



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 20-100

### **Application of the BOARD OF EDUCATION OF THE BETHPAGE 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:**

Jaspan Schlesinger, LLP, attorneys for petitioner, by Carol A. Melnick, Esq.

Law Offices of Douglas A. Spencer, PLLC, attorneys for respondents, by Douglas A. Spencer, Esq.

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to partially reimburse the parents for the costs of the student's tuition at the Gersh Academy (Gersh) for the 2016-17 and 2017-18 school years. The parents cross-appeal from the IHO's determination which denied their request to be fully reimbursed for the costs of the student's tuition at Gersh for both school years. The appeal must be sustained. The cross-appeal must be dismissed.

#### **II. Overview—Administrative Procedures**

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

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

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

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

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

The student in this case attended a district public school from preschool—first as a preschool student with a disability—through 11th grade in January 2016 (2015-16 school year) (see Dist. Exs. 1 at p. 1; 2 at pp. 5-6; 59 at p. 2; see also Tr. pp. 32-34). In kindergarten and first grade—after his eligibility for special education as a student with multiple disabilities was continued—the student attended a self-contained special class and received occupational therapy (OT) and speech-language therapy (see Dist. Ex. 1 at p. 1). In second grade, the student was

diagnosed as having an attention deficit hyperactivity disorder (ADHD) and a pervasive developmental disorder (PDD); he attended an integrated class and continued to receive OT and speech-language therapy, with the additional support of a weekly social skills group (id.). The student continued to attend an integrated class in third grade, with related services of OT and speech-language therapy (addressing his "eye contact, pragmatics, and other areas of weakness") (id. at pp. 1-2). For fourth and fifth grade, the student was placed in the integrated class and received OT and speech-language therapy (id. at p. 2).

Upon transitioning to a district middle school for sixth grade, the student began the school year by attending a self-contained special class for all of his academic courses, and received additional services through a support skills class and biweekly speech-language therapy services (see Dist. Ex. 1 at p. 2). In February, the student transitioned to an integrated class for social studies, but remained in a self-contained special class for "all other subjects" (id.). During sixth grade, the student also received reading support on "alternating days" (id.). For seventh grade, the student received similar special education and related services, and "weekly counseling/social skills were added to his IEP" (id.). In eighth grade, the student attended an integrated class for science, English, and social studies, but remained in a self-contained special class for mathematics; in addition, the student received related services consisting of "[c]ounseling/social skills" and speech-language therapy (id.).

According to the evidence in the hearing record, "[s]ocial and behavioral concerns were noted" at the student's annual review held for his transition from eighth grade to ninth grade (Dist. Ex. 1 at p. 2). To assist in his transition to a district high school for ninth grade (2013-14 school year), the student "was placed" in a self-contained special class for social studies, mathematics, and English, but remained in an integrated class for science (id.; see Dist. Ex. 2 at p. 1). The student also received biweekly individual counseling, "in addition to the weekly counseling/social [s]kills," as well as speech-language therapy services and a support skills class (Dist. Ex. 1 at p. 2; see Dist. Ex. 2 at p. 1). The evidence in the hearing record reflects that in December 2013, the student transitioned into a "GOAL 10 Science class to reflect a fully [s]elf-[c]ontained schedule" for his academic courses, but he continued to attend a general education setting for his art course (Dist. Ex. 1 at p. 2; see Dist. Ex. 2 at p. 1; see also Tr. p. 33).<sup>1</sup> At that time, the district recommended a functional behavioral assessment (FBA) and a behavioral intervention plan (BIP)

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<sup>1</sup> "GOAL" refers to "Goal Oriented Academic Learning" classes at the district (IHO Ex. II at p. 2). At the impartial hearing, the assistant superintendent of pupil personnel services (assistant superintendent) explained that the GOAL program at the district consisted of classes with a 15:1 student-to-teacher ratio, which were taught by "dual-certified Special Education teachers" (Tr. pp. 21, 24; see Tr. pp. 29-30). For example, an "[E]nglish goal class" would be taught by a teacher with a "certification in Special Education and [E]nglish" (Tr. p. 24). In addition to the teacher, GOAL classes were also staffed with "one teacher assistant," who was a "certified teacher" (Tr. pp. 649-50). All of the students in the GOAL program worked "towards a Regents Diploma" (Tr. p. 25). The assistant superintendent testified that, in ninth grade, although the student's GOAL classes could include up to 15 students, his actual GOAL classes were "much less" populated—with approximately eight to nine total students per class—which offered the "teacher ample opportunity to modify the work based on the student's IEP" (Tr. pp. 29-30). More specifically, the assistant superintendent explained that "all the work in these [GOAL] classes [were] modified based on student IEPs, so the work [was] individualized, the class assignments and their homework assignments [were] modified based on the IEP," and the GOAL classes used "multisensory approaches throughout the classrooms" (Tr. pp. 30-33).

to "address [the student's] rigidity and inflexibility" (Dist. Ex. 1 at p. 2; see Dist. Ex. 8 at p. 1 [reflecting the BIP's "Original Date of Plan" as "March 21, 2014"]).<sup>2</sup> During ninth grade, the student also received testing accommodations, including: "flexible setting, directions simplified and/or explained, extended time (1.5 for lessons, quizzes and exams), extended time (2.0 for tests, quizzes and state assessments in Integrated classes) and [u]se of [b]reak [p]eriods (during tests and state assessments)" (Dist. Ex. 1 at p. 2).<sup>3</sup>

In 10th grade (2014-15 school year), the student attended GOAL self-contained classes for English, life science, mathematics, and social studies (Dist. Ex. 2 at p. 3; see IHO Ex. II at p. 4). In addition, the student received a support skills class (see Dist. Ex. 2 at p. 3). The student also attended art classes—animation and sculpture—in general education settings (see Dist. Ex. 2 at p. 3; see also Tr. p. 33; IHO Ex. II at p. 4).<sup>4</sup>

On July 21, 2015, a CSE convened for a meeting per the parents' request and developed an IEP for the 2015-16 school year (11th grade) (see Dist. Exs. 3 at p. 1; 4 at p. 1). Finding that the student remained eligible for special education as a student with multiple disabilities, the July 2015 CSE recommended a 15:1 special class placement for instruction in English, mathematics, social studies, and science; daily resource room; counseling/social skills services (one 30-minute session biweekly); and counseling services (one 30-minute session biweekly) (see Dist. Ex. 4 at pp. 1, 7). The July 2015 CSE also recommended the following as supplementary aids and services, program modifications, and accommodations: reteaching of materials; refocusing and redirection; a copy of class notes; additional time to complete assignments; and the services of a full-time, individual aide (id. at pp. 7-8).<sup>5</sup> The July 2015 CSE recommended behavioral intervention consultation

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<sup>2</sup> In December 2013, a district school psychologist conducted a psychological evaluation of the student as part of his "three-year re-evaluation" (Dist. Ex. 1 at p. 1). The school psychologist administered the following assessments to the student: the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III), the Behavior Assessment System for Children-Second Edition (BASC-2) Adolescent Self-Report, and the "Multi-dimensional Sentence Completion" (id. at pp. 1, 7). The December 2013 psychological evaluation also included a review of teacher reports, a record review, and a social history update (id.).

<sup>3</sup> According to the evidence in the hearing record, in ninth grade the student received grades that ranged overall from 65 to 95 during all four quarters (see Dist. Ex. 2 at pp. 1-2). The student's final grades for ninth grade ranged from 72 (social studies) to 89 (mathematics) in his academic courses (id.). At the impartial hearing, the parents' attorney clarified that there was "no allegation that [the district] artificially inflated any of [the student's] grades" (Tr. p. 532).

<sup>4</sup> The evidence in the hearing record reflects that, for 10th grade, the student received grades over the course of the year that ranged overall from 60 to 100 (see Dist. Ex. 2 at pp. 3-4). The student's final grades for 10th grade ranged from 65 (social studies and mathematics) to 86 (English) in his academic courses (id.). At the conclusion of 10th grade, the student took, but did not pass, the Regents examinations in social studies (Global History) and mathematics (Integrated Algebra) (id. at p. 6). In the student's area of interest—art—he received a final grade of 96 in animation and 91 in sculpture (id.). As noted previously, the parents' attorney clarified at the impartial hearing that there was "no allegation that [the district] artificially inflated any of [the student's] grades" (Tr. p. 532).

<sup>5</sup> At the impartial hearing, the assistant superintendent testified that the IEP provisions calling for the student's aide during the 2015-16 school year were fulfilled by providing a teaching assistant who was a "certified teacher"

services (throughout the school day as needed) as a support for school personnel on behalf of the student (*id.* at p. 8). At that time, the July 2015 CSE indicated in the IEP that the student required "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" (*id.* at p. 5). The July 2015 CSE also indicated in the IEP that the student required a behavioral intervention plan (BIP) (*id.*). The July 2015 IEP included annual goals, measurable postsecondary goals, testing accommodations, and a coordinated set of transition activities (*id.* at pp. 6-7, 9-10).<sup>6</sup>

In or around January 15, 2016, the parents notified the district of their intentions to unilaterally place the student at Gersh on February 1, 2016, at district expense (*see* Dist. Ex. 59 at p. 2).<sup>7, 8</sup> The district responded by convening a CSE meeting on January 28, 2016 (*see* Dist. Exs. 13 at p. 1; 14 at p. 1; 15 at p. 1; 16 at p. 1; 59 at p. 2).<sup>9</sup> At the January 2016 CSE meeting, members reported on the student's progress behaviorally, academically, and socially (*see* Dist. Ex. 15 at p. 1). The student's 1:1 aide reported on his participation in the vocational program at BOCES; in addition, CSE members described what the student worked on in the support skills class, group counseling (social skills), and individual counseling (*id.*). The guidance counselor attending the meeting reported that the student was "in good shape with his credits towards graduation," noting that he currently had "12" credits and would accrue nearly all of the "needed 22 credits for graduation at the end of th[at] year" (*id.*). The January 2016 CSE also discussed the student's Regents examination grades in mathematics and social studies, and indicated that he would take the "English, US History and Living Environment at the end of th[at] year" (*id.*).

At the CSE meeting, the student's father expressed what he characterized as "certain 'constants' at home, regarding parent concerns" (Dist. Ex. 15 at p. 1). He specifically pointed to concerns about the student's "reading and writing ability, the student always asking his parents to read to him, and his vocabulary deficiencies" (*id.*). The student's father also noted that the student had received "private tutoring for reading," evaluative information reflected that the student was "many years behind his peers," and he had received a score of "1" on the "ELA [S]tate exam" (*id.*).

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(Tr. pp. 261, 264).

<sup>6</sup> The student's educational programming for the 2015-16 school year included participation in a computer animation course offered through a Board of Cooperative Educational Services (BOCES) (Tr. pp. 40-41; *see* Dist. Ex. 4 at p. 10). As noted in the July 2015 IEP, the 1:1 aide provided services to the student while at the BOCES program—which comprised approximately three hours in the morning—and when the student returned to the district public school, the aide then provided services to the student during his academic courses (*see* Dist. Exs. 4 at pp. 8, 10; 5 at p. 1; 7).

<sup>7</sup> The hearing record does not include a copy of the parents' January 2016 letter (*see generally* Tr. pp. 1-1684; Parent Exs. A-H; Dist. Exs. 1-62; IHO Exs. I-II).

<sup>8</sup> To assist the student's anticipated transition into Gersh on or about February 1, 2016, the student's father told the student at or around the beginning of January 2016 about the upcoming transfer to Gersh so that the student could begin saying his goodbyes to district staff (*see* Tr. pp. 1186-87).

<sup>9</sup> The student's father attended the January 2016 CSE meeting with his attorney (*see* Dist. Exs. 14 at p. 1; 15 at p. 1). The district's attorney also attended the meeting (*see* Dist. Ex. 14 at p. 1).

In addition, the student's father spoke about "social concerns that date[d] back to [the student's] time in the middle school" and that the student "constantly complain[ed] at home about how the students in his Goal classes treat[ed] him" (id.). According to the student's father, "this [was] because of the placement and classes" the student attended (id.). As a final point, the student's father expressed additional "family concerns," which raised questions regarding "how [the student] ha[d] passed his classes but failed some of the Regents exams" (id.).

The January 2016 CSE then turned to reviewing the student's IEP "in detail" (Dist. Ex. 15 at p. 1). The CSE discussed "[a]ll functioning levels, needs and goals" and noted that the student's "[r]eading and writing levels w[ould] be described in more detail and goals for these areas w[ould] be added" (id.; see Dist. Exs. 14 at pp. 4, 6-7; 16 at p. 1). In addition, CSE members "addressed how the student's skills [were] being strengthened": in resource room, the student received training in his "basic skills"; and in "his Goal English class," the student used the "research based reading Achieve 3000 program" (Dist. Ex. 15 at p. 1).<sup>10</sup> In order to put "more building level reading supports" into place for the student, the January 2016 CSE suggested removing the student from the morning BOCES vocational program (computer animation), and the student's father agreed to that change because—while "important"—he felt that "improving [the student's] reading and writing skills [was] even more important" (id.).

