



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 20-111

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Pine Bush Central School District**

### **Appearances:**

Gellen Law PLLC, attorneys for petitioner, by Andrea L. Gellen, Esq.

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

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program recommended by respondent's (the district's) Committee on Special Education (CSE) for her son for the 2017-18 and 2018-19 school years was appropriate and that the district had appropriately addressed any bullying issues affecting the student during the 2019-20 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which awarded the student prospective placement at an unapproved non-public school for the remainder of the 2019-20 school year. The appeal must be sustained in part. The cross-appeal must be sustained in part.

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

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

34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

The parties' familiarity with the facts of this case is presumed; however, considering the length of the impartial hearing and the issues on appeal, at the outset, a limited background of the student's educational history is warranted.

The student was first referred to the district Committee on Preschool Special Education (CSPE) due to concerns regarding his speech development and attention span (Dist. Ex. 16 at p. 1). He reportedly had language and articulation delays and he was subsequently classified as a Preschool Student with a Disability (id.). The student received speech–language services two times per week as well as counseling due to his lack of verbal expression in preschool (id.).

The student entered kindergarten without an IEP as he met his goals and objectives (from preschool) and the parent felt he was capable of succeeding without special education services (Dist. Ex. 16 at pp. 1-2). Counseling services were retained to help with the student's transition (to kindergarten) and with his shyness (id. at p. 2).

When the student was in the second grade, he was referred to the Committee on Special Education (CSE), at which time the CSE determined he was eligible for special education services as a student with a speech or language impairment (Dist. Ex. 16 at p. 2). The student was placed in a resource room program with consultant teacher services and received speech-language therapy (id.). The student continued to struggle academically the following year (third grade) and was moved into a 15:1+ 2 special class and his classification changed to learning disability (id.). The student remained in a special class setting throughout elementary school (id. at p. 2). Documentary evidence reflects that the student was described at that time as a hard-working student who struggled with reading, vocabulary, writing, and math concepts (id. at p. 2).

When the student was approximately eight or nine years old, he was diagnosed with attention deficit hyperactivity disorder (ADHD), for which he received medication over a period of years (Tr. pp. 887, 889; Parent Ex. YY at p. 7). The ADHD diagnosis and the name of medication prescribed to manage the student's condition were indicated on his physical reports that the parent provided to the student's school(s) every year (Tr. p. 890; Parent Exs. LL; YY at pp. 7, 10, 13, 16, 19).

The student entered middle school for sixth grade and was placed in a "[c]onsultant [t]eacher [d]irect" program for his classes except English language arts (ELA), for which the student continued to receive instruction in a special class (Dist. Ex. 16 at p. 2). The student struggled throughout sixth grade with basic academic concepts (id.). Academic testing conducted at that time revealed the student had deficits in decoding, reading comprehension, and math skills (id.). For seventh grade (2016-17 school year), the CSE recommended the student be placed in a 15:1+1 special class for all four core classes, a 15:1 special class for "skills," and that he receive the related service of speech-language therapy in a small group (5:1) (Parent Ex. C at pp. 1, 7-8; Dist. Ex. 7 at pp. 8-9).

For eighth grade, the student's program remained largely the same as the previous school year with the exception that the student's IEP was amended in October 2017 to add a daily 15:1+1 special class for reading and exempt the student from the language other than English (LOTE) requirement (Dist. Exs. 7 at p. 11; 16 at p. 2).

The student transitioned to the district high school for the 2018-19 school year for ninth grade (see Tr. p. 821). He was initially recommended for placement in a 15:1+1 special class for all core subjects, a 15:1 special class for reading, and the related service of speech-language therapy in a small group (5:1) (Dist. Ex. 8 at pp. 9-10). Later during the 2018-19 school year, the

student's special class for science was changed to integrated co-teaching services (ICT) and the frequency of his receipt of speech-language therapy was decreased (Dist. Exs. 9 at pp. 1, 8; 10 at pp. 1, 9).

Also, as discussed in greater detail below, when the student was in eighth grade in a district middle school (2017-18), he was involved in various incidents which were documented in "student referral" forms (Dist. Ex. 49 at pp. 4-12). Three of the incidents involved physical altercations, and two of the incidents resulted in the student receiving out-of-school suspensions (Dist. Ex. 49 at pp. 4, 8, 12).

During the 2018-19 school year, when the student was in ninth grade at the district high school, the student was involved in several incidents, which he and the parent attributed to being bullied by alleged gang members and/or other students that were friendly with the alleged gang members (Parent Ex. NN). Some of the incidents included violence and resulted in the student or another student receiving injuries that required surgery and follow-up therapies (Parent. Ex. P). Following an incident in April 2019 in which the student was stabbed, the student was transferred to home instruction for two hours a day with a 1:1 tutor from April 24, 2019 through the end of the 2018-19 school year (see Dist. Exs. 37; 38).<sup>1</sup>

For the 2019-20 school year, the district initially recommended that the student be placed in 15:1 special classes for all core subjects, including science, and that he receive the related service of speech-language therapy in a small group (5:1) (Dist. Ex. 11 at pp. 1, 7). A few days after the 2019-20 school year started, on September 9, 2019, the student was involved in an incident with another student that resulted in injury to both, and for which the student received a five-day suspension (Dist. Ex. 44). On September 16, 2019, the CSE convened a manifestation determination review (MDR) (Dist. Ex. 12). The MDR resulted in a finding that the student's behavior in question was not "directly" or "substantially related" to his "math learning disability" (id. at pp. 1, 7). According to the meeting information summary, the parent shared her concerns regarding the student's new diagnosis and behaviors and based on doctor, counselor and psychiatrist reports, the CSE recommended that the student be placed out-of-district, pending the outcome of a superintendent's hearing (id. at p. 1). The September 2019 CSE recommended the student for a 1:1 special class (home instruction) for two hours a day (id. at p. 7).<sup>2</sup> The September 2019 CSE did not recommend any related services (see id. at pp. 1, 7). Subsequent to the MDR,

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<sup>1</sup> In a "To whom this may concern" letter dated April 11, 2019, the student's physician recommended that "due to the nature of [the student's] trauma" he be placed on home instruction until May 10, 2019 to facilitate healing (Dist. Ex. 37). In an email to the assistant principal, dated May 15, 2019, the parent requested the continuation of home tutoring for the remainder of the 2018-19 school year, noting that she was very concerned about the student's safety (Dist. Ex. 38). The assistant principal authorized the continuation of home tutoring that same day (Dist. Ex. 38).

<sup>2</sup> The director of special programs indicated that the CSE decided to refer the student to out-of-district placements based on letters submitted by three of the student's providers (psychiatrist, counselor, and pediatrician) all of whom "gave some pretty significant [mental health] diagnoses" that concerned the CSE that the student needed a placement with more therapeutic supports (Tr. pp. 1102-04). The director of special programs indicated that the decision to seek an out-of-district placement was not based on the district's concern for the student's safety if he were to return to school, rather on the diagnoses in the letters and the parent's expressed concern about the student returning to the high school (Tr. pp. 1103-04).

a superintendent's hearing occurred, the outcome of which resulted in the student's suspension from school for the 2019-20 school year whereupon he would receive home instruction with a tutor for two hours daily (Dist. Ex. 47). No FBA, related services or out-of-school placement was recommended other than the home instruction (see id.).

Although the hearing record reflects that the district referred the student to approximately four different Board of Cooperative Educational Services (BOCES) in several different counties, the contemplation of a BOCES placement was not reflected in the September IEP and none of the BOCES programs accepted the student, with one rejection occurring as early as October 2019 (Tr. pp. 1104-09). By the conclusion of the impartial hearing on March 6, 2020, the district had not yet found an out-of-district placement for the student and according to testimony by the district director of special programs, the district's "next round" would be to send (application) packets to State-approved private day placements (Tr. pp. 1110-13).

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

By amended due process complaint notice dated September 18, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17, 2017-18, 2018-19 and 2019-20 school years (IHO Ex. II at pp. 1, 2, 6).<sup>3</sup> Specifically, the parent alleged that the district failed to devise IEPs for the student with appropriate services and accommodations, impeded the student's and his parent's opportunity to participate in the decision-making process and caused a deprivation of educational benefits (id. at 6). The parent argued that the IEPs failed to provide appropriate special education services to address the student's disabilities, including his attention issues, anxiety, and intellectual deficits and that, despite the student having made a serious threat to cause himself harm and the impact of his emotional difficulties on his daily school performance, he received no counseling in his 2018-19 IEP even though the district was aware of his mental state having informed the parent of the threat (id.). The parent also argued that the district failed to consider the student's strengths, his parent's concerns, the results of his most recent evaluations, and his academic, developmental and functional needs (id.). The parent asserted that the district violated the student's rights under section 504 of the Rehabilitation Act of 1973 (section 504), by failing to design the student's IEPs to meet his unique needs as adequately as the needs of his non-disabled peers, and the Americans with Disabilities Act (ADA) (id. at p. 7). The parent also asserted that the district failed to establish annual goals related to the student's needs in the evaluations listed in his IEPs, that the student's goals were recycled from year to year, and the CSE did not discuss progress or amendments to the goals (id.). The parent alleged that the district failed to conduct an FBA and develop a BIP to address behaviors that impeded the student's learning, emotional and focus issues, and other challenges (id.). Finally, the parent alleged that the district failed to address bullying of the student at the district, building and CSE levels in the 2018-19 and 2019-20 school years by failing to implement safety plans despite being aware of, and having received documentation of, the bullying and its deleterious effects on the student's mental and physical health (id. at pp. 7-8). For relief, the parent requested a finding that the student was denied a FAPE for the school years at issue, prospective placement in the Goshen Central School District (Goshen), or alternatively, a private school of the

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<sup>3</sup> The parent filed an original due process complaint notice dated September 16, 2019 which was amended and superseded by the September 18, 2019 due process complaint notice (IHO Decision at p. 3).

parent's choosing, compensatory education, and a copy of the student's entire educational file (id. at pp. 1, 8).

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

The parties proceeded to an impartial hearing on December 12, 2019, which concluded on March 6, 2020 after 6 days of nonconsecutive proceedings. In a decision dated May 13, 2020, the IHO found that the district provided the student with a FAPE for the 2017-18 school year (IHO Decision at p. 39). Although the IHO noted that the 2017 IEP omitted any reference to the student's diagnosis with ADHD and that some of the goals developed for the student lacked precision, he further stated that he was satisfied that these factors did not detract from the appropriateness of the educational program the student received during the 2017-2018 school year (id. at pp. 36-37). The IHO further determined that the district had performed all necessary evaluations to ensure that the student received an appropriate program for that school year. Specifically, the IHO found that it was unnecessary for the district to conduct an FBA "to determine Student's displayed inattention and distraction in class, as the basis for such was clear to his teachers" (id. at p. 38).

With respect to the 2018-19 school year, the IHO similarly determined that the failure of the February 2018 IEP to include the student's ADHD diagnosis did not rise to the level of a deprivation of FAPE (IHO Decision at p. 46). The IHO further found that the district performed all necessary evaluations to ensure that the student received a proper program and was not obligated to conduct a FBA "to determine the basis of Student's displayed inattention and distraction in class, as the basis for such was clear to his teachers (id.). The IHO also noted that the district provided the student with home instruction after he "suffered an injury in early April of 2019," and that he was "satisfied" that home instruction was appropriate for the student for the remainder of the 2018-19 school year (id.).

Concerning the parent's claims that the district deprived the student of a FAPE by failing to address incidents of bullying experienced by the student during the 2018-19 and 2019-20 school years, the IHO determined that the district's response to any issues related to bullying of the student had been appropriate (IHO Decision at pp. 64-65). In support of his determination, the IHO found that the student's allegations of ongoing harassment by other students were not credible based on his finding that the student had not been truthful in his testimony at the impartial hearing with respect to one of six specific bullying incidents that the student claimed he had experienced (id. at pp. 63-64). The IHO also found that the "vast majority" of the bullying incidents described at the impartial hearing had occurred "off district property" and, in any event the district "appropriately responded to the known concerns" that the student had expressed (id. at 65-66). The IHO noted that the district had assisted the parent in obtaining orders of protection against the offending students and in "counseling [the] Student as to how [he] might respond to perceived off-site 'bullying' actions" (id.). The IHO also stated that after the student was stabbed during an incident that occurred in April 2019, the district consented to the parent's request that, after the student had recovered and was cleared to return to school, the student would be permitted to continue on home instruction for the remainder of the 2018-2019 school year (id.). While noting that at least one district court had created a four-prong test to determine whether a district had failed to protect a disabled student from bullying (T.K v. New York City Dep't of Educ., 779 F.Supp.2d, 316), the IHO declined to review or apply such decision, finding that the district had "met all of its obligations regarding such issue" (id. at p. 66).

With respect to the 2019-20 school year, the IHO found that the September 2019 IEP did not provide the student with a FAPE (IHO Decision at p. 78). Specifically, the IHO found that the September 2019 IEP was "clearly woefully inadequate" because it failed to recommend any related services to address the student's needs (id. at p. 76). The IHO further found that to the extent the district relied upon an out-of-district placement to demonstrate that it provided the student with a FAPE, such placement was also "clearly inadequate (id. at pp. 76-77). The IHO noted that although the district sent application packets to four BOCES programs, the September 2019 IEP recommended home instruction, and the district "has failed to establish that it provided anything to the solicited BOCES on which such BOCES could rationally make a decision regarding its ability or inability to accept Student into its program (id. at pp. 77-78) The IHO further found that none of the BOCES programs accepted the student which also served to confirm that the district failed to offer the student an appropriate program for the 2019-20 school year (id.).

