding "[c]laims concerning [the] present levels of performance," the IHO agreed with the parents' assertion that the description of the student in the May 2019 IEP was belied by objective testing (IHO Decision at p. 58). In support of this finding, the IHO identified several inconsistencies between the evaluative information and information provided by the student's teachers and the description of the student in the present levels of performance (*id.* at pp. 58-59).

For example, the IHO noted that although the May 2019 IEP reflected that "written expression [was] an area of strength" for the student, the most recent assistive technology evaluation of the student reviewed at the CSE meeting "revealed that [the student] struggled in written expression, spelling, reading comprehension and math calculation," and further reported that the student "had a significant delay in reading comprehension, written expression, [and] attention, which inhibited progress in general education" (*id.* at p. 58). In addition, the assistive technology evaluation indicated that although "writing was an area of strength" for the student in the 2018-19 school year, his "spelling, putting [] thoughts on paper, writing a paragraph or essay about a specific topic were areas of challenge" for him (*id.*). The IHO also found that while the hearing record was "replete with [the student's] difficulty with handwriting," the hearing record was "silent as to which teacher was responsible to address [the student's] needs to improve his handwriting" (*id.* at pp. 58-59). Thereafter, the IHO summarized testimony by the student's resource room teacher that she "credit[ed]"—such as that the student "did not require 1:1 [Orton-Gillingham] instruction because he did not have an intense level of deficit in reading" and he was "making progress in reading"—or the absence thereof ("no testimony . . . to establish how to improve written expression skills"), and concluded that the resource room teacher could not "address [the student's] [executive functioning] issues, or his reading or writing issues in the class of 5" (*id.* at p. 59). The IHO also found that the May 2019 CSE "was aware of [the reading specialist's] recommendation on her May 9, 2019 evaluation of [the student] who needed to 'develop the pre-writing steps'" and that he was "'very resistant'" to that task because he did "'not like to write and take the time to edit and revise'" (*id.*). Overall, the IHO determined that "specialized reading instruction by [Orton-Gillingham] was required to meet" the student's needs (*id.*).

As for "[c]laims concerning insufficient evaluations and inappropriate and insufficient IEP," the IHO agreed with the parents' assertion that the May 2019 IEP had been "developed with inadequate assessments and inadequate descriptions of present levels of performance" (IHO Decision at p. 59). According to the IHO, the CSE "must review and consider all of [the student's] most recent evaluations" (*id.*). The IHO noted that the parents' concerns about the student's "ability to process information as well as seeing, hearing and writing information" had been noted on the IEP, but that the May 2019 IEP failed to "contain the recommendations from [the February 2016 neuropsychological evaluation] and the [January 2019 reading evaluation] reports," and similarly failed to include the "recommendations from [the reading specialist]" (*id.*). As a final point, the IHO indicated that he agreed with the parents' argument that the May 2019 IEP contained information that was not consistent with "objective testing," such as in the area of written expression (*id.* at pp. 59-60).

Next, the IHO addressed "[c]laims concerning inappropriate goals" in the May 2019 IEP (IHO Decision at p. 60). The IHO agreed with the parents' argument that the annual goals therein were "simply strategies" that failed to "address the underlying difficulties that ha[d] resulted in clinical reading scores" that ranged from the 9th percentile to the 18th percentile (*id.*). In addition, the IHO found that the annual goals did not address "other serious reading deficits identified in [the February 2016 neuropsychological] evaluation and in the [January 2019 reading evaluation] report" (*id.*). As a result, the IHO concluded that the annual goals were not "individualized to meet [the student's] unique needs" (*id.*).

Based upon the foregoing, the IHO found that the district failed to sustain its burden to establish that the student's "IEP and program were appropriate for the 2019-2020 school year" (IHO Decision at p. 60).

For the district's failure to offer the student a FAPE for the 2018-19 and 2019-20 school years, the IHO found that the student was entitled to compensatory educational services (IHO Decision at pp. 60-61). The IHO directed the district to "fund 5 sessions per week for 1 hour per session of 1:1 [Orton-Gillingham] instruction by a reading specialist trained in [Orton-Gillingham] for a total bank of 200 hours to be implemented in school during the school year" (*id.* at pp. 61-62). With respect to the parents' request to be reimbursed for the costs of the January 2019 reading evaluation, the IHO concluded that the parents were entitled to full reimbursement and ordered the district to reimburse them for the "outstanding" amount due: \$1600.00 (*id.*).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that it failed to offer the student a FAPE for the 2018-19 and 2019-20 school years. Initially, the district contends that the IHO ignored legal precedent and erred in finding that the student's "outstanding grades in the general education classes did not establish that the IEPs for the 2018-2019 school year were reasonably calculated to enable [the student] to make progress."⁴⁴ The district also contends that the IHO erred in concluding that the district failed to present sufficient evidence to establish that the program recommended for the 2018-19 school year—namely, daily resource room—met the student's needs. Next, the district argues that the IHO erred in finding that the student's "passing grades" were attributable to the "extra work and instruction" he received at home from his parents. With respect to the 2019-20 school year, the district asserts that the IHO erred in finding that the IEP was not appropriate. The district further asserts that the IHO erred in concluding that, for both the 2018-19 and 2019-20 school years, the district was "obligated to provide 1:1 Orton-Gillingham . . . reading instruction" to the student. In addition, the district contends that the IHO erred in finding that the district failed to present any witnesses to "establish why an ICT classroom would not have been appropriate and why 1:1 or small group [Orton-Gillingham] instruction not larger than 3 was not appropriate." With respect to the 2018-19 school year, the district argues that the IHO erred in concluding that the CSE failed to consider the February 2016 neuropsychological evaluation. Relatedly, the district contends that the IHO erred in relying on the February 2016 neuropsychological evaluation to determine whether the CSE's "proposed program" for the 2018-19 and 2019-20 school years were appropriate. With respect to the 2019-20 school year, the district argues that the IHO erred in finding that the recommendation for direct consultant teacher services in the May 2019 IEP was "not merely to appease [the student's] parents but was instead an acknowledgement that [the student] required specialized reading services." Relatedly, the district contends that the IHO erred in concluding that the "provision of 1:1 reading services after school did not comply with the LRE mandates because such services were not offered as close as possible to the student's home." In addition, the district asserts that the IHO erred in finding that the ELA workshop was not adequate to meet the student's special education needs, and that the student made progress due to the "instruction he received from [the reading specialist] who was certified in [Orton-Gillingham] reading methodology." Next, the district argues that the IHO erred in concluding

⁴⁴ Many of the allegations in the district's request for review do not identify which school year the specific allegation may be directed at—therefore, when possible and for clarity, a school year(s) at issue has been inserted based on the pages cited from the IHO's decision for the proposition stated, as the IHO divided the analysis of issues in the decision based upon each separate school year.

that the parents did not have a meaningful opportunity to participate in the decision-making process regarding the provision of a FAPE for both the 2018-19 and 2019-20 school years because the CSEs ignored or failed to consider the February 2016 neuropsychological evaluation, the parents' concerns about the student's progress in reading, and the parents' request for specialized reading instruction.

With respect to both the 2018-19 and 2019-20 school years, the district argues that the IHO erred in finding that the IEPs were not developed with adequate assessments or adequate descriptions of the student's present levels of performance. Similarly, the district argues that the IHO erred in finding that the annual goals in the IEPs for the 2018-19 and 2019-20 school years were not individualized to meet the student's "unique needs." Finally, the district asserts that the IHO erred in concluding that the district "refused to provide [the student] with a specialized reading program and failed to evaluate him in all suspected areas of disability."

Turning to the relief ordered by the IHO, the district argues that the evidence in the hearing record does not support an award of 1:1 Orton-Gillingham instruction, and moreover, the IHO's order violates the LRE. The district also contends that the IHO erred in awarding the parents full reimbursement for the costs of the January 2019 reading evaluation, as the evidence in the hearing record reflected that the district's policy limited the amount it could expend on IEEs.

