



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-126

**Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Elmira City School District**

### **Appearances:**

Sterne & Walsh, PLLC, attorneys for petitioner, by Jason H. Sterne, Esq.

The Law Firm of Frank W. Miller, PLLC, attorneys for respondent, by Frank W. Miller, 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 a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for the student's 2017-18, 2018-19, and 2019-20 school years were appropriate.<sup>1</sup> The appeal must be dismissed.

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

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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

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<sup>1</sup> The student's grandparents are the student's legal guardians; therefore, consistent with State regulation, the grandmother will be referred to as the "parent" throughout this decision (*see* Tr. p. 2425; IHO Ex. II at p. 2; *see also* 8 NYCRR 200.1[ii][1]).

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 student was initially determined to be eligible for special education and related services as a student with a learning disability while attending kindergarten in another school district (Parent Ex. II at p. 2). She repeated kindergarten and received resource room support and speech-language therapy through fourth grade (id.). The student's family moved into the district when she was in fourth grade and in fifth grade she received integrated co-teaching (ICT) services for math and reading, as well as speech-language therapy (id.). According to the parent the student has also

received outside counseling services since the age of nine (Tr. p. 2496; Parent Exs. G at p. 5; H at p. 5; I at p. 6).

In March 2013, during fifth grade, the district conducted psychological and speech-language reevaluations of the student (Parent Exs. HH; II). During the 2015-16 school year (eighth grade), the student received ICT services in English language arts (ELA), math, science, and social studies as well as curb to curb transportation for safety (see Parent Exs. H at pp. 8, 12; I at pp. 9, 13, 14). In March 2016, the CSE changed the student's classification, finding the student eligible for special education as a student with an other health-impairment (compare Parent Ex. I at p. 1, with Parent Ex. H at pp. 1, 4).

The student underwent a private psychological evaluation in April 2016 (Parent Ex. FF).<sup>2</sup> During the 2016-17 school year (ninth grade), the student continued to receive ICT services in ELA, math, science, and social studies as well as curb to curb transportation for safety (Parent Exs. G at pp. 8, 12; H at pp. 8, 12).<sup>3</sup>

For the 2017-18 school year (tenth grade), the CSE again recommended ICT services for the student in the four core academic subjects and curb to curb transportation (Parent Ex. F at pp. 8, 11, 12).

In a letter dated April 12, 2018, the student's nurse practitioner reported that the student was being bullied at school and that the students who were bullying her threatened to beat her up if she reported the abuse (Parent Ex. SS). The nurse practitioner requested that the issue be addressed, indicating that the parent was having difficulty getting the student to go to school and that she may take her out of school and have her tutored if the bullying continued (id.).<sup>4</sup>

On June 27, 2018, a private psychologist conducted a child intelligence evaluation of the student (Parent Ex. EE at pp. 1, 5).<sup>5</sup> The evaluation report indicated, among other things, that the student was taking medication to assist her in focusing, had been receiving counseling every other week since the age of eight, and had received diagnoses of a mild intellectual disability, mixed

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<sup>2</sup> The April 14, 2016 private psychological evaluation report reflected the evaluation was conducted because the parent was concerned about the possible presence of an autism spectrum disorder (ASD), which was subsequently ruled out (Parent Ex. FF at pp. 1, 3, 4). The district school psychologist testified that she had never heard of or discussed this report at any meeting related to the student (Tr. p. 1308; see Parent Ex. FF at p. 1).

<sup>3</sup> The student's IEPs for eighth and ninth grade indicated that the CSE recommended curb to curb transportation because the student was "immature, very trusting," would follow anyone who asked her to, and did not recognize dangerous situations, which "per physician" was "[d]ue to low cognitive abilities" (Parent Exs. G at p. 12; H at p. 12; I at p. 13).

<sup>4</sup> The district's assistant principal testified that she had not seen this letter (Tr. pp. 1739-40).

<sup>5</sup> According to the parent, she obtained this evaluation because she needed it as part of the student's application for assistance through the Office for People with Developmental Disabilities (OPWDD) (Tr. p. 2479). There was a dispute during the hearing as to whether the district received this report as the parent testified that shortly after the evaluation report was completed she provided it to the district; however, the district's witnesses testified that they had never seen the report and that it had never been presented to the CSE (compare Tr. pp. 548-49, 1095-96, 1339-40, with Tr. p. 2480).

receptive and expressive language disorder, attention deficit hyperactivity disorder (ADHD), combined type, and rule out depressive disorder, unspecified (id. at pp. 1, 4). The evaluator recommended that the student receive consistent psychiatric and psychological treatment, OPWDD services, and special education services (id. at p. 4).

In separate letters dated October 15, 2018, the CSE informed the parent and the student of an upcoming October 25, 2018 CSE meeting to review the student's IEP and discuss the student's post-secondary goals and transition services (Dist. Exs. 19; 20).