The IHO also determined that the parent was not entitled to an independent neuropsychological examination at district expense because she had not established that she disagreed with any of the evaluations the district had conducted and the district was unable to defend its own neuropsychological examination of the student because it had not conducted one (IHO Decision at pp. 49-50). The IHO denied the parent's request for compensatory education with respect to the 2017-18 and 2018-19 school years because he found that the district had provided the student with a FAPE for both school years (id. at p. 67))

Concerning relief to which the parent was entitled based on his finding that the district had deprived the student of a FAPE for the 2019-20 school year, the IHO determined that the parent was permitted to immediately place the student at Maplewood School, an out-of-district nonpublic school, as a residential student for the remainder of the 2019-2020 school year, at district expense, and the district was also directed to transport the student from his home to the Maplewood School on the first day of his attendance there and to transport him home from the school at the conclusion of the school year (IHO Decision at pp. 80-89).

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

The parent appeals from the decision and asserts that the IHO incorrectly found that the district's failure to conduct an FBA of the student for the 2017-18 and 2018-19 school years did not deprive the student of a FAPE. The parent further alleges that the IHO erred by finding that the district fulfilled its obligations to address bullying of the student during the 2018-2019 and 2019-2020 school years. The parent also claims that the IHO erred by failing to find that the district's IEPs for the student during the school years in question did not contain appropriate goals for the student. With respect to relief, the parent asserts that the IHO inappropriately limited the placement of the student at the Maplebrook School at district expense to the remainder to the 2019-20 school year because such limited placement was inadequate to remedy the district's denial of FAPE to the student for the entirety of the 2019-20 school year. As relief, the parent requests that the student be placed at Maplebrook School for the 2020-21 school year at district expense. She further requests that the district be directed to conduct an FBA of the student and that the student should also be awarded any compensatory education that may be appropriate.

The district answers with a series of admissions and denials and cross-appeals the IHO's finding that the district failed to provide the student with a FAPE for the 2019-20 school year based

on alleged deficiencies in the September 2019 IEP that were not raised by the parent in her due process complaint notice. The district also cross-appeals the IHO's finding that the student's annual reading goals for the 2017-18 school were inadequate. The district further asserts the IHO erred by finding that a prospective residential placement at Maplebrook School was appropriate for the student and issuing an order permitting the parent to immediately place the student at Maplebrook School for the remainder of the 2019-20 school year at district expense.

In an answer to the district's cross-appeal, the parent asserts that the IHO did not exceed his jurisdiction by ruling on the appropriateness of the IEP developed in September 2019 because the district opened the door to this issue when the district's counsel raised it in his opening statement and questioned witnesses about the CSE meeting conducted on September 16, 2019 and the IEP developed in that meeting, as part of its case-in-chief. In addition, the parent contends that the IHO was within his authority to order prospective placement at district expense.

## **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>4</sup>

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).

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<sup>4</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).

## VI. Discussion

### A. Scope of Impartial Hearing

In its cross-appeal, the district asserts that the IHO lacked jurisdiction to rule on issues that were not raised in the parent's due process complaint notice, in the absence of district consent. Specifically, the district asserts that the IHO lacked authority to rule on amendments to the 2019-20 IEP approved by the CSE at the MDR on September 16, 2019, including the decision to provide the student with home instruction during his disciplinary suspension and proposed BOCES placement following the completion of the student's suspension, and the appropriateness of the services provided to the student during his disciplinary suspensions from September 2019 to June 2020. The district also asserts that the IHO lacked authority to rule on the parent's request for a prospective placement at Maplebrook School, as the district states that the due process complaint notice makes no reference to the parent's interest in such placement.

The parent contends, in her answer to the cross-appeal, that the IHO did not exceed his jurisdiction by ruling on the appropriateness of the IEP developed in September 2019 because the district opened the door to this issue when the district's counsel raised it in his opening statement and questioned witnesses about the CSE meeting conducted on September 16, 2019 and the IEP developed in that meeting, as part of its case-in-chief. In addition, the parent contends that the IHO was within his authority to order prospective placement at Maplebrook School at district expense.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice 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]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at \*7-\*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In the instant case, the IHO found that the district failed to meet its burden of establishing that it offered the student a FAPE for the 2019-20 school year because "[i]f the latest I[EP] on which [the d]istrict relies in contending that it offered [the s]tudent a [FAPE] for 2019-2020 school year is [the] September 16, 2019 [IEP], it wa[s] clearly woefully inadequate, failing to offer any special education services" except for home instruction and tutoring and while the IEP contained annual goals for speech-language therapy, "it specifically provide[d] for no [r]elated [s]ervices (IHO Decision at pp. 30-31). Similarly, the IHO found that "[i]f [the d]istrict contends that the program offered to [the s]tudent on which it relies to establish that it offered [the s]tudent a [FAPE] during the 2019-2020 school year is that which placed [the s]tudent in an out-of-district program, it wa[s] also clearly inadequate" as "none of the solicited BOCES agreed to accept [the s]tudent" into its program. (*id.* at p. 31). However, the parent's due process complaint notice does not include any specific allegations related to the appropriateness of the September 2019 IEP (*see* IHO Ex. II).<sup>5</sup> Upon review of the hearing record, the district did not subsequently agree to add the appropriateness of the September 2019 IEP as an issue and the parents did not attempt to amend the due process complaint notice to include it.

Further, to the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (*M.H.*, 685 F.3d at 250-51; *see N.K. v. New York City Dep't of Educ.*, 961 F. Supp. 2d 577, 585 [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 [Aug. 5, 2013]; *B.M. v. New York City Dep't of Educ.*, 2013 WL 1972144, at \*5-\*6 [S.D.N.Y. May 14, 2013]), here, the issue of the appropriateness of the September 2019 IEP was first addressed during the impartial hearing as part of the parent's counsel's cross-examination of the district director of special programs, who served as the CSE chairperson at the September 2019 CSE meeting (Tr. p. 109). The district, in contrast, did not initially elicit testimony regarding the appropriateness of the September 2019, other than asking routine questions about the three letters submitted by the parent from the student's doctor, psychiatrist, and therapist for background purposes and to defend against allegations in the due process complaint notice that the district was in receipt of those letters and had not even convened a CSE to consider the information (Tr. pp. 96-98; *see* Tr. 1006, Dist. Ex. 39, 42, 43; IHO Ex. II at p. 5), and, therefore, could not be deemed to have "opened the door," under the holding of *M.H.*, to the substantive September 2019 IEP issues on which the IHO based his determinations that the district had failed to provide the student with a FAPE for the 2019-20 school year (*see A.M.*, 964 F. Supp. 2d at 283; *J.C.S.*, 2013 WL 3975942, at \*9; *B.M.*, 2013 WL 1972144, at \*6). Accordingly, the IHO erred in reaching the issue of the appropriateness of the September 2019 IEP and finding the IEP and recommended program "inadequate" (IHO Decision at p. 31).

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<sup>5</sup> Although, the parent's due process complaint notice does list as one of the issues "whether the school district's IEP for the 2019-20 school year fails to provide the student FAPE" and references the student's 10<sup>th</sup> grade year (2019-20) in its contention that "[a]t all relevant periods, the [d]istrict failed to devise appropriate IEPs for the [s]tudent" thereby "resulting in a denial of FAPE" to the student (*see* IHO Ex. II at pp. 1-2, 6), the only specific claim the parent raised with respect to the student's 2019-20 school year was the district's failure to address the bullying issues experienced by the student.

With respect to the parties' contentions as to whether the IHO was within his authority to order prospective tuition at Maplebrook School, while the parent's due process complaint notice did not specifically request prospective placement at Maplebrook School, it did state that "[a]lternatively, if Goshen Central School District is unwilling to accept the child then the [d]istrict should pay prospective tuition at [a] private school of [the] parent's choosing" (IHO Ex. II at p. 8). The director of special programs testified that she informed the parent that "to be placed in Goshen schools you had to be a resident of Goshen schools," that she did not reach out to Goshen to inquire as to whether "they accept [an] out-of-district resident with tuition," and that of the "occasions in which a student was placed out of district at another local public school district as a special education placement," none of those placements were at Goshen (Tr. pp. 102-104). Further, while testimony regarding Maplebrook School specifically as a potential private out-of-district placement was introduced by the parent at the impartial hearing, the relief ordered by the IHO was not something the district had no notice of, or lacked an opportunity to make objections to on the record at the hearing, including cross-examination of the parent's witnesses or challenges to documents presented by the parent (Tr. p. 611-620). Accordingly, I find that the IHO did not err in reaching the issue of awarding the parent's request for a prospective placement at Maplebrook School.<sup>6</sup>

### **B. 2017-18 School Year – Failure to Conduct FBA**

The parent argues that the IHO erred by finding that the district provided the student with a FAPE for the 2017-18 school year despite its failure to conduct an FBA of the student.

State regulation requires that an initial evaluation include a variety of assessment tools and strategies, identifies specific assessments that must be conducted as a part of an initial evaluation, and also requires "other appropriate assessments or evaluations, including [an FBA] for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities" (8 NYCRR 200.4[b][1]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it (8 NYCRR 200.1[r]). According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student's record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

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<sup>6</sup> For further discussion of the IHO's authority to order prospective placement relief, see the "Relief" section herein.

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F.3d at 190).

"The 'purpose of an FBA is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors.'" (L.O., 822 F.3d at 111, quoting R.E., 694 F.3d at 190). Accordingly, the district's "[f]ailure to conduct an FBA . . . does not render an IEP legally inadequate under the IDEA so long as the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior" (M.W. v. New York City Dept. of Educ., 725 F.3d 131, 140 [2d Cir. 2013]).

The hearing record shows that in the instant case a subcommittee of the CSE (CSE subcommittee) convened on February 21, 2017 to conduct the student's annual review (Parent Ex. C at p. 1). Attendees included the CSE subcommittee chairperson who also participated as the school psychologist, a special education teacher, a general education teacher, a guidance counselor, and a speech-language therapist (id.). The IEP meeting summary noted that the parent did not attend the meeting and could not be reached by phone (id.). However, the parent was contacted after the meeting to review the outcome and was in agreement with all recommendations (id.). The IEP did not include a health alert that the student was diagnosed with ADHD or that he was prescribed medication to address it (Parent Exs. LL; YY at pp. 7, 10, 13, 16, 19; see Parent Ex. C). As noted above, the February 2017 IEP was amended on October 2, 2017 to add a 15:1+1 special class for reading to the student's program and to indicate that that the student was exempt from the language other than English (LOTE) requirement (Dist. Exs. 7 at pp. 1, 9, 11; 16 at p. 2).

It is undisputed that the district did not conduct an FBA for the student during the 2017-18 school year. As discussed below, a review of the student's February 2017 and October 2017 IEPs shows that they included information regarding his behavior in school (see Dist. Ex. 7).

The February 2017 and October 2017 IEPs included a list of evaluations/reports and tests the CSE subcommittee considered in developing the student's IEP, including a 2011 social history and a 2014 classroom observation that were not made part of the hearing record (Dist. Ex. 7 at pp. 3-4). The IEPs included the results of State and district-wide assessments from 2013 (third grade) and 2016 (sixth grade) for ELA and mathematics where the student's scores were all at "Level 1" (id. at pp. 4-5). Other evaluations considered by the February and October 2017 CSE subcommittees are discussed below, specifically with regard to the student's behavior and social development and their effect on his school performance (id. at pp. 3-4).

Notably, a February 18, 2015 psychological evaluation report indicated the student was referred for a full re-evaluation as part of his required triennial evaluation (Dist. Ex. 19 at p. 1). Initially, the evaluator observed the student in his classroom during a small group lesson (4:1) (id. at p. 1). The evaluator described the student at that time as having enthusiasm for the lesson as he frequently volunteered to answer questions and remained an active participant in the lesson even

when incorrect answers were brought to his attention (id.). In terms of testing behavior, the evaluator reported that the student was attentive and focused throughout testing, requiring no redirection to task (id.). In addition, the evaluator described the student as polite and respectful (id.).

Administration of the Woodcock-Johnson Test of Cognitive Abilities-Third Edition (WJ COG III) using the Brief Intellectual Ability battery revealed that the student's then-current intellectual functioning was within the average range (Dist. Ex. 19 at p. 2). In addition, administration of the Beery-Buktenica Test of Visual-Motor Integration yielded results that indicated the student's visual-motor integration skills were also within the average range (id. at pp. 2, 3). To assess the student's social-emotional functioning, the student's special education teacher completed the Behavior Assessment System for Children-Second Edition Teacher Rating Scales (BASC-2 TRS) and the parent completed the BASC-2 Parent Rating Scales (PRS) (id. at pp. 2-3). The teacher's responses on the BASC-2 placed the student's behaviors in the school setting in the "average" range for all areas at that time (id.). In contrast, the parent's responses on the BASC-2 placed the student's behaviors in the home setting in the "clinically significant" range for hyperactivity, aggression, externalizing problems, anxiety, depression, internalizing problems, atypicality, withdrawal, attention problems, difficulties (with) activities of daily living, difficulties with functional communication, difficulties with adaptive skills, and the overall Behavioral Symptoms Index score (id. at p. 3). The report noted that a "clinically significant" score suggested the student had difficulty in these areas, as compared to his same-age peers (id.). The report further indicated that the parent's responses also placed the student's behaviors in the "at-risk" range for social skills difficulties (id.).