In an answer, the parents respond to the district's allegations, and generally argue to uphold the IHO's decision 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 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., 580 U.S. ___, 137 S. Ct. at 999). While the Second Circuit has emphasized that school districts must comply with the checklist of

procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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]).⁴⁵

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

VI. Discussion

A. Preliminary Matters—Sufficiency of IHO Decision

As noted, the district argues, in part, to reverse the IHO's findings that it failed to offer the student a FAPE for the 2018-19 and 2019-20 school years because the IHO's legal analysis was flawed. More specifically, the district argues that, according to the Supreme Court's holding in Endrew F., when a student is educated in "general education classes," the student's IEP need only be "reasonably calculated to enable [the student] to achieve passing marks and advance from grade to grade" (Req. for Rev. at ¶ 1). As a result, the district contends that, based upon the student's "excellent marks" reflected on his report card for the 2018-19 school year, the IHO should have concluded that the district offered the student a FAPE for the 2018-19 school year.

Initially, the district correctly reflects the language in Endrew F., quoting the standard set forth in Rowley, that "for a child fully integrated in the regular classroom, an IEP typically should, as Rowley put it, be 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade'" (Endrew F., 137 S. Ct. at 999). However, the district ignores the context within which the Supreme Court embraced this language, as the Supreme Court also cautioned that "[t]his guidance should not be interpreted as an inflexible rule" and noted that the Court "declined to hold in Rowley, and [] do[es] not hold today, that 'every handicapped child who is advancing from grade to grade . . . is automatically receiving a [FAPE]'" (Endrew F., 137 S. Ct. at 999, citing Rowley, 458 U.S. 203, n. 25). Additionally, in interpreting Rowley, the Second Circuit has held that "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress" (Walczak, 142 F.3d 130). However, the Second Circuit has also cautioned that where an "IEP is materially incomplete in identifying the learning deficits acknowledged to exist," a district "cannot rely on the passing grades it has given and the promotional decision it has made to argue that the remedial measures in the IEP are, as a matter of law, reasonably calculated to deliver educational benefits" (M.S. v. Bd. of Educ. of the City Sch. Dist. of the City of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]).

Finally, the district's argument regarding the student's progress appears to be results oriented, focused on the student's progress made after development of the IEP, which the Second

⁴⁵ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

Circuit rejected (R.E., 694 F. 3d at 184-88). In grappling with the permissibility of retrospective evidence, the Second Circuit squarely held that the question of whether an IEP was reasonably calculated to enable the student to receive education benefits "must be evaluated prospectively as of the time [the IEP] was created" (R.E., 694 F. 3d at 184-88 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). In so holding, the Court further explained that "[t]his rule recognize[d] the critical nature of the IEP as the centerpiece of the system, ensure[d] that parents w[ould] have sufficient information on which to base a decision about unilateral placement, and put[] school districts on notice that they must include all of the services they intend to provide in the written plan" (R.E., 694 F. 3d at 188). 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]). Accordingly, the analysis focuses on the information available to the CSE, including the student's grades, at the time the IEPs were developed. As discussed below, based on the information available to the October 2018 CSE and the May 2019 CSE, the student's needs in the area of reading were not sufficiently identified in the present levels of performance, resulting in inadequate annual goals to address those areas, and the lack of a recommendation for specialized reading instruction.

B. October 2018 IEP

1. Present Levels of Performance

The district generally argues that the IHO erred in finding that the IEPs were developed without adequate assessments or adequate descriptions of the present levels of performance. Relatedly, the district contends that the IHO erred in relying on the February 2016 neuropsychological evaluation report to find that the district failed to offer the student a FAPE for the 2018-19 school year. More specifically, the district argues that the February 2016 neuropsychological evaluation—completed when the student was in third grade—did not take into account the progress the student made over four years.⁴⁶ In addition, the district argues that

⁴⁶ To the extent that the district argues that the February 2016 neuropsychological evaluation was outdated, and thus, less reflective of the student's needs at the time of the October 2018 CSE meeting and, even later, at the May 2019 CSE meeting, a review of the October 2018 IEP and the May 2019 IEP reveals that both IEPs included the student's testing results dating back to the 2015-16 school year (see Dist. Exs. 3 at pp. 3-5; 20 at pp. 3-5). In addition, at the time of the October 2018 CSE meeting the student had been receiving AIS for reading since third grade (Tr. pp. 452-53). As noted above, the director testified that the district's AIS constituted a Tier 2 intervention in the district's RtI plan (Tr. pp. 35-36, 452-53). A school district may provide an RTI program in lieu of providing AIS to eligible students (8 NYCRR 100.2[ee][7]). As RtI includes a progress monitoring component, the student's participation in AIS, as a Tier 2 intervention, should have yielded significant data regarding his reading ability (8 NYCRR 100.2[ii][1][iv]; see Response to Intervention – Guidance for New York State School Districts, Office of Special Educ. [Oct. 2010], p. 21, available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf> ["Progress monitoring should occur not less than

the IHO failed to give sufficient weight to the student's grades, and the testimony of district witnesses (i.e., teachers), who opined that the proposed program was appropriate for the student.

The parents deny these assertions, noting that the IEPs reveal significant inconsistencies in identifying the student's areas of need, and more specifically, in delineating his present levels of performance. Upon review, the evidence in the hearing record supports the IHO's finding that the present levels of performance in the October 2018 IEP failed to fully and adequately describe the student's needs, especially in the area of reading. Consequently, the district's contentions must be dismissed.

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 CSE must also consider IEEs obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993], citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; K.E. v. Indep. Sch. Dist. No. 15, 2010 WL 2132072, at *19 [D. Minn. May 24, 2010]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 2005 WL 1791533 [2d Cir. July 25, 2005]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at *6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567; Application of the Dep't of Educ., Appeal No. 12-165).⁴⁷

once every two weeks in Tier 2"). There is no evidence in the hearing record that the October 2018 CSE reviewed this data.

⁴⁷ It is well settled that a CSE need not adopt the recommendations from a private evaluation in order to satisfy its obligation to consider a private evaluation (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL

However, neither the IDEA nor State law requires a CSE to "consider all potentially relevant evaluations" of a student in the development of an IEP or to consider "every single item of data available" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. 2013], quoting F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581-82 [S.D.N.Y. 2013]; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP, and that the failure to memorialize which evaluative information the CSE reviewed constituted a "serious procedural violation"]); M.Z., 2013 WL 1314992, at *8). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs, the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *7-*9 [S.D.N.Y. Oct. 12, 2011]).

At the impartial hearing, the director—who acted as chairperson of the October 2018 CSE and who had been "chairing [the student's] meetings since third grade"—was not asked any questions about the development of the student's October 2018 IEP during her direct examination (Tr. pp. 26; see generally Tr. pp. 24-43). More evidence about the development of the October 2018 IEP was adduced through cross-examination, but even if that testimonial evidence could be weighed in the district's favor as part of its case-in-chief, none of the questioning elicited specific evidence about the development of the present levels of performance in the October 2018 IEP. For example, turning to the October 2018 CSE meeting, the director testified that the CSE determined that the student was exempt from the foreign language requirement (see Tr. pp. 60-61; Dist. Ex. 20 at p. 2). The director further testified that at the October 2018 CSE meeting, the student's "academic scores" were discussed, as a reevaluation of the student had been completed (Tr. pp. 61-62). According to a notation in the comments section of the IEP—which indicated that the student had "limited-to-average ranges in his academic testing"—the director testified that that information had been provided by the district special education teacher attending the CSE meeting, who had been providing resource room services to the student and who had conducted an updated evaluation of the student (Tr. pp. 62; see Dist. Ex. 7 at pp. 1-4). The director then read additional evaluative information noted in the comments section of the October 2018 IEP (compare Tr. p. 62, with Dist. Ex. 20 at p. 1).

In addition to the updated evaluation conducted by the student's resource room teacher, the director also testified that the district conducted an "independent reading assessment" of the student (Tr. p. 64; see generally Dist. Ex. 10). According to the director, the parents did not receive a copy of the reading assessment prior to the October 2018 CSE meeting, even though she knew that the parents were "concerned about reading specifically" (Tr. pp. 64-67). The director also testified that she did not know whether the "reading specialist" who conducted the

3975942, at *11 [S.D.N.Y. Aug. 5, 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] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]).

assessment of the student spoke with the student's teachers or reviewed any prior information about him—and, moreover, the reading assessment was the first time this particular district "reading specialist" had worked with the student and was not personally familiar with the student (Tr. pp. 67-68).