During the January 2016 CSE meeting, the student's father requested an independent educational evaluation (IEE) of the student (see Dist. Ex. 15 at p. 2). The CSE agreed to the request, and noted that the results of the evaluation would "help in updating the student's IEP goals to reflect his current needs" (id.; see Dist. Exs. 16 at p. 1; 58).<sup>11</sup>

As a result of the foregoing, the January 2016 CSE—finding that the student remained eligible for special education as a student with multiple disabilities—recommended a 15:1 special class placement for instruction in social studies, mathematics, science, and English; daily resource room; a daily support skills class; counseling/social skills services (one 30-minute session per week); individual counseling services (one 30-minute session biweekly); speech-language therapy (one 30-minute session per week); and individual parent counseling and training services (one 60-minute session per week delivered at home) (see Dist. Ex. 14 at pp. 1, 7-8). The January 2016 CSE also recommended the following as supplementary aids and services, program modifications, and accommodations: reteaching of materials; refocusing and redirection; a copy of class notes; additional time to complete assignments; and the services of a full-time, individual aide (for academic classes in fourth through ninth periods) (id. at pp. 8-9). The January 2016 CSE recommended behavioral intervention consultation services (throughout the school day as needed)

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<sup>10</sup> At the impartial hearing, the assistant superintendent described the Achieve 3000 reading program as a "research-based data driven program that [was] geared towards each student's individual strengths and weaknesses" (Tr. pp. 46-47). As a "computer-based" program, the Achieve 3000 had "artificial intelligence" that allowed the program to adjust the students work on a "daily basis to their needs" (Tr. p. 47). The assistant superintendent also testified that the district was "aware of the deficits in the reading area," and the Achieve 3000 reading program was a part of the 15:1 GOAL class the student had been attending in the 2015-16 school year (Tr. pp. 46-47).

<sup>11</sup> After the January 2016 CSE agreed to the requested psychological IEE, the student's father advised that he had "already set this evaluation up ([t]hree 2 1/2 hour sessions)" (Dist. Ex. 15 at p. 2).

as a support for school personnel on behalf of the student (*id.* at p. 9). At that time, the January 2016 CSE indicated in the IEP that the student required "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" (*id.* at p. 5). The January 2016 CSE also indicated in the IEP that the student required a BIP (*id.*). The January 2016 IEP included annual goals (study skills, reading, writing, mathematics, and social/emotional and behavioral), measurable postsecondary goals, testing accommodations, and a coordinated set of transition activities (*id.* at pp. 6-7, 9-11).

In summary, the January 2016 CSE reviewed the student's new daily schedule in light of the changes made to his educational program: first period, a support skills class to "focus on reading and writing skills"; second period, a "reading class on alternate days" opposite a music class; third period, "individualized instruction/support in reading"; fourth period, a continuation of the student's daily resource room (as already scheduled); and the remainder of the school day—i.e., fifth through ninth periods—would remain the same as already scheduled (Dist. Ex. 15 at p. 2; *see* Dist. Exs. 14 at pp. 1, 8-9; 16 at p. 1).<sup>12</sup> In addition, the January 2016 CSE recommended speech-language therapy for the student and modified the group counseling services; the CSE also removed the 1:1 aide services during the morning (first three periods), but continued to recommend 1:1 aide services for the rest of the school day (fourth through ninth periods) for support (*see* Dist. Ex. 15 at p. 2; *see also* Dist. Ex. 14 at pp. 1, 8-9).<sup>13</sup>

According to the January 2016 CSE meeting minutes, the student's father and his attorney stepped out of the meeting to discuss the recommendations (*see* Dist. Ex. 15 at p. 2). Upon returning to the meeting, the student's father informed the CSE that "his son was accepted to Gersh 3 months ago" and "they [were] going to stay with the plan, despite being satisfied with this potential change to his IEP and high school schedule" (*id.*). The student's father also noted that if, for some reason, the student returned to the district, he would be "happy to bring him back to this schedule" (*id.*). The student's father also explained that, at Gersh, the student would be starting as a 10th grade student, "despite currently being in 11th grade at the high school" (*id.*).<sup>14</sup>

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<sup>12</sup> The assistant superintendent testified that the January 2016 CSE did not include the reading instruction on the student's IEP because it was a "mainstream program"; she further testified that the reading instruction would be provided to the student from a teacher "certified in Wilson" and that he would continue to use the Achieve 3000 program (Tr. pp. 49-50).

<sup>13</sup> The January 2016 CSE also recommended parent counseling and training services—however, the student's father indicated at the meeting that he was "not ready to commit to it" (Dist. Ex. 15 at p. 2). Nevertheless, the January 2016 IEP included parent counseling and training as a recommendation (*see* Dist. Ex. 14 at pp. 1, 9). The January 2016 CSE discussed a request for an assistive technology evaluation of the student, but declined this request with the agreement of the student's father (*see* Dist. Ex. 15 at p. 2).

<sup>14</sup> At the impartial hearing, the student's father testified that although the changes made to the student's IEP at the January 2016 CSE meeting were "relevant to [the student's] needs" and were "relevant to [his own] concerns," he decided to go forward with his plan for the student to attend Gersh because the district's recommended programming continued to include GOAL classes, it was not a program for students with autism, the district would not give the student an additional year of high school, and the student would no longer have a lunch period allowing him to eat in the cafeteria (Tr. pp. 1179-80; *see* Tr. p. 1277 [reflecting testimony by the student's father agreeing that the January 2016 CSE developed an IEP that specifically addressed his concerns, with no objections by him or his attorney]). The January 2016 CSE meeting minutes do not reflect that the student's father raised

On or about February 1, 2016, the student began attending Gersh (see Tr. p. 1184).<sup>15</sup> Over the course of four dates in February and March 2016, the student underwent the psychological evaluation (psychological IEE) requested by the student's father at the January 2016 CSE meeting (see Dist. Ex. 19 at p. 1). The student's father testified that the psychological IEE report was not generated until May 2016 (see Tr. pp. 1200-01). Briefly, the evaluator who conducted the psychological IEE diagnosed the student as having an autism spectrum disorder (without accompanying intellectual impairment, "Severity Level 2"), a learning disorder (impairments in reading, written expression, and mathematics), and an unspecified anxiety disorder (Dist. Ex. 19 at p. 16). According to the evaluator, the student's "diagnosis of [autism spectrum disorder] and his unique profile of strengths and weaknesses" required an "educational setting and program that c[ould] simultaneously support his academic and adaptive development while meeting his social-emotional and behavioral needs" (*id.*). As such, the evaluator recommended the following, in part, to address the student's needs: consider changing the student's eligibility category to autism (as a more accurate reflection of the student's "diagnosis" and his "social-emotional, communication, executive functioning, and educational needs"), "intensive social-emotional and behavioral supports to function safely and appropriately within the educational setting," and "intensive learning supports to acquire and demonstrate mastery of grade-level academic material" (*id.*). In addition, the evaluator recommended the following, in part, in light of the "substantial impact on [the student's] social, emotional, and behavioral needs on his learning:" a "[h]ighly structured school/classroom setting with very low student to teacher ratio that allow[ed] for 1:1 instruction and support as needed throughout the day," "[r]educed/minimal transitions throughout the school day," "[m]odified and individualized academic curriculum that allow[ed] [the student] to acquire skills at his own pace," "[c]urriculum embedded with instruction in life skills," "[c]lassroom or consultant staff members who [were] highly trained in working with students on the Autism Spectrum, such as Board Certified Behavior Analysts or those trained in the principles of [a]ppplied [b]ehavior [a]nalysis [ABA]," a "school/classroom environment designed to minimize sensory and environmental distractors that infere[d] with [the student's] learning," and "[e]mbedded supports throughout the day for managing [the student's] social skills impairments that impact[ed] his academic and behavioral functioning" (*id.* at pp. 16-17). The evaluator further recommended related services consisting of group counseling ("difficulties relating and interacting appropriately with peers"), individual counseling ("to support [the student's] development of improved cognitive/behavioral flexibility as well as adaptive expression and coping of challenging emotions or situations"), speech-language therapy (to address "substantial deficits in pragmatic language and awareness" and in organizing and communicating his thoughts), and parent counseling and training (assist the parents with "more effectively managing his behavior and setting up his home

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the lunch or extra year concerns at the January 2016 CSE meeting or at any time prior to his testimony at the impartial hearing (see generally Tr. pp. 1-1684; Parent Exs. A-G; Dist. Exs. 1-62; IHO Exs. I-II). Nevertheless, the student's father also testified that he remained open-minded at the January 2016 CSE meeting and to the district's recommendations (see Tr. pp. 1190-91). At the impartial hearing, the student's father also testified that, while not mentioned at the January 2016 CSE meeting, he also wanted the student to receive a Regents diploma and he did not think the student had enough time left at the district within which to achieve this outcome (see Tr. p. 1193).

<sup>15</sup> At the impartial hearing, the student's father testified that he first took the student to visit Gersh in September or October 2015 and that Gersh accepted the student within that same timeframe (see Tr. p. 1167).

environment to optimize his learning across settings") (id. at p. 17). With regard to "[t]ransition [p]lanning," the evaluator recommended that the student "remain within a supportive educational setting until the age of 21" to receive "ongoing opportunities to develop his skills" (id.). Thereafter, the evaluator included more specific recommendations pertaining to social skills training ("at school and/or in outpatient settings"), psychotherapy, psychiatric recommendations (medication management), "[e]ntitlement services," additional transition planning (i.e., supplemental needs trust), family supports, and reevaluation recommendations (id. at pp. 17-19).

On June 29 and July 28, 2016, CSEs convened to conduct the student's annual review and to develop an IEP for the 2016-17 school year (12th grade) (see Dist. Exs. 15 at pp. 2-4; 20-23; 25-27).<sup>16</sup> According to the June 2016 CSE meeting minutes, the student's father reported that the student was "doing excellent," and provided the CSE with "copies of his progress report from Gersh" (Dist. Ex. 15 at p. 2; see Dist. Exs. 18 at pp. 1-3; 21 at p. 2; 22 at p. 2).<sup>17</sup> At the June 2016 CSE meeting, a district school psychologist reviewed and discussed the psychological IEE report generated as a result of the evaluation of the student that took place in February and March 2016 (see Dist. Ex. 15 at p. 2; see generally Dist. Exs. 19; 22). As a result, the June 2016 CSE agreed to change the student's eligibility category from multiple disabilities to autism (see Tr. pp. 79-82; Dist. Exs. 15 at p. 2; 21 at p. 1; 22 at p. 1).<sup>18</sup> After discussing the student's progress reports, the June 2016 CSE agreed to adjourn and schedule a follow-up meeting to continue to develop the student's annual goals with input from the Gersh school staff (see Dist. Ex. 15 at pp. 2-3).

On July 28, 2016, a CSE reconvened (see Dist. Exs. 15 at p. 3; 26 at p. 1). At the meeting, Gersh staff—who participated via teleconference—reported on the student's progress; the CSE reviewed and discussed the student's "current functioning achievements"; the July 2016 CSE updated the student's IEP "[a]s needed"; and with input from Gersh staff, the CSE created approximately 19 annual goals targeting the student's identified needs in the areas of study skills,

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<sup>16</sup> The student's father attended the June and July 2016 CSE meetings with his attorney (see Dist. Exs. 15 at pp. 2-3; 21 at p. 1; 26 at p. 1). The district's attorney also attended both CSE meetings (see Dist. Exs. 21 at p. 1; 26 at p. 1).

<sup>17</sup> The progress reports available to the June 2016 CSE consisted of the student's report card from Gersh and an annual goals progress report, which the district could access through its IEP "Direct" (see Tr. p. 78; Dist. Exs. 15 at pp. 2-3; 18 at pp. 1-4). The annual goals progress report reflected that Gersh worked on the annual goals included in the January 2016 IEP (see Tr. pp. 77-79; compare Dist. Ex. 14 at pp. 6-7, with Dist. Ex. 18 at pp. 2-4). According to the annual goals progress report, the student achieved 10 of the 11 annual goals (see Dist. Ex. 18 at pp. 2-4). While at Gersh, the student achieved overall grades ranging from 75 (Geometry) to 94 (Art Therapy) in the third and fourth quarters (see Dist. Ex. 18 at p. 1). He received final grades for the same period of time at Gersh that ranged from 83 (Global II) to 90 (Social Thinking) (id.). According to the student's report card, he passed the Global History Regents examination in June 2016, scoring a 69 (the student's fourth attempt) (id.; see Dist. Ex. 15 at p. 2). The June 2016 CSE meeting minutes further reflected that the student "obtained a 57 on Algebra and Earth Science, which he w[ould] retake in August in the hopes that he w[ould] pass with a 65" (Dist. Ex. 15 at p. 2; see Dist. Exs. 2 at p. 6; 18 at p. 1; Parent Ex. C). The student's father also reported that the student would attend the "Gap camp this summer" at Gersh, and would begin 11th grade in September (Dist. Ex. 15 at p. 2).

<sup>18</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

reading, writing, mathematics, speech-language, and social/emotional and behavioral (Tr. pp. 87-93, 95-106, 110-14; Dist. Ex. 15 at pp. 3-4; see generally Dist. Ex. 24; compare Dist. Ex. 26 at pp. 4-9, with Dist. Ex. 21 at pp. 4-7, and Dist. Ex. 14 at pp. 4-7).<sup>19</sup>

"After reviewing all information including formal and informal reports," the July 2016 CSE—finding that the student remained eligible for special education as a student with autism—recommended a 15:1 special class placement for instruction in social studies, mathematics, English, and science; daily resource room; a daily support skills class; counseling/social skills services (one 30-minute session per week); individual counseling services (two 30-minute sessions per week); speech-language therapy (one 30-minute session per week); and individual parent counseling and training services (one 60-minute session per month delivered at home) (see Dist. Exs. 15 at p. 4; 26 at pp. 1, 9-10). The July 2016 CSE also recommended the following as supplementary aids and services, program modifications, and accommodations: reteaching of materials; refocusing and redirection; a copy of class notes; additional time to complete assignments; and the services of a full-time, individual aide (for academic classes in mathematics, English, and social studies) (id. at pp. 10-11). The July 2016 CSE recommended behavioral intervention consultation services (throughout the school day as needed) as a support for school personnel on behalf of the student, and indicated that the student required a BIP (id. at pp. 6, 10). The July 2016 IEP also included measurable postsecondary goals, testing accommodations, and a coordinated set of transition activities (id. at pp. 7, 12-13).<sup>20</sup>

At the conclusion of the July 2016 CSE meeting, the student's father "advised that he was rejecting the recommendation to have [the] student attend [the district] [h]igh [s]chool" and that the student would remain at Gersh (Dist. Ex. 15 at p. 4).<sup>21, 22</sup>

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<sup>19</sup> As reported in the meeting minutes, the student did not receive speech-language therapy services at Gersh (see Dist. Ex. 15 at p. 3). The student's father noted that the student would retake the Geometry Regents examination in August (id. at p. 4).