A March 8, 2016 speech-language report indicated that at the time it was written, the student was in sixth grade and attending a district middle school where he received group speech-language therapy twice a week to address receptive and expressive language skills (Dist. Ex. 14 at p. 1). The report noted that overall, the student made "some progress" on his speech-language therapy goals but had yet to master them (id. at p. 2).<sup>7</sup> At the time, the student's goals targeted his ability to discuss an object in terms of attributes and functions; use vocabulary related to content area curriculum; verbally complete phrases using analogies, metaphors and similes; and recall and comprehend a sequence of events presented orally (id. at pp. 1-2).

An April 27, 2016 reevaluation of academic achievement testing report indicated the purpose of the evaluation was to review the student's then current classification of learning disability (Parent Ex. M at pp. 1, 4). According to the report, the student was struggling in his then-current placement where he received consultant teacher services in most of his core subject area classes and attended a special class for ELA (id.). The reevaluation report described the student as cooperative and attentive to tasks during testing and noted that he increased his level of effort in response to difficult tasks (id. at p. 1). Administration of the Woodcock-Johnson IV Test of Achievement (WJ- IV-ACH) revealed that the student performed in the average range on numerous subtests including writing samples, oral reading, sentence reading fluency and sentence writing fluency (id. at pp. 2, 4). The student performed below average on the letter-word

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<sup>7</sup> The report did not offer any data regarding the amount of progress the student made toward achieving his speech-language goals (see Dist. Ex. 14).

identification, spelling, calculations, word attack, and math fluency subtests (id.). He performed in the limited range on the applied problems and passage comprehension subtests (id.).

The description of the student in the present levels of performance of the February 2017 and October 2017 IEPs is the same (compare Parent Ex. C at pp. 4-5, Dist. Ex. 7 at pp. 5-6). With regard to study skills, the IEPs indicated that the student did not always complete homework or finish his classwork as he said that he was too busy (Parent Ex. C at p. 4; Dist. Ex. 7 at p. 5). Although writing was a strength for the student, he required a lot of prompting to complete assignments, as well as a lot of refocusing to stay on task (id.). Once the student was on-task he could produce very creative writing assignments using a Google Chromebook (id.). The IEPs indicated that the student struggled in math (id.). His basic math facts were weak, and he had a lot of difficulty retaining the math lessons (id.). As memorialized in the IEPs, the student was on a 3.2 grade level according to STAR Math (id.). The IEPs stated that the student gave up very easily in math and he required a lot of prompting to continue (id.). The IEPs also noted that the student worked best in a small math group (id.).

With regard to the student's social development, the February 2017 and October 2017 IEPs indicated that the student became very social with peers during the 2016-17 school year and he had many friends with whom he enjoyed "hanging out" (Parent Ex. C at p. 4; Dist. Ex. 7 at p. 5). The IEPs noted that during the school year, the student attempted to seek attention from his peers by talking back to the teachers and, at times, refusing to complete work assignments (id.; see Dist. Ex. 49 at p. 3). On occasion, the student had difficulty following classroom routines (Parent Ex. C at p. 4; Dist. Ex. 7 at p. 5).

The February 2017 and October 2017 IEPs identified the student's academic and social strengths and needs (Parent Ex. C at p. 4; Dist. Ex. 7 at p. 5). With regard to the student's academic strengths, the IEPs indicated that the student was very social with his peers, that his social life and his appearance were important to him, and that he enjoyed hands-on experiences (id.). With regard to the student's academic needs, the IEPs indicated that the student he required an environment with a small student-to-teacher ratio in order to be successful (id.). The IEPs further indicated that the student also needed to practice and review his math facts daily so he could be successful in math class (id.). According to the IEPs, the student did not always complete his assignments, something that affected his grades (id.). The IEPs noted the student's mother had been extremely helpful in keeping the student on track with his schoolwork at home (id.). With regard to the student's social strengths, the IEPs indicated that the student had many friends and enjoyed playing outside with them during recess (id.). The student's social needs included his need to comply with teachers' requests at all times and to be respectful (id.). The IEPs noted that the student also needed to speak up in class when he did not understand a lesson (id.). The IEPs included a statement that the parent was in "constant" communication with the school to monitor the student's progress in his classes (id.).

With regard to the student's management needs, the February 2017 and October 2017 IEPs indicated the student had significant delays in reading and math that required a small teacher-to-student ratio program with minimal distractions in order for him to progress academically (Parent Ex. C at p. 5; Dist. Ex. 7 at p. 6). The IEPs indicated the student would often need to be refocused and redirected when he was off task (id.). In addition, the IEPs noted that the student would rather give up on assignments than ask for help from his teachers (id.). The IEPs stated that in order to

be successful academically, the student needed to tell his teachers when he did not understand a topic or if he needed clarification (*id.*). The student also needed to turn in his assignments on time and to follow the classroom rules and expectations for him to be successful in class (*id.*). With regard to special factors, the IEPs indicated that the student did not need strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impeded his learning or that of others, and he did not require a behavior intervention plan (*id.*).

Although the February 2017 and October 2017 IEPs noted that the student sought attention from his peers by talking back to the teachers and at times, refusing to complete work assignments it does not appear that an FBA was warranted at the time the student's IEPs were developed for the 2017-18 school year (Parent Ex. C at p. 4; Dist. Ex. 7 at p. 5). There is no evidence that the student's behavior was such that it impeded his learning or that of others. In addition, the February 2017 and October 2017 CSEs included strategies and goals that addressed the student's need to complete classwork and follow class routines. Specifically, the CSEs recommended that he be provided accommodations of additional examples as needed, refocusing and redirection, and reteaching of materials, all daily, in the classroom, and throughout the school day (Parent Ex. C at p. 8; Dist. Ex. 7 at p. 9). In addition, the CSEs recommended a goal that targeted the student's need to complete homework and classroom assignments for all of his classes (Parent Ex. C at p. 6; Dist. Ex. 7 at p. 7). The CSE also recommended the student for a 15:1 special class for skills that met every other day (*id.*).<sup>8</sup>

As the 2017-18 school year progressed, the student continued to demonstrate some off-task behavior and difficulty completing his work. The student's eighth grade special education teacher recalled that the student "sometimes lacked academic confidence" (Tr. pp. 440, 442-43).<sup>9, 10</sup> She explained that the student started off the year strong and whenever he would fall behind, she called the parent and the student would get back on track (Tr. p. 443). The teacher attributed the student's inattentiveness to being "distracted by his peers" who "pull[ed] him off task" (Tr. p. 445). She reported that it was "fairly easy" for her to redirect the student and that he was compliant with her directives "most of the time" (Tr. pp. 443-45, 488). The special education teacher indicated the student was polite when she approached him, and that he was aware and took responsibility for himself (Tr. p. 488). She indicated that she was not aware that the student had been diagnosed with ADHD and did not recall the student engaging in impulsive behaviors during classroom instructional time, except for calling out once during a class period (Tr. pp. 445-46). The special education teacher noted, however, that as the school year went on and the student became more

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<sup>8</sup> The student's special education teacher testified that she supported the student with regard to his work habits during his skills period by going over time management, prioritizing assignments, and making sure he could access "SchoolTool" independently to know what he was missing (Tr. pp. 457-58). The teacher indicated her calls to the parent approximately three times per month "w[ere] always the key" if the student was missing any homework (Tr. p. 458). She also indicated that the parent liked to be "in the know," so if the teacher thought the student was being disrespectful or not meeting expectations, she let the parent know (Tr. p. 468; *see* Tr. pp. 469-70 and Dist. Ex. 49 at p. 9).

<sup>9</sup> The teacher testified that for eighth grade she taught the student in all core area subjects and was also the case manager for the student's IEP (Tr. p. 442).

<sup>10</sup> The teacher indicated there were fewer than 15 students in the student's 15:1+1 classes (Tr. p. 444).

comfortable, he needed to be redirected a little bit more often (Tr. p. 488). The teacher acknowledged referring the student for disciplinary action during the 2017-18 school year but indicated that the referrals were not the result of aggressive behavior (Tr. pp. 446-47; Dist. Ex. 49 at pp. 5, 9-10). However, she was also aware that the student had been disciplined for aggressive behaviors in eighth grade (Tr. p. 447; see Dist. Ex. 49).

The hearing record contains copies of eight disciplinary referrals of the student made during the 2017-18 school year (Dist. Ex. 49). The first referral, dated December 4, 2017, indicated that the student had committed an assault that had resulted in physical injury to another student (id. at p. 12). The student referral form stated that several students were tossing juice cartons back and forth at the lunch table and the student got up, walked around the table, and pulled another student off the seat and slammed him to the ground (id. at p. 4). The student who had been slammed to the ground sustained an injury to his head and required medical attention (id.). According to the student referral form, a school official met with the student who admitted to his behavior (id.). The official also met with the parent (id.). The student received one day of out-of-school suspension for his offense (id.).

A February 26, 2018 student referral form indicated that the student had been late to class on four days in February 2018 (Dist. Ex. 49 at p. 5). The referral indicated that the student's second and third period classes were in the same room, and therefore there was no reason for his lateness (id.). According to the referral form, the parent was contacted and reminded to use a particular "app" regarding lateness (id.). A school official met with the student and his teacher (id.). The referral form indicated that the student would not be allowed to leave the classroom between classes and the teacher would let him know when he could leave the class (id.).

A second student referral form dated February 26, 2018 indicated that the student was in possession of/using an electronic device (Dist. Ex. 49 at p. 6). According to the referral form, the student used his cell phone to take a picture of a teacher talking to another student in the locker room (id.). The student then posted the picture to Snapchat where it was reposted by several other students (id.). The student referral form indicated that previous action taken by the district included reminding all middle school students that cell phones and picture taking in the locker rooms were not allowed (id.). The referral form indicated that the student met with a school official the next day and admitted to the offense (id.). After receiving an explanation about the seriousness of taking inappropriate photos and posting them without permission, the student received a one-day in-school suspension to be served on March 1, 2018 (id.). The school official spoke with the parent on February 27 and February 28, 2018 (id.).

The next student referral form, dated March 9, 2018, indicated that the student was again in possession of/using an electronic device and also engaging in inappropriate behavior in the classroom (Dist. Ex. 49 at p. 7). According to the referral form, the student was directed to log on to "Schooltool" to record his grades and assignments (id.). The student was looking up memes/images and lending his Chromebook to another student who was not allowed to use it (id.). The referral form indicated that the teacher took the student's Chromebook away (id.). After meeting with a school official that day and reviewing the expectations for Chromebook use, the school official determined that the student would not be allowed to use the Chromebook for three days (id.).

A fifth student referral form, dated March 16, 2018, indicated that the student engaged in inappropriate behavior during his sixth period class (Dist. Ex. 49 at p. 7). The referral form stated that a peer came into the class and started bothering the student (id. at p. 8). The student stood up and the two began to push each other (id.). When the teacher asked them to stop and they did not she told them to leave and walked them out of class (id.). According to the referral form, the student met with a school official in the main office and stayed in the office for the remainder of the period (id.).

A sixth student referral form, dated April 13, 2018, indicated that the student was insubordinate during fifth period class, as he refused to sit at the desk assigned by the teacher (Dist. Ex. 49 at p. 9). The referral form stated that while working on a Holocaust unit and watching a video clip of survivors speaking, the student was "continuously laughing" (id.). According to the referral report, the teacher quietly pulled the student out of class and spoke to him about the topic and how laughing seemed insensitive (id.). The student agreed and rejoined the class (id.). However, once back in class, the student started laughing again (id.). The referral form indicated that the teacher asked the student to switch his seat to another desk in the back of the room (id.). The student refused to sit in the new seat and chose to go to the office instead (id.). As noted in the referral form, the student was seen in the main office, stayed there for a time and through lunch, and was permitted to return to class for his academic subjects (id.).

A seventh student referral form, dated May 15, 2018, indicated that the student cut his fifth period class (Dist. Ex. 49 at p. 10). According to the referral form, the student stated that he was being treated unfairly and shortly after requested a pass to the main office (id.). When the teacher asked him why he needed to go to the main office, the student did not want to say (id.). The teacher signed the pass and told the student that if no one was available to see him in the main office then he should ask for paper and write his statement down and return to class (id.). The referral form indicated that the student never returned to class (id.). When the teacher later checked up on his office visit, the student told her that he did not ask to see anyone or request to write a statement, rather he just sat in the office (id.). At that time, the teacher told him that she perceived that as skipping class, but she would double check in the main office (id.). According to the referral form, the office verified that the student's behavior constituted skipping (id.). The teacher spoke with the parent about the incident on May 15 and also later met with the student and his mother after school to review behavioral expectations (id.). In addition, a school official met with the student in the main office and advised the student that he would not be allowed to leave class unless escorted by an adult (id.). The referral form indicated that the student would be able to get "grab and go" breakfast first thing in the morning and not leave class third period (id.). The referral form indicated that this restriction would continue until Tuesday May 29, 2018 (id.). Notably, the referral form indicated that disposition of the referral included a "[b]ehavior [p]lan/[c]ontract" (id.). The hearing record does not contain a copy of the behavior plan or any witness testimony concerning the specifics of such a plan.