The CSE convened on October 25, 2018, for the student's 2018-19 school year (eleventh grade), determined that the student continued to be eligible for special education as a student with an other health-impairment, and recommended that she receive ICT services in ELA, math, science and social studies, as well as curb to curb transportation (Joint Ex. 1 at pp. 1, 7, 11; Dist. Exs. 18; 34 at p. 1). In addition, with regard to the student's post-secondary plan, the CSE discussed the student's interest in cosmetology, various diploma/certificate options and Adult Career and Continuing Education - Vocational Rehabilitation (ACCES-VR) as a post-secondary transition support (Dist. Ex. 34 at pp. 1-2; see Tr. p. 1815). The parent signed consent on October 25, 2018, giving permission for the student to receive the recommended services (Dist. Ex. 43).<sup>6</sup>

In February 2019, the district sent the parent a reevaluation planning form in order to determine what assessments were needed for the student's upcoming "three-year re-evaluation" (Dist. Ex. 40 at p. 2). The planning form reflected that the student's special education teacher, social studies teacher, school psychologist, school counselor, and the CSE chairperson had indicated that based on information already compiled, no additional evaluative information was needed in the areas of communication, motor ability, general intelligence, academic performance, social/emotional/behavioral status, social history update, physical evaluation, or a classroom observation (id. at pp. 2-3). The parent signed the planning form on February 5, 2019, indicating agreement that the student did not need further evaluation in any areas (id. at p. 3).

On March 13 and 14, 2019, the district school psychologist completed a reevaluation statement as part of a psychoeducational report (Dist. Ex. 24 at p. 1). The reevaluation statement indicated that the student's special education team had met to discuss the need for reevaluation of the student and based on the academic, behavioral, and cognitive information already available in the student's school records, had determined that new testing was not needed in order to gain more information about the student's academic, social-behavioral or cognitive functioning or to determine whether her classification and/or special education program was appropriate (id.). The reevaluation statement reflected a review of the student's updated medical information and noted that the student's most recent cognitive assessment in March 2016 "revealed low average to borderline intellectual ability with verbal skills being slightly more developed" (id.). According to the reevaluation statement, a severe discrepancy in math computation was noted, and assessment of the student's intellectual functioning suggested that she may experience difficulty with higher level thinking and more advanced, complex, or abstract concepts, understanding the meaning of advanced vocabulary, and general language (id. at pp. 1-2). The statement further noted the

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<sup>6</sup> In a prior written notice dated October 26, 2018, the district informed the parent of the services the October 25, 2018 CSE recommended (Dist. Ex. 39).

student's continued ADHD symptoms that impacted her ability to be more successful in the general education setting (id. at p. 2).

The CSE convened on March 14, 2019, for the student's reevaluation meeting (Dist. Exs. 22; 33).<sup>7</sup> The resultant student information summary and IEP indicated that the student continued to be eligible for special education as a student with an other health-impairment, that the CSE had changed the student's diploma expectation from a Regents to a local high school diploma, and again recommended her curb to curb special transportation services (compare Joint Ex. 1 at pp. 1, 11, with Dist. Ex. 33 at pp. 1, 11). The CSE recommended the student receive ICT services for ELA and social studies, continue to receive ICT services in science through June 2019, and discontinued ICT services in math (Dist. Exs. 22 at p. 1; 33 at p. 8). The meeting minutes of the March 14, 2019 CSE meeting indicated that the student had completed the math requirements for graduation and that upon successful completion of her current science class in June 2019, the science requirement for graduation would be met (Dist. Exs. 14 at p. 2; 22 at p. 1). However, the student had a "deficit in [physical education] to graduate on time" (Dist. Ex. 22 at p. 1).<sup>8</sup> The meeting minutes also reflected that the CSE discussed the student's reevaluation report, her post-secondary plan, testing accommodation, and instructional adaptations (Dist. Ex. 14 at pp. 1, 2). On the date of the CSE meeting, the parent signed a committee report form indicating that she agreed with and consented to the program recommended by the March 14, 2019 CSE (Dist. Ex. 42). Later on that date, the district issued a prior written notice of the CSE's recommendations related to the student's reevaluation meeting (Dist. Exs. 4; 25).

In June 2019, the student's case manager prepared a progress report that reflected the student's progress towards her IEP goals during the 2018-19 school year (see Dist. Ex. 36).

With regard to the 2019-20 school year (twelfth grade), following an incident at school in October 2019, the student began feeling anxious and afraid to go to school (Tr. pp. 1659-60, 2581-85). According to the assistant principal, shortly after the incident, the district received a request that the student receive at-home tutoring services for the remainder of the school year (Tr. pp. 1676-77; see also Tr. p. 318).

On October 18, 2019, the CSE convened for an annual review of the student and to develop an IEP for the 2019-20 school year (Dist. Ex. 44 at p. 1). According to the parent, at the time of the CSE meeting the student was not attending school (Tr. pp. 2584-85). Just prior to the CSE meeting, the parent delivered a letter to the school from the student's nurse practitioner, indicating that the student needed to be home tutored due to her anxiety (Tr. pp. 1793-95, 2584-85).<sup>9</sup> The CSE did not discuss the parent's home tutoring request at the CSE meeting because the school was in the process of investigating the incident that had occurred, and there were "some steps that would've occurred first prior to the CSE taking a look at the situation" (Tr. pp. 1794-95, 2588-89).

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<sup>7</sup> The date of implementation for the recommended ICT services in the March 14, 2019 IEP was April 12, 2019 (Dist. Ex. 33 at p. 8).

<sup>8</sup> The March 14, 2019 IEP indicated that the student was failing physical education because she was not participating in the swimming unit as she felt uncomfortable because she could not swim and she was in a class of tenth graders (Dist. Ex. 33 at p. 4).

<sup>9</sup> The letter referenced by the parent was not included in the hearing record.