<sup>20</sup> The July 2016 CSE meeting minutes reflected that the CSE discussed whether the student required a 12-month school year program, and the CSE provided the student's father with a "Level I [V]ocational Assessment," which the parent agreed to complete and return to the district to later update the student's measurable postsecondary goals (Dist. Ex. 15 at p. 4). The CSE also recommended a speech-language evaluation to be completed by district staff (id.).

<sup>21</sup> Consistent with the recommendation made at the July 2016 CSE meeting, the district conducted a speech-language evaluation of the student on September 13, 2016 (see Dist. Ex. 28 at p. 1). On September 28, 2016, a CSE convened to review the speech-language evaluation (see Dist. Exs. 15 at p. 4; 30 at pp. 1-3; 31 at p. 1; see generally Dist. Ex. 28). As a result, the September 2016 CSE agreed to continue the recommendation for one 30-minute session per week of speech-language therapy services (see Dist. Ex. 15 at p. 4; compare Dist. Ex. 20 at pp. 1, with Dist. Ex. 26 at pp. 1, 10). The student's father attended the September 2016 CSE meeting (see Dist. Exs. 15 at p. 4; 30 at p. 1).

<sup>22</sup> With the parents' consent, the district modified the student's IEP without a meeting in January 2017 to adjust the date of the student's mandatory three-year reevaluation (see generally Dist. Exs. 33-35). Thereafter, in a letter dated April 3, 2017, the district sought the parents' consent to further modify the student's IEP without a meeting to remove the home-based parent counseling and training services, given the parents' repeated failure to respond

A CSE next convened on June 15, 2017 to conduct the student's annual review and to develop an IEP for the 2017-18 school year (12th grade/fifth year of high school) (see Dist. Exs. 15 at pp. 4-5; 37 at p. 1; 44 at p. 1; see also Parent Ex. E at p. 1).<sup>23</sup> Finding that the student remained eligible for special education as a student with autism—the June 2017 CSE recommended a 15:1 special class placement for instruction in social studies, mathematics, English, and science; daily resource room; a daily support skills class; counseling/social skills services (one 30-minute session per week); individual counseling services (two 30-minute sessions per week); speech-language therapy (one 30-minute session per week); and individual parent counseling and training services (one 60-minute session per month delivered at home) (see Dist. Exs. 15 at p. 5; 44 at pp. 1, 8-9). The June 2017 CSE also recommended the following as supplementary aids and services, program modifications, and accommodations: reteaching of materials; refocusing and redirection; a copy of class notes; additional time to complete assignments; the services of a full-time, individual aide (for academic classes in mathematics, English, and social studies); use of a graphic organizer; use of a calculator; and preteaching materials (*id.* at pp. 9-10). The June 2017 CSE continued to recommend behavioral intervention consultation services (throughout the school day as needed) as a support for school personnel on behalf of the student, and indicated that the student required a BIP (*id.* at pp. 5-6, 10). The June 2017 IEP also included approximately 15 annual goals (study skills, reading, writing, mathematics, speech-language, and social/emotional and behavioral), measurable postsecondary goals, testing accommodations, and a coordinated set of transition activities (*id.* at pp. 6-8, 11-12).<sup>24</sup>

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to "numerous attempts" to schedule the services (Dist. Ex. 36 at p. 1).

<sup>23</sup> The June 2017 CSE included Gersh staff, as well as the student's father, his attorney, and the district's attorney (see Dist. Ex. 44 at p. 1). At the meeting, Gersh staff read through their respective progress reports—i.e., speech-language therapy, academics, and social/emotional—and the CSE discussed, in particular, the student's needs in reading, writing, and mathematics (see Parent Ex. E at pp. 3-4; Dist. Exs. 15 at pp. 4-5; 44 at pp. 2, 3-5; see generally Dist. Exs. 38; 41-42). In addition, the June 2017 CSE discussed the student's transition needs (see Parent Ex. E at pp. 4-5; Dist. Exs. 15 at p. 5; 44 at pp. 6, 11-12). The June 2017 CSE had a "Transition Report" dated June 12, 2017 available, completed by Gersh's transition coordinator, which reflected "June 2020" as the date of the student's "Expected date of graduation or aging out" (Dist. Ex. 43 at pp 1-2). According to the June 2017 CSE meeting minutes, the student had a "few more requirements to meet for a local diploma," although Gersh indicated he had presently accrued "22 credits" (Dist. Ex. 15 at p. 5; see Parent Ex. E at p. 4). According to Gersh, the student needed to complete an "ELA, a math, a gym class and [government/economics] to graduate" (Parent Ex. E at p. 4). Gersh also indicated that if the student sought to achieve a Regents diploma, he would require "more Regents exams"—and the meeting minutes reflected that the student's father wanted him "to try for a [R]egents diploma" (Parent Ex. E at pp. 4-5; Dist. Ex. 15 at p. 5). To that end, the CSE noted science requirements, and suggested that the student "retake earth science to prepare to take the [R]egents a second time" (Dist. Ex. 15 at p. 5; see Parent Ex. E at p. 5). The CSE further discussed the possibility of the student "taking an algebra class," and that if he "were looking to attend college, he m[ight] have to take a placement exam that w[ould] focus primarily on algebra" (Dist. Ex. 15 at p. 5). For the 2017-18 school year, the student "would attend classes and go to transition services" during the second part of the school day at Gersh (Parent Ex. E at p. 5; see Dist. Ex. 15 at p. 5). After discussing the student's transition needs, the June 2017 CSE reviewed the student's FBA and BIP ("Action Plan") completed by Gersh staff (see Parent Ex. E at p. 5; see generally Dist. Exs. 39-40). The CSE meeting minutes noted that while Gersh did not feel a BIP was necessary for the student, the CSE disagreed and "concluded that it [was] necessary" (Dist. Exs. 15 at p. 5; 44 at pp. 5-6).

<sup>24</sup> According to the student's Gersh transcript, in June 2017, the student took the English Regents examination and passed with a score of 65; he also took the Regents examination in U.S. History and passed with a score of

After making its recommendations for the 2017-18 school year, Gersh staff and the student's father "disagreed," and the student's father advised that the student would "continue at Gersh" (Dist. Ex. 15 at p. 5).<sup>25</sup>

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

By due process complaint notice dated February 16, 2018, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16, 2016-17, and 2017-18 school years (see Admin. Hr'g Ex. 1 at pp. 2, 6, 9, 14).<sup>26</sup> As relevant to the alleged failure to offer the student a FAPE for the 2016-17 school year, the parents indicated that the CSE convened in June 2016, and then reconvened in July 2016, to develop the student's IEP (id. at p. 6). At that time, Gersh staff attending the CSE meeting noted the student's "significant progress across all academic and social-emotional realms" (id.). According to the parents, the CSE reviewed the psychological IEE report, which included the following "various findings and recommendations:" diagnoses of autism spectrum disorder, learning disorder (impairments in reading, written expression, and mathematics), and anxiety disorder (unspecified); changing the student's eligibility category to autism; "[i]ntensive social-emotional and behavioral support"; "[i]ntensive learning supports"; "[h]ighly structured school/classroom setting with very low student to teacher ratio that allow[ed] for 1:1 instruction and support as needed throughout the day"; "[r]educed/minimal transitions throughout the day"; "[m]odified and individualized academic curriculum"; "[c]urriculum embedded with life skills"; "[c]lassroom staff or consultant who [was] highly trained in working with students with Autism"; "[s]chool/classroom environment designed to minimize sensory and environmental distractors"; "[e]mbedded supports throughout the day to manage social skills impairments"; and related services consisting of group and individual counseling, speech-language therapy, parent counseling and training, transition planning, and social skills training (id. at pp. 7-8). The parents alleged that, notwithstanding the findings and recommendations contained within the psychological IEE report, the CSE "continued to recommend" a 15:1 special class placement, resource room, a skills class, and related services consisting of counseling and speech-language therapy (id. at p. 8). The parents further alleged that the CSE ignored the "vast majority" of the recommendations in the psychological IEE report, and "in particular those related to [the student's] academic placement and needed supports, accommodations and modifications" (id.).

As noted in the due process complaint notice, the parents "disagreed with the IEP developed" for the 2016-17 school year as "not otherwise calculated to provide [the student] with

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68 (see Parent Ex. C). At the impartial hearing, the student's father explained that the student actually passed the English Regents examination later in August 2017, with a score of 65, after failing his first attempt at the English Regents examination in June 2017 (see Tr. pp. 1248-49, 1335).

<sup>25</sup> At the impartial hearing, the student's father testified on cross-examination that he agreed with all of the information in the June 2017 IEP, except for the "placement" at the district and the student's inability to have "lunch in the cafeteria" (Tr. p. 1323).

<sup>26</sup> For reasons unexplained, the due process complaint notice was not entered into the hearing record as evidence at the impartial hearing nor sent to the Office of State Review as part of the administrative hearing record on appeal. As a result, this office requested the document from the district. For ease of reference, citations to the due process complaint notice will be referenced as "Admin. Hr'g Ex. 1."

a [FAPE]" (Admin. Hr'g Ex. 1 at p. 8). Specifically, the parents asserted that the CSE "failed to recommend an educational placement commensurate with [the evaluator's] recommendations" in the psychological IEE report and as "outlined herein" (*id.*). In addition, the parents contended that the CSE failed to recommend speech-language therapy, counseling, social skills training, OT, and physical therapy (PT) "at a level, frequency, and duration commensurate with [the student's] deficits and needs" (*id.*). Next, the parents alleged that the CSE failed to recommend "specialized reading instruction, specialized writing instruction, specialized mathematics instruction, assistive technology, and [applied behavioral analysis (ABA)] and/or other behavioral supports commensurate with [the student's] deficits and needs" (*id.* at p. 9). In addition, the parents alleged that the CSE failed to "identify, consider and implement appropriate postsecondary needs, goals and transition services" (*id.*). Overall, the parents contended that the CSE failed to provide "appropriate academic, social, and emotional support" through an "appropriate academic placement, necessary related services, as well as needed supplementary aids and services, accommodations and modifications," to enable the student to make meaningful progress (*id.*). As a result, the parents alleged that the district failed to offer the student a FAPE for the 2016-17 school year (*id.*). The parents additionally noted that, after the CSE meeting and recommendations, they "advised of their disagreement with the IEP as well as their intent to continue [the student's] placement at Gersh Academy" for the 2016-17 school year (*id.*).

Turning to the 2017-18 school year, the parents indicated that a CSE convened in June 2017 to develop the student's IEP (*see* Admin. Hr'g Ex. 1 at p. 9). Similar to the previous school year, the Gersh staff noted the student's "significant progress across all academic and social-emotional realms" during the 2016-17 school year; the parents further noted that the CSE "updated accordingly" the student's "areas of need and measurable annual goals" (*id.* at p. 10). The parents asserted that the CSE "continued to, as it had in the past, recommend" a 15:1 special class placement, resource room, a skills class, and related services consisting of counseling and speech-language therapy, and similarly ignored the "vast majority of [the evaluator's] recommendations" in the psychological IEE report (*id.*). According to the parents, they "disagreed with the IEP" for the 2017-18 school year "as not otherwise calculated to provide [the student] with a [FAPE]" (*id.*). More specifically, the parents alleged that the CSE failed to recommend the following: an "educational placement commensurate with [the evaluator's] recommendations"; speech-language therapy, counseling, social skills training, OT, PT; "specialized" reading, writing, and mathematics instruction; "assistive technology, and ABA and/or other behavioral support commensurate with [the student's] deficits and needs" (*id.*). The parents also alleged that the CSE failed to "identify, consider and implement appropriate postsecondary needs, goals and transition services" (*id.*). In addition, the parents asserted that the CSE failed to provide "appropriate academic, social, and emotional support" through an "appropriate academic placement, necessary related services, as well as needed supplementary aids and services, accommodations and modifications," to enable the student to make meaningful progress—and thus, the district failed to offer the student a FAPE for the 2017-18 school year (*id.* at p. 11). According to the due process complaint notice, the parents, after the CSE meeting and recommendations, "advised" the district of "their disagreement with the IEP as well as their intent to continue [the student's] placement at the Gersh Academy" for the 2017-18 school year (*id.*).