An eighth student referral form, dated June 7, 2018, indicated that the student was in possession of/using an electronic device in the classroom (Dist. Ex. 49 at p. 11). The referral form stated that the student was using his Chromebook to look up cartoons when he was asked to complete assignments (id.). As a result, the student was not allowed to use his Chromebook in class for the remainder of the week (id.).

The final student referral form for the 2017-18 school year, dated June 18, 2018, indicated that the student engaged in a minor altercation with another student in the hall (Dist. Ex. 49 at p. 12). According to the referral form, the student and another male student communicated with each other over the weekend, exchanging insults and threats via social media, and planned to get into a physical altercation outside of school (id.). When this did not occur, the student sought out the other student in his classroom during homeroom and punched him in his ear (id.). The referral form indicated that the second student had to seek immediate medical attention both in and out of school (id.). Two school officials met with the student the day of the incident (id.). The student admitted to his behavior (id.). The referral form stated that the student was suspended out-of-school for four days from June 19, 2018 through June 22, 2018 (id.). One of the school officials spoke to the parent on June 18, 2018 to inform her of the situation and the consequences (id.).

The evaluative information available to the CSE at the time it recommended the student's program for the 2017-18 school year, and the present levels of performance included in the student's IEP correctly that reflected that information, support a finding that the IEP developed for the student appropriately addressed any behavioral issues the student demonstrated without the need for an FBA and, accordingly, the district's failure to conduct an FBA for the 2017-18 school year did not deprive the student of a FAPE.

### **C. 2018-19 School Year**

#### **1. Failure to Conduct FBA**

The parent argues that the IHO erred by finding that the district provided the student with a FAPE for the 2018-19 school year despite its failure to conduct an FBA of the student.

In preparation for the student's February 2018 annual review, on January 3, 2018 the district conducted a psychological evaluation as part of the student's three-year reevaluation and to assess his special education status and determine whether modifications should be made to the student's educational program in order to most effectively meet his needs (Dist. Ex. 16 at p. 1). Background information included in the psychological evaluation report indicated that, according to the student's most recent report cards, his quality and completion of work were inconsistent (id. at p. 2). The report also indicated that, although the student was courteous and well behaved, he did not put forth his best effort and demonstrated some work avoidance (id.). At the time of the report the student was passing all subjects with grades ranging from 65 to the low 80s (id.). The evaluator observed that the student attended testing sessions willingly and compliantly (id.). In addition, he presented as polite and cooperative (id.). According to the evaluator, although the student was somewhat quiet, he was appropriately sociable with the examiner (id.). The evaluator reported that the student attempted tasks as needed and needed no redirection (id.). In addition, the student appeared focused throughout testing (id.). The evaluator noted that the student was verbally expressive during more challenging tasks and said, "[t]hat one is so confusing" or made other comments (id.). The evaluator opined that the student seemed to put forth his best effort on all tasks (id.).

The January 3, 2018 psychological evaluation report indicated that cognitive testing was performed via administration of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) (Dist. Ex. 16). The student's performance on the WISC-V yielded a full scale IQ

(FSIQ) of 76 (5th percentile) which was in the "[v]ery [l]ow" range compared to same-aged peers (id. at p. 3). On the verbal comprehension index (VCI), which measured the student's ability to use word knowledge, verbalize meaningful concepts, and reason with language-based information, the student's overall standard score (SS) of 81 (10th percentile) was in the "[l]ow [a]verage" range (id.). On the visual spatial index (VSI), which measured the student's ability to evaluate visual details and understand part-whole relationships, the student's overall score was also within the "[l]ow [a]verage range (SS 81, 10th percentile) (id. at pp. 3-4). The evaluation report indicated that on the fluid reasoning index (FRI), which measured the student's logical thinking skills and ability to use reasoning to apply rules, the student's overall score (SS 76, 5th percentile) was in the "[v]ery [l]ow" range (id.). On the working memory index (WMI), which measured the student's attention, concentration, and mental control, his overall score (SS 88, 21st percentile) was also in the "[l]ow [a]verage" range (id.). In addition, on the processing speed index (PSI), which measured the student's ability to quickly and correctly scan visual information, the student's overall score (SS 8, 23rd percentile) was in the "[l]ow [a]verage" range (id.).

The evaluator indicated that although the student appeared to be putting forth his best effort throughout testing, it was worth noting that his scores were significantly lower than those of his previous two evaluations, both of which indicated average cognitive ability (Dist. Ex. 16 at p. 5). The evaluator indicated that the test results should be interpreted with caution as they may have presented an underestimate of the student's then-current ability level (id.).

In addition to cognitive testing, the district also conducted a January 5, 2018 assessment of the student's academic achievement using the Woodcock Johnson IV Tests of Achievement (WJ IV-ACH), administered by the student's eighth grade special education teacher (Dist. Ex. 18 at p. 1). The student's teacher observed that although the student was not eager to take the test, he was cooperative during the testing session (id.). The teacher noted that the student approached the test stating that he expected to do poorly on it (id.). However, his concentration and attention to task was good (id.). According to the teacher, the student remained calm throughout the testing session and took his time responding to tasks (id.). When the tasks became more difficult, he attempted them with consistent effort (id.). The teacher reported that the student struggled in math if the calculations required long division (id.). Based on the student's consistent effort during testing, the teacher considered the results of the evaluation to be a valid estimate of his current level of academic achievement and functioning at that time (id.). The student's standard scores on the WJ IV-ACH ranged from a high of 93 on the writing samples subtest to a low of 75 on the calculation subtest (id. at p. 2). According to the summary included in the report, the evaluation results indicated that the student had relative strengths in written expression and academic applications (id.). Although he showed some weakness in reading, his weakest area was in math calculation skills (id. at p. 2).

On January 3, 2018, the district performed a speech-language assessment of the student, the results of which were memorialized in a report dated January 18, 2018 (Dist. Ex 17 at pp. 1, 4). According to the evaluator's findings, administration of the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5) indicated the student's language skills were in the marginal range (mildly delayed) (id. at p. 4). The evaluator noted a strength in the student's language content skills based on his average performance on the word classes and sentence assembly subtests (id. at pp. 2-3). The evaluator noted that the student's weakest areas were in receptive language and language memory and that the student experienced difficulties on

the recalling sentences subtest (repeating sentences that included subordinate clauses "before," "after" and "when") and understanding spoken paragraphs subtest (recalling details, sequencing inferencing prediction and social context) (id.).

CSE subcommittee convened on February 6, 2018 to conduct the student's annual review and to review results of the student's (three-year) reevaluations (Dist. Ex. 8 at p. 1). Attendees included the CSE subcommittee chairperson who also participated as school psychologist, a special education teacher, a general education teacher, a school counselor, a speech-language therapist, and the student (id.). The parent participated via telephone (id.). The February 6, 2018 IEP did not include a health alert that the student was diagnosed with ADHD or indicate that the student was taking medication to address it (Parent Ex. YY at p. 18; see Dist. Ex. 8). The February 6, 2018 IEP included updated evaluative results from the January 3, 2018 psychological evaluation report, January 3, 2018 speech-language triennial report, January 5, 2018 reevaluation academic achievement testing report, and listed additional reports used to inform the CSE including a February 6, 2018 teacher progress report, October 9, 2017 physical examination, and July 2017 social history (Dist. Exs. 8 at pp. 1, 3-4; 15-18). The meeting information summary indicated that in the special class and general education settings the student was respectful, but tended to get distracted by his peers (Dist. Ex. 8 at p. 1).

With regard to the student's then present levels of academic performance, the February 2018 IEP reflected the results of the January 2018 speech-language evaluation which noted a strength in the student's language content skills and weaknesses in his receptive language and language memory (Dist. Exs. 8 at p. 4; 17 at p. 4).

Specific to study skills, the present performance levels indicated that the student started the year with strong, independent work habits which began to dwindle toward the end of the second quarter (Dist. Ex. 8 at p. 5). The IEP stated that whenever the student fell behind in academics, communication with the parent put him back on track (id.). The IEP noted that frequently the student needed to borrow something with which to write and that he needed to build better time management skills (id.). According to the IEP, when the student had spare time in class (e.g., a study hall, or after a test when there was still some time left) he frequently chose to search the web for entertainment, rather than be productive with schoolwork (id.). The student could be easily distracted by peers (id.).

For reading, the present performance levels indicated the student had shown significant growth in reading comprehension since he started middle school, especially in eighth grade (Dist. Ex. 8 at p. 5). The IEP noted that the student was willing to read aloud in class (id.). As noted on the IEP, in the beginning of the school year (September 2017) the student earned a score of 458 (4.1 grade equivalent [GE]) on the STAR Reading Assessment (Dist. Exs. 8 at p. 5; 20; 23; 24). When the student took the assessment again in December 2017 he attained a score of 587 (5.2 GE). The IEP stated that in literary pieces, the student needed to focus on determining theme, as well as citing textual evidence to support the analysis of literary text (Dist. Ex. 8 at p. 5). In informational reading, the student also needed to focus on citing evidence to support the analysis of the text (id.).

Turning to math, the February 2018 IEP indicated that math was a weakness for the student (Dist. Ex. 8 at p. 5). He had difficulty with basic math facts and struggled with long division (id.).

The IEP stated that the student was proficient with using a calculator (id.). He worked hard in math and was good about letting the teacher know when he did not understand something (id.). According to the IEP, reteaching and repetitive practice had helped the student with retention in math (id.). The IEP indicated that in September 2017 the student earned score of 593 (4.0 GE) on the STAR Math Assessment (Dist. Exs. 8 at p. 5; 20; 23; 24). When he took the math assessment for the second time in December 2017, his score increased to 678 (5.2 GE) (Dist. Exs. 8 at p. 5; 23).

With regard to writing, the February 2018 IEP noted that written expression was a relative strength for the student (Dist. Ex. 8 at p. 5). According to the IEP, the student was proficient with word processing and could accurately use the spellcheck feature (id.). When responding in writing about a text, he sometimes had difficulty identifying the most relevant piece of text evidence to support his claim (id.). He had a good grasp on the writing conventions and applied them appropriately (id.).

With regard to social development, the February 2018 IEP indicated that the student's social and emotional levels and abilities were within age expectations (Dist. Ex. 8 at p. 5). With regard to physical development, the IEP indicated that the student appeared to have no physical or medical problems (id. at p. 6).

The February 2018 IEP identified the student's academic and social strengths and needs (Dist. Ex. 8 at pp. 5-6). Academically, the student's relative strength was in written expression (id. at p. 5). The IEP noted that the student was good at applying writing conventions (was proficient using technology) and was good about asking for help when he did not understand a concept (id.). In terms of the student's social strengths, the IEP indicated the student was a polite young man who treated adults with respect (id.). In addition, he maintained long term friendships with his peers (id.).

With regard to the student's academic needs, the February 2018 IEP indicated the student needed to work on time management and prioritizing assignments, especially when he had independent time (Dist. Ex. 8 at p. 5). In addition, he needed to come to class prepared with something to write with on a more consistent basis (id.). The IEP stated that the student could be easily distracted by his peers and needed to be refocused (id.). In math, the student benefited from reteaching of materials and repetitive practice (id.). The IEP suggested that the student use a calculator to compensate for weak computational skills (id.). The IEP further suggested that when writing in response to a text, the student should continue to work on selecting the strongest piece of text evidence to support his claim (id.).

The February 2018 IEP indicated that there were no social or emotional needs of the student that should be addressed through special education at that time (Dist. Ex. 8 at p. 6). There were also no physical or motor needs to be addressed through special education at that time (id.).

With regard to the student's management needs, the February 2018 IEP indicated the student needed assistance building independent study skills, including time management and prioritizing assignments for completion (Dist. Ex. 8 at p. 6). He could be easily distracted by his peers and needed to be refocused when that happened (id.). The IEP stated that in math, the student benefited from re-teaching of material and repetitive practice and he should use a

calculator (id.). The student was good about letting the teacher know when he did not understand something, and he should continue to advocate for himself in that way (id.). The IEP indicated that home/school communication had been beneficial, especially if the student was missing an assignment (id.).

Similar to the February 2017 IEP, the February 2018 IEP noted that the student had significant delay in reading skills, written expression and speech-language skills that affected progress in the general education curriculum (Dist. Ex. 7 at p. 6; Dist. Ex. 8 at p. 6). With regard to special factors, the February 2018 IEP indicated the student did not need strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impeded his learning or that of others, and he did not need a behavior intervention plan, (Dist. Ex. 8 at pp. 6-7).

The February 2018 IEP included postsecondary goals that indicated the student's plans for where he would live, work and learn as an adult (Dist. Ex. 8 at p. 7). In addition, the IEP contained approximately 13 annual goals aligned with the student's needs related to study skills, writing, math, and speech-language skills (id. at pp. 7-8).