Next the director testified that the October 2018 CSE reviewed the "psychological report" and the "educational report" at the meeting, but did not review the "reading evaluation" (Tr. p. 78; see Dist. Ex. 20 at p. 3; see generally Dist. Exs. 7-8; 10).^{48, 49} The parents' attorney asked the director if the consultant teacher services had been terminated "even though [the student's] "scores were weak"—and the director testified that the CSE "increased the resource room [services] to address those needs" (Tr. p. 79). She also testified, however, that although the resource room teacher was a special education teacher, she was not a "reading specialist" (Tr. p. 79). In addition, the director confirmed that, at the time of the October 2018 CSE meeting, she was aware that the parents were "specifically concerned about having a specialized reading program" for the student and that she was also aware that the February 2016 neuropsychological evaluation report included a recommendation for a specialized reading program (Tr. pp. 79-80). The director noted, however, that that evaluator had not spoken to "anyone in the school . . . in making his recommendations" (Tr. p. 80). At that point, the director admitted that the October 2018 CSE "used" the February 2016 neuropsychological evaluation, but further noted that the CSE did not "take all of the recommendations, every single CSE" (Tr. p. 80).

Turning to the October 2018 IEP, it appears that, while not explained in the hearing record, the October 2018 CSE modified the student's present levels of academic performance in the areas of reading, writing, and mathematics based upon the reevaluation testing results from the district's "psychological report" and the "educational report"—but not the October 2018 reading assessment and not, despite the director's testimony and its affirmative arguments on appeal, the February 2016 neuropsychological evaluation (see Tr. p. 78; Dist. Ex. 20 at pp. 3-4, 6; see generally Dist. Exs. 7-10). The district does not explain the failure to review or consider the October 2018 reading assessment, which was available at the time of the CSE meeting and which had been completed at the parents' request (see generally Tr. pp. 1-537; Parent Exs. A-K; Dist. Exs. 1-24; IHO Exs. I-VIII). Nor does the district explain the failure to include any information describing the student's needs from the February 2016 neuropsychological evaluation in the development of the present levels of performance, even if the CSE was not ultimately required to adopt any of the recommendations from that evaluation (see generally Tr. pp. 1-537; Parent Exs. A-K; Dist. Exs. 1-24; IHO Exs. I-VIII). Instead, it appears that, after "reviewing" the February 2016 neuropsychological evaluation in April 2016—and, as new evaluative information, using it as a basis to find the student eligible for special education—the district thereafter divested itself, without explanation, from the use of that evaluation in developing any of the student's IEPs or to describe his needs or develop annual goals (see

⁴⁸ The October 2018 IEP did not list the October 2018 reading assessment in the evaluative information section (see Dist. Ex. 20 at p. 3).

⁴⁹ If the October 2018 CSE had reviewed the October 2018 reading assessment it would have shown, similar to the February 2016 neuropsychological evaluation, that the student had difficulty decoding multisyllabic words and appeared to lack either knowledge of or automaticity with applying phonics rules to multisyllabic words (compare Dist. Ex. 9 at pp. 12-14, with Dist. Ex. 10 at p. 1).

generally Dist. Exs. 3; 19-24).⁵⁰ As one of the "most recent evaluations" of the student—completed within three years of the October 2018 CSE meeting—the October 2018 reading assessment and the February 2016 neuropsychological evaluation should have been considered by the October 2018 CSE (L.O., 822 F.3d at 110-11). This is especially true in this case given the parents' repeated concerns about the student's reading and writing skills, the parents' request for an immediate CSE meeting in September 2018 to address growing concerns about the student's increasing struggles, and their request for a "comprehensive reading eval[uation]" of the student (Tr. pp. 448, 463; see Tr. p. 68; Parent Ex. I at p. 1).

In addition, while a CSE need not exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it, guidance in the development of IEPs notes that the present levels of performance should "summarize information from a variety of sources"; "translate information from technical evaluation reports to clear, concise statements"; "identify the instructional implications of evaluations"; and, "describe, in language the parents and professionals can understand, the unique needs of the student that the IEP will address and identify the student's level of performance in those need areas" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 18, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>).

With this as backdrop, the description of the student's reading needs in the present levels of performance in the October 2018 IEP—when compared to the information from the February 2016 neuropsychological evaluation—does not portray a full and accurate description of the student's needs consistent with this guidance (see Dist. Ex. 20 at p. 6, with Dist. Ex. 9 at pp. 12-13). According to the IEP, in reading, the present levels of performance reflected the student's scores on certain subtests of the "Woodcock Johnson IV," such as broad reading, which fell within the "limited range" in measures of oral sight word reading skills, silent reading comprehension speed, and passage comprehension when reading silently (Dist. Ex. 20 at p. 6). In addition, the present levels of performance reflected that the student performed within the average range on the basic reading skills subtest (id.). According to the IEP, the student could "decode words and [was] able to fluently read a passage" in class, but "struggle[d] with comprehending what he ha[d] read" (id.). The IEP also reflected that the student had been "successful when a reading ha[d] been read aloud, breaking the reading up into smaller sections

⁵⁰ State and federal regulations contemplate other vehicles for documenting and/or sharing this information with parents. Specifically, both State and federal regulations require a district to provide prior written notice any time a district proposes or refuses to "initiate or change the identification, evaluation, or educational placement of [a] child or the provision of FAPE to the child" (34 CFR 300.503[a]; 8 NYCRR 200.5[a]). Among other things, the prior written notice must include "a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action" (34 CFR 300.503[b][3]; 8 NYCRR 200.5[a][3][iv]). If a district did not send a prior written notice to the parent, the district must respond to the parent's due process complaint notice and include the same information regarding the evaluations, assessments, records, or reports the CSE relied upon (34 CFR 300.508[e]; 8 NYCRR 200.5[i][4][i]). In the instant case, the hearing record does not include a prior written notice for either the April 2018 CSE or the October 2018 CSE meetings, nor does the hearing record include the district's response to the parents' due process complaint notice to otherwise identify the evaluations, assessments, records, or reports the April 2018 CSE or the October 2018 CSE relied on (see generally Tr. pp. 1-537; Parent Exs. A-K; Dist. Exs. 1-24; IHO Exs. I-VIII).

and asking questions throughout" (*id.*). The student also had difficulty when "identifying text evidence within a reading" (*id.*).

In comparison, the February 2016 neuropsychological evaluation explained that the student was "impaired in terms of his reading fluency, [meaning] the speed and automaticity with which he [was] able to identify words, apply phonics rules, and read text" (Dist. Ex. 9 at p. 12).⁵¹ The evaluator explained that the student's "below average" performance on the reading fluency composite was a result of the student's "difficulty recognizing the morphemes and other common letter combinations" such as prefixes (e.g., 'un') and suffixes (e.g. 'ing'), as well as letter strings that c[ould] stand on their own as a word or c[ould] be used as building blocks for other words (e.g. 'hall' which [was] a word by itself and c[ould] be used as a part of words such as in 'hallway.')" (*id.*). Because the student did "not easily recognize such parts of words," he could not "quickly break down words into syllables in order to decode them," which "slow[ed] down the speed with which he [was] able to identify multi-syllable words" (*id.*). The evaluator linked the student's "difficulty recognizing morphemes and other common letter combinations . . . , at least in significant part, [to] his deficit in memory for visual details" (*id.* at pp. 12-13). The evaluator indicated that "[m]emory for visual details [was] a necessary prerequisite skill for decoding as it allow[ed] the reader to recognize the 'parts' of words, such as prefixes (e.g. 'un'), suffixes (e.g. 'ing'), as well as other letter strings that [went] together as a unit to represent a sound(s) (e.g. -ight making an 'ite' sound, as in the words, light, night, right, etc.)" (*id.* at p. 13). In addition, the evaluator noted that visual memory was "especially important for learning irregular letter-sound correspondences, such as those that contain[ed] silent letters" (*id.*). Thus, at times, "one must recall what the words look[ed] like," which relied on the "task of visual memory" (*id.* [emphasis in original]). The evaluator explained that "neuropsychological research" supported the "conclusion that a deficit in visual memory caus[ed] an impairment in decoding" and that a "dysfunction in an area of the brain responsible for recognizing subtle visual distinction [was] responsible for certain forms of dyslexia" (*id.*). For this student, his "dyslexia involve[d] a deficit in visual recognition, interfering with the speed with which he c[ould] syllabicate and thus interfering with his reading fluency" (*id.*).⁵²

⁵¹ The district's October 2018 educational evaluation indicated that the student's reading fluency was in the "low range" and he received a standard score of 77 (4th percentile) on the sentence reading fluency subtest of the WJ-IV (Dist. Ex. 7 at pp. 1, 4).