As relief, in part, for the alleged violations, the parents sought an order finding that—for both the 2016-17 and 2017-18 school years—the district failed to offer the student a FAPE, Gersh was an appropriate unilateral placement, and equitable considerations weighed in favor of their

request to be reimbursed for the costs of the student's tuition at Gersh (see Admin. Hr'g Ex. 1 at pp. 11-13).<sup>27</sup>

## **B. Events Post-Dating the Due Process Complaint Notice**

In a meeting notice dated March 6, 2018, the district invited the parents to the student's annual review scheduled for March 14, 2018 at 10:00 a.m. (see Dist. Ex. 56 at p. 1). In a second letter—also dated March 6, 2018—the district invited the parents to attend a resolution session, which was scheduled for March 14, 2018 at 11:00 a.m. (id. at p. 3). Thereafter, in a revised meeting notice dated March 15, 2018, the district invited the parents to attend the student's annual review scheduled for March 26, 2018 at 1:30 p.m. (see Dist. Ex. 60 at p. 1).

When the CSE convened on March 26, 2018 for the student's annual review, Gersh staff inquired as to whether "this [was] an exit CSE or not" (Parent Ex. F at p. 1; see Dist. Exs. 61 at p. 1; 62 at p. 1).<sup>28</sup> While district staff believed the student was, at that time, in 11th grade, the student's father explained that the student was in 12th grade and that it was his "5th year" of high school (Parent Ex. F at p. 1).<sup>29</sup> The student's father also advised the CSE that the student would graduate with a "local diploma" in June 2018 and expected to attend a community college in September 2018 (Dist. Ex. 62 at p. 1). As the CSE meeting continued, Gersh staff reported on the student's progress in academics and speech-language, and the CSE reviewed a copy of the student's transcript (see Parent Ex. F at pp. 1-2). The CSE "confirm[ed] the credits [the student] earned at the district" and concluded that the student "ha[d] the credits for graduation" (id. at p. 1).<sup>30</sup> In light of this information, the CSE adjourned and agreed to hold an exit summary meeting for the student in May 2018 (see Dist. Ex. 62 at p. 1; Parent Ex. F at p. 2). As a final point, the student's father

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<sup>27</sup> In a letter dated March 5, 2018, the district's attorney responded to the parents' due process complaint notice (see Dist. Ex. 59 at p. 1).

<sup>28</sup> While Gersh staff questioned the purpose of the March 2018 CSE meeting, it appears that Gersh prepared several annual review progress reports in January and February 2018, which documented the student's progress—and continued needs—in the areas of speech-language skills, social/emotional skills, academics, and behavior (FBA, BIP/"Action Plan") (see Dist. Exs. 48 at p. 1; 49 at p. 1; 50 at p. 1; 51 at p. 1; 52 at p. 1; 54 at pp. 3, 5). In addition, Gersh prepared two transition reports, dated February 7, 2018; however, one transition report reflected "June 2020" as the student's "Expected date of graduation or aging out"—the same date reported on the transition report prepared by Gersh on June 12, 2017—and the second transition report reflected "June 2018" as the student's "Expected date of graduation or aging out" (compare Dist. Ex. 51 at p. 1, and Dist. Ex. 43 at p. 1, with Dist. Ex. 52 at p. 1). Notably, the FBA and BIP ("Action Plan") prepared by Gersh, dated February 22, 2018, both reflected that the student was in 11th grade at that time (see Dist. Exs. 54 at pp. 1, 3-5). According to the student's father, the student took "senior electives" at Gersh during the 2017-18 school year (Tr. pp. 1242-43).

<sup>29</sup> The student's father, his attorney, and the district's attorney attended the March 2018 CSE meeting (see Dist. Ex. 61 at p. 1).

<sup>30</sup> The hearing record contains two transcripts from Gersh, one titled "Official Transcript Class of 2017" and the other titled "Official Transcript Class of 2018" (compare Dist. Ex. 55, with Parent Ex. C). Both transcripts reflect that the student had accrued 17 credits by the end of the 2015-16 school year and 24 total credits by the end of the 2016-17 school year (see Dist. Ex. 55; Parent Ex. C).

indicated that "he would not be seeking any additional education from the district after June 30, 2018" (Dist. Ex. 62 at pp. 1, 3).

On May 21, 2018, the district completed the student's exit summary report (see Dist. Ex. 57 at p. 1). At the impartial hearing, the student's father testified that the student graduated with a "Regents diploma" issued by Gersh and a "vocational certificate" (i.e. "CDOS") (Tr. pp. 1242-43, 1341).<sup>31</sup>

### **C. Impartial Hearing Officer Decision**

On August 29, 2018, the parties proceeded to an impartial hearing, which concluded on September 11, 2019, after 13 total days of proceedings (see Tr. pp. 1-1684). In a decision dated May 5, 2020, the IHO determined that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years and that Gersh was an appropriate unilateral placement for both school years (see IHO Decision at pp. 29-33, 35-62, 64).<sup>32</sup> As relief, the IHO found that the parents were entitled to an award of reimbursement for the costs of the student's tuition at Gersh for both school years, but further concluded that equitable considerations warranted a 25 percent reduction of the amount of tuition reimbursed for each school year (*id.* at pp. 62-64).

In analyzing whether the district offered the student a FAPE, the IHO initially noted that the district's "recommended placement directly addressed [the student's] significant reading difficulties" by providing access to the "scientific-based Achieve-3000 reading program," and scheduling a "'period of individualized reading instruction' and an extra 'Support Skills' class to focus on reading"—as well as through the development of annual goals in reading (IHO Decision at pp. 35-36). With respect to the psychological IEE requested by the student's father, the IHO found that, upon completion, the "CSE considered all of [the evaluator's] findings and recommendations in developing [the student's] IEPs throughout the 2016-2017 and 2017-2018 school years" (*id.* at p. 36). According to the IHO, the district was already aware of "many" of the evaluator's findings, including that the student "had autism, cognitive, functional, social, and attentional difficulties"—but disagreed with other findings that were "opposite of the [d]istrict's records" (*id.*). The IHO noted, for example, that aspects of the psychological IEE report "portrayed [the student] as significantly aggressive," and in contrast, the district maintained that the student "had never been significantly defiant or aggressive" while attending district schools and that he

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<sup>31</sup> "CDOS" refers to the Career Development and Occupational Studies commencement credential (see 8 NYCRR 100.5[d][11]). At the impartial hearing, the student's father also testified that the student graduated from Gersh in June 2018 because he had "met all of his requirements" and they "saw no need for him to continue on for any other reason" (Tr. pp. 1341-42). The student's transcript submitted into evidence by the parents indicated that, in June 2018, the student failed the "Algebra" and "Earth Science" Regents examinations (Parent Ex. C; see Tr. pp. 827-29).

<sup>32</sup> Before determining whether the district offered the student a FAPE, the IHO addressed the district's argument that the statute of limitations barred the parents' claims "with respect to any period of time prior to February 20, 2016" (see IHO Decision at pp. 33-34). The IHO agreed with the district's argument, and concluded that "more than two years ha[d] since passed" from both the July 2015 IEP and the January 2016 IEP, and therefore, the "statute of limitations for challenging the 2015-2016 school year IEPs ha[d] expired" (*id.*). Consequently, the IHO determined that the parents' due process complaint notice, dated February 20, 2018, was untimely and the parents' claims pertaining to the 2015-16 school year must be dismissed (*id.* at p. 34).

"displayed much better self-advocacy and interpersonal skills than the report indicated" (id.). The IHO also noted that while the evaluator typically reached out to a student's district "for information on the student's functioning," the evaluator in this instance did not do so and thus, the parents served as the informants for writing the report (id.). The IHO found that the district "considered but did not incorporate all of [the evaluator's] recommendations into [the student's] IEPs as it disagreed with certain findings" (id.).

Next, the IHO examined the district's contention that its recommended program was the least restrictive environment (LRE) "that suited his educational needs," which—according to the IHO—"required certain recommendations from the [psychological IEE] report to be implemented in less severe and nonrestrictive ways" (IHO Decision at p. 36). The IHO noted that the evaluator recommended a "highly structured classroom setting with a very low student to teacher ratio that allow[ed] for 1:1 instruction and support as needed throughout the day" (id. at pp. 36-37). Testimony by the assistant superintendent indicated that the district's "classroom setting had a low student to teacher ratio, [and the student had] a 1:1 aide to assist him" (id. at p. 37). The evaluator also "suggested that [the student] have minimal transitions throughout the school day" (id.). The IHO, again pointing to the assistant superintendent's testimony, indicated that in light of the student's "issues with rigidity and frustration, the [LRE] for him still included a certain amount of pullout support services as listed in his IEPs," but further noted that the student had not exhibited difficulties with transitions from "one classroom to another" when he had attended at the district (id.). The IHO also indicated that, per the district's position, the student's "social development" benefitted from exposure to nondisabled peers at the district, noting that the student "had friends in [the district] and his frustration issues were less frequent," the student had participated in "certain general education classes," and that "role models were helpful to him" (id.). According to the IHO, the district "maintained that [the student] need[ed] and benefit[ed] from being with typical and non-aggressive/behavioral peers," which was supported by the evaluator, who testified at the impartial hearing that the student could "'definitely' benefit from having typical peer role models at a higher social-emotional level than him because it was 'one of the ways' he 'could potentially learn appropriate behaviors'" (id.).

Finding support for the district's position that the student made progress "academically, behaviorally, and socially," the IHO pointed to testimony by the district school psychologist and the student's English teacher during the 2015-16 school year (IHO Decision at pp. 37-38). In addition, the IHO noted the documentary evidence—namely, the student's report cards—as supporting the district's argument about the student's progress at the district (id. at p. 38).

Next, the IHO recapped the parents' arguments, which primarily focused on the district's failure to present sufficient evidence in order to meet its burden of proof (see IHO Decision at pp. 38-39, 40-41). For example, the IHO noted that, according to the parents, the district failed to present evidence to "establish either [the student's] progress toward achieving his special education goals or the effectiveness of its GOAL Program (i.e. IEP Progress Reports, assessments, data, progress monitoring, baseline or other testing, etc.) other than a report card and the self-serving testimony of the [assistant superintendent] who never formally observed [the student in the classroom, a school psychologist [with limited] interactions" with the student through counseling services and an evaluation in 2013, and testimony from the student's English teacher during the 2015-16 school year "who never issued any formal reports or evaluations of [the student], never conducted any progress monitoring or other baselines testing and never attended any of [the

student's] CSE meetings or issued any reports in connection therewith" (*id.* at pp. 38-39). The parents also argued that the district presented "only a single witness with direct knowledge of [the student's] instruction within the GOAL [p]rogram," and "no evidence to substantiate the efficacy of the unsupported daily reading program added to [the student's] IEP in January 2016" (*id.* at p. 40).

Thereafter, the IHO concluded that the "GOAL program failed to meet the [student's] special education needs and otherwise afford meaningful progress in his areas of deficit and failed to account for [the student's] unique special education needs" (IHO Decision at p. 39). The IHO noted that the evaluator "recommended a program able to render a combination of supports to [the student] throughout the course of the school day, one capable of providing a high level or 'intense' social, emotional and behavioral supports throughout the day, and a low student-teacher ratio" (*id.* at p. 39 [emphasis in original]). The district's recommended GOAL program, according to the IHO—as a "self-contained, [R]egents track program with a [15:1] ratio and the addition of a classroom aide whose duties were of course limited by her title"—"provided no opportunities for 1:1 instruction, embedded social/emotional support throughout the day nor a low student-teacher ratio," and thus, it was "not the program envisioned by [the evaluator], nor was it able to address [the student's] intensive needs as noted herein" (*id.*). In addition, the IHO indicated that the district "also recommended, albeit belatedly, counseling twice per week, and speech[-]language services, albeit absent an evaluation" (*id.*).

As described by the IHO, the student "required a classroom that operated at a very slow pace to manage not only his deficits in working memory and processing speed, but the high frequency of off-task, work-interfering behaviors; not one that simply encouraged [the student] to simply move forward whether he was ready or not and failed to account for his particular deficits" (IHO Decision at p. 39). In addition, the IHO noted that the evaluator recommended "1:1 instruction" and that, even within that setting, the student "still required a lot of behavioral management"; the evaluator also recommended "minimal transitions throughout the day to minimize [the student's] distress triggers, as [the student] had difficulty moving in between tasks and activities" (*id.*). According to the IHO, the district's GOAL program "offered no or minimal opportunities for 1:1 instruction, did not allow [the student] to work at his own pace, did not account for or address the frequency of off-task behaviors, and did not minimize transitions" (*id.*).

Turning back to the psychological IEE report, the IHO noted the evaluator's additional recommendations for a "modified and individualized curriculum to meet [the student's] learning style and pace and to address his deficits in working memory and processing speed; a curriculum embedded with life skills, a staff trained to work with students with autism spectrum disorder, and a learning environment that minimized sensory and environmental distractors" (IHO Decision at pp. 39-40). As further noted by the IHO, the evaluator recommended "collecting data" on the student's "sensory aversions" (i.e., taste, smell and touch response), as well as providing "services and skills-building" to address the student's communication and adaptive skills (*id.* at p. 40).

With respect to the parents' argument that the district failed to present evidence to "establish that the bullying and/or harassment that [the student] experience while in the GOAL program was addressed," the IHO noted that the district's "failure to address not only the occurrences complained of but the ramifications on [the student's] social and emotional functioning, which, consequently, were well known, c[ould] be viewed as no less than a critical error serving only to

deny [the student] a FAPE" (IHO Decision at p. 41). The IHO further noted that the student was a "victim of bullying, the [d]istrict was on notice of the bullying, the district was indifferent as staff did little to correct the situation and lastly, whatever steps taken by the district were insufficient" (id.). As a final point, the IHO indicated that the "bullying substantially restricted [the student's] educational opportunities because he either missed classroom instruction and/or was not motivated or able to concentrate because of being bullied" (id.).