For the 2018-19 school year, the CSE subcommittee recommended the student for continuation of special classes (15:1+1) for all core subject areas, a special class for reading (15:1), and speech-language therapy in a small group (5:1) 45 times per year (Dist. Ex. 8 at pp. 9-10). Accommodations and modifications were the same as in the previous IEP except for the addition of use of a calculator during independent work in math class (id. at p. 10). The CSE recommended a decrease in the extra time allowed for testing from 2.0 to 1.5 times (id. at pp. 2, 11). The IEP included a coordinated set of transition activities to facilitate the student's movement from school to post-school activities with regard to instruction, related services, community experiences, development of employment and other post-school adult living experiences, and acquisition of daily living skills (id. at pp. 11-12). The IEP noted that in consideration of the student's current levels of performance, a functional vocational evaluation was not needed at that time (id. at p. 12). The IEP indicated that the student would participate in the same State and district-wide assessments of student achievement that were administered to general education students (id. at p. 9). However, the IEP also indicated that the student would not participate in general education programs for ELA, math, science, and social studies (id. at p. 12). The student was exempt from the LOTE requirement (id.). The February 2018 CSE subcommittee recommended placement for the student in the home public school district (id. at p. 13).

At the time the February 6, 2018 IEP was developed, the student had received one disciplinary referral for the 2017-18 school year, however the incident included physical assault and an out-of-school suspension (see Dist. Ex. 49 at p. 4). The IEP offered little in the way of specific classroom management strategies or positive behavioral supports to address the student's classroom management needs (Dist. Exs. 7 at p. 9; 8 at p. 10). Despite the fact that the IEP did not include an alert that the student had a diagnosis of ADHD, for which he received medication, the IEP provided for accommodations of additional examples as needed, refocusing and redirection, both daily, in the classroom, and throughout the school day, reteaching of materials during instructional time in math, and use of a calculator for independent work in math (Dist. Ex. 8 at p. 10). Recommended testing accommodations were for extended time (1.5), a location with

minimal distractions, directions read to the student and directions explained, all except as prohibited by State Education Department policy on State assessments, and questions read to the student for all quizzes and tests (*id.* at pp. 1, 11). Therefore, the evidence in the hearing record specific to the student's behavior in class does not reflect that the student needed an FBA at the time of the February 6, 2018 CSE subcommittee met to plan the student's program for the 2018-19 school year. However, as noted above, by the end of the 2017-18 school year there was enough evidence to show that the student's academic performance and behavior in school had declined and that an FBA was warranted.

Adding to that evidence was an incident that occurred in October 2018. Shortly after the 2018-19 school year began, the student was involved in a verbal altercation in the cafeteria with another student, and refused to comply with security to leave and go to the office (Dist. Ex. 34). In addition, the student was involved in a social media exchange which lead to disruption of the normal school environment (Tr. pp. 158-63; Dist. Ex. 34; see Dist. Ex. 50). As a result of the student's disorderly and insubordinate behavior he received a five-day, out-of-school suspension, lasting from October 12, 2018 to October 19, 2018 (Dist. Ex. 34 at p. 1).

On October 22, 2018, by agreement, the student's IEP was amended without a meeting to change his special class for science to an integrated co-teaching class (ICT) (Dist. Ex. 9 at pp. 1, 8). No changes were made to the student's IEP with regard to his behavior or management needs. The amended IEP made no mention of the student's recent five-day out-of-school suspension, nor did it include a recommendation for an FBA (see Dist. Ex. 9).

A January 4, 2019 student referral form and superintendent's letter advised the parent that the student had been involved in an unspecified "minor" physical altercation with another student that resulted in the student receiving an out-of-school suspension for five days (Dist. Ex. 35).

On February 22, 2019, the student was involved in "serious school misconduct" in which he shoved another student in the hallway (Dist. Ex. 36). The student received another out-of-school suspension, this time for three days (*id.*).

The October 2018 and February 2019 student disciplinary referrals served to confirm that the student's in-school behavior was declining and that an FBA was needed to identify the factors that were contributing to the behavior and the conditions that maintained it. In her testimony, the parent reported that her son was "not an angel," and that at times he initiated things and at other times he responded when provoked (Tr. pp. 929-30). However, as noted previously herein, none of the IEPs developed by the CSE subcommittee for the 2017-18 and 2018-19 school years reflected the student's disciplinary referrals or suspensions (see Parent Ex. C and Dist. Exs. 7-10). For the 2017-18 and 2018-19 school years, the hearing record reflects that the CSE subcommittee never questioned or explored how the student's disability impacted his behavior in school (*id.*). Instead the IEPs for the two school years indicated the student had limited or no social or emotional needs that needed to be addressed by special education (Dist. Exs. 7 at p.5; 8 at p. 6; 9 at p. 5; 10 at p. 5). No CSE subcommittee during those years recommended counseling for the student (see Dist. Exs. 7-10). The disciplinary referrals and superintendent letters included in the hearing record present a picture of a student with more intensive behavioral needs than those reflected in the student's IEPs, particularly his IEPs for the 2018-19 school year. Accordingly, the accumulation of disciplinary actions based on the student's increasingly maladaptive behavior in

school warranted that an FBA of the student be conducted by end of the 2017-18 school year in anticipation of the upcoming 2018-19 school year and creation of an IEP for that year. However, it is not necessary for me to determine in isolation whether the district's failure to conduct an FBA of the student for the 2018-19 school year deprived him of a FAPE because, as discussed further below, the district denied a FAPE to the student when it failed to address the educational impact of the bullying of the student in its special education and programming and placement recommendations for the student for the 2018-19 school year, and its failure to conduct an FBA of the student is more properly viewed as a compounding factor to that foundational denial of FAPE.

## 2. Bullying

The parent argues that the IHO incorrectly determined that the district's failure to address bullying of the student and to keep the student safe at school did not deny the student a FAPE during the 2018-2019 school year.

Under certain circumstances, if a student with a disability is the target of bullying, such bullying may form the basis for a finding that a district denied the student a FAPE (Dear Colleague Letter: Bullying of Students with Disabilities, 61 IDELR 263 [OSERS 2013] [stating that bullying that results in a student with a disability not receiving meaningful educational benefit constitutes a denial of a FAPE and that districts have an obligation to ensure that students who are targeted by bullying behavior continue to receive a FAPE pursuant to their IEPs]; see Smith v. Guilford Bd. of Educ., 226 Fed. App'x 58, 63-64 [2d Cir. June 14, 2007] [indicating that bullying might, under some circumstances, implicate IDEA considerations]; M.L. v. Fed. Way. Sch. Dist., 394 F.3d 634, 650-51 [9th Cir. 2005] [finding that "[i]f a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE"]; Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 199-201 [3d Cir. 2004] [reviewing whether the district offered the student "an education that was sufficiently free from the threat of harassment to constitute a FAPE"]; Dear Colleague Letter: Responding to Bullying of Students with Disabilities, 64 IDELR 115 [OCR 2014]; Dear Colleague Letter: Harassment and Bullying, 55 IDELR 174 [OCR 2010] [stating that "a school is responsible for addressing harassment incidents about which it knows or reasonably should have known"]; Dear Colleague Letter: Prohibited Disability Harassment, 111 LRP 45106 [OCR/OSERS 2000]).<sup>11</sup> In determining whether allegations related to bullying rise to the level of a denial of FAPE, the United States Department of Education has clarified that:

A school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP team must then

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<sup>11</sup> New York State has addressed bullying in schools through the Dignity for All Students Act, which imposes specific obligations on school districts with regard to the prevention and investigation of harassment and bullying (Educ. Law §§ 10-18). The law defines bullying as "the creation of a hostile environment by conduct or by threats, intimidation or abuse" that, among other things, interferes with a student's educational performance, mental, emotional, or physical well-being, causes a student to fear for his or her physical safety, or causes physical or emotional harm (Educ. Law § 11[7]).

determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly.

(Dear Colleague Letter, 61 IDELR 263).

Additionally, in determining whether allegations related to bullying and harassment rise to the level of a denial of FAPE, one district court in New York has found that "students have a right to be secure in school" under the IDEA and that bullying may constitute the denial of a FAPE if "it is likely to affect the opportunity of the student for an appropriate education" (T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 308, 316-17 [E.D.N.Y. 2011]). The District Court in T.K. developed a test to determine whether bullying resulted in the denial of a FAPE as follows: "(1) was the student a victim of bullying; (2) did the school have notice of substantial bullying of the student; (3) was the school 'deliberately indifferent' to the bullying, or did it fail to take reasonable steps to prevent the bullying; and (4) did the bullying 'substantially restrict' the student's 'educational opportunities?'" (T.K., 779 F. Supp. 3d at 316, 318; see also T.K. v. New York City Dep't of Educ., 32 F. Supp. 3d 405, 417-18 [E.D.N.Y. 2014], aff'd, 810 F.3d 869 [2d Cir. 2016]). Moreover, the court in T.K. found that "where there is a substantial probability that bullying will severely restrict a disabled student's educational opportunities . . . an anti-bullying program is required to be included in the IEP" (T.K., 779 F. Supp. at 421-22). Accordingly, if a student requires the supports related to bullying in order to receive a FAPE, the plans or supports should be described or at the very least referenced in the IEP, else a district may be hard-pressed to defend an IEP with evidence outside of its four-corners (see R.E., 694 F.3d at 185-86). In addition, with respect to additional steps that a district might take to address bullying about which it is on notice, the United States Department of Education has identified the following nonexclusive actions: "separating the accused harasser and the target; providing counseling for the target and/or harasser, or taking disciplinary action against the harasser" (Dear Colleague Letter, 55 IDELR 174 [OCR Oct. 26, 2010]). However, when assessing a district's response to allegations of bullying, it is also useful to recognize the general principle that while "[s]chools are under a duty to adequately supervise the students in their charge . . . [s]chools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students" (Mirand v. City of New York, 84 N.Y.2d 44, 49-50 [1994]; see Stephenson v. City of New York, 19 N.Y.3d 1031, 1033-034 [2012]).

The hearing record supports that there were a number of incidents that took place during the 2018-19 school year during which the student was purposefully intimidated and threatened by fellow students. Although, as the IHO notes, several of these incidents took place away from the school grounds, the salient point of inquiry is whether bullying of the student by fellow students with whom he continued to attend school had an impact on his ability to access educational benefit from his special education programming such that the district was obligated to address the bullying issue through CSE meetings and the IEP development process and whether the district, if the student's needs were demonstrably affected by the bullying, continued to provide the student with an appropriate education according to the relevant FAPE standards.

According to the parent, the incidents began in ninth grade when the student was teased/mockered by school peers (including at least one peer who was allegedly part of a gang) for being in special classes, and about his younger brother who had a disability and whom the student sometimes got off the school bus (Tr. pp. 822-24). The parent testified that as she understood the

situation, the student had an altercation with an alleged gang member who was making fun of him and that student spoke to other alleged gang members who joined in on teasing the student (Tr. p. 824). Thereafter the student stopped participating in a private basketball team that he had attended (id.). The parent recalled that she began receiving phone calls from the assistant principal who advised her that the student was using his cell phone in class and who also told her that the student reported being bothered by other students (Tr. pp. 824-25). According to the parent and the assistant principal, in December 2018 when the student and a friend were at the mall, several district high school students that were allegedly members of a gang encircled the student and his friend (Tr. pp. 169, 173, 194-95, 825; see Tr. pp. 407-08). Mall security came and the student was able to walk away (Tr. p. 826). Testimony by the assistant principal indicated that he saw pictures of the gang circled around the student and in a conversation with the parent he expressed his concern for the student's safety, and encouraged her to contact the police to seek an order of protection (Tr. pp. 169-70, 194-96; Dist. Ex. 51 at p. 3).

According to testimony by the parent and assistant principal, they were in frequent contact with each other (Tr. pp. 177-78; 915-16, 833-34, 915-16, 926). In addition, the school resource officer was involved in an investigation of the incident at the mall (Parent Ex. 51 at pp. 3; see Tr. pp. 833-34). Following the mall incident, the assistant principal gave the student a one-minute pass to leave class early and pass through the halls to his next class (Tr. p. 203).

The assistant principal completed a DASA form, dated December 19, 2018, that documented the mall incident (Dist. Ex. 51 at p. 1). In addition to the mall, the principal checked boxes indicating incidents had occurred in the hallway/locker, cafeteria, and "other" locations (Tr. pp. 171-73; Dist. Ex. 51 at p. 1). Other checkboxes indicated the incident involved direct physical, social/relational, and cyberbullying aspects (Dist. Ex. 51 at p. 2). The form noted a video was attached; however, that video was not included in the hearing record (id.). According to the DASA form, the assistant principal was conducting an ongoing investigation in conjunction with the school resource officer and the local police (id. at p. 3). The parent requested contact with the school resource officer as she wanted to press charges (against the perpetrator) (Tr. p. 173; Dist. Ex. 51 at p. 3).