The meeting minutes of the October 18, 2019 CSE indicated that the student was demonstrating educational gains, that the CSE discussed the credits and exams required for Regents/local diplomas and a post-secondary plan, and that transitional assessments had been conducted (Parent Ex. C at p. 2).<sup>10</sup> The CSE continued the student's eligibility for special education as a student with an other health-impairment, indicated the expectation that she would earn a local high school diploma, and recommended curb to curb special transportation (compare Dist. Ex. 44 at pp. 1, 11, with Dist. Ex. 33 at pp. 1, 11). The CSE also recommended the student continue to receive ICT services in ELA and social studies (Dist. Ex. 44 at p. 8).

Subsequently, the student began receiving tutoring services (Tr. pp. 121, 531). The student's regular education and special education teachers "put together assignments for the tutor to work on with her" and the case manager was in contact with the tutor to ensure that work was being provided, and to help answer questions regarding adapting or differentiating assignments according to the IEP (Tr. pp. 529, 531, 533).

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

In a due process complaint notice dated February 4, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18, 2018-19, and 2019-20 school years (IHO Ex. II).<sup>11</sup> The parent asserted that the district failed to meaningfully include her in the development of the student's IEPs (id. at p. 7). In addition, the parent alleged that, for all three school years, the district failed to sufficiently evaluate the student in all areas of need and that the CSEs ignored results of private evaluations provided by the parent (id. at pp. 3-6).

For the November 2017, October 2018, March 2019, and October 2019 IEPs, the parent asserted that the eligibility category of other health-impairment did not accurately describe the student's needs (IHO Ex. II at pp. 4-7). The parent contended that the annual goals in the IEPs were not appropriate in that they were "vague, immeasurable, and meaningless," did not address all of the student's areas of need, such as her speech-language, activities of daily living (ADL) and self-care, social skills, safety, or social/emotional needs, and remained the same from year to year with no evidence of progress (id. at p. 8).

The parent alleged that, for years, the student had failed to make expected progress due to the district's "failure to provide her with appropriate special education instruction and related services" (IHO Ex. II at p. 5). The parent argued that the student's IEPs failed to address her "unique special education needs" and did not include needed related services of counseling, social skills training, or speech-language therapy, small group specialized reading, writing, or math instruction, assistive technology, extended school year services, or any supplementary aids, program modifications, or supports for school personnel (id. at pp. 5, 6-7). As for the student's post-secondary transition needs, the parent alleged that the district did not conduct an appropriate

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<sup>10</sup> The IHO decision listed Parent Exhibit C as "P-C-12,13" (IHO Decision at p. 26). Parent Exhibit C is two pages long, for clarity purposes it will be cited to as Parent Ex. C and the pages as 1 or 2 (see generally Parent Ex. C).

<sup>11</sup> The parent also alleged that the district violated section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a) (IHO Ex. III at p. 6).

vocational assessment and that the IEPs failed to include appropriate transition activities and post-secondary goals (id. at pp. 6-7). The parent also contended that the student had been bullied in school for several years and that the CSEs failed to address the parent's concerns about bullying as raised at the CSE meetings (id. at pp. 4-5, 7, 8).

Regarding implementation of the student's IEPs, the parent alleged that for all the school years in question, the district failed to provide a copy of the IEPs to all of the student's teachers, failed to provide ICT services as mandated in the IEPs, and failed to provide the student with a hard copy of notes for all classes (IHO Ex. II at p. 7). Specific to the October 2019 IEP, the parent alleged that, once the student began receiving home instruction, the district failed to implement the student's IEP in that no teacher was assigned until November 2019, the student was provided with no more than one hour of instruction daily, the teacher was not provided with a copy of the student's IEP, and the teacher did not hold State certification as a high school teacher (id. at pp. 5, 7-8).

For relief, the parent sought compensatory education in the form of academic tutoring to be maintained as a bank of services for the student to use until she was no longer eligible for special education by reason of age or graduation, as well as compensatory speech-language therapy, counseling, and vocational services, and transportation to and from such services (IHO Ex. II at p. 8, 10). In addition, the parent requested an order for extended eligibility for the student beyond the age of 21 or beyond graduation (id. at p. 9).

The parent noted that she advised the district of her disagreement with the March 2019 reevaluation of the student in a letter dated January 6, 2020 and requested that the district be required to fund independent educational evaluations (IEEs) of the student, including a psychological evaluation, a speech-language evaluation, administration of an autism diagnostic observation schedule (ADOS), and a vocational assessment (IHO Ex. II at pp. 6, 9). The parent also requested that the district conduct assistive technology and central auditory evaluations of the student (id. at p. 9). The parent sought an order requiring the CSE to reconvene, change the student's eligibility category to intellectual disability or learning disability, and review the evaluations and develop a new IEP based thereon (id.). Further, the parent requested that the district be required to provide the student with assistive technology, along with training in the use thereof for the student and the parent (id.).

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

According to the case manager, during the 2019-20 school year tutoring process the student "did fairly well," and in March 2020 "the entire district went virtual" (Tr. pp. 533-35). After that point the tutoring ended, the student "switched over to virtual learning," and "was able to complete the courses" in which she was enrolled (Tr. p. 535). By the end of the 2019-20 school year, the student had "passed all of her classes," "made up courses" including her physical education (PE) class, earned the credits required for graduation, and had passed Regents exams in Algebra I and English (Tr. pp. 121-22, 322, 536). By letter to the district dated June 18, 2020, the parent submitted a Regents examination exemption declination form indicating that she declined the

student's exemption from the Living Environment Regents examination, which prevented the student from graduating in June 2020 (Tr. pp. 323-25; Dist. Ex. 13 at pp. 1-2).<sup>12</sup>

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

An impartial hearing convened on November 18, 2020 and concluded on March 9, 2021, after 15 days of proceedings (see Tr. pp. 1-3407). In a decision dated May 3, 2021, the IHO determined that the district offered the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years (see IHO Decision).