Next, the IHO found that the "CSE failed to develop adequate, measurable annual goals" for the student, citing to the January 2016 IEP "by way of example" (IHO Decision at p. 41, citing Dist. Ex. 14).<sup>33</sup>

In summary, the IHO concluded that, consistent with the parents' contentions, the district's "persistent recommendation of the GOAL [p]rogram" failed to provide the student with "appropriate academic, social, and emotional support" (IHO Decision at p. 41). The IHO further noted that the district failed to offer an "appropriate academic placement, necessary related services, as well as needed supplementary aids and services, accommodations and modifications, as set forth in the evaluation and report of [the evaluator]" (id.). According to the IHO, "[a]bsent these supports, [the student] was unable to and would not have been ab[le] to make meaningful progress in his specific areas of need" (id.). As a result, the IHO found that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years (id.).

Having determined that the district failed to offer the student a FAPE, the IHO examined the parties' arguments related to whether Gersh was an appropriate unilateral placement for the student (see IHO Decision at pp. 41-49). The district argued that, for several reasons, Gersh was not appropriate (id. at pp. 41-47). For example, the district asserted that Gersh teachers were not certified in either special education or content areas, Gersh "staff's insufficient experience and/or qualifications, contributed to GERSH's inability to provide [the student] with an appropriate educational experience as it did not require that its teachers and or administrators have any prior educational experience or teaching or New York State certifications" (id. at pp. 41-42 [emphasis in original]; see IHO Decision at p. 47). The district also asserted that Gersh failed to use "any specialized strategies to address [the student's] unique needs" and that Gersh's "progress reports indicate[d] bizarre leaps of progress that conflict[ed] with many of the difficulties that [the student] still struggled with at the time he had his exit summary" (id. at pp. 42-43; see IHO Decision at pp. 45-47). In addition, the district argued that Gersh failed to address the student's social/emotional goals, postsecondary goals, and speech-language needs (id. at pp. 43-44). According to the district, Gersh was not the student's LRE, as he was "surrounded" by students on the autism spectrum and had no opportunities to interact with nondisabled peers, and attended classes with students who demonstrated disruptive, and at times, aggressive behaviors—which, at the impartial hearing, the evaluator "agreed that this type of disruptive environment would be 'potentially problematic'" for the student (id. at pp. 44-45). The district further argued that, while at Gersh, the student regressed behaviorally and otherwise failed to make progress (id. at pp. 45-47).

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<sup>33</sup> Notwithstanding the language used, the IHO did not make any specific findings with respect to the appropriateness of the annual goals in IEPs for the 2016-17 or 2017-18 school year (see generally IHO Decision).

As for the parents' arguments, the IHO noted that they argued that Gersh used a "research based approach to instruct children with significant disabilities with Autism Spectrum Disorder," which was "individualized for each student, utilizing a therapeutic, collaborative problem solving model" (IHO Decision at p. 48). According to the IHO, the parents contended that Gersh's model allowed for "on-the-spot interventions and applie[d] a social-thinking curriculum, teaching models of social interaction specific to children with autism" (id.). In addition, the IHO noted that Gersh "readily utilize[d] therapeutic interventions, social thinking, and small class settings of no more than 8 students allowing for individualized, direct instruction" (id.). The IHO further noted that, while at Gersh, the student attended classes of four to eight students "in a therapeutic environment and [that] included both a special education teacher and teaching assistant" (id.).<sup>34</sup> According to the IHO, Gersh staff "met regularly, discussing [the student's] strengths and weaknesses and how to build tools into his individual program, including individualized instruction in his deficit areas, to work toward his particular goals" (id.). The IHO also noted that Gersh staff "conducted [an FBA], developed a [BIP] and built strategies into his program to address his anxiety, social deficits, speech and language deficits, perspective taking, and expressive language difficulties, amongst others" (id. at p. 49). Moreover, Gersh staff "was trained in the collaborative problem solving approach, the model was implemented throughout the course of the day as situations would arise; [the student's] needs would also be met through counseling and speech/language therapy" (id.). The IHO also noted that the student made progress at Gersh, graduating with "both the NYS CDOS Certificate and a NYS Regents Diploma, passing Regents Exams in Global Studies, U.S. History, and English," and per staff reports, made social/emotional and behavioral progress (id.). In light of the foregoing, the IHO concluded that Gersh was an appropriate unilateral placement for the student (id.).

Turning to the final criterion for an award of tuition reimbursement, the IHO examined the parents' requested relief and equitable considerations (see IHO Decision at pp. 49-64). Within this section of the decision, the IHO initially reflected the parties' contentions with regard to the parents' request for tuition reimbursement (id. at pp. 49-52), "compensatory education and/or tuition reimbursement" (id. at p. 51), and an "updated independent comprehensive psychological evaluation" and an assistive technology evaluation (id. at pp. 51-52). Next, the IHO noted that the parents had requested that the "CSE convene to identify, consider, and implement appropriate postsecondary needs, goals, and transition services" for the student, as well as "recommending related services"—which the district asserted had already been done (id. at p. 52). Overall, the district contended that equitable considerations did not weigh in favor of the parents' requests for tuition reimbursement or compensatory educational services (id. at pp. 49-52).

With regard to the district's assertion that the parents did not "fully cooperate" with its efforts to provide the student with a FAPE, the IHO found that, contrary to this assertion, the evidence reflected that the parents participated at each CSE and "provided sufficient notice to the CSE of their disagreement with the CSE's recommendation and their intention to remove" the student from the district "prior to each school year at issue in accordance with the IDEA" (IHO

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<sup>34</sup> A review of the transcript pages cited to by the IHO in support this statement reveals that, contrary to the decision, the witness did not testify that Gersh staffed the student's classrooms with a "special education teacher"; instead, the witness testified that the student's classrooms were staffed with a "teacher, teaching assistant and generally one or two of the students would have one-to-one paraprofessionals" (Tr. pp. 765-66).

Decision at p. 52). The IHO did not find any evidence suggesting that the parents "engaged in any actions or other conduct that [was] unreasonable or in any way prevented" the district from meeting its obligation to offer the student a FAPE (id.).<sup>35</sup>

Next, the IHO—within the same section of the decision dealing with equitable considerations and having already determined that the statute of limitations barred the parents' claims pertaining to the 2015-16 school year—pointed to the July 2015 CSE meeting, which was convened to develop the student's IEP for the 2015-16 school year, noting that a "crucial factor" was whether the CSE "predetermined the decision to re-enroll" the student in the GOAL program with its Achieve 3000 reading program and to "remove paraprofessional support from the student's IEP based on district policy" (IHO Decision at p. 53 [emphasis added]). After reciting legal standards concerning predetermination, the IHO engaged in a lengthy discussion (with no citations to the hearing record) about the 2015-16 school year program and placement recommendations—developed at the July 2015 CSE and then revised at the January 2016 CSE meeting—as well as describing events that occurred during the 2015-16 school year (id. at pp. 53-58).

The IHO then moved forward through the chronology of events following the completion of the psychological IEE, including that the June 2016 CSE reviewed the IEE report, briefly describing recommendations made within the IEE report, and noting finally that the CSE "recommended changes in the absence of [the evaluator, a special education teacher, and a regular education teacher]" (see IHO Decision at pp. 59-60). Next, the IHO turned to the July 2016 CSE meeting and reported information shared by Gersh staff at the meeting about the student's progress (id. at p. 60). According to the IHO, the CSE recommended the "GOAL program" despite the recommendations in the psychological IEE report, the student's "failure to make progress" in the GOAL program "over the preceding 2 years, and despite [the student's] progress at Gersh" (id.).

The IHO then touched on the 2017-18 school year, noting that Gersh staff "again noted significant progress in each area of deficit" and the parents reported on the student's accomplishments at Gersh during the past year (IHO Decision at pp. 60-61). Repeating previous language, the IHO indicated that the CSE recommended the "GOAL program" despite the recommendations in the psychological IEE report, the student's "failure to make progress" in the GOAL program "over the preceding 2 years, and despite [the student's] progress at Gersh" (compare IHO Decision at p. 61, with IHO Decision at p. 60). The IHO then recounted witness testimony describing the student's progress at Gersh during the 2017-18 school year, and the student's achievement of a "NYS CDOS Certificate and a NYS Regents diploma" at the conclusion of that school year (id. at pp. 61-62). As a final point, the IHO noted that he gave "deference to [the evaluator's] recommendations; noting that [the student] failed to make progress in the [district's] GOAL program over the preceding 2 years," the annual goals "presented at the June 2016 CSE meeting were not appropriate because the goals did not state the level of prompting and support expected of the teacher or provider implementing the goal with the student," and the district "'did not adopt or implement recommended IEP goals'" (id. at p. 62).

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<sup>35</sup> It is unclear why the IHO further elaborated on the 2015-16 school year, having already dismissed those claims, unless for the sole purpose of completeness; however, this would not explain why the IHO decided to include the discussion as part of equitable considerations.

The IHO resumed the analysis of equitable considerations by reciting the legal standards and examining the evidence (see IHO Decision at pp. 62-64). Notably, the IHO found that the student's father "stated that he was satisfied with the IEPs that the [d]istrict had developed for [the student], both at the January 28, 2016 meeting and at subsequent meetings through the 2017-2018 school year, and that he would have accepted them if [the student] remained in [the district]" (*id.* at p. 63). The IHO opined that "the parents [were] not clear in expressing their dissatisfaction with the process of developing the student's IEP" and if they had "been more transparent especially with the recommendations, the CSE might have avoided some of the defects later found in the IEP" (*id.*). Ultimately, the IHO found that the parents were responsible for 25 percent of the student's tuition costs at Gersh for both the 2016-17 and 2017-18 school years (*id.* at p. 64).

#### **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 2016-17 and 2017-18 school years. Initially, the district contends that the IHO erred by failing to view the IEPs developed for the 2016-17 and 2017-18 school years as a "snapshot when assessing FAPE," and penalized the district for updating the student's IEPs. The district further argues that the evidence in the hearing record does not support the IHO's conclusions that the GOAL program failed to meet the student's needs, and more specifically, that the GOAL program did not allow the student to work at his own pace, address the frequency of off-task behaviors, and minimize transitions. In addition, the district contends that the IHO erred in finding that the student's IEPs for the 2016-17 and 2017-18 school year failed to provide the student with opportunities for 1:1 instruction, embedded social/emotional support throughout the day, and a low student-to-teacher ratio. The district argues that, contrary to the IHO's finding, the student's specific reading needs were addressed through both direct instruction and the scientific-based reading program, Achieve 3000. The district further contends that the IHO erred in concluding that the student's IEPs were "inconsistent" with the findings and recommendations made by the evaluator within the psychological IEE report. In addition, the district argues that the IHO's conclusion that the district failed to offer the student a FAPE ignored the student's grades and advancement from grade to grade as evidence of his progress, and receiving educational benefits, while attending the district. Thus, contrary to the IHO's decision, the district asserts that the student's IEPs for the 2016-17 and 2017-18 school years were reasonably calculated to enable the student to receive educational benefits and offered the student a FAPE in the LRE, and the IHO's findings must be reversed.

Alternatively, the district contends that even if the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years, the IHO erred in finding Gersh an appropriate unilateral placement and that equitable considerations weighed in favor of awarding partial tuition reimbursement to the parents for both school years.

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's decision finding that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years and that Gersh was an appropriate unilateral placement for the student. As and for a cross-appeal included with their answer, the parents assert that the IHO erred in finding that equitable considerations warranted a 25 percent reduction of the Gersh tuition for the 2016-17 and 2017-18 school years. As relief, the parents seek an order directing the district to fully

reimburse them for 100 percent of the costs of the student's tuition at Gersh for the 2016-17 and 2017-18 school years.

The district, in an answer to the parents' cross-appeal, responds to the allegations and seeks to dismiss the cross-appeal.

## **V. Applicable Standards**

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>36</sup>

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

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<sup>36</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

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—Scope of Impartial Hearing and Review**

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]).

Initially, the parents—with respect to the 2016-17 and 2017-18 school years—asserted claims in the due process complaint notice related to the district's failure to recommend speech-language therapy, counseling, social skills training, OT, and PT commensurate with the student's deficits (see Admin. Hr'g Ex. 1 at ¶¶ 35, 47); the district's failure to recommend specialized writing and mathematics instruction, assistive technology, and ABA and/or other behavior supports commensurate with the student's deficits (id. at ¶¶ 36, 47); and the district's failure to identify, consider, and implement appropriate postsecondary needs, goals, and transition services (id. at ¶¶ 37, 48). The IHO did not address the claims in the decision, and neither party raises these claims on appeal in the request for review, in the parents' cross-appeal, or otherwise argues that the IHO failed to address them or erred by failing to address them (see generally Req. for Rev.; Answer & Cr. App.). Accordingly, these claims are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).

In addition, the parents—as the aggrieved party—do not cross-appeal that portion of the IHO's decision dismissing any and all allegations in the due process complaint notice related to the district's alleged failure to offer the student a FAPE for the 2015-16 school year based on the statute of limitations (see generally Answer & Cr. App.; Admin. Hr'g Ex. 1 at ¶¶ 4-25). As such, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

Finally, with regard to the district's failure to offer the student a FAPE, the IHO found that the district failed to address the "bullying and/or harassment" of the student (IHO Decision at p. 41).<sup>37</sup> The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR

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<sup>37</sup> To be clear, the IHO's "findings" in the decision on this issue, as well as many others, mirrored language copied verbatim from the parents' (and at times, the district's) post-hearing brief (compare IHO Decision at p. 41, with IHO Ex. I at pp. 28-29).