Subsequently, sometime in January 2019, five or six students (several of whom attended the district high school), were outside the student's home and contacted him to come outside (Tr. pp. 174-76, 204-05, 828, 830; Dist. Ex. 52). The parent told the student not to go outside and called the police (Tr. p. 828). More orders of protection naming the student as the protected party were issued (Tr. p. 830). Two students were arrested because they sent the student photos of weapons and bullets (Tr. p. 828). According to the parent, following the incident the students began following the student around in school, calling him a "snitch" and a "cop caller" (Tr. pp. 836-37). A January 25, 2019 police incident report documented the incident (Parent Ex. II). On January 28, 2019, the assistant principal completed a DASA report that indicated the student was targeted in a cyberbullying incident (Tr. pp. 203-07; Dist. Ex. 52). The DASA form included a checkbox for the student to receive education ("wellness day") on how to respond to bullying for the purpose of making good choices (Tr. pp. 178-79, 208; Dist. Ex. 52). Another checkbox indicated the district notified the police about the incident (Dist. Ex. 52 at p. 2). The DASA report indicated that this was not the first time the student had been bullied (id.).

According to testimony by a school guidance counselor, on February 8, 2019 the student appeared at her office, looking physically upset (Tr. p. 520). The counselor reported that the student was overwhelmed and mentioned that he "had a lot going on" (Tr. p. 521). In response to questioning, the student disclosed that he had had suicidal thoughts in the past and that he was seeing a counselor outside of school (Tr. pp. 517, 520-24; see Tr. p. 532; Parent Ex. QQ). The guidance counselor called the parent and recommended that the student meet with the outside counselor as soon as possible (Tr. pp. 523, 525). The parent was unable to pick up the student from school and wanted him to return home on the school bus (Tr. pp. 529-30). The guidance counselor called the school social worker for a second opinion as to whether it was "adequate" for the student to ride the bus home (Tr. pp. 383-84; 529-30). The guidance counselor noted that in her conversation with the parent, the parent confirmed that the student saw a counselor outside of school and informed the guidance counselor that the student had been diagnosed with depression and was on medication (Tr. p. 385, 543; see Parent Ex. QQ). The guidance counselor followed up her conversation with the parent with an email later that day, in which she inquired as to whether the student had made it home (Parent Ex. NN). The parent thanked the guidance counselor and indicated the student told her he had talked to the guidance counselor about the bullies, that he went to her because he had no place else to go, and that he felt safe and comfortable with the guidance counselor (Parent Ex. NN). On February 10, 2019, a high school People Assuring Student Success (PASS) committee met, with attendees that included the assistant principal, the social worker, and the school psychologist, among others (Tr. pp. 385-86; Parent Ex. E). The PASS committee meeting minutes noted that the guidance counselor had met with the student due to "ideation" and that the student was "being treated for depression (medication)" (Parent Ex. E). The PASS meeting minutes indicated that the student was "[f]requently involved in peer conflict both in and out of school" that the police were involved, and that the social worker was going to meet with the student (Tr. pp. 388, 413; Parent Ex. E).

On February 19, 2019, the student's 2018-19 IEP was amended by agreement without a meeting (Dist. Ex. 10 at p. 1). The student's speech-language therapy was reduced to one time per week (id. at pp. 1, 9). No changes were made to the student's IEP with regard to the description of the student's behavior needs or his management needs (see Dist. Ex. 10), and the IEP made no reference to the DASA reports and PASS committee meeting although such information indicated significant changes in the student's social situation at school. The amended IEP made no mention of the student's recent interaction with alleged gang members, his visit to the high school guidance counselor's office, or his prior thoughts of suicide (see Tr. pp. 520-23; see Parent Exs. E; NN; Dist. Ex. 10). Despite knowing that the student had been threatened on multiple occasions during the 2018-19 school year, with such incidents recorded in DASA reports and also reported to members of the school administration and staff, the district did not convene the CSE to determine whether as a result of the effects of the bullying, the student's needs had changed such that the IEP was no longer designed to provide meaningful educational benefit for him.

Moving beyond the February 19, 2019 CSE subcommittee meeting, in April 2019 the student was walking to a deli with a high school friend, when he was stabbed by a friend who at that time had allegedly "joined forces" with the alleged gang members who were possibly trying to initiate him into their group (Tr. p. 830-33). As a result of the stabbing, the student spent two to three days in the hospital post-surgery for repair of a "laceration of [his] left upper arm" and "evisceration of [his] bowel" (Tr. p. 830-33; Parent Ex. P at p. 1). The student was transferred to home instruction two hours a day initially to recover from surgery and later to address the parent's

concern about the student's safety if he returned to the high school (Tr. pp. 92-93, 147, 335, 672, 833; Dist. Exs. 37; 38). The parent testified that she received a call from the school resource officer that he heard there was going to be retaliation between "[the student] and the kids" at which point the assistant principal, school resource officer, and the parent thought it would be better for the student not to return to school, anticipating that over the summer things would "die down" (Tr. pp. 833-34). The student received home instruction from April 24, 2019 through the end of the 2018-19 school year (Dist. Ex. 53 at pp. 1-4). The student's global studies teacher for ninth grade testified that after the incident in the student's neighborhood involving his receipt of phone calls "we" had concerns about the student's safety (Tr. p. 341). The global studies teacher noted that she, the parent, and the other teachers were concerned because what happened (inferring the stabbing) to the student was "pretty traumatic" (id.).

The hearing record shows that the district continued the student on home instruction, after he recovered from the physical wounds he sustained during the stabbing, because it was concerned about the student's safety. There is no evidence to suggest that the CSE met to update and address the student's special education needs generally or while being educated at home for the duration of the 2018-19 school year (Parent Exhibit E), despite having changed the student's placement to a much more restrictive setting with entirely different programming, even though by that time the social worker, guidance counselor, and the assistant principal had attended the February 2019 PASS committee meeting where the student's suicidal ideation was discussed, as well as his treatment for depression with private counseling and medication.

In her testimony, the parent reported that her son was "not an angel," and that at times he initiated things and at other times he responded when provoked (Tr. pp. 929-30). However, as noted previously herein, none of the IEPs developed by the CSE subcommittee for the 2017-18 and 2018-19 school years reflected the student's disciplinary referrals or suspensions (see Parent Ex. C and Dist. Exs. 7-10). For the 2017-18 and 2018-19 school years, the hearing record reflects that the CSE subcommittee never questioned or explored how the student's disability impacted his behavior in school (see Parent Ex. C and Dist. Exs. 7-10). Instead the IEPs for the two school years indicated the student had limited or no social or emotional needs that needed to be addressed by special education (Dist. Exs. 7 at p. 5; 8 at p. 6; 9 at p. 5; 10 at p. 5). No CSE subcommittee during those years recommended counseling for the student (see Dist. Exs. 7-10). Overall, when reviewing the student's various IEPs, his disciplinary referrals and the superintendent letters, it appears as if the student was described differently in the IEPs than he was described in the documentation for behavioral incidents with associated consequences of out-of-school suspension (compare Dist. Exs. 7-10 and 49 at pp. 5-12; 35; 36). Moreover, although the well documented bullying incidents and the student's increasing psychological distress over his social situation at school overlap considerably with the time period during which the student's disciplinary issues and behavioral maladjustment increased, as with the disciplinary issues, the bullying issue and its ramifications remained unexplored by the CSE during the 2018-19 school year and are not reflected in the IEPs for that year.

As a result of the foregoing, the IHO erred in finding that the district adequately addressed the bullying of the student and provided the student with a FAPE for 2018-19 school year. The IHO neglected to weigh the totality of the evidence discussed above that should have alerted and required the CSE or CSE subcommittee to reconvene to discuss the student's special needs in light of his frequent behavior incidents and suspensions, attention difficulties, trauma and depression

after being stabbed (see Dist. Exs. 55-56). This failure compounded with the district's failure to conduct an FBA for the 2018-19 school year despite mounting evidence that the student's behavior was regularly resulting in disciplinary measures and was interfering in his ability to obtain educational benefit from his program and services resulted in the district radically changing the student's placement without an assessment of the current nature of the student's needs and the programming, placement and special education services that were appropriate under the circumstances to meet those needs, particularly if his needs had changed. Indeed, the district's solution to the student being bullied appears to have been to allow him to remain at home for approximately one quarter of the 2018-19 school year with home instruction and no special education services. Given that the relevant authority and guidance concerning the bullying of special education students, as discussed above, recognizes that districts have an obligation to ensure that students who are targeted by bullying behavior continue to receive a FAPE pursuant to their IEPs, to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit, to determine to what extent additional or different special education or related services are needed to address the student's individual needs and to modify the IEP to include appropriate anti-bullying support, I find that the district's failure to abide by these principles and procedures denied the student a FAPE for the 2018-19 school year.

#### **D. 2019-20 School Year – Bullying**

The parent argues that the IHO incorrectly determined that the district's failure to address bullying of the student and to keep the student safe at school did not deny the student a FAPE during the 2019-2020 school year.

The meeting information summary attached to the student's IEP for 2019-20 school year indicated that the CSE subcommittee convened on March 27, 2019 for the student's annual review (Dist. Ex. 11 at p. 1). Attendees included the CSE subcommittee chairperson who also participated as the school psychologist, a special education teacher, a general education teacher, a school social worker, a speech-language therapist, and the student (id.). The parent participated via telephone (id.). The meeting summary noted that the parent was encouraged to use "SchoolTool" daily with the student to help him assess his academic status (id.). Consistent with previous years, neither the meeting summary nor the March 2019 IEP included the student's diagnosis of ADHD (see Parent Exs. 7-11 and Parent Ex. C). According to the meeting information summary, the student's science teacher reported that the student was very distracted and off task and needed reminders to complete his work (Dist. Ex. 11 at p. 1). In addition, he was often socially inappropriate with his peers and he was often on his phone, distracting him from his work (id.). The meeting summary indicated that in speech-language therapy, the student was doing well but could be distracted by his phone and therefore required a lot of redirection in the small group (id.). His speech-language therapist requested that the student be reevaluated in the fall to assess his continued need for speech-language therapy (id.). As reflected in the meeting summary, the student's social studies teacher shared similar concerns, notably that the student was polite but he needed support to settle into instruction time (id.). The meeting summary indicated that the school social worker introduced himself to the student due to some school-based issues and expressed hope that the student would seek assistance from him when needed, if other issues arose (id.). According to the meeting summary, the CSE subcommittee agreed that the student would continue in a special class placement for English, social studies and math (id.). In addition, the CSE recommended that the

student move back to a special class for science, after moving to ICT services in October 2018 (id.).

The March 2019 IEP included the same list of evaluations as noted in the previous IEP with the addition of a speech-language progress summary dated March 27, 2019 (Dist. Ex. 11 at pp. 2-3).<sup>8</sup> With regard to study skills, the present levels of performance indicated that the student could become distracted within the classroom by his peers and he needed many reminders and refocusing to get back on task (id. at p. 4). The IEP stated that the student needed to put forth consistent effort in all of his classes throughout the entire school year and noted that his effort and motivation dwindled as the school year progressed (id.). The IEP indicated that the student needed to continue working independently and to seek out help from teachers when he needed it (id.). In addition, he also needed to complete missing assignments when absent (id.).

The March 2019 IEP indicated that reading was an area of weakness for the student (Dist. Ex. 11 at p. 4). According to the IEP, the student would read aloud in class when asked but preferred not to (id.). In reading class, the student was often distracted and wasted time (id.). The IEP indicated that he needed to continue working on reading fluency, reading for context, and citing evidence to support analysis and theme of text in both reading class and content classes (id.).

With regard to writing, the present levels of performance indicated that written expression was a relative strength for the student (Dist. Ex. 11 at p. 4). He was proficient in using a Chromebook for written assignments (id.). The IEP noted that the student needed to continue working on providing supporting details in his written work (id.). He also benefited from graphic organizers/outlines for written assignments (id.).

Turning to mathematics, the present levels of performance indicated that mathematics was an area of weakness for the student (Dist. Ex. 11 at p. 4). The IEP indicated that the student had difficulty with basic math facts and applying them to advanced concepts throughout the year (id.). According to the IEP, the student's quiz/test grades had been consistently low (id.). The student benefitted from the re-teaching of concepts and repeated practice of basic math facts (id.).

The present levels of performance indicated that the student demonstrated progress in all speech-language goal areas (Dist. Ex. 11 at p. 4). The student improved in his ability to interpret sentences and make comparisons, use subordinate conjunctions (before, after, when), recall and comprehend a verbally presented sequence of events, and follow three-step directions that were verbally presented (id.). In addition, the IEP noted that the student benefitted from information rephrased with verbal cues when needed (id.).

With regard to social development, the March 2019 IEP indicated that the student's social and emotional needs were within age expectations (Dist. Ex. 11 at p. 4). It also noted that the student had been suspended from school due to negative peer interactions (id.). The IEP indicated that while the student was honest about his role in those interactions, he struggled with consistently making good choices and avoiding negative peer interactions (id.). According to the IEP, the student's physical abilities were within age appropriate expectations, and he had no physical or motor needs that needed to be addressed by special education at that time (id. at p. 5).