⁵² To be clear, the United States Department of Education has explained in a policy guidance letter that there is nothing in the IDEA that prohibits or requires the use of the terms dyslexia, dyscalculia, or dysgraphia in IDEA evaluations, eligibility determinations, or IEP documents (Dear Colleague, 66 IDELR 188 [OSEP 2015]). In addition, neither federal nor State regulations require the district to set forth students' diagnoses in an IEP; instead, they require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and obtain information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at *13 [S.D.N.Y. Mar. 31, 2014] [finding that the "absence of an explicit mention" of a particular diagnosis in a student's annual goals was not fatal to the IEP because the goals were adequately designed to address the student's learning challenges as a whole and related to the particular diagnosis]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *10 [S.D.N.Y. Oct. 12, 2011]). Here, the deficiencies in the present levels of performance and annual goals pertain to failing to fully and accurately describe the student's needs, rather than a failure to include a dyslexia diagnosis in the IEP.

Given that the district bore the burden of proof and burden of persuasion to establish that it offered the student a FAPE for the 2018-19 school year, the absence of any evidence about the development of the present levels of performance—which a CSE relies upon as the "foundation on which [it] builds to identify goals and services to address the student's individual needs"—will ultimately prove fatal to not only the district's arguments relate to the present levels of performance, but also to the district's appeal related to the 2018-19 school year ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 18, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>; see generally Tr. pp. 1-537; Parent Exs. A-K; Dist. Exs. 1-24; IHO Exs. I-VIII).

2. Annual Goals

The district contends that the IHO erred in finding that the annual goals in the October 2018 IEP were not individualized to meet the student's unique needs. In support of this contention, the district argues that the IHO improperly substituted her own judgement for that of professional educators who drafted the annual goals and who were familiar with the student and his needs. The parents deny these contentions, asserting that the student's annual goals failed to provide him with the necessary services and interventions to enable the student to make progress. In addition, the IEP failed to include annual goals to address the student's dysgraphia and his needs in spelling, the IEP failed to include any specific reading protocol to address his dyslexia, and the IEP failed to include annual goals to address his difficulties sustaining attention.

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][II]; 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]).

In this case, the October 2018 IEP included a total of 11 annual goals targeting the student's needs in study skills, reading, writing, and mathematics (see Dist. Ex. 20 at pp. 8-9). In reading and writing, the October 2018 IEP included four annual goals for each area (*id.*). A careful review of the all of the annual goals reveals that, consistent with regulations, each annual goal included an evaluative criteria (i.e., 80 percent success over 5 consecutive occasions, 3 out of 5 trials on 5 consecutive occasions), an evaluation schedule (i.e., every marking period, monthly), and a procedure to evaluate the goals (i.e., teacher devised tests or worksheets, work samples, recorded observations) (*id.*). Thus, the annual goals included in the October 2018 IEP—having met the regulatory requirements mentioned above and which appear to target the student's needs identified in the present levels of performance—are appropriate.

However, having determined that the present levels of performance in the October 2018 IEP failed to fully and accurately describe the student's needs, particularly as it related to reading, the annual goals in the October 2018 IEP are similarly deficient. Here, the February 2016 neuropsychological evaluation included detailed recommendations to address the student's

reading needs that the October 2018 CSE should have incorporated into the IEP as annual goals. For example, with respect to improving reading fluency, the evaluator delineated—in addition to recommending reading instruction—that the reading instruction provided to the student "should focus on improving [the student's] ability to recognize morphemes and other commonly occurring letter strings in order to increase the speed with which he [was] able to syllabicate in order to improve his reading fluency" (Dist. Ex. 9 at pp. 16-24). According to the evaluator, the recommended reading instruction "should also" focus on improving the student's "ability to remember what words 'look like'"; incorporate "multi-sensory techniques," such as "skywriting" to "compensate for [the student's] weak visual memory"; "[u]se spoken (auditory) mnemonics to help [the student] recall letter sequences"; "[p]rovide explicit instruction on the six syllable types (i.e., closed, consonant-le, vowel consonant-e, r-controlled, open, and double vowel syllables)"; and use "read by analogy techniques to promote [the student's] ability to recognize commonly occurring letter strings" (*id.* at p. 16).

Absent a full and accurate description of the student's present levels of performance, the October 2018 CSE was unable to develop annual goals related to these unidentified needs.

3. Reading Instruction

The district argues that the IHO erred in finding that it was obligated to provide the student with 1:1 Orton-Gillingham reading instruction. Relying on its interpretation of Andrew E., the district contends that the student achieved excellent grades in general education classes and advanced from grade to grade without Orton-Gillingham reading instruction; thus, the district was not obligated to recommend or provide specialized reading instruction to the student. The district also argues that the IHO erred in finding that, for the 2018-19 school year, it "refused" to recommend or provide the student with a specialized reading program and failed to evaluate the student in all suspected areas of disability.

The parents deny these allegations, arguing that the district failed to provide any cogent explanation for failing to recommend Orton-Gillingham services for the student, especially given the evaluative information. In addition, the parents argue that the district did not provide the student with a specialized reading program to address his reading deficits emanating from his diagnosis of dyslexia for the 2018-19 school year. Additionally, the parents assert that the district did not have, consider or review any comprehensive reading evaluation when developing the October 2018 IEP.

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 via a resource room program, as a consultant teacher service, 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>).⁵³ 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.*).⁵⁴

The evidence in the hearing record demonstrates that, but for the parents' request for an "immediate CSE meeting" in September 2018, a CSE meeting was not anticipated to reconvene until the conclusion of the first marking period, as noted in the April 2018 IEP (*see* Tr. pp. 448, 463; Dist. Ex. 21 at p. 1). In addition, if not for the parents' request for a comprehensive reading evaluation in September 2018, the hearing record contains no evidence that the district would have initiated such evaluation on its own, and moreover, that it was only due to the parents' request for an immediate CSE meeting that prompted the district to conduct the student's three-year mandatory reevaluation at the same time (*see* Tr. pp. 448, 463; *see* Tr. p. 68; Parent Ex. I at p. 1; Dist. Exs. 7-8; 10).

As previously noted, the director did not testify at the impartial hearing about the development of the October 2018 IEP—nor did she testify to any degree about the CSE process

⁵³ State guidance specific to students with disabilities resulting from dyslexia, dysgraphia, and dyscalculia emphasizes that "[t]he specially designed instruction that is appropriate to the unique needs of each student with a disability resulting from dyslexia, dysgraphia, and/or dyscalculia may vary across individual students with each of these specific learning disabilities" and that "[b]ecause of this, there is no single approach, product, or method of delivering specially designed instruction to such students that is required in federal or State law and regulations" ("Students with Disabilities Resulting from Dyslexia, Dysgraphia, and Dyscalculia: Questions and Answers, at p. 6, Office of Special Educ. [Aug. 2018], [available at http://www.p12.nysed.gov/specialed/publications/documents/q-and-a-students-with-dyslexia-dysgraphia-dyscalculia.pdf](http://www.p12.nysed.gov/specialed/publications/documents/q-and-a-students-with-dyslexia-dysgraphia-dyscalculia.pdf); *see generally* Educ. Law § 305[56]; *Dear Colleague Letter*, 66 IDELR 188 [OSERS 2015]).

⁵⁴ 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], *affg* 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 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 district did not identify a specific reading curriculum, or any specific methodology used as part of its general education or AIS reading instruction (*see* Tr. pp. 259, 269). As noted above, the district also provided limited information regarding the student's response to its AIS reading intervention (progress monitoring). As such, it is unclear as to whether a specific methodology was necessary to address the student's reading deficits.

(Tr. pp. 26; see generally Tr. pp. 24-43). However, the director did briefly testify that, although the district conducted an "independent reading assessment" of the student, the parents were not provided with a copy of that assessment until the day of the meeting and that the October 2018 CSE did not review the district's "reading assessment"—but instead, reviewed the district psychological and educational evaluations (Tr. pp. 64-67; see Dist. Ex. 20 at p. 3; see generally Dist. Exs. 7-8; 10).