300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

Here, the parents did not raise any claims related to bullying in the due process complaint notice as an issue to be resolved at the impartial hearing (see generally Admin. Hr'g Ex. 1), and although the parents later referred to bullying in their post-hearing brief to the IHO (see, e.g. IHO Ex. I at pp. 3, 6, 9, 11, 28-29), they did not seek the district's agreement to expand the scope of the impartial hearing to include this issue or file an amended due process complaint notice containing this claim (see M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*13 [S.D.N.Y. Dec. 16, 2011] [declining to address new claims first raised in the party's post hearing brief after a lengthy impartial hearing process]).<sup>38</sup> In addition, the issue of bullying was first raised by the parents' attorney during the cross-examination of the district assistant superintendent at the impartial hearing—rather than being raised by the district on direct examination for the purpose of defending against such claim (see Tr. pp. 345-46); thus, it cannot be said that the district opened the door in this proceeding to such issues (see M.H., 685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*9 [S.D.N.Y. Aug. 5, 2013]). There being no such indication that the bullying issue was timely raised by the parents in their complaint or that the district opened the door to the issue of bullying during the impartial hearing, the IHO erred in reaching the issue and finding a denial of a FAPE on the basis that the district failed to address any occurrences regarding the student that may have constituted bullying, or the consequences of bullying with regard to the student's special education needs. The IHO's determination on the issue of bullying must be vacated.<sup>39</sup>

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<sup>38</sup> Notably, the district asserted in its post-hearing brief to the IHO that the parents had not raised the issue of bullying in the due process complaint notice, and instead, raised it for the first time at the impartial hearing (see IHO Ex. II at pp. 7-8).

<sup>39</sup> Even assuming for the sake of argument that the issue of bullying and/or harassment of the student had been properly raised by the parents, the IHO's decision failed to address any of the evidence contradicting his findings that the district "was on notice of the bullying, the district was indifferent as staff did little to correct the situation and lastly, whatever steps taken by the district were insufficient" (IHO Decision at p. 41). When first raised by the parents' attorney during the cross-examination, the assistant superintendent testified that she had not been advised, during discussions with the student's "previous teachers, the building principal from the middle school and the high school, [and] the school psychologist at both the middle school and the high school," about the student having "been the subject of bullying at any point" (Tr. pp. 345-46). Referring to a statement in the psychological IEE report that the student had experienced—and continued to experience—bullying and poor peer interactions, the assistant superintendent testified that she believed the evaluator generated this summary based upon the parents' reporting, as it had not been reported by the district (Tr. pp. 346-37). When the evaluator testified at the impartial hearing, she confirmed that the parents had been the sole informants with respect to the student's experience of bullying specifically reflected in the psychological IEE report (see Tr. pp. 1599-1602; Dist. Ex. 19 at p. 2). When asked if the student had been bullied during ninth grade, the district school psychologist testified that, at times, another student may have made a "comment" to the student that "would upset

## B. CSE Process—Consideration of Evaluative Information

In this case, the crux of the parties' dispute concerns the district's GOAL program, which comprised one of the components of the student's IEP recommendations for both the 2016-17 and 2017-18 school years and which, according to the parents and—as ultimately determined by the IHO—failed to offer the student a program that incorporated the findings and recommendations made by the evaluator in the psychological IEE report (see Admin. Hr'g Ex. 1 at pp. 6-10; IHO Ex. I at pp. 23-26; IHO Decision at pp. 39-41).

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

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him that he didn't like, and then we would address it"—either herself, the school social worker who provided group counseling services (i.e., social skills training) to the student, or the assistant principal (Tr. pp. 456, 458). She further testified that situations were resolved, with the student reporting that "things [were] fine now" (Tr. pp. 458-59). The school psychologist also testified that, based upon her knowledge of bullying and her role as a "dignity act coordinator," she did not characterize what the student reported as "bullying," because, oftentimes, any investigation of the matter revealed that the student had misperceived the comment, and had not, as the student believed, been "done purposely in a hurtful manner" (Tr. pp. 459-61). The school psychologist clarified that, while she had not characterized the student's experiences as bullying, the matter(s) were taken seriously and investigated to "make sure that it wasn't" (Tr. p. 460). In addition, the school psychologist testified that after investigating what the student reported, she did not believe bullying had occurred "as defined by" the Dignity of All Students Act (DASA) regulations (Tr. pp. 461-62). Later, the school psychologist testified similarly with respect to bullying and the student's experience during 11th grade (see Tr. pp. 501-04). Finally, the assistant superintendent—called as a rebuttal witness—testified that the student's father had never reported bullying of the student to her, either directly or indirectly through staff (see Tr. pp. 1658-59). She also testified that the student's father had not raised the issue of bullying at CSE meetings, nor had any of the district school psychologists reported any bullying issues of the student to her (see Tr. p. 1661). The assistant superintendent described the steps taken by the district when bullying was reported (see Tr. pp. 1659-61), and testified that the district had "no DASA complaint" on file pertaining to this student (Tr. p. 1661). The IHO did not provide any rationale explaining why he thought he could permissibly reach this issue, did not provide any references to the evidence that he used to make his findings against the district, and failed to address the evidence that contradicted his findings.

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, 142 Fed. App'x 9 [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). Moreover, 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 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, 325 F. Supp. 2d 141 at 145 [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"]).<sup>40</sup>

In the decision, the IHO noted that the "CSE considered all of [the evaluator's] findings and recommendations in developing [the student's] IEPs throughout the 2016-2017 and 2017-2018 school years" (IHO Decision at p. 36). Based upon the evidence in the hearing record, it is undisputed that the CSEs considered the findings and recommendations in the psychological IEE report, supporting the IHO's finding. For example, with respect to the 2016-17 school year, the assistant superintendent testified that the school psychologist reviewed the psychological IEE report—including all of the findings and recommendations contained therein—at the CSE meeting held in June 2016 (see Tr. pp. 79-83, 360; see generally Dist. Exs. 15; 19; 21-22). At the impartial hearing, the student's father confirmed this statement, testifying that the June 2016 CSE and/or the July 2016 CSE "certainly" reviewed the psychological IEE report (Tr. pp. 1202-10, 1215-18). With respect to the 2017-18 school year, the assistant superintendent testified that, in reference to the evaluations listed within the June 2017 IEP, "all the evaluations [were] always considered when creating the IEP" (Tr. p. 123; see Dist. Ex. 44 at pp. 2-3; see generally Dist. Ex. 15).<sup>41</sup>

However, the IHO also found that the district "considered but did not incorporate all of [the evaluator's] recommendations into [the student's] IEPs as it disagreed with certain findings" (IHO Decision at p. 36). A review of the evidence in the hearing record supports this finding. For example, the assistant superintendent testified that the CSEs did not include all of the recommendations in the student's IEPs, noting specifically that some recommendations could not be provided within the district (see Tr. pp. 374-76). She also testified that the district had a "very

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<sup>40</sup> 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]).

<sup>41</sup> Although the June 2017 IEP did not list the psychological IEE report by name—as reflected in the July 2016 IEP—the IEP nonetheless reported the same testing results from the IEE report as reflected in the July 2016 IEP (compare Dist. Ex. 44 at pp. 2-3, with Dist. Ex. 26 at pp. 2-3).

solid" program and that the district had been addressing the student's needs "on many different levels" (Tr. p. 375). In addition, the assistant superintendent testified about disagreements with certain statements or findings in the psychological IEE report, explaining that the evaluator described the student "as much more disabled than [the district] found [the student] when he attended [school at the district]" (see Tr. pp. 410-17). The assistant superintendent further testified that the CSEs did not adopt all of the recommendations in the psychological IEE report (see Tr. p. 417).

Most notably, however, the evaluator who conducted the psychological IEE testified at the impartial hearing that, "given [her] objective data and clinical impressions, [she] w[ould] be able to speak to the needs of [the student] and outline . . . a package of recommendations that [she] believe[d] would be most appropriately suited to [the student's] needs" (Tr. p. 1642). In addition, the evaluator testified that her recommendations in the psychological IEE report were not the "sole and exclusive means by which [the student's] needs could be met" (Tr. pp. 1642-43).

As noted above, the evidence shows that the CSE met its obligations under the law to consider the psychological IEE report, but in considering an IEE report, CSEs are nevertheless required to use their own judgment in determining whether to adopt the findings and recommendations that may be contained within an IEE report because, as the evaluator essentially admitted, there were often multiple viewpoints regarding the "best" way to educate a student and rarely only one way in which a student's needs can be appropriately addressed (see J.C.S., 2013 WL 3975942, at \*11 [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"]; G.W., 2013 WL 1286154, at \*19; C.H., 2013 WL 1285387, at \*15; T.B., 933 F. Supp. 2d at 571; Watson, 325 F. Supp. 2d at 145 [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]; see also Pascoe, 1998 WL 684583, at \*6; Tucker, 873 F.2d at 567; Application of the Dep't of Educ., Appeal No. 12-165).

Nevertheless, and as explained more fully below, even though the CSEs were not required to adopt the recommendations within the psychological IEE report, the evidence in the hearing record demonstrates that—contrary to the IHO's findings—the program recommendations made in both the July 2016 IEP and the June 2017 IEP were consistent with the IEE recommendations. As such, the IHO's ultimate conclusion that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years because the district's programming was not consistent with the program envisioned by the evaluator must be reversed.

## **C. July 2016 IEP**

### **1. Present Levels of Performance**

In this instance, although the sufficiency of the present levels of performance and individual needs section of the July 2016 IEP are not at issue, a review thereof facilitates the discussion of the disputed issue to be resolved—namely, whether the educational programming recommended in the July 2016 IEP was reasonably calculated to enable the student to make progress appropriate in light of his circumstances.

According to the present levels of performance in the July 2016 IEP, the student's intellectual functioning, working memory, and processing speed all fell within the low average range, and the student's academic fluency fell within the extremely low range (see Dist. Ex 26 at p. 4). In addition, the present levels of performance noted that the student had difficulty copying notes or completing classwork at a consistent pace, worked very slowly and especially when challenged academically, and that his rate of progress was below average (id. at pp. 4-5). The present levels of performance in the July 2016 IEP further reflected that the student's executive functioning skills were in the low average range and that he had difficulty initiating, organizing, and making decisions related to academic functions (id. at p. 5). In addition, the July 2016 IEP indicated that many of the student's abilities were impaired by his behaviors and cognitive inflexibility; he had a difficult time making decisions, but when given no choice, he became frustrated or angry; and he had difficulty adapting to change (id.).

With respect to reading, the present levels of performance in the July 2016 IEP indicated that the student could read words and used the rules of phonics to decode language; he struggled with reading comprehension; and the student tended to fixate on details, which limited his ability to fluidly read a paragraph and interpret its meaning using context clues in the text (see Dist. Ex. 26 at p. 5). In the area of writing, the July 2016 IEP noted the student had "beautiful" penmanship; however, his attention to detail with his writing slowed him down during tasks and he would often erase his work numerous times "just to try to make it look how he th[ought] it should look" (id.). Also, the July 2016 IEP noted that the student had substantial delays in his ability to formulate and communicate his thoughts in written format, as well as difficulty using appropriate written convention, semantics, syntax, and text structure in his writing (id.). Regarding mathematics, the July 2016 IEP reflected that the student struggled with simple facts and benefitted from the use of a calculator, although he often refused—or was reluctant—to use it (id.). Additionally, the student struggled comprehending some mathematics problems and needed assistance with determining problem-solving methods (id.). In the area of speech and language development, the July 2016 IEP noted that the student performed within the low average range with rote verbal knowledge and further noted that his overall written expression skills were weak, with the student performing at the second percentile (id.).

Regarding social development, the present levels of performance in the July 2016 IEP described the student as having poor eye contact, a limited range of facial expressions, and difficulty interpreting social cues (see Dist. Ex. 26 at p. 5). More specifically, the IEP reflected that the student often took neutral cues or conversations as being negative toward him and that he needed support and guidance from his teachers to better understand cues and expectations in social situations (id.). According to the IEP, the student would become frustrated when his expectations were not met, had difficulty deviating from plans during class, and often needed a break and would leave the classroom to take a walk (id.). The July 2016 IEP further indicated that the student often became upset when feeling frustrated and would verbalize his feelings to others; in many cases, the student exhibited angry or vaguely threatening comments or he may also shut down and ignore any redirection or the person with whom he was upset (id.). However, the July 2016 IEP also reflected that the student responded well to positive feedback and was characterized as having an "older mentality" and therefore, he did not like the common social norms of his peers (id.).

With respect to physical development, the present levels of performance in the July 2016 IEP indicated that the student exhibited symptoms of impulsivity, inattention, and distractibility;

he often liked to complete assignments in different ways than the rest of the class and distracted himself with minute details of the task; and he required extra time to complete tasks due to his inattention and distractibility, as well as his low processing speed (see Dist. Ex. 26 at p. 6). The July 2016 IEP indicated that the student became frustrated and anxious easily, and he expressed his anger by banging his fists on the table or by standing up and walking out of the classroom (*id.*).

As for strategies to address the student's management needs, the July 2016 IEP indicated that the student needed "1:1 reinforcement and support"; and, to "function at his best, he need[ed] positive reinforcement, redirection, and planned ignoring" (Dist. Ex. 26 at p. 6). In addition, the July 2016 IEP reflected that the student had "difficulty changing routine and breaking plans," he needed to "understand expectations before starting a task," and he needed to "be told about changes in classroom routine prior to starting a new routine" (*id.*). The July 2016 IEP further noted that the student needed "counseling to communicate his frustrations and ideas appropriately, as well as to cope with his aggression and/or frustrations" (*id.*). Finally, the July 2016 IEP reflected that the student needed a "small teacher-to-student ratio with minimal distractions within a regular school environment in order to academically progress," a BIP, "additional time to complete assignments," and a "copy of class notes" (*id.*).