The student's cited academic strengths and needs were consistent with his previous IEPs

(compare Dist. Ex. 11 at p. 4, with Dist. Exs. 8 at p. 5; 9 at p. 4; 10 at p. 4). With respect to the student's social strengths, the IEP indicated that in addition to enjoying socializing with adults and peers, having a large peer group, and enjoying basketball, the student was very honest about his peer interactions and would seek help when struggling with peer relationships (Dist. Ex. 11 at p. 4). The March 2019 IEP indicated that the student had no social or emotional needs that needed to be addressed by special education at that time, however, also noted that the student needed to continue to work on making positive choices with regard to peer interactions (id. at pp. 4-5).

Specific to the student's management needs, the March 2019 IEP indicated the student had significant delays and required a small teacher-to-student ratio program with minimal distractions in order to progress academically (Dist. Ex. 11 at p. 5). With regard to special factors, the March 2019 IEP indicated the student did not need strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impeded his learning or that of others (id.).

The March 2019 IEP included postsecondary goals that outlined the student's plans at that point in time for living, working and learning as an adult (Dist. Ex. 11 at p. 6). Based on the student's desires to attend a four-year college and be involved in basketball in school, be gainfully employed after college, and live on or near campus, the IEP indicated that the student would participate and investigate career assessment inventories in order to indicate areas of interest for him (id.). Then the student would investigate collegiate programs of interest to him (id.). The IEP postsecondary goals indicated that the student would continue to take and complete courses necessary for graduation with a Regents high school diploma with the support of special education services (Dist. Ex. 8 at p. 6).

The March 2019 IEP contained approximately nine measurable annual goals that were aligned with the student's identified needs (Dist. Ex. 11 at pp. 6-7). The March 2019 IEP included fewer goals than his previous IEP and the goals were less specific (id.). The IEP included one study skills goal, two reading goals, four math goals, one speech-language goal, and one career/vocational/transition goal (id.).

The CSE subcommittee recommended that for the 2019-20 school year the student attend 15:1 special classes for all core subject areas, and receive speech-language therapy in a small group (5:1) 20 times per year (Dist. Ex. 11 at p. 7). In addition, the CSE subcommittee recommended several accommodations and modifications to address the student's classroom needs, including checks for refocusing and redirection, checks for understanding, and the provision of a copy of class notes; however, the CSE subcommittee no longer recommended the use of a calculator (id. at pp. 7-8). Recommended testing accommodations continued to allow the student extra time (1.5) for tests, and added tests administered in a small group of no larger than 15 students for midterms, finals, and Regents, but no longer included any accommodations related to directions being read and reread (id. at p. 8). The IEP offered no explanation or rationale for modifying the student's accommodations (see Dist. Ex. 11). The March 2019 IEP also included a coordinated set of transition activities to facilitate the student's movement from school to post-school activities (Dist. Ex. 11 at p. 9). The CSE subcommittee recommended a ten-month placement for the student in his home public school district (id. at p. 10).

Similar to the student's IEPs for 2018-19 school year, and as discussed previously, the March 2019 IEP did not reflect the student's out-of-school suspensions in January and February

2019 (Dist. Exs. 35; 36; see Dist. Ex. 11). The March 2019 IEP also did not include a medical alert that the student had been diagnosed with ADHD, and no FBA was conducted (see Dist. Ex. 11).

In July 2019 the student attended a county fair where he ran into members of the alleged gang (Tr. p. 672-73). The student reported that the alleged gang members came up to him and threatened him, one member going so far as to show the student a gun he had in his pocket (Tr. 673). The student reported that the alleged gang member asked him if he wanted to fight and he replied no and left the scene (id.). The parent testified that she learned of the incident the next day during an appointment with the district attorney (D.A.) regarding an earlier incident (Tr. pp. 902-03). According to the parent, the D.A. indicated that the student should have called the police at the time of the incident; he stated he would look into the incident that took place at the fair but was not sure there was much he could do (Tr. pp. 903-04).

The assistant principal testified that following the incident at the county fair the parent requested that the student's placement be changed to an alternate location in another district or school (Tr. p. 185). According to the assistant principal, he advised the parent to contact the district's director of special programs (Tr. pp. 185, 227-28). The director of special programs testified that the parent called her and inquired as to how she could have the student attend a different public high school (Tr. p. 93). She recalled that she advised the parent that she would have to be a resident of the other district for the student to attend its high school (id.). The parent testified that she obtained letters from the student's three private providers (medical doctor, psychiatrist, and social worker) and mailed them to the district's special programs office on or around September 3, 2019, in the hope that the district would provide support to get the student into a safe environment (Tr. pp. 904-07; Dist. Exs. 39, 42, 43).<sup>12</sup>

According to testimony by the assistant principal, by August 2019 he had already done some preliminary work on the student's schedule, so that he would not be in classes with any of the students he had been involved with in the past and so there would be the least amount of contact possible (Tr. p. 186). The parent obtained a temporary order of protection, dated July 12, 2019, against a particular student and gave it to the school (Parent Ex. HH).

On September 9, 2019, the student was involved in a fight with another student at school that resulted in a head injury to the other student that required hospitalization and also resulted in a concussion and thumb injury that required surgery to the student (Tr. pp. 95, 151, 153-54, 675-77, 935; Dist. Ex. 44.) The student received five days of out-of-school suspension for his role in the fight (id.).

On September 16, 2019, the CSE convened a manifestation determination review (MDR) (Dist. Ex. 12). According to the director of special programs, the parent provided her with the three letters from the student's medical doctor, psychiatrist, and counselor at the MDR meeting (Tr. pp. 97-98; Dist. Exs. 39; 42; 43).<sup>13</sup> The MDR resulted in a finding that the student's behavior

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<sup>12</sup> The student's psychiatrist and physician indicated that the student was experiencing post-traumatic stress (Dist. Exs. 39; 42).

<sup>13</sup> The September 2019 IEP meeting information summary referenced reports from a "doctor, counselor, and

in question was not "directly" or "substantially related" to his "math learning disability," and recommended the student attend an out-of-district placement (Tr. pp. 106-07; Dist. Ex. 12 at pp. 1, 7).<sup>14</sup> However, pending such placement and the outcome of a superintendent's hearing, the CSE recommended home instruction for two hours a day, not because of concerns regarding the student's safety, rather because the letters submitted by the parent contained "some pretty significant (mental health) diagnoses" and the CSE was concerned that the student needed a placement with more therapeutic supports (Tr. pp. 1102-04; Dist. Ex. 12 at pp. 1, 7, 10).<sup>15</sup> Also, the CSE received input from the parent about her concerns with the student returning to school (Tr. pp. 1103-04). The September 2019 CSE did not recommend any related services for the student (see Dist. Ex. 12 at pp. 1, 7).

The September 16, 2019 IEP, documenting the CSE's MDR, was the first IEP to mention the student had been fighting or suspended (Dist. Ex. 12 at pp. 1, 4). While the present levels of performance in the September 17, 2019 IEP for the most part remained the same as in the March 2019 IEP, the CSE added information to reflect that the student had been suspended from school due to negative peer interactions (Dist. Ex. 12 at p. 4; compare Dist. Ex. 11 at pp. 4-5, with Dist. Ex. 12 at pp. 4-5). The IEP also indicated that while the student was honest about his role in those interactions, he struggled with consistently making good choices and avoiding negative peer interactions. (Dist. Ex. 12 at p. 4). Still, the September 2019 IEP continued to state that the student had no social or emotional needs that needed to be addressed by special education at that time (Dist. Exs. 11 at p. 4; 12 at p. 4).

Following the September 16, 2019 CSE manifestation determination review, a superintendent's hearing was held on September 17, 2019, which resulted in the student's suspension from school for the 2019-20 school year (Dist. Ex. 47). The parent was advised that the student would be provided with a tutor for the duration of the suspension (id.). No related services or other special education services such as counseling were recommended (Dist. Ex. 12 at pp. 1, 7-8, 10). The letter from the student's psychiatrist requested the student be evaluated for an "immediate update" to his IEP, and indicated that, "[b]ecause of the severity of [the student's] symptoms, coordination of care between school and his outpatient providers [wa]s of utmost importance" (Dist. Ex. 42). The letter indicated that the student was being treated for diagnoses of PTSD (post-traumatic stress disorder); depression, major, single episode, complete remission; attention-deficit hyperactivity disorder, combined type; and child victim of physical bullying, initial encounter (id.).

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psychiatrist" but did not further identify the dates or authors of the reports (Dist. Ex. 12 at p. 1).

<sup>14</sup> The September 2019 CSE MDR meeting resulted in a finding that the student's behavior in question was not "directly" or "substantially related" to his "math learning disability," and recommended the student receive an out-of-district placement (Dist. Ex. 12 at pp. 1, 7). However, the hearing record did not offer explanation of how or why the student's learning disability was redefined as only a "math learning disability" when the September 2019 IEP identified academic difficulties in reading and writing (id. at pp.1-4).

<sup>15</sup> The director of special programs testified that following the CSE meeting the district referred the student to several BOCES programs for enrollment (Tr. pp. 1104-05).

Despite the documentary and testimonial evidence discussed above, the IHO concluded that the student "had lied under oath" and "was untruthful in his description of the altercation of September 7, 2019" and therefore all of his testimony was subject to rejection (IHO Decision at pp. 25, 27). However, although an IHO's credibility determinations are generally entitled to significant weight, it is important to note that the student's testimony regarding other incidents that occurred is consistent with medical documentation, a police report and orders of protection contained in the hearing record (Tr. pp. 663-706; Parent Exs. V; W; Y; GG; II; Dist. Exs. 55 at p. 3; 56 at p. 4; 57 at p. 3; 58 at p. 3; 59 at p. 3; 60 at p. 3; 62 at p. 3; 63). Moreover, the IHO failed to grapple with the body of evidence introduced at the hearing, entirely apart from the student's testimony, that demonstrated multiple documented incidents of bullying and disciplinary incidents involving the student as well as evidence that the student had exhibited social emotional needs, and had obtained mental health diagnoses, related to the bullying. Once again, as in 2018-19, even while acknowledging for the first time in the September 2019 IEP some of bullying incidents, disciplinary incidents and beginning to reference some of the student's needs related to these incidents, the nexus between the student's social circumstances and special education needs was far from fully explored and the placement and programming solution was deemed to be two hours of home instruction a day with no related services. Although attempts were made to have the student accepted to an out-of-district BOCES program, such placement was not included in the IEP and the student was not accepted into a BOCES program. Accordingly, the IHO erred in finding that the district had adequately addressed the issue of bullying for the student's 2019-20 school year and had provided the student with a FAPE for that year.

### **E. Annual Goals**

Both the parent and the district assert that the IHO erred with respect to his findings on goals. Although the parent only made general claims concerning the goals for all three school years, 2017-18, 2018-19 and 2019-20, without specificity as to each school year individually, and the IHO only addressed goals for the 2017-18 school year by finding that, while deficient in some respects, any deficiency in the goals for that year did not, on its own, support a FAPE denial, in an abundance of caution, I will briefly address the appropriateness of the student's goals for the years in question.

For the 2017-18 school year, the February 2017 and October 2, 2017 IEPs included approximately 14 annual goals addressing the student's needs specific to study skills, reading, writing, mathematics, speaking/listening skills, and speech-language development (Parent Ex. C at pp. 6-7; Dist. Ex. 7 at pp. 7-8). The one study skills goal contained in the IEPs targeted the student's need to complete homework and complete classroom assignments for all of his classes (Parent Ex. C at p. 6; Dist. Ex. 7 at p. 7). Two reading goals addressed various targets related to narrative and/or informational text presented to the student on the eighth-grade level (*id.*). Two writing goals targeted writing formal arguments and/or explanatory text using a variety of text related strategies to prove an argument while acknowledging opposing claims, and using precise and domain-specific vocabulary to show compare/contrast, cause/effect, time-order, problem/solution, and description (*id.*). A third writing goal targeted the student's need to produce and publish writing using the Internet and available technology (*id.*). The three mathematics goals contained in the student's October 2017 IEP targeted the student's use of the Pythagorean Theorem, plot values for x and y values, and problem solving involving real numbers or algebraic equations with real number coefficients using four basic operations and their properties (Parent Ex. C at pp.

6-7; Dist. Ex. 7 at pp. 7-8). Two speaking/listening goals targeted the student's ability to state conclusions, make inferences, and identify the main idea based on text read aloud or information in diverse media and formats (Parent Ex. C at p. 7; Dist. Ex. 7 at p. 8). The three speech-language goals addressed the student's understanding and use of figurative language, recall and comprehension of a sequence of events from a paragraph or short story, and ability to verbally discuss objects and given information by identifying similarities and differences (id.).

The student's IEP progress report for the 2017-18 school year indicated that except for two of the three speech-language goals, the student did not achieve his IEP goals (Dist. Ex. 31). The student's 2017-18 report card appears to show that he received passing grades (Dist. Ex. 27).

For the 2018-19 school year, the February 2019 IEP contained approximately 16 annual goals aligned with the student's needs related to study skills, writing, math, and speech-language (Dist. Ex. 10 at pp. 6-8). While, the goals addressed the same general skills as the goals in the student's prior IEP, the language of the goals was different, as was the criteria for mastery, which was lowered (compare Dist. Ex. 7 at pp. 7-8 with Dist. Ex. 10 at pp. 6-8). The reading goals contained in the student's February 2019 IEP targeted the student's ability to work with narrative and informational text on the ninth-grade level (Dist. Ex. 10 at pp. 6-7). However, at the time the IEP was developed the student's performance on the STAR Reading Assessment yielded a grade equivalent score of 5.2 for reading (id. at p. 4).