With respect to the decision to terminate the consultant teacher services previously recommended by the April 2018 CSE, the director testified that the CSE "increased the resource room [services] to address those needs"—meaning the weaknesses in broad reading and sentence reading fluency reflected in the updated evaluation conducted by the resource room teacher (Tr. p. 79; see Tr. pp. 61-63).⁵⁵ Her testimony reflects, however, that the resource room teacher was not a "reading specialist" (Tr. p. 79). And despite acknowledging her awareness that, at the time of the October 2018 CSE meeting, the parents were "specifically concerned about having a specialized reading program" for the student and that the February 2016 neuropsychological evaluation report included a recommendation for a specialized reading program for the student, the hearing record contains no evidence regarding any discussion of a specialized reading program at the October 2018 CSE meeting—other than the director's testimony that the CSE did not "take all of the recommendations, every single CSE" (Tr. pp. 64-67, 79-80).

To the extent that the October 2018 CSE increased the recommendation for resource room to address the student's reading needs, the hearing record contains no evidence that daily resource room services—as opposed to a specialized reading instruction program—would have met the student's needs (see generally Tr. pp. 1-537; Parent Exs. A-K; Dist. Exs. 1-24; IHO Exs. I-VIII). Notably, by the time the October 2018 CSE convened, the student had received AIS reading support for three years—as well as an ELA workshop in sixth grade—and the hearing record is devoid of any evidence describing the instruction provided to the student during AIS reading support, or more significantly, that the student made progress as a result of that reading support, such that a specialized reading instruction program was not required to address his needs (see generally Tr. pp. 1-537; Parent Exs. A-K; Dist. Exs. 1-24; IHO Exs. I-VIII).⁵⁶ In

⁵⁵ State regulation defines a resource room program as "a special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]).

⁵⁶ Assuming, without deciding, that the district provided AIS as a Tier 2 RtI intervention, an RtI process includes "the application of information about the student's response to intervention to make educational decisions about changes in goals, instruction and/or services," (8 NYCRR 100.2[ii][1][v]). Additionally, State guidance suggests that "[t]he recommended time a student will spend in the second tier of intervention will vary from approximately nine to 30 weeks" and that "[w]hen progress monitoring of a Tier 2 intervention indicates lack of adequate response, schools should consider adjusting the intervention in terms of intensity" (8 NYCRR 100.2[ii][1][iv]; see Response to Intervention – Guidance for New York State School Districts, Office of Special Educ. [Oct. 2010], p. 14, available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>). Accordingly, without a review of the progress monitoring data that should have been produced as a part of the RtI process for the student, it is unclear how the district made the decision to provide the student with Tier 2 RtI services for approximately three years or whether a change in intensity of services was required. Finally, according to State guidance, for a student receiving special education services to address reading, and who also qualifies for AIS in reading, "a review by the CSE of the student's IEP may be warranted to coordinate the additional reading instruction" (see "Academic Intervention Services: Questions and Answers," at p. 20, Office of P-12 Mem. [Jan. 2000], available at <http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf>). There is no

addition, at the impartial hearing, the resource room teacher testified that she did not provide reading instruction to the student but, instead, worked on the student's annual goals, which included reading (see Tr. pp. 104-05). She also testified that the student did not participate in resource room to specifically work on reading, but to work on his annual goals for reading, writing, and mathematics (see Tr. pp. 105, 115).⁵⁷

Having noted the district's reliance on its misplaced interpretation of the applicable legal standard, the evidence in the hearing record does not support the district's contentions and there is no reason to disturb the IHO's finding that the student required a specialized reading program during the 2018-19 school year.

C. May 2019 IEP—2019-20 School Year

1. Present Levels of Performance

The district generally argues that the IHO erred in finding that the IEPs were developed without adequate assessments or adequate descriptions of the present levels of performance. More specifically, the district argues that in developing the 2019-20 IEP, the CSE considered all of the data presented to the CSE, including the student's grades and test scores, the student's performance and behavior in the classroom, the student's performance on district assessments (i.e., the NWEA), district-conducted evaluations, privately obtained evaluations, teacher reports, and the parents' concerns.⁵⁸

indication in the hearing record that this took place.

⁵⁷ The district resource room teacher's direct testimony focused primarily on the 2019-20 school year and how she implemented the annual goals in the May 2019 IEP with the student (see generally Tr. pp. 100-32). According to the resource room teacher, she testified on cross-examination that she did not observe the student's dyslexia diagnosis "because he [was] fluent in reading" but she did observe the dysgraphia diagnosis in his penmanship, and at times, in the disorganization of his spelling (Tr. pp. 136-37; see Tr. pp. 163, 166-67). The resource room teacher also testified that she did not have "any training in special ed[ucation] reading instruction" (Tr. p. 137). With respect to the student's reading fluency needs, the resource room teacher testified that during the 2019-20 school year to address this need, she previewed vocabulary words within passages with her students and had students "say the words out loud after [she] sa[id] them out loud"; then the students would read the words in sentences or passages (Tr. p. 144).

⁵⁸ The district generally argues that the IHO erred in finding that the May 2019 IEP for the 2019-20 school year was not appropriate because, in light of the student's success in the 2018-19 school year, it was reasonable to recommend a similar program for the student for the 2019-20 school year (see Req. for Rev. ¶ 4). Generally, "[a]lthough past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (*S.H. v. Eastchester Union Free Sch. Dist.*, 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011] citing *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1153 [10th Cir. 2008]; see also *D.D-S. v. Southold Union Free Sch. Dist.*, 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011] [determining that evidence of likely progress was "the fact that the [challenged IEP] was similar to a prior IEP that generated some progress"]; *J.G. v. Kiryas Joel Union Free Sch. Dist.*, 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011] [finding that when the student made some progress under a previous IEP, it was not unreasonable for the CSE to propose an IEP "virtually identical to" the previous one]; *M.C.*, 2008 WL 4449338, at *16 [determining that when the IEP at issue mirrored a past IEP under which the student "demonstrated significant progress," the IEP at issue was reasonably calculated to afford the student educational benefit]). However, the May 2019 IEP recommendation for the 2019-20 school year did not include a program similar to the October 2018 IEP—most notably, because the May 2019 IEP included consultant teacher services

The parents deny these assertions, noting that the IEPs reveal significant inconsistencies in identifying the student's areas of need, and more specifically, in delineating his present levels of performance. The parents further argue that the present levels of performance in the May 2019 IEP inconsistently described the student within the document itself.

Relying on the standard as set forth above for the prior school year, the evidence in the hearing record does not support the district's contentions. First, while the district contends that the May 2019 CSE relied on all of the information presented—including the student's grades and test scores, the student's performance and behavior in the classroom, the student's performance on district assessments (i.e., the NWEA), district-conducted evaluations, privately obtained evaluations, and teacher reports—the May 2019 IEP lists the same evaluative information in the document that the October 2018 CSE purportedly relied upon, and failed to include any indication of the student's "NWEA" scores or teacher reports (if written) (compare Dist. Ex. 3 at pp. 3-5, with Dist. Ex. 20 at pp. 3-5). Furthermore, to the extent that the comments section of the May 2019 IEP referenced this evaluative information, this is the only portion of the May 2019 IEP wherein the information is located—most notably because the present levels of performance in reading in the May 2019 IEP repeated, verbatim, the present levels of performance in reading from the March 2019 IEP (compare Dist. Ex. 3 at pp. 1-2, 6, with Dist. Ex. 19 at p. 5).⁵⁹ In writing, the May 2019 IEP similarly repeated, verbatim, the present levels of performance from the March 2019 IEP (compare Dist. Ex. 3 at p. 6, with Dist. Ex. 19 at p. 5). Moreover, the March 2019 CSE—in creating the present levels of performance in reading and writing—lifted the present levels of performance from the October 2018 IEP, with the addition of one to two sentences in both reading and writing (compare Dist. Ex. 19 at p. 5, with Dist. Ex. 20 at p. 6).

In addition, the evidence in the hearing record included a January 2019 reading evaluation of the student and a May 2019 diagnostic evaluation (see generally Dist. Exs. 11; 15-16).⁶⁰ As the "most recent" evaluations of the student, the reading and diagnostic evaluations should have been considered by the CSE in developing the May 2019 IEP, and in particular, the present levels of performance in reading and writing. Moreover, the student began receiving two hours per week of individual reading instruction in May 2019, with a private reading specialist hired and funded by the district—yet the hearing record does not indicate whether the district

(to provide the student with reading instruction) and assistive technology services, and the October 2018 IEP included one special education recommendation for daily resource room services (compare Dist. Ex. 3 at pp. 1, 9-10, with Dist. Ex. 20 at pp. 1, 9-10). Additionally, as discussed above, the October 2018 IEP did not offer the student a FAPE and the same argument could be made by the parents that a similar IEP would carry forward those same defects. However, given that the two recommendations are dissimilar, the district's argument need not be further addressed.

⁵⁹ As discussed above the CSE developed an IEP for the student in March 2019; however, the start date for services in the March 2019 IEP was set for September 2019, accordingly, the May 2019 IEP superseded the March 2019 IEP (Dist. Exs. 3 at p. 1; 19 at p. 1).

⁶⁰ The May 2019 CSE did not list either the January 2019 reading evaluation or the May 2019 diagnostic evaluation within the IEP as evaluative information (see Dist. Ex. 3 at pp. 3-5). While it was not clear from the evidence in the hearing record that the May 2019 CSE had the May 2019 diagnostic evaluation available or otherwise relied on it, the IHO found that the district was aware of the May 2019 diagnostic evaluation and its recommendations, and neither the district nor the parents challenged this determination on appeal (see IHO Decision at p. 59).

sought input from this provider or gathered any information from this provider (see generally Tr. pp. 1-537; Parent Exs. A-K; Dist. Exs. 1-24; IHO Exs. I-VIII).

In discussing the May 2019 CSE meeting and resultant IEP at the impartial hearing, the director—when asked about the January 2019 reading evaluation—testified that the March 2019 CSE had "previously consider[ed] the findings and recommendations in the [January 2019 reading evaluation]" (Tr. p. 28).⁶¹ Other than that brief reference, the director was not asked any questions, and did not provide any further testimony, about the evaluative information relied upon by the May 2019 CSE; nor did the director testify about the development of the present levels of performance or annual goals in the May 2019 IEP (see Tr. pp. 24-43).

On cross-examination, the director testified that the May 2019 CSE reviewed the "assistive technology evaluation" of the student at that meeting (Tr. p. 80; see generally Dist. Ex. 16). The director further testified, however, that the May 2019 CSE did not review "any reading assessments," and that references in the IEP indicating that the student had been "assessed in reading, writing and math" were related to the assistive technology evaluation (Tr. p. 81).

Turning to the May 2019 IEP, the CSE described the student's reading needs in the present levels of performance by reflecting the student's scores on certain subtests of the "Woodcock Johnson IV," such as broad reading, which fell within the "limited range" in measures of oral sight word reading skills, silent reading comprehension speed, and passage comprehension when reading silently (Dist. Ex. 3 at p. 6). In addition, the present levels of performance reflected that the student performed within the average range on the basic reading skills subtest (id.). According to the IEP, the student could "decode words and [was] able to fluently read a passage" in class, but "struggle[d] with comprehending what he ha[d] read" (id.). The IEP also reflected that the student had been "successful when a reading ha[d] been read aloud, breaking the reading up into smaller sections and asking questions throughout" (id.). The student also had difficulty when "identifying text evidence within a reading" (id.). In addition, the present levels of performance reflected that "[b]reaking the text down into smaller parts and skimming the reading for unfamiliar words prior to reading ha[d] been beneficial" to the student; and "[he] also benefit[ed] from taking notes on who, what, when, and where, as he read[]" (id.).

In comparison, the January 2019 reading evaluation found, in part, that the student's performance in "each of the overarching concepts of reading, language and expression including; phonological awareness, phonics, spelling, vocabulary, fluency, comprehension and writing" fell within the "very poor to superior range" (Dist. Ex. 11 at p. 6 [emphasis in original]). In addition, the evaluator noted that the student's "overall 'weakness' in the area of rapid naming may manifest and be contributing to a deficiency in reading fluency" as discussed later in the report (id.). With respect to phonics skills, the student could "read words, identify sight words and apply word attack skills such as breaking longer words into syllables, however, [the student's] skills deteriorate[d] when efficiency [was] required" (id.). Notably, while the student did not exhibit "noticeable difficulty reading the regular and sight word lists" on the WIST, the student's "performance significantly decreased" on the TOWRE-2—which required the student to "read

⁶¹ The director testified that she did not participate in the March 2019 CSE meeting and had no information about that meeting (see Tr. p. 72; see generally Dist. Ex. 19).

words under timed conditions" (id.). On the GORT-5, which measured the student's "decoding skills . . . in passage form," the evaluator noted that the student's "accuracy was again weak but was largely related to pausing and repeating phrases rather than word reading errors" (id.). In addition, the evaluator found that the student's performance on the "irregular or pseudo-word decoding tasks of the WIST and TOWRE-2" fell within the "below average" range—further noting that "[b]oth sub-tests measure[d] his application of sound/symbol knowledge, one for accuracy, one for efficiency and on each he fell short" (id.).

In summarizing her findings, the evaluator noted the diagnoses of a language disorder, and specific learning disorders of dyslexia, dysgraphia, and an ADHD (inattentive type) from the February 2016 neuropsychological evaluation, and further noted the student's "intact cognitive flexibility and metacognition with poor planning skills, poor inhibition, accelerated tempo (goes too fast), and challenges with sustained attention" as reported by the previous evaluator (Dist. Ex. 11 at p. 9). Notably, the evaluator concluded that the "[previous evaluator's] findings remain[ed] consistent with the results of the current evaluation," and moreover, the "brief educational testing done by the school district in October of this school year [2018-19] for [the student's] reevaluation [were] also consistent with his performance on the current battery" (id.).

Next, the evaluator indicated that the student's "performance on the current battery further validate[d] [the previous evaluator's] interpretations and conclusions" in regard to reading and reading comprehension skills (Dist. Ex. 11 at p. 9). Here, the evaluator referred to how the previous evaluator "specifically outline[d] the manifestation of [the student's] dyslexia involving visual recognition of words and morphemes that interfere[d] with and inhibit[ed] his reading fluency" (id.). Given the similarity of findings between the February 2016 neuropsychological evaluation and the January 2019 reading evaluation, the evaluator, again, referred to the previous evaluator, and noted that he had "laid out [a] very comprehensive and specific prescription and treatment plan that remain[ed] appropriate in light of the current findings" (id.). Thereafter, the evaluator provided additional recommendations for consideration by the student's "support team," including a recommendation for student's "participation in an Orton Gillingham-based (O-G) program" together with additional programs (i.e., "Morgan Dynamic Roots," "Wilson Reading System-4th Edition") to "specifically address roots, prefixes, suffixes and vocabulary as well" (id. at pp. 10-14).

In the May 2019 diagnostic evaluation, after discussing the student's testing results, the private reading specialist recommended, in part, a multisensory reading program, which included instruction in the following areas of need: a review of blend and digraphs, specific spelling generalizations, vowel digraphs and diphthongs, inflectional endings, forming plurals, spelling and pronunciation of soft and hard g and c words with -cle patterns, reading and spelling of words with prefixes and suffixes, concept of syllables (open and closed), syllabication, use of diacritical markings for correct pronunciation, vocabulary development including academic vocabulary, how to use a thesaurus for expanding vocabulary, and grammar instruction for expanding sentences (Dist. Ex. 15 at p. 3).

Given that the district bore the burden of proof and burden of persuasion to establish that it offered the student a FAPE for the 2019-20 school year, the absence of any evidence about the development of the present levels of performance—which a CSE relies upon to formulate annual goals and make program recommendations—and the abject failure to rely upon either the January 2019 reading evaluation or the May 2019 diagnostic evaluation in the development of

the present levels of performance, together with the failure to explain why the May 2019 CSE did not rely upon these evaluations, similarly proves fatal to not only the district's arguments related to the present levels of performance, but also to the district's appeal related to the 2019-20 school year (see generally Tr. pp. 1-537; Parent Exs. A-K; Dist. Exs. 1-24; IHO Exs. I-VIII).

2. Annual Goals

The district contends that the IHO erred in finding that the annual goals in the May 2019 were not individualized to meet the student's unique needs. In support of this contention, the district argues that the IHO improperly substituted her own judgment for that of professional educators who drafted the annual goals and who were familiar with the student and his needs. Denying the district's contentions, the parents argue that the May 2019 IEP provided strategies, and not annual goals, to address the student's reading needs.

Relying on the standard regarding annual goals as set forth above for the prior school year, the May 2019 IEP included a total of 13 annual goals targeting the student's needs in study skills, reading, writing, mathematics, and "other" (i.e. related to assistive technology) (see Dist. Ex. 3 at pp. 8-9). In reading and writing, the May 2019 IEP included three annual goals for each area (id.). A careful review of the all of the annual goals reveals that, consistent with regulations, each annual goal included an evaluative criteria (i.e., 80 percent success over 5 consecutive occasions), an evaluation schedule (i.e., every marking period), and a procedure to evaluate the goals (i.e., work samples) (id.). Thus, the annual goals included in the May 2019 IEP—having met the regulatory requirements mentioned above and which appear to target the student's needs identified in the present levels of performance—are appropriate.⁶²

However, having determined that the present levels of performance in the May 2019 IEP failed to fully and accurately describe the student's needs, particularly as it related to reading, the annual goals in the May 2019 IEP are similarly deficient. Both the January 2019 reading evaluation and the May 2019 diagnostic assessment included detailed recommendations to address the student's reading needs that the May 2019 CSE should have incorporated into the IEP as annual goals. For example, in addition to incorporating recommendations made in the February 2016 neuropsychological evaluation—pointing specifically to "participation in an Orton Gillingham-based (O-G) program" together with additional programs (i.e., "Morgan Dynamic Roots," "Wilson Reading System-4th Edition") to "specifically address roots, prefixes, suffixes and vocabulary as well, the evaluator included over four pages of specific drills and tools to address the student's needs as reflected in the testing results (Dist. Ex. 11 at pp. 10-14).

The May 2019 diagnostic evaluation included a recommendation for multisensory reading instruction to specifically target the student's decoding and encoding skills, in addition to listing skills to target with the reading instruction, such as: a review of blend and digraphs, specific spelling generalizations, vowel digraphs and diphthongs, inflectional endings, forming plurals, spelling and pronunciation of soft and hard g and c words with -cle patterns, reading and spelling of words with prefixes and suffixes, concept of syllables (open and closed),

⁶² The director testified that no one at the May 2019 CSE meeting objected to the annual goals in the IEP and she thought the annual goals were appropriate (see Tr. p. 34). She also testified that the student's resource room teacher drafted the annual goals for reading and study skills (see Tr. p. 34).

syllabication, use of diacritical markings for correct pronunciation, vocabulary development including academic vocabulary, how to use a thesaurus for expanding vocabulary, and grammar instruction for expanding sentences (see Dist. Ex. 15 at p. 3). The private reading specialist also included an appendix with suggestions to improve the student's writing (*id.* at pp. 3-6). And finally, the last three pages of the evaluation report included approximately 25 annual goals targeting the student's ability to read and spell words using decoding and encoding skills and approximately 16 annual goals to improve the quality of the student's grammar skills and writing ability (*id.* at pp. 7-9).

However, absent a full and accurate description of the student's present levels of performance, the May 2019 CSE was unable to develop annual goals designed to address the student's needs as described in the available evaluative information, but unidentified in the present levels of performance.

3. Reading Instruction/Direct Consultant Teacher Services

Here, the district reasserts the same arguments with respect to the October 2018 IEP, namely, that the IHO erred in finding that it was obligated to provide the student with 1:1 Orton-Gillingham reading instruction in light of the student's progress.⁶³ The district also asserts that the IHO erred in finding that the recommendation for consultant teacher services in the May 2019 IEP—to be delivered outside of school—did not comply with LRE mandates.

The parents deny these allegations, arguing that the district failed to provide any justification for the recommendation to provide the student with Orton-Gillingham instruction (i.e., consultant teacher services) after school, at a substantial distance from the student's home, and for refusing to recommend reading instruction as part of the student's school day. In addition, the parents argue that the district was obligated to implement the recommendation for consultant teacher services in compliance with State regulations requiring that such services be provided as part of the student's regular education classes. Finally, the parents contend that a

⁶³ The district argues that the IHO erred in finding that the May 2019 CSE's recommendation for direct consultant teacher services in the May 2019 IEP "was not to merely appease" the parents, but an acknowledgement that the student required specialized reading services (Req. for Rev. ¶ 9). The district's argument, however, is belied by the evidence in the hearing record. Here, the May 2019 prior written notice in the hearing record specifically noted that the district "offered reading with a reading specialist outside of the school day as a compromise to the parents" (Dist. Ex. 4 at p. 10). In addition, the director repeatedly testified that the student did not require consultant teacher services in the May 2019 IEP and that the recommendation was done in an effort to "work with the family to provide some reading support" (Tr. pp. 83-85, 90-91). The director also testified that "[p]erhaps [she] should not have put it on the IEP, but the CSE d[id] not believe he require[d] individualized reading during the course of the school day" (Tr. p. 90). She also testified that she had never encountered a situation where a student eligible for special education only received reading instruction as a consultant teacher service (see Tr. pp. 90-91). In addition, the district began providing the student with individual reading support and/or instruction after school beginning in December 2018, which continued until March 2019; the district thereafter hired and funded a private reading specialist to provide individual reading instruction to the student that began on May 9, 2019. Given the totality of this evidence, it was inherently logical for the IHO to conclude that the May 2019 CSE's decision to provide the student with reading instruction—while not specifically recommended but embedded in the IEP as direct consultant teacher services—tacitly acknowledged that the student required a reading instruction program. Consequently, the district's argument is without merit and will not be further addressed.

placement, for purposes of the LRE analysis, should include all components of a student's program.

As previously noted, State regulations define consultant teacher services as "direct or indirect services, . . . , provided to a student with a disability in the student's regular education classes and/or to such student's regular education teachers" (8 NYCRR 200.1[m]; see 8 NYCRR 200.6[d]). State regulation also defines direct consultant teacher services, to wit, as "specially designed individualized or group instruction provided by a certified special education teacher, . . . , to a student with a disability to aid such student to benefit from the student's regular education classes" (8 NYCRR 200.1[m][1]).

At the May 2019 CSE meeting, the CSE added two hours per week of direct consultant teacher services with the private reading specialist for reading, after school and outside of school (see Tr. pp. 81-83; Dist. Ex. 3 at pp. 1-2, 10). However, while a review of the May 2019 IEP reflects that the IEP included a recommendation for direct consultant teacher services, the IEP does not include any recommendation for reading instruction or that the private reading specialist would deliver that service to the student (see generally Dist. Ex. 3). The director explained that the direct consultant teacher services were "not a push-in for [the student] in this particular instance, [because] it was outside the school day" (Tr. pp. 82-83). Although the director could not recall the parents' specific concerns, she admitted the parents expressed concerns about the direct consultant teacher services being provided "outside of the school day" (Tr. p. 83). When asked why the direct consultant teacher services were to be provided "outside of the school setting," the director testified that the CSE was "looking to work with the family to provide some reading support" and she secured "some reading teachers to work with [the student] outside of the school day in lieu of the ELA workshop" (Tr. p. 83). She further testified that the "ELA workshop" was the "reading program" that was "offered to the parents" as provided during the "course of the school day" (Tr. p. 84). The parents' attorney then noted, however, that the evaluation documented in the IEP—the February 2016 neuropsychological evaluation—"recommended a specialized reading instruction program at least three times a week," to which the director explained, that that was a "recommendation of an outside evaluator in the absence of speaking to the school" (Tr. p. 84).

When asked why the May 2019 CSE recommended direct consultant teacher services "outside of the school setting," the director testified that the "CSE d[id] not believe that [the student] require[d] direct one-on-one reading" and the CSE was "looking to work with the family and provide some support" (Tr. pp. 84-85). However, she also testified that the student could "participate in our ELA workshop, which [the CSE felt was] appropriate for him and which [was] provided during the course of the school day" (Tr. p. 85). She also confirmed that, while the CSE did not believe the student required individualized reading instruction, the May 2019 CSE recommended it nonetheless as direct consultant teacher services to specifically address his reading deficits (see Tr. pp. 89-90).

The parents' attorney asked the director why the direct consultant teacher services could not address the student's "reading deficits in the classroom, within the general education setting"; the director responded that "[w]e have an ELA workshop for that, that the parents have elected not to participate in" (Tr. p. 90). Pressing on, the parents' attorney asked why the consultant teacher services could not be provided to the student "in the general education setting which [was] his least restrictive environment"; the director responded, "[w]e don't believe that he

require[d] it" and "[t]his was done in a method of helping and working with the parents" (Tr. p. 90). She further testified that "[p]erhaps [she] should not have put it on the IEP, but the CSE d[id] not believe he require[d] individualized reading during the course of the school day" and "[i]f we did, we would provide it"; noting additionally, that "[w]e have an ELA workshop that he c[ould] participate in" (Tr. p. 90). Finally, on redirect examination, the director testified that the student "doesn't actually need consultant teacher services at all" (Tr. p. 98), and that she was providing that service "solely as an accommodation to the parents" (Tr. p. 98). She also testified that resource room and "ELA workshop would address all of [the student's reading] deficits" identified in "various reports" (Tr. p. 99).

Given the foregoing, the hearing record fails to establish that the CSE discussed whether to recommend a specialized reading instruction program in the IEP—and a review of the IEP reveals no such recommendation (see generally Dist. Ex. 3). In addition, at the time of the May 2019 CSE meeting, the district had been providing the student with individual reading support after school from December 2018 through March 2019 by a district reading teacher, and in May 2019, the district hired and funded the private reading specialist to provide reading instruction to the student after school and outside of school. Yet, when the May 2019 CSE convened, it appears that despite the parents' repeated requests for the CSE to recommend a specialized reading instruction program for the student, the CSE—as an alleged accommodation to the parents—recommended direct consultant teacher services for two hours per week outside of school without any explanation in the IEP as to the purpose of these services (id.). Moreover, while State regulations envision that a CSE may deliver a reading instruction program to a student via consultant teacher services or resource room, the May 2019 CSE failed to recommend any reading instruction program in the IEP for the student, and then compounded this failure by recommending direct consultant teacher services outside of school—in a manner that did not comply with the delivery of that service envisioned by State regulations: "in the student's regular education classes." As such, the hearing record contains no evidence to find that the district met its burden to establish that resource room, together with direct consultant teacher services, would meet the student's reading needs. Thus, there is no reason to disturb the IHO's finding that the student required a specialized reading instruction program during the 2019-20 school year.⁶⁴

VII. Relief

A. Compensatory Educational Services

The district argues that the IHO erred in ordering the district to fund five hours of 1:1 sessions per week of Orton-Gillingham instruction by a reading specialist trained in Orton-Gillingham, for a total of 200 hours, and to be delivered to the student during the school day in the school. The district asserts that the IHO's order is contrary to the evidence in the hearing record, which reflected that the evaluator who conducted the January 2019 reading evaluation testified that the student did not require 1:1 instruction. The district also asserts that the IHO's

⁶⁴ As a final point, the hearing record is devoid of any evidence that the May 2019 CSE discussed—or even considered—whether the recommendation to deliver direct consultant teacher services outside the school violated the LRE. However, having found that the district did not establish the appropriateness of the recommended services in the May 2019 IEP, I need not address this as a separate violation.

order violates LRE mandates requiring students with disabilities to be educated with their nondisabled peers to the maximum extent possible.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

I find that the IHO's award of five hours per week of 1:1 sessions of Orton-Gillingham instruction by a reading specialist trained in Orton-Gillingham, for a total of 200 hours, and to be delivered to the student in the school during the school day, represents an appropriate balance between the purpose of an award of compensatory educational services with a fact-specific inquiry into the student's areas of need in order to accomplish the IDEA's purpose of providing the student with the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place (see Reid, 401 F.3d at 524). As previously discussed, the IHO found that the district deprived the student of a FAPE for the 2018-19 and 2019-20 school years when it failed to recommend specialized reading instruction. Contrary to the district's assertion that the award is not supported by evidence in the hearing record, the 2016 neuropsychological evaluation recommended "one on one or small group . . . evidence based, multi-sensory, Orton-Gillingham based reading instruction" (District Ex. 9 at p. 20) and the 2019 reading evaluation effectively adopted the recommendations of the 2016 neuropsychological evaluation, noting that it had "laid out [a] very comprehensive and specific prescription and treatment plan that remain[ed] appropriate in light of the current findings" (District Ex. 11 at p. 9). Moreover, the district's objection to the delivery of compensatory educational services on a one-to-one basis is somewhat disingenuous given that it utilized one-to-one instruction when the student received instruction provided by a reading specialist after

school at a separate location. In addition, although the district objects to both the substance and delivery of compensatory educational services ordered by the IHO, there is little evidence in the hearing record that the district attempted to alternatively assert any arguments or provide evidentiary support on the issue of what, if any, compensatory remedy would be appropriate if it were found to have denied the student a FAPE (see, e.g., Application of a Student with a Disability, Appeal No. 16-050).

Moreover, with respect to the district's LRE arguments, it would be improper for the district's CSE to consider compensatory education services when developing future IEPs for the student, as they are awarded to remedy a past violation, rather than to offer the student a FAPE going forward (see Boose v. Dist. of Columbia, 786 F.3d 1054, 1056 [D.C. Cir. 2015] [noting that an IEP is required to "provide some educational benefit going forward," while the purpose of compensatory education is to "undo[] damage done by prior violations"] [internal quotations omitted]). Accordingly, while the compensatory educational services ordered by the IHO must be provided during the school day, and the CSE by necessity will be obligated to take into account the scheduling issues attendant to the award, the CSE continues to be obligated to provide a FAPE in the LRE to the student independent of the provision of compensatory educational services which serve as a remedy for prior failings and should not be considered as part of the student's program for the purposes of providing a FAPE or evaluating the appropriate LRE. As a result, the IHO properly awarded a total of 200 hours of five hours per week of 1:1 sessions of Orton-Gillingham for a total of 200 hours as compensatory educational services to make up for the district's failure to provide appropriate reading instruction during the 2018-19 and 2019-20 school years to address the student's special education needs.

B. IEE

The district argues that the IHO erred in ordering the district to fully reimburse the parents for the costs of the January 2019 reading evaluation (\$1600.00). According to the district, the evidence in the hearing record reflected that the district—pursuant to its policy—limited the amount it could spend on certain evaluations, and the parents, who were aware of the district's policy, arranged for an evaluation that far exceeded the district's cap for that evaluation.

When a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). Upon request, the district is required to provide the parents with information regarding where IEEs may be obtained, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the district's list of independent evaluators (34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii], [vi]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable

charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

In a March 21, 2019 e-mail to the parent, the district's executive director for pupil personnel services noted that the district received the parent's request for an IEE on November 5, 2018, that the district responded by letter on November 5, 2018 authorizing the IEE and including cost parameters, that the district provided the parent with the name of an evaluator "who works within the District parameters" on November 21, 2018, that on December 21, 2018 the district informed the parent it would fund \$450 towards the cost of the IEE, that the parent selected a different evaluator and requested reimbursement, and that the district denied reimbursement because it was in excess of the district's cost parameters and the parents did not demonstrate a substantial need for the evaluation (Dist. Ex. 13). There is no other evidence in the hearing record regarding the district's criteria for IEEs. Accordingly, while the district's position with respect to reimbursement of the cost of the January 2019 IEE may have been a permissible determination, without a copy of the information provided to the parent to justify that position there is insufficient information in the hearing record to overturn the IHO's award of reimbursement.

VIII. Conclusion

In summary, the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years. As for relief, the evidence in the hearing record also supports the IHO's award of five hours per week of 1:1 sessions of Orton-Gillingham instruction by a reading specialist trained in Orton-Gillingham, for a total of 200 hours and full reimbursement to the parents for the costs of the January 2019 reading evaluation (\$1600.00). Accordingly, there is no basis in the hearing record to disturb the IHO's decision.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
June 10, 2020**

**CAROL H. HAUGE
STATE REVIEW OFFICER**