## 2. Programming Recommendations

For the 2016-17 school year the July 2016 CSE recommended, among other supports and services, that the student continue to attend the GOAL 15:1 special class placement for all core academic classes, and receive resource room services and counseling as he had during the 2015-16 school year (compare Dist. Ex. 4 at pp. 1, 7, with Dist. Ex. 26 at pp. 1, 10).<sup>42</sup> According to State regulations concerning the continuum of services, the "maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting shall not exceed 15 students" (8 NYCRR 200.6[h][4]). "Although past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (*S.H.*, 2011 WL 6108523, at \*10, citing *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1153 [10th Cir. 2008]; see also *C.S. v. Yorktown Cent. Sch. Dist.*, 2018 WL 1627262, at \*18 [S.D.N.Y. Mar. 30, 2018]; *H.C. v. Katonah-Lewisboro Union Free Sch. Dist.*, 528 Fed. Appx. 64, 67 [upholding district court's conclusion that because the student made progress in previous

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<sup>42</sup> The parties do not dispute that the 15:1 special class that the student attended and that was discussed and proposed by the CSE for the 2016-17 and 2017-18 school years was the GOAL programming as described in the hearing record. The student's report cards from the district most clearly identify the special classes in his academic areas as "GOAL" classes in each of the relevant special class areas (see, e.g. Dist. Ex. 2), whereas the proposed IEPs take a reverse approach and identify that the student would have additional time to complete assignments in his "non-GOAL" classes, leaving it to the parties' understanding of what the GOAL special class programming consists of (see, e.g. Dist. Ex. 26 at p.11; 44 at p. 9). The nature of the programming offered by the CSE is not a disputed issue in this case, but some of the time spent in this 13-day hearing could have been avoided had the district incorporated additional details in its documentation regarding the programming being offered rather than the odd, negative "non-GOAL" description used in the student's IEPs. In this case it is not fatal, and the assistant superintendent stated that her testimony about the GOAL program and makeup of the special education classes "held true" for the special classes recommended for the student for the 2016-17 school year (Tr. p. 114), again a matter that is not in contention in this case.

years, the later, similar IEPs were reasonably calculated to enable progress]; 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]; see generally Application of a Student with a Disability, Appeal No. 12-064; Application of the Bd. of Educ., Appeal No. 11-128).<sup>43</sup> In this instance, as described above, the student demonstrated overall progress during the prior school years attending the district's GOAL classes, such that the July 2016 CSE's decision to recommend a program and placement for the 2016-17 school year modeled on the prior IEPs was reasonably calculated to enable the student to make progress appropriate in light of his circumstances and offered the student a FAPE.

Here, the evidence demonstrates that, for the first two years of high school—that is, 9th (2013-14) and 10th (2014-15) grades—as well as through the second quarter of the 11th grade (2015-16), the student attended the district's high school in the GOAL 15:1 special class placements (see Tr. pp. 24-25; Dist. Ex. 2 at pp. 1-5). The assistant superintendent explained that the GOAL 15:1 special classes were Regents-based, and the students in the GOAL program were working toward a Regents diploma and participated in all the State assessments (see Tr. pp. 24-25). She added that all the GOAL classes were taught by dual-certified special education teachers, meaning that the teacher of a GOAL English class was both a certified special education teacher and certified in English, which was important because the students were being taught mainstream curriculum, and at the high school level, the teachers must have a solid knowledge of the subject area that they were teaching (see Tr. pp. 24, 115). According to the assistant superintendent, the teacher-to-student ratio in the GOAL classes offered the teacher ample opportunity to modify the work based on the student's IEP, and she explained that the work was individualized and the class assignments and homework were modified based on the IEP (see Tr. pp. 30-31). The assistant superintendent testified that the teachers used multisensory approaches throughout the GOAL classrooms, so that teachers could address the specific needs of all the student (Tr. p. 31).

According to the assistant superintendent, during ninth grade the student "did very well in some of his subject areas," he was "passing everything," "[h]is attendance was good," the "comments were all positive" and although he struggled with social studies, "otherwise he did very well" (Tr. pp. 28-29; see Dist. Ex. 2 at pp. 1-2). As compared to his performance in grade nine, during the 2014-15 school year while in 10th grade the student "did better" and "his grades really picked up" with the exception of social studies (Tr. p. 32; see Dist. Ex. 2 at pp. 1, 3). The assistant superintendent also stated that the student's report card comments were again "positive" and that his "grades were all passing by quite a bit" (Tr. p. 32; see Dist. Ex. 2 at pp. 3-4). Prior to his removal from the district's high school at the beginning of the third quarter of the 2015-16 school

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<sup>43</sup> At least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

year (11th grade), the assistant superintendent indicated that the student's grades were "anywhere from a C to A," which were "[g]ood grades" considering the student's needs related to his language, cognition, attention, and social skills deficits (Tr. pp. 33-34, 36-37; see Dist. Ex. 2 at p. 5).

The student's IEP for the 2016-17 school year continued to identify him as being placed on a track toward a Regents diploma (Dist. Ex. 26 at p. 1). The assistant superintendent testified that the student's recommended special classes were "created to address reading and writing needs" and that the whole program was "based on each child's different weaknesses and needs" (Tr. pp. 302-03). Regarding the parents' allegation that the district did not address the student's reading needs, the assistant superintendent testified that the district was aware of the student's reading deficits and that the student had and would have continued to receive special education reading instruction in the 15:1 English special class, which included the Achieve 3000 program (Tr. pp. 47, 271-76). As discussed above, district staff described the Achieve 3000 program as a research-based, data driven, "whole reading" program designed to support students individually to improve their reading comprehension, fluency, and decoding skills (Tr. pp. 47, 274-75, 721). According to district staff, the computer-based program used artificial intelligence, and was geared toward each student's individual strengths and weaknesses so that, based on student responses and input, the work adjusted daily to the student's needs (Tr. pp. 47, 274, 721). Specifically to address the student's identified reading comprehension needs, the July 2016 CSE—which included input from Gersh staff—"discussed and revised" the IEP reading annual goals that were designed to improve the student's ability to cite details to support inferences, define unknown and multiple meaning words and phrases, and provide an objective summary of a text (Tr. pp. 85, 87, 90-91; Dist. Exs. 15 at p. 3; 26 at pp. 5, 8).<sup>44</sup>

To further support the student's ability to benefit from academic instruction, study skill annual goals developed by the July 2016 CSE were to improve the student's ability to attend to a task without distraction during classroom instruction, transition from one classroom activity to another, independently seek out assistance to complete assignments, and respond to changes in the classroom routine in an acceptable manner (Dist. Ex. 26 at pp. 7-8). In addition, the CSE recommended a number of supplementary aids and services, program modifications, and accommodations for the student including reteaching of materials, refocusing and redirection, a copy of class notes, additional time to complete assignments, graphic organizers, use of a calculator, and daily 1:1 aide services during math, social studies and English classes to assist in attending to classroom activities (id. at pp. 10-11).

In conjunction with the special education supports and instruction provided in the 15:1 academic special classes, the July 2016 IEP further provided the student with a daily support skills special class in a group of 15 to focus on reading and writing skills (Dist. Ex. 26 at pp. 1, 10; see

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<sup>44</sup> In addition to the reading annual goals, the July 2016 CSE—in collaboration with Gersh staff—developed three writing annual goals to address the student's need to improve the use of conventions of grammar and usage, formal objective argument writing, and the planning and revising in the writing process, as well as three math annual goals involving translating simple verbal expressions into algebraic expressions, utilizing problem solving strategies, and individually utilizing a graphing calculator with basic mathematical computations (Dist. Ex. 26 at pp. 5, 8-9; see Dist. Ex. 15 at p. 3).

Dist. Ex. 15 at pp. 2, 4). According to the assistant superintendent, the support skills class was a self-contained class taught by one of the student's core teachers who was considered his case manager and was responsible for communicating with mainstream staff, parents, and administrators (Tr. pp. 49, 135-36, 522). The school psychologist testified that students in the support skills class received academic support related to the material from their GOAL classes, such that the students were "being supported in the subjects that they [were] learning about throughout the school day" (Tr. pp. 450, 522-23). The assistant superintendent explained that the district tried to schedule the support skills class at the end of the day and that this was a time to "review everything that ha[d] happened" in the classes and assist with any difficulties that the student may have had (Tr. pp. 135-36). To further support the student's academic needs, the July 2016 CSE recommended that the student receive daily resource room services in a group of five (Dist. Ex. 26 at pp. 1, 10). 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]). State regulation mandates that resource room programs "shall be for the purpose of supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]). According to the assistant superintendent, resource room services were provided by a "different" special education teacher than those who taught the GOAL classes and that while the resource room teacher could review what had happened in class, the focus of resource room services was to work on increasing the student's skill level (Tr. pp. 136-37).

Additionally, the July 2016 CSE recommended that the student receive related services including one 30-minute session per week of counseling for social skills in a small group, and two 30-minute sessions per week of individual counseling (Dist. Ex. 26 at pp. 1, 10). According to the assistant superintendent, the CSE recommended the social skills group counseling session because one of the student's "main problems" was his socialization skills, and she described the session as a group of boys that met under the guidance of a social worker to discuss different topics and how each student may deal with a different scenario, which provided the student the opportunity to problem-solve and interact with peers (Tr. p. 116; see Dist. Ex. 26 at pp. 5-6). The assistant superintendent further explained that the social skills group provided the student time practicing skills such as pragmatics and conversation turn-taking which he had "such great difficulty with," and the July 2016 IEP included an annual goal designed to improve the student's ability to interact in a socially acceptable manner with adults and peers (Tr. p. 165; Dist. Ex. 26 at p. 9). Further, to address the student's other identified social/emotional needs, including deficits in social awareness, communication, and flexibility, the CSE developed social/emotional annual goals to improve his ability to accurately identify his own emotions, the intensity of those emotions, and strategies to deal with those feelings, and also identify and appropriately use a coping skill when expressing a negative emotion at school in order to maintain acceptable school behavior (Dist. Ex. 26 at pp. 5-6, 9). The CSE also determined that the student needed strategies, including positive behavioral interventions, supports, and other strategies to address behaviors that impede his learning and that of others, and indicated that he had a BIP (id. at p. 6; see Dist. Ex. 8). To further support the student's behavioral needs, the CSE provided a behavioral intervention consultation for the team, that included direct observation of the student, teacher, and classroom, as needed throughout the school day (id. at p. 11).

Turning to the student's communication needs, the assistant superintendent stated that the CSE added one 30-minute session per week of group speech-language therapy to the student's IEP in January 2016 due to the parents' concern that the student's pragmatic skills were weak (Tr. pp. 51-52; see Dist. Ex. 14 at p. 9). The assistant superintendent explained that the district did not generally offer speech-language therapy to students in high school—because either by that point there was "no more remediation to be had," or, because all the classes were language-based, therefore those skills would be addressed in the regular classes—but due to the parents' concerns, the CSE agreed to provide the student with speech-language therapy for pragmatic skill remediation (Tr. pp. 51-52). The July 2016 CSE continued to recommend that the student receive one 30-minute session per week of speech-language therapy in a group (Dist. Ex. 26 at pp. 1, 10). The three speech-language annual goals included in the July 2016 IEP addressed the student's pragmatic language needs including the need to improve his skills at distinguishing between correct and incorrect vocal behaviors in conversational speech, correctly using semantic skills, and using correct speaker-listener responsibilities during conversational speech (id. at pp. 5-6, 9). The assistant superintendent testified that the annual goal involving speaker-listener responsibilities was important because the student had great difficulty maintaining conversations with peers that allowed for back and forth conversation and she stated that this skill was needed "if you're going to work, going to college" and that it was a really important skill (Tr. pp. 112-13).

Next, the July 2016 IEP reflected measurable post-secondary goals related to the student's education and employment, the results of his Level 1 assessment, and his independent living skill plans (Dist. Ex. 26 at p. 7). Transition needs identified included that the student needed to improve self-advocacy and time management skills, decrease distractibility, and increase social awareness and communication skills (id.). The student's transition plan included activities such as meeting with a counselor to discuss classes required for a Regents diploma, electives related to his career interests, and colleges that offer majors of interest; advocating for himself in the classroom at times when he requires accommodations; and participating in CSE meetings, school activities of interest to him, driver's education, and career interest inventories (id. at p. 13). Finally, the July 2016 CSE recommended that the student receive testing accommodations including flexible setting, directions simplified and/or explained, extended time (2.0), use of break periods, test materials read, and use of a word processor and calculator (id. at p. 12).

As described previously, on appeal the district asserts that the IHO erred in concluding that the program the CSE recommended for the student for the 2016-17 school year was inconsistent with the recommendations from the psychological IEE report. Review of the student's 2016-17 IEP reflects that although the CSE was not required to adopt, as written, all of the recommendations set forth in an evaluation report, overall the CSE's recommendations addressed the student's needs and provided supports and services consistent with the evaluator's recommendations.