The student's IEP progress report for the 2018-19 school year showed that the student did not achieve any of his IEP goals that school year (Dist. Ex. 32).<sup>16</sup> The student's report card for the 2018-19 school year reflects final grades in the 60s and 70s with a final average of 71 (Dist. Ex. 28). The student took no Regents courses and no Regents examinations, even though all versions of his IEP for 2018-19 school year indicated his interest in pursuing a Regents diploma (Dist. Ex. 28; see Dist. Exs. 8 at p. 6; 9 at p. 6; 10 at p. 6).

For the 2019-20 school year, the March 2019 IEP contained approximately nine annual goals aligned to the student's identified needs but with less specificity than in his previous IEPs (Dist. Ex. 11 at pp. 6-7). The IEP included one study skills goal, two reading goals, four math goals, one speech-language goal, and one career/vocational/transition goal (id.).

The clinical director of a private medical practice who had an extensive background in learning disabilities, and who conducted a record review of the student, opined that it was hard to understand how the recommended program was going to bring the student to the ninth grade level, as referenced in his reading goals, by the end of the school year (Tr. p. 751). He further opined that "from the start it seemed ill-conceived that the student would reach a ninth-grade level" (Tr. pp. 744-49, 751). The clinical director explained that based on the student's trajectory of achievement testing results, several of the reading goals did not appear to reflect "a logical progression of skill development" that would likely bring the student to a ninth grade level (Tr. p. 751-52). With regard to the 2019-20 school year, the clinical director testified that the March 2019 IEP would not have adequately addressed the student's learning needs (Tr. p. 753). He noted that

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<sup>16</sup> The IEP progress indicated that by the end of the school year the student was either progressing inconsistently (making inconsistent progress and may not meet goal) or progressing gradually (making less than anticipated progress but may still achieve goal) toward his IEP goals (Dist. Ex. 2).

when compared with the previous year's IEP, the student's goals for the 2019-20 school year "diminished" from 16 goals down to 9 (Tr. p. 753; Dist. Exs. 6-8; 11 at pp. 6-7). He pointed out that there was one study skills goal and two reading goals that had been significantly diminished in terms of specificity and there were no writing goals (Tr. p. 753). The clinical director indicated that for a student with a speech-language disorder, the goal expecting the student to recall and comprehend a sequence of three events from a short story seemed "extremely meager and just a huge disconnect" and highlighted the gap between the goal and the student's transition goals of obtaining a Regents diploma and attending a four-year college (Tr. p. 754). The clinical director testified that it was "magical thinking" to expect the student would obtain a Regents diploma and attend college based on his services in his March 2019 IEP, especially given the trajectory of the student's development in the past, when he was getting seemingly more intensive support (id.).

The student's special education teacher for global studies testified that the student was capable of attaining the skills articulated in his March 2019-20 goals, although perhaps not as written, at the ninth-grade level (Tr. pp. 311-12, 324-27).

With respect to the student's goals, it appears that while some goals may have been inadequate, others were appropriate to meet his needs. Moreover, given the disruptions that occurred during the 2018-19 and 2019-20 school years due to the many bullying and disciplinary incidents experienced by the student, including incidents where he was the victim of serious violence, and his move to home instruction during both school years, it is difficult to judge the reason for his progress or lack thereof with respect to his goals during those school years. Accordingly, upon my independent review of the hearing record, I find that although the student's goals were not perfect for the 2017-18, 2018-19 and 2019-20 school year, and may need revision in the future, including the addition of social-emotional goals geared toward the student's behavioral need and experiences of bullying, the goals created during those years for the student were not so inadequate as to deny the student a FAPE.

## **F. Relief**

### **1. Prospective Placement at Maplebrook School**

With respect to relief, the parent argues that the IHO's award permitting her to place the student at Maplebrook School at district expense for the remainder of the 2019-20 school year was inadequate to remedy the district's failure to provide the student with a FAPE for the entirety of the 2019-20 school year and, on appeal, seeks the student's placement at Maplebrook School for the 2020-21 school year at district expense. As an initial matter, although the IHO analyzed the appropriateness of Maplebrook School in a manner akin to that which is utilized when determining whether a unilateral parental placement is appropriate and the tuition for same is reimbursable to the parent by the district, the relief he ordered is more properly viewed as the prospective placement of the student at a unapproved non-public school. For example, one district court recently described a situation similar to the one in this matter insofar as: "[the parents] ha[d] not expended any money on tuition thus far and [we]re not, at th[at] time, requesting any tuition reimbursement for past-made payments"; the court characterized the parents' request in that matter as "a request for prospective placement reasonably intended as compensatory education" (Smith v. Cheyenne Mountain Sch. Dist. 12, 2018 WL 3744134, at \*7-\*8 [D. Colo. Aug. 7, 2018] [concluding that the administrative law judge's decision not to award compensatory education

services was supported by the record and not erroneous and that an award of prospective nonpublic school placement as compensatory relief was likewise unwarranted, particularly in light of the IDEA's preference for avoiding "separate schooling or other removal . . . from the regular educational environment"], quoting 20 U.S.C. 1412[5][A]; see also Eley v. District of Columbia, 2012 WL 3656471, at \*11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges that IEP]) In contrast, another district court seemed less concerned with the need to avoid an unnecessary removal from public schooling and instead appeared to employ an analysis closer to, but not identical to a parental unilateral placement/reimbursement case, relying on the Supreme Court's decision in Carter to determine whether the parent's proposed private school placement was "proper under the Act" (S.C. v. Chariho Reg'l Sch. Dist., 298 F. Supp. 3d 370, 381 [D.R.I. 2018], quoting Carter, 510 U.S. at 15; see also D.C. v. Oliver, 2014 WL 686860, at \*5 [D.D.C. Feb. 21, 2014] [discussing both Reid compensatory education relief, Carter, and Forest Grove reimbursement, and finding that, when a school district has failed to develop an IEP, propose a location of services, and otherwise offer an eligible child a FAPE, parents may seek placement at a nonpublic school on a prospective basis and are not required to wait and see a proposed IEP in action before concluding that it is inadequate and choosing to enroll their child in an appropriate nonpublic school]; J. v. Portland Pub. Sch., 2016 WL 5940890, at \*23 [D. Me. Oct. 12, 2016] [suggesting that LRE considerations, although required by the Act, may be of lesser importance when an administrative hearing officer is fashioning relief in the form of a compensatory educational placement in a nonpublic school setting], adopted at, 2016 WL 7076995 [D. Me. Dec. 5, 2016]). There are various practical differences that come into play depending on how this sort of relief is characterized, not the least of which is application of the burden of proof (compare Educ. Law § 4404[1][c] [providing that a "parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement"], with M.M., 2017 WL 1194685, at \*4 [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; Application of a Student with a Disability, Appeal No. 19-016; Application of the Dep't of Educ., Appeal No. 17-105).

Another area of concern in effectuating a prospective placement is the effect on the district's obligations and the procedural protections of the IDEA. That is, an award of prospective placement in a nonpublic school tends to circumvent the statutory process, under which the CSE is the entity tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

Here, the evidence in the hearing record does not present one of those few cases where a prospective placement might be appropriate (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]). At

this point, if it has not already done so, the CSE should be meeting in the upcoming months to develop a new IEP for the student for the 2020-21 school year (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). Although the hearing record supports a finding that the parent and the district agreed that the student should be placed out-of-district for the 2019-20 school year, and despite the fact that the student was ultimately not accepted into any of the BOCES programs to which he applied, there is no evidence that the district and parent have concluded that there is no out-of-district or private non-approved school available that would be appropriate for the student's needs, particularly for the 2020-21 school year that has not yet commenced for the student. To determine that the student should be placed at Maplebrook School would inappropriately circumvent the CSE's role in determining what the student's needs are for the 2020-21 school year and recommending an appropriate program based on those needs as they currently exist. Accordingly, the IHO's award of prospective placement of the student at Maplebrook School at district expense must be overturned. I am mindful of the parent's concerns especially since the district was unable to find a placement other than home instruction without related services for the 2019-20 school year. Accordingly, although I am not ordering that the student be placed at Maplebrook School for the 2020-21 school year, I encourage the district and the parent, if they both agree that there is no appropriate out-of-district or approved nonpublic school recommended by the district to which the student has been accepted to attend by the beginning of the school year, that the district seriously consider placement of the student at a private school of the parent's choice, including Maplebrook School, particularly if the school has accepted the student and would pass muster as appropriate if considered pursuant to the relevant authorities governing the unilateral private placement of students under the IDEA where the district has deprived the student of a FAPE. Moreover, if the parent remains displeased with the CSE's recommendation for the student's program for the 2020-21 school year, she may obtain appropriate relief by challenging the district's determinations regarding that school year in a separate proceeding (see *Eley*, 2012 WL 3656471, at \*11 [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

## **2. Compensatory Education**

Given the unavailability of prospective placement as a remedy in this matter, the more appropriate course is the remediation of past harms that have been explored through the development of the underlying hearing record and to grant an appropriate award of compensatory education. Based on my conclusion that the district denied the student a FAPE for the 2018-19 and 2019-20 school years when it failed to address bullying of the student and put the student on home instruction in April 2019 for the remainder of the 2018-19 school year and for most of September 2019 through June 2020 during the 2019-20 school year, while depriving the student of related services and neglecting to assess the appropriateness of home instruction given the student's social emotional or academic needs, the student is entitled to a compensatory education award tailored to make up for the specific nature of the FAPE violation.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (*Wenger v. Canastota*, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an

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

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at \*7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory

education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

Given that an award of compensatory education should be guided by the overarching goal of placing a student in the same position that he or she would have occupied but for the school district's violations of IDEA (see Puyallup, 31 F.3d at 1497), it is helpful to review the hearing record for evidence of what type and amount of special education services would make up for the district's failure to address the bullying of the student. In the instant case, the district inappropriately responded to the bullying by placing the student on home instruction for portions of the 2018-19 and 2019-20 school years, and he did not receive related services during those periods of time.<sup>17</sup> To the extent the student would otherwise have been eligible to receive speech-language therapy if he had not been placed on home instruction, make-up services designed to address his speech-language needs are an appropriate equitable remedy. The student's February 2018 IEP provided that he receive small-group speech-language therapy sessions 45 times a year. Accordingly, based generally on a 40-week school year, the student is eligible for 15 sessions of make-up speech-language therapy for the 2018-19 school year. The student's March 2019 IEP provided for 20 small-group sessions of speech-language therapy a year and, given that the student spent almost the entire 2019-20 school year on home instruction, he is entitled to 20 make-up speech-language therapy sessions for the 2019-20 school year. Therefore, the district is ordered to provide a total of 35 sessions of speech-language therapy to the student by the conclusion of the 2020-21 school year as compensatory education due to its deprivation of FAPE to the student for the 2018-19 and 2019-20 school years. As an adjunct to this award, and based upon the failure of the district to address the bullying of the student and its impact on his social-emotional needs, the district is directed to conduct an FBA and neuropsychological evaluation of the student within 60 days of the date of this decision and to reconvene the CSE within 30 days of its receipt of each evaluation to consider that evaluation.

## **VII. Conclusion**

In summary, the evidence in the hearing record establishes that the district offered the student a FAPE for the 2017-18 school year but denied the student a FAPE for the 2018-19 and 2019-20 school years. However, the prospective placement relief ordered by the IHO was not commensurate with the violation of FAPE and unduly hampered the CSE process on a going-forward basis.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

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<sup>17</sup> I note that the home instruction received by the student during the 2018-19 and 2019-20 school years likely differed substantially from the special education placement and program the CSE recommended for him in his IEPs. However, given the dearth of evidence in the record concerning the nature of the home instruction the student received, and what, if any, compensatory education might be appropriate to remedy any deficiencies in the home instruction, I am constrained from awarding any additional compensatory education related to that change in placement.

**THE APPEAL IS SUSTAINED IN PART.**

**THE CROSS-APPEAL IS SUSTAINED IN PART.**

**IT IS ORDERED** that the IHO decision dated May 13, 2020 is modified, by: (1) reversing that portion of the decision which found that the district offered a FAPE to the student for the 2018-19 school year; (2) reversing that portion of the decision which found that the district denied the student a FAPE based on the inappropriateness of the September 2019 IEP as such finding was outside of the scope of the hearing, and (3) reversing that portion of the decision which found that the district did not deny the student a FAPE for the 2019-20 school based upon its failure to address the bullying of the student appropriately.

**IT IS FURTHER ORDERED** that the IHO Decision dated May 13, 2020 is modified to reverse the IHO's award of prospective placement of the student at Maplebrook School at district expense; and

**IT IS FURTHER ORDERED** that the district shall provide the student with 35 sessions of speech-language therapy by the conclusion of the 2020-21 school year as compensatory education, and shall conduct an FBA and neuropsychological evaluation of the student within 60 days of the date of this decision and shall reconvene the CSE to consider the results of the aforesaid evaluations within 30 days of receipt of each evaluation.

**Dated:**           **Albany, New York**  
                      **August 9, 2020**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**