Concerning the parent's participation, the IHO found that the district meaningfully included the parent in the development of the student's IEPs (IHO Decision at pp. 17-18). Next, the IHO addressed the parent's claims that the district failed to sufficiently evaluate the student and failed to consider private evaluations provided by the parent (*id.* at pp. 15-17). The IHO found that the "weight of the credible evidence" supported a finding that neither the April 2016 private psychological evaluation nor the June 2018 child intelligence evaluation "was presented to the CSE for consideration" (*id.* at pp. 15-16). Citing evidence that, on February 5, 2019, the parent signed a planning form, which reflected that no additional evaluations were needed to determine whether the student remained eligible for special education, the IHO found that "the CSE comprehensively and appropriately evaluated the student" (*id.* at pp. 16-17).

The IHO found that the evidence supported that the disability category of other health-impairment appropriately described the student's needs (IHO Decision at p. 19). In addition, the IHO found that, while the goals were carried over from year to year to a degree, "presumably" they would be more difficult for the student given the curriculum content (*id.* at p. 21). The IHO also found that the annual goals were aligned with the student's needs and designed to allow the student to progress in the general education curriculum (*id.*). Regarding the parent's claim that the IEPs offered insufficient services and supports, the IHO found no evidence in the hearing record to suggest that the student required speech-language therapy, counseling, social skills training, small group instruction (for reading, writing, or math), or assistive technology in order to progress in the general education curriculum (*id.* at p. 17). The IHO determined that the IEPs "addressed the student's identified needs and were reasonably calculated to enable her to achieve passing marks and advance from grade to grade" (*id.*).

Turning to the claims related to bullying, the IHO found that the first report to the district of alleged bullying was after an incident in October 2019 and that no school staff observed bullying of the student "at any time" (IHO Decision at pp. 18-19). The IHO found that the evidence in the hearing record did not show that the district was aware of an April 2018 letter from the student's nurse practitioner and noted that, although the parent stated that she raised bullying at the CSE meetings, no mention of bullying appeared in any of the documents pertaining to the meetings (*id.*). The IHO noted that the district conducted an investigation and found no evidence that the student had been bullied prior to the October 2019 incident (*id.* at p. 18). Further, the IHO opined

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<sup>12</sup> The parent testified that she submitted the declination of the Regents exam because the student needed to learn more life skills to take care of herself and to have something that she could do after high school (Tr. pp. 2597-98). Also, it was the parent's understanding that she was declining the student's exemption from all Regents exams and she was unaware that the district waived the student's requirement to take the Global and US History Regents exams (Tr. pp. 2596-2600, 2737-38; see Tr. p. 324).



that "while it [wa]s conceivable that a student could be bullied into engaging in the behavior in which the student engaged [in October 2019], one might reasonably expect to hear some details related by the student to others as to how the student was bullied into it" (*id.*). The IHO indicated that there were no such details in the hearing record (*id.*). Based on the foregoing, the IHO found that evidence supported a finding that the district did not fail to address bullying (*id.* at p. 19).

The IHO found that no evidence was offered during the impartial hearing to support the claims that the district failed to implement the student's IEPs while the student was attending the district school and indicated that the parent appeared to have abandoned those claims (IHO Decision at pp. 19-20). As for implementation of the student's IEP after October 2019, the IHO concluded that "[n]otwithstanding the tutor not having special education certification, . . . the home instruction was appropriate in all curriculum areas" (*id.* at pp. 20-21).

As the IHO found that the district offered the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years, he determined that the student was not entitled to compensatory education (IHO Decision at p. 22). Turning to the parent's requested IEEs, the IHO indicated that, according to the parent's post-hearing brief, only the vocational assessment remained outstanding (*id.*). However, as the district was providing the student with services "supportive of the long term goals for living, working, and learning as an adult on the last IEP at issue" and the lack of a vocational assessment was a procedural violation, the district was not required to fund an IEE in this area (*id.* at pp. 22-23).

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

The parent appeals. The parent initially reiterates her claims raised and requested relief from the due process complaint notice.

With respect to evidentiary matters at the impartial hearing, the parent contends that the IHO erred by failing to allow the October 2020 psychoeducational IEE and April 2020 speech-language IEE into the hearing record. Moreover, the parent argues that the IHO erred by failing to allow the October 2020 psychoeducational IEE evaluator to testify. The parent also asserts that the IHO erred by refusing to allow the January 10, 2020 determination letter from the OPWDD into the hearing record.

Turning to the parent's substantive claims, the parent contends that the IHO erred by finding that the district sufficiently evaluated the student in all areas of suspected disability. The parent asserts that it is uncontroverted that "the district conducted no evaluations whatsoever as part of the February 2019 triennial review" and had not conducted a speech-language evaluation since 2013. Nor, argues the parent, had the district "received" a vocational evaluation since 2014 and despite the student's "severe deficits in reading" she had never been evaluated to identify any assistive technology deficits.

The parent contends that the annual goals developed by the CSEs for the 2018-19 and 2019-20 school years "lack[ed] specificity, [we]re immeasurable, and so vague as to be meaningless." According to the parent, the November 2017 IEP contained the same reading goal as the 2019 IEP and the student had yet to achieve the goal after two years which calls "into question the efficacy of the district's programming." The parent argues that the "failure to include measurable goals, with concrete baselines, not only deprives [the student] of appropriate services,

but also deprives the parent of meaningful participation in the decision-making process" and notes that the progress reports for the goals also failed to communicate any progress with specificity. The parent asserts that the district created a transitional annual goal in the March 2019 IEP which indicated the student needed to improve reading, writing and math skills, yet the district failed to provide any math instruction during the 2019-20 school year.

The parent also asserts that the district failed to offer appropriate reading instruction for the 2018-19 and 2019-20 school years. The parent indicates that the student received instruction via the Read 180 program during the 2017-18 school year and demonstrated improvement, yet the district discontinued this service and failed to offer any specialized reading instruction for either the 2018-19 or 2019-20 school years. The parent contends that the student's present levels of performance for both of these school years indicated that the student was struggling in reading, yet none of the IEPs include an annual goal "teaching [the student] how to read." The parent asserts that "the absence of specialized instruction, or even annual goals, to address this severe area of need" demonstrates that the IHO erred by finding that the district offered the student a FAPE for the school years at issue.

Next, the parent argues that the district failed to offer the student any related services in the 2018-19 and 2019-20 IEPs despite the present levels of performance acknowledging that the student had deficits in speech-language and social skills. Moreover, the parent notes that the last speech-language evaluation conducted by the district was in 2013, and, although she offered an updated speech-language evaluation as evidence during the impartial hearing, the IHO refused to admit it. The parent contends that the record is devoid of any recent evaluative information regarding the student's speech-language needs. The parent asserts that the IHO erred by finding the district offered a FAPE in light of the lack of related services recommended. Additionally, the parent contends that the IHO erred by finding that the absence of assistive technology services did not deny the student a FAPE.

The parent asserts that the hearing record demonstrates that the student regressed over school breaks and that despite this clear evidence of substantial regression, the district failed to offer extended school year services for any of the school years at issue. In addition, the parent argues that the district's transition plan for the student was based on an outdated vocational assessment from 2014 and the transition goals included in the IEPs were vague and immeasurable. The parent asserts that, as the vocational assessment was outdated, the IHO erred by failing to order an independent functional vocational assessment.

The parent argues that the IHO erred by not finding that the absence of assistive technology, the district's failure to address bullying, and the failure to implement services while the student was on home instruction denied the student a FAPE. The parent further alleges that the IHO erred by not finding that the district impeded the parent's right to participate, and by not finding that the district failed to include appropriate supplementary aids, program modifications and supports for school personnel on the IEPs at issue. For these claims, the parent indicates that her argument was "set forth more fully" in the memorandum of law.

The parent requests a finding that the district denied the student a FAPE for the 2017-18, 2018-19 and 2019-20 school years. The parent also requests an order directing the district to fund an independent vocational assessment and to conduct an assistive technology evaluation. Finally,

the parent requests that the case be remanded to the IHO to hear testimony and accept evidence on appropriate compensatory educational services and any appropriate relief.

In an answer, the district generally denies the parent's allegations. The district asserts that it offered the student a FAPE for all three years at issue and asserts that the student successfully completed all of her courses and all but one Regents exam, which would have enabled her to graduate had the parent signed a waiver. The district argues that the hearing record demonstrates that the student had made considerable academic progress and that the academic programs offered by the CSEs were appropriate.

## 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" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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>13</sup>

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427

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<sup>13</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" (Endrew F., 137 S. Ct. at 1000).

F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Compliance with Practice Regulations and Scope of Review**

State regulation provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, a request for review must provide a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" 8 NYCRR 279.8[c][2]). Further, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). Section 279.8 requires that a request for review shall set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
- (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]-[b]; see Davis v. Carranza, 2021 WL 964820, at \*12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at \*23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for

review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]).

Initially, the request for review simply numbers every paragraph, with intermittent unnumbered headings in small caps stating a topic as an "issue for review," instead of following the requirement for "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately" (8 NYCRR 279.4[c][2], [4] [emphasis added]; see also 8 NYCRR 279.4[a], [f]). Further, the request for review in several instances fails to identify the IHO's precise rulings, failures to rule, or refusals to rule presented for review, opting instead to list a mixture of factual allegations and allegations of district wrongdoing together, without, for the most part, describing how the IHO erred on specific issues. Additionally, other allegations of IHO error are broadly stated without citations to the portions of the IHO's decision which the parent appeals and without stating the grounds for reversal or modification of the IHO's decision. For example, in raising bullying on appeal, the parent alleges that "[a]s is set forth more fully in the accompanying memorandum of law, [the] IHO erred in not finding the failure to address bullying denied [the student] a FAPE" (Req. for Rev. ¶ 30). However, review of the IHO decision reveals that the IHO dedicated approximately two pages of his decision to addressing the specific allegations related to bullying and made discrete findings that the first report to the district of alleged bullying was after an incident in October 2019, that no school staff observed bullying of the student "at any time," that the district was not aware of an April 2018 letter from the student's nurse practitioner, that no mention of bullying appears in any of the documents pertaining to the CSE meetings, that the district conducted an investigation of bullying but found no evidence that the student had been bullied, and that the hearing record lacked detail about bullying related to the October 2019 incident sufficient to warrant a finding that bullying occurred or that the district failed to address it (IHO Decision at pp. 18-19). In her request for review, the parent did not grapple with any of the IHO's findings on these points. Likewise, in her memorandum of law, the parent summarized authority and evidence in the hearing record related to her claim but did not point to why she felt the IHO erred in his discrete findings (see Parent Mem. of Law at pp. 20-22).

Here, the parent does not specifically articulate a challenge in her request for review to the IHO's determinations that the CSEs did not receive the evaluation reports that the parent alleged she provided, and that the CSEs appropriately found the student eligible for special education as a student with an other health-impairment (IHO Decision at pp. 16-17, 19). Moreover, the parent does not articulate a clear challenge to the IHO's discrete findings on her claims related to bullying, assistive technology, parent participation, implementation, and the supplementary aids, program modifications, and supports for school personnel listed on the IEPs (see IHO Decision at pp. 17-21; see also Req. for Rev. ¶¶ 29-33). Accordingly, the IHO's findings relating to the district's consideration of private evaluations, the appropriateness of the other health-impairment eligibility category, bullying, assistive technology, parent participation, implementation and the supplementary aids, program modifications, and supports for school personnel listed on the IEPs have become final and binding on the parties and will not be further discussed (8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

## **2. IHO Conduct/Hearing Record**

The parent alleges that the IHO failed to allow evidence into the hearing record (Req. for Rev. ¶¶ 34-37). Specifically, the parent argues that the IHO did not allow the October 2020 psychoeducational IEE, the April 2020 speech-language IEE, and a January 2020 letter from OPWDD, nor did the IHO allow the October 2020 psychoeducational IEE evaluator to testify regarding her report. State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). The parent attaches the two IEE reports and the OPWDD letter to her request for review. Review of the additional evidence and the parent's arguments regarding them indicate that this evidence was submitted to bolster and support the parent's claim for compensatory education. I decline to reverse the IHO's decisions regarding this evidence, because as discussed in significant detail below, there is substantial evidence in the hearing record contemporaneous to the development of the IEPs to support the IHO's findings that the district offered the student a FAPE for the three school years at issue.

### **B. FAPE**

#### **1. Sufficiency of Evaluative Information**

The parent asserts that the IHO erred in finding that the district appropriately evaluated the student in all areas of need, alleging that the student's speech-language needs had not been evaluated since 2013, she had not been administered a vocational evaluation since December 2014, the district did not conduct any evaluations of the student as part of her "February 2019 triennial review," and despite her "severe deficits in reading" the student's assistive technology needs were not evaluated (Req. for Rev. ¶ 21, 24).

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48

IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

A review of the student's IEPs for the 2017-18, 2018-19, and 2019-20 school years reveals, as described below, that the district had a significant amount of information regarding the student at the time of each of the CSE meetings.

#### **a. 2017-18 IEP**

The student's November 7, 2017 IEP indicated that the CSE had before it test results from a March 22, 2016 psychological evaluation related to the student's cognitive, academic, and behavioral functioning (Parent Ex. F at p. 2). The IEP reflected that administration of the Wechsler Abbreviated Scale of Intelligence-Second Edition (WASI-II) to the student yielded a full scale IQ of 78 and that she was functioning within the low average to borderline ranges cognitively (*id.*). With regard to academics, the student achieved subtest standard scores of 92 in word reading, 83 in sentence comprehension, 93 in spelling, and 64 in math computation on the Wide Range Achievement Test-Fourth Edition (WRAT-4) (*id.*). With regard to the student's behavior, the IEP reflected that administration of the Behavior Assessment System for Children-Second Edition (BASC-2) yielded elevated scores in the areas of learning problems and atypicality (*id.*).

Regarding the student's language skills, the November 2017 IEP also reflected the results of a March 2013 speech-language evaluation, including that the student demonstrated receptive vocabulary skills in the low average range of functioning (standard score 85) on the Receptive One-Word Picture Vocabulary Test; expressive vocabulary skills just below the average range of functioning (standard score 83) on the Expressive One-Word Picture Vocabulary Test; and an overall standard score of 86 on the Test of Auditory Processing, with subtest standard scores of 92 (phonological), 80 (memory), and 90 (cohesion) (Parent Ex. F at pp. 2, 3). The IEP further reflected the student's scores from an administration of the Oral and Written Language Scales that included a total test standard score of 51, a listening comprehension standard score of 56, and an oral expression standard score of 65 (*id.* at p. 3). The student was described as primarily an auditory learner who did better when she could listen to instruction and then verbally explain her understanding of a concept (*id.*). The IEP indicated that due to processing delays, the student required a hard copy of class notes so she could listen to and comprehend what the teachers were talking about, and also needed multiple step directions broken down, the provision of verbal prompts, positive reinforcement, and a seat near the instruction (*id.*). According to the IEP, the student liked to answer questions when she was sure that she knew the answer, and she enjoyed discussing her ideas with adults, but struggled to socialize with peers outside of classwork (*id.* at p. 4).

The present levels of performance section of the November 2017 IEP indicated that the student had transitioned very well into tenth grade at the district's high school, that she was a very



hard worker, and would advocate for herself when needed (Parent Ex. F at p. 3). The IEP reflected that the student enjoyed her classes, tried her best to complete all assignments and was passing all of her classes (id.). With regard to writing, the student was reported to struggle to complete the process on her own, relying on teacher prompts and graphic organizers to lead her through the writing process (id.). She had difficulty staying on topic and supporting the topic with appropriate quotes from the text (id.). The IEP indicated that the student was receiving instruction using the Read 180 program to assist her in increasing her reading comprehension and to provide structure for the writing process (id.). According to the IEP, the student was unable to consistently read a long passage by herself and arrive at the correct answer (id. at pp. 3-4). The student was reported to need someone to read short passages to her in order to pull out the correct information from the text (id. at p. 4). The student's math teacher reported at the time of the CSE meeting, the student had a grade of 70 in the class, she exhibited inconsistent skills, and required the use of a calculator for all math computations (id.). She exhibited the ability to solve one-step equations but struggled with two-step equations and equations with variables on both sides of the equation (id.). The teacher further reported that she had concerns about the student passing the Algebra Regents examination, as she currently struggled with passing chapter tests in class (id.). The CSE identified that the student needed to use active reading strategies such as chunking and highlighting when text was read aloud to answer comprehension questions correctly, correctly solve multi-step math problems, use a graphic organizer, and write a detailed paragraph independently (id.). Additionally, the November 2017 IEP indicated that the student's performance on the spring 2016 eighth grade State test was at a Level 1 in ELA, math, and science (id. at p. 3).

In the area of transition, the November 2017 IEP indicated that the student had engaged in conversations with her case manager about her transition to the high school and what she would like to do after high school (Parent Ex. F at p. 4). According to the IEP, the student was "feeling good about her progress in her classes" and felt comfortable seeking out help (id.). At that time, the student was thinking she would like to work at a day care after high school and believed she would need to go to college (id.). She was interested in the "BOCES Early Childhood Development program" and planned on signing up for a "Tech Tuesday" to visit the program (id.). The IEP noted that the student's family was very supportive of her future plans and wanted her to be as independent as possible (id.).

#### **b. 2018-19 IEP**

Review of the October 2018 evaluative information and academic present levels of performance shows that it was generally consistent with that information included in the November 2017 IEP (compare Parent Ex. F at pp. 2-4, with Joint Ex. 1 at pp. 2-4). Additional information in the October 2018 IEP included that in writing, the student's slow processing and low retention led to struggles with recall of previously learned information, which had greatly affected her success on Regents exams; in reading, she struggled with inferences, was able to answer questions if the answer came directly from the text, and she was not able to answer higher level questions without prompting from a teacher and the breakdown and simplification of the question (Joint Ex. 1 at p. 3). In math, the teacher reported that the student completed her homework daily and at times asked questions, she benefitted from frequent checks for understanding of concepts, she solved one step equations but struggled with multi-step problems, even when the steps were provided, and she had difficulty remembering what she had learned (id.). Regarding transition, completion of an October 2018 interest inventory showed and confirmed that the student enjoyed helping others and should pursue a 'social career' such as a counselor or nurse aide (id.). Additional information from a

student interview with her case manager indicated that the student wanted to pursue a career in cosmetology and that they discussed an adult cosmetology program (*id.*). The student opined that she needed to work on concentrating on her work, completing assignments on time, and understanding directions (*id.*). The CSE also identified that the student needed to work on being able to concentrate on each task and understand what she needed to do (*id.* at p. 4).

### **c. 2019-20 IEP**

Turning to the March 14, 2019 CSE reevaluation meeting, review of the hearing record reflects that, as described below, the CSE had a significant amount of information regarding the student at that time.

The student's March 14, 2019 IEP indicated that the CSE had before it the test results from the March 22, 2016 psychological evaluation related to the student's cognitive, academic, and behavioral functioning previously reflected in the October 2018 IEP (compare Dist. Ex. 33 at p. 2, with Joint Ex. 1 at p. 2). Similar to previous years, the present level of academic performance section of the March 2019 IEP indicated that the student was a very hard worker who would advocate for herself when she felt comfortable and that she was primarily an auditory learner who did best when she was able to listen to instruction and then verbally explain her understanding of a concept (Dist. Ex. 33 at pp. 2-3). The IEP described the student as having difficulty in the areas of focusing, retention, and slow processing and indicated that she required multiple step directions broken down and a hard copy of notes so that she could listen to and comprehend what the teachers were talking about (*id.* at p. 3). To support her needs related to attention, the IEP noted that the student benefited from verbal prompts, positive reinforcement, and preferential seating near instruction (*id.*).

The March 2019 IEP indicated that the student relied on teacher prompts and graphic organizers to help lead her through the writing process and that she had difficulty putting information into her own words, supporting it with quotes from the text, and staying on topic (Dist. Ex. 33 at p. 3). Due to slow processing and low retention, the student struggled with recalling previously learned information, which impacted her success with writing responses (*id.*). The IEP indicated that the student was able to stay on topic and provide details in her writing with 60 percent accuracy during the past year (*id.*).

According to the IEP, the student was not able to consistently read longer passages to herself and arrive at the correct answer, she needed short passages read to her in order to pull out the correct information from the text to answer questions, she struggled with inferences, and required prompting, breaking down, and simplification of questions in order to answer higher level questions (Dist. Ex. 33 at p. 3). The IEP indicated that during the past year, the student was able to answer comprehension questions with 70 percent accuracy (*id.*).

With regard to math skills, the student was able to complete her homework each day, at times asking questions (Dist. Ex. 33 at p. 3). She benefited from frequent checks of her understanding of concepts and although able to solve one-step equations, she struggled with multi-step problems even when steps were provided (*id.*). The IEP indicated that the student was reported to understand a concept on one day but on the next, had a hard time remembering what she had learned (*id.*). The IEP further indicated that over the past year, the student was able to solve multi-step problems with 60 percent accuracy (*id.*). The CSE noted in the IEP that the

student required the use of a calculator for all assessments involving mathematical calculations (id. at p. 9).

The CSE was also aware of the student's needs related to her transition to post high school. The March 2019 IEP reflected that the student had completed an interest inventory in October 2018 indicating that she enjoyed helping others and should pursue a 'social career' such as a counselor or nurse aide and had also completed a student interview with her case manager at that time, where she indicated interest in pursuing a career in cosmetology (Dist. Ex. 33 at p. 3). The IEP indicated that the student and her case manager discussed that the student could attend the BOCES adult cosmetology program (id.). In addition, the IEP reflected that the student indicated she felt she needed to work on concentrating on her work, completing assignments on time, and understanding directions and also noted that one of her barriers was being able to break tasks down in order to understand what she needed to do for each assignment in her classes (id.). The IEP further reflected the student's transition needs including that she needed to improve her reading, writing and math skills in order to pursue a career in cosmetology and also needed to investigate what credentials she needed in order to be a cosmetologist (id. at p. 6). According to the March 2019 IEP, the parent completed a parent questionnaire in February 2019, indicating that she wanted to see the student find a job where she could be successful (id. at p. 3). The parent indicated that the student would live at home with her family, noting that she was very shy but tended to trust people easily, making it easy to take advantage of her (id.).

The IEP included a March 12, 2019 update of the student's graduation status indicating that in January, the student had taken the English Regents exam and had retaken the Algebra Regents exam, passing both with scores of 66 and 67 respectively, giving her Regents credit for the two exams (Dist. Ex. 33 at p. 3). The IEP indicated that in June the student would need to retake the Living Environment Regents and would also be "challenging" the US History Regents exam (id.). According to the IEP, the student would complete the required classes and Regents exams so she could graduate with a local diploma and would also take a food and consumer science course so that she could learn daily living skills (id. at p. 6).

The March 2019 IEP also included information regarding the student's social skills (Dist. Ex. 33 at p. 4). The present level of social development section of the IEP indicated that the student was a hard worker and tried her best; however, lacked confidence with her skills and did not seek out help unless she was comfortable in the class (id.). The IEP indicated that the student enjoyed discussing her ideas with adults but had difficulty socializing with her peers outside of class work; although she would work in groups, she did not initiate the forming of groups and preferred to work on her own (id.). The student's strengths included that she was very polite, quiet, and able to follow school and classroom rules (id.). Her social development needs included that she needed to advocate for herself in all classes, that she struggled with social skills, and needed adult assistance and prompting for safety concerns (id.).<sup>14</sup>

With regard to the student's present level of physical development, the March 2019 IEP indicated that the student had received a diagnosis of ADHD and took medication at home, wore glasses, and had normal physical growth, hearing and vision (Dist. Ex. 33 at p. 4). However, the

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<sup>14</sup> The student's special education teacher testified that the safety concerns referred to the parent's concern related to the transportation of the student (Tr. p. 760; see Dist. Ex. 33 at p. 11).

IEP indicated that at that time, the student was failing PE because she was not participating in the swimming unit (*id.*). According to the IEP, the student indicated she felt very uncomfortable because she could not swim and she was in a class of tenth graders, while she was in eleventh grade (*id.*; *see* Tr. p. 550). Physical development needs of the student including consideration of needs that were of concern to the parent were that the student needed to speak with her PE teacher to help problem solve her concerns regarding the swimming unit and that the student needed special transportation (curb to curb) due to her low cognitive ability and safety concerns (Dist. Ex. 33 at pp. 5, 11). The meeting minutes of the March 14, 2019 CSE meeting indicated that while special transportation was recommended to continue, a plan to promote the student's independence and resiliency within this area would be discussed/developed for the student's post-secondary transition (Dist. Ex. 14 at p. 2).

The March 2019 IEP indicated that the effect of the student's needs on her involvement and progress in the general education curriculum included that she exhibited difficulty sustaining attention and completing multi-step processes without assistance due to her diagnosis of ADHD, that she demonstrated weak language skills that impacted her comprehension, processing, and retention of materials presented visually and auditorily, and that she was able to understand, answer and retain literal information more fluidly (Dist. Ex. 33 at p. 5).

The March 2019 CSE also determined the strategies that the student needed to address her management needs, which included directions repeated to her and chunked, tasks broken down into steps so she knew what to do first, second, etc., and the provision of a hard copy of notes, preferential seating near the teacher and instruction, gentle redirection prompts and reminders to attend to the task at hand, positive reinforcement, and graphic organizers (Dist. Ex. 33 at p. 5). The student was also provided with access to a calculator for all math calculation as an assistive technology support (*id.* at p. 8). The CSE was also aware of the student's needs with regard to testing and accordingly included in her IEP that she required directions read, repeated and simplified, a location with minimal distractions, the provision of verbal and visual cues to remain on task, test passages, questions, items and multiple choice responses read to her with questions simplified so that she understands what the question is asking, time and a half to complete the test, and the use of a calculator (*id.* at p. 9).

In addition to the information reflected in the student's IEPs, testimony included in the hearing record demonstrates that the district had substantial knowledge of the student's needs. Notably, the district school psychologist stated that she was familiar with the student as she had participated in her November 7, 2017 annual review (*see* Tr. pp. 1296-98), her October 25, 2018 annual review (Tr. pp. 1330, 1332, 1341), as well as the student's March 14, 2019 CSE reevaluation meeting (Tr. pp. 1369-70). In preparation for the student's March 2019 reevaluation, the school psychologist described a