Specifically, the evaluator concluded that the student required an educational setting with features such as "a highly structured" classroom setting with a "very low student to teacher ratio that allow[ed] for 1:1 instruction and support as needed throughout the day," reduced transitions, modified and individualized curriculum that allowed the student to acquire skills at his own pace, classroom/consultants trained in working with students with autism, an environment designed to reduce distractors, and embedded supports to manage the student's social skill impairments (Dist.

Ex. 19 at pp. 16-17).<sup>45</sup> As discussed above, for the 2016-17 school year the CSE recommended a 15:1 special class placement for core academic courses and support skills instruction, resource room services, and the services of a 1:1 aide to provide support for the student's attention needs (compare Dist. Ex. 19 at p. 17, with Dist. Ex. 26 at pp. 10-11). District staff testified that the GOAL program curriculum was modified and the modifications were based on the students' IEPs, consistent with the evaluator's recommendation; additionally, the IEP provided additional time for the student to complete assignments and reteaching of materials "as needed after new lessons in [the] support skills class" (compare Tr. pp. 29-31, 623, and Dist. Ex. 26 at pp. 10-11, with Dist. Ex. 19 at p. 17). The IEP also provided the student with social/emotional supports similar to those recommended by the evaluator, including behavioral intervention consultation for the student's team as needed throughout the day, and both individual and group counseling services designed to directly address the student's social skill impairment (compare Dist. Ex. 19 at p. 17, with Dist. Ex. 26 at pp. 10-11). Also, and in accordance with the evaluator's recommendation, the CSE provided that the student would receive speech-language therapy specifically to address his pragmatic language deficits (compare Dist. Ex. 19 at p. 17, with Dist. Ex. 26 at p. 10). Additionally, review of the student's IEP reflects recommendations for home-based parent counseling and training as well as transition planning to determine skills, interests, and appropriate educational and/or vocational goals post-graduation, which would help support life skills development and were services also recommended by the evaluator (compare Dist. Ex. 19 at p. 17, with Dist. Ex. 26 at pp. 7, 10, 12-13).<sup>46</sup> Therefore, contrary to the IHO's finding and in consideration of the array of

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<sup>45</sup> The assistant superintendent testified that the evaluator did not specify within the psychological IEE report what she envisioned with respect to her recommendation for a "very low student to teacher ratio" (Tr. pp. 446-47). She further testified that although the GOAL program classes were a 15:1 student-to-teacher ratio, "usually" the class composition was "much less," and during ninth grade, the student's GOAL classes consisted of eight or nine students (Tr. pp. 29-30). Thus, to the extent that the IHO found that the district's 15:1 special class recommendation was not appropriate because it failed to replicate the evaluator's recommendation for a classroom setting with a "very low student to teacher ratio," overall, the IHO did not otherwise specify what he believed to be a "very low student to teacher ratio" for purposes of instruction. This illustrates a common predicament found in disputes between some school districts and parents—often what is considered "small" in terms of class size is in the eye of the beholder, especially if the parties and experts gloss over what is meant by the term small (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013] [holding "[t]hat the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits"]), and that what is really relevant is whether a placement provides appropriate services to meet a student's needs (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015]). The IHO's conclusion failed to take into account and grapple with the panoply of services that the July 2016 CSE recommended in addition to the support of the 15:1 support skills special class placement, such as the resource room services in a 5:1 student to teacher ratio, and 1:1 aide services in three of the student's academic classes (see Dist. Ex. 26 at pp. 1, 10-11).

<sup>46</sup> To the extent the evaluator indicated that the student required "curriculum embedded with instruction in life skills," the July 2016 CSE determined that instruction in the acquisition of daily living skills was considered but not required at that time, and aside from the student's social skill needs described above, which the IEP adequately addressed, an overall read of the hearing record does not support the conclusion that the student required life skills instruction beyond the supports and services provided for in the July 2016 IEP (compare Dist. Ex. 19 at p. 17, with Dist. Ex. 26 at p. 13). Additionally, although the evaluator recommended that the student "remain within a supportive educational setting until the age of 21" due to the need for "opportunities to develop his skills" in the areas of academic achievement and adaptive functioning, at the time the student was removed by the parents from the district in February 2016, he had acquired 12 credits toward graduation, and was "in progress" to complete

services recommended by the CSE's July 2016 IEP including a special class setting that was geared toward students working toward a Regents diploma, 1:1 support in three classes, 5:1 support in a resource room, and individual and group counseling services, the evidence in the hearing record supports a finding that the student's educational programming was sufficiently consistent with the evaluator's written recommendations and, moreover, that it was reasonably calculated to enable the student to make progress appropriate in light of his circumstances.

#### **D. June 2017 IEP**

##### **1. Present Levels of Performance**

In June 2017 the CSE convened to conduct the student's annual review and develop an IEP for the 2017-18 school year (Dist. Exs. 15 at p. 4; 44 at pp. 1-14). The district's assistant superintendent testified that all the evaluations listed on the June 2017 IEP were discussed and considered at the CSE meeting and that Gersh staff participated by telephone (Tr. pp. 123, 137-38; see Dist. Ex. 44 at pp. 1-3, 14).<sup>47</sup> The assistant superintendent stated that since the district staff had not seen the student in over a year and a half, it was "essential" that Gersh staff participate in the CSE meeting because the CSE needed to know his then-current levels of functioning (Tr. pp. 144-45). She stated that "most" of the information included in the June 2017 IEP was based on information reported by Gersh staff (Tr. p. 144).

The June 2017 IEP study skills present levels of performance stated that the student was prepared for class, was "overall" well organized, and began classwork with minimal prompting (Dist. Ex. 44 at p. 3). The June 2017 IEP stated that the student was "very methodical" in his note taking and would often use different colored pens/pencils to section his notes, that this slow pace made it difficult for the student to keep pace with the lesson, and that providing the student with a template with space for key concepts was a successful strategy (id.). However, it was noted that the student was not always willing to use a template since his rigidity and methodical methods "keep him wanting to take notes in his own way" (id.). According to the June 2017 IEP present levels of performance the student "like[d] the element" of choice and contributed to class discussion, when prompted, especially on topics of interest, although was hesitant when he was unsure he had the correct answer (id. at pp. 3-4). The June 2017 IEP stated that when frustrated with or distracted by classroom events that upset him, the student would lose focus or ask to leave, and that usually a quick walk helped the student to return to the classroom and continue with the lesson (id. at p. 4).

The June 2017 IEP reflected similar academic needs as identified in the July 2016 IEP in the areas of reading, writing, and math (compare Dist. Ex. 26 at p. 5, with Dist. Ex. 44 at p. 4). In addition, the June 2017 IEP stated that the student benefitted from group brainstorming to begin writing tasks, and graphic organizers/note-taking templates to help organize his thoughts and ideas,

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8.5 additional credits by the end of eleventh grade (Dist. Ex. 2 at pp. 5-6).

<sup>47</sup> The June 2017 IEP referenced a Gersh academic annual review report, speech-language therapy review report, a social/emotional progress report, and a transition assessment report (Dist. Ex. 44 at p. 2). The IEP also indicated that the CSE referenced a September 2016 parent report and observation and speech-language evaluation report (id.).

preferred creative writing projects, and that he often volunteered to read aloud in class (Dist. Ex. 44 at p. 4). The June 2017 IEP speech-language present levels of performance indicated that the student's performance with regard to rote verbal knowledge was in the low average range, he exhibited difficulty recalling details which affected reading comprehension, and he also demonstrated weaknesses in syntax and organization, especially when asked to provide sentences on his own without visual cues (id.). The IEP also reflected that the student's conversation skills and ability to make inferences were relative strengths (id.).

With respect to social development and in addition to the strengths and needs identified in the July 2016 IEP, the June 2017 IEP stated that the student was a polite young man who enjoyed interactions with others when it was of interest to him, whose ability to seek out support when experiencing difficulty had improved, and who could express himself and identify his emotions/feelings clearly, yet continued to struggle socially and emotionally and was "very rigid" in his thinking (compare Dist. Ex. 26 at pp. 5-6, with Dist. Ex. 44 at p. 4). The June 2017 IEP present levels of performance indicated that utilizing collaborative problem solving with the student had helped improve his ability to tolerate potentially frustrating situations and that modeling, role playing, redirection, and discussion were all strategies that worked for the student when provided with time to calm himself down (Dist. Ex. 44 at pp. 4-5).

The present levels of performance in the June 2017 IEP reflected the same information within the sections designated to describe the student's physical development and management needs as identified in his July 2016 IEP (compare Dist. Ex. 44 at p. 5, with Dist. Ex. 26 at p. 6).

## **2. Programming Recommendations**

For the 2017-18 school year, the June 2017 CSE continued to recommend for the student the GOAL 15:1 special class placement for core academic classes, together with other supports and services such as daily resource room services and the daily 15:1 support skills special class (Dist. Ex. 44 at pp. 1, 9). The assistant superintendent stated that for 12th grade, the self-contained classes were staffed with either a teacher that was dually-certified in the subject content area and special education or there was a special education teacher and a content area teacher in the class (Tr. pp. 132-33).

The June 2017 IEP again offered the same related services and supplementary aids and services and accommodations for the student that were recommended in the July 2016 IEP, with the addition of preteaching of material in the classroom (compare Dist. Ex. 44 at pp. 1, 9-10, with Dist. Ex. 26 at pp. 1, 10-11). Also, while the June 2017 CSE meeting minutes stated that Gersh staff did not feel that a formal BIP was needed, the July 2017 IEP again indicated that the student required a BIP, and included the recommendation for behavioral intervention consultation for the team as necessary throughout the school day (Dist. Ex. 15 at p. 5; compare Dist. Ex. 26 at pp. 6, 11, with Dist. Ex. 44 at pp. 6, 10).

A review and comparison of the student's present levels of performance in the July 2016 IEP and present levels of performance in the June 2017 IEP—which the parties do not dispute—and the assistant superintendent's testimony demonstrated that the areas in which the student required special education support did not change substantially during the course of the 2016-17 school year while attending Gersh (see Tr. pp. 138-48; Dist. Exs. 26 at pp. 4-6; 44 at pp. 3-6).

Although she did not think it was the case that the student did not make any progress over the past year, the assistant superintendent testified that, at the time of the June 2017 CSE meeting, the student was struggling with the same issues as when he left the district (see Tr. pp. 145, 158-59, 163-64, 167-68).

To address the student's organization and attention needs, the June 2017 IEP included two study skills annual goals addressing refocusing and attending to task and transitioning from one classroom task to another and as referred to above, daily 15:1 support skills special class, resource room services, and 1:1 aide services in three academic classes (Dist. Ex. 44 at pp. 7, 9). The assistant superintendent indicated that the student benefitted from strategies such as pre-reading, pre-teaching, and review, which occurred in either the support skills special class or when the student received resource room services, as well as in the academic special classes if needed (Tr. pp. 141-42). In addition to the 15:1 special class placement, the student's academic and speech-language needs were addressed by the June 2017 IEP's four reading annual goals involving recognizing and reading high frequency words, reading literature text and content area subject matter fluently with accuracy and appropriate rate, defining unknown and multiple meaning words and phrases, and reading and answering question from prose, drama, poetry, and content areas; two writing annual goals targeting formal argument writing with attention to supporting evidence and opposing claims and the use of planning and revising in the writing process with attention to audience and purpose; two math annual goals involving utilizing a graphing calculator with mathematical computations and using problem solving strategies (Dist. Ex. 44 at pp. 7-9). The June 2017 CSE also recommended that the student receive aides and accommodations, such as reteaching of materials, refocusing and redirection, copy of class notes, additional time to complete assignments, use of graphic organizers and a calculator, and pre-teaching of materials, as well as testing accommodations (id. at pp. 9-11).

To address the student's social/emotional needs, the July 2017 CSE provided annual goals to improve his verbal expression, appropriate response, and semantic skills when conversing, and his ability to cope with change, accurately identify emotions and feelings, communicate and interact with peers in a positive manner, and identify and appropriately use coping skills to maintain acceptable school behavior, together with both individual and group counseling services and group speech-language therapy (Dist. Ex. 44 at pp. 7-9). Additionally, to address the student's tendency to become frustrated and his rigidity surrounding task completion, the assistant superintendent indicated that a BIP was provided to address those behaviors, and behavioral consultation services for staff throughout the day when needed (Tr. pp. 139-41; see Dist. Ex. 44 at pp. 6, 10).

To the extent the parents continue to assert that the June 2017 CSE's programming and placement recommendations for the student were inconsistent with the recommendations from the psychological IEE report, that claim fails for the same reasons as described in detail above regarding the 2016-17 school year (compare Dist. Ex. 19 at pp. 16-18, with Dist. Ex. 44 at pp. 9-12). Rather, the evidence in the hearing record supports a finding that the student's needs had not changed substantially by the time of the June 2017 CSE meeting, and that the programming supports and services the June 2017 CSE continued to recommend in the student's IEP to address those needs remained appropriate and reasonably calculated to enable the student to make progress appropriate in light of his circumstances.

**VII. Conclusion**

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2016-17 and 2017-18 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether Gersh was an appropriate unilateral placement for the student (Burlington, 471 U.S. at 370).

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated May 5, 2020, determining that the student was denied a FAPE due to a failure of the district to address bullying is vacated; and,

**IT IS FURTHER ORDERED** that the IHO's decision, dated May 5, 2020, is modified by reversing that portion of the IHO's determination that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years; and,

**IT IS FURTHER ORDERED** that the IHO's decision, dated May 5, 2020, is modified by reversing the IHO's order that the district must reimburse the parents for the costs of the student's tuition and expenses at Gersh for the 2016-17 and 2017-18 school years.

**Dated:** Albany, New York  
July 17, 2020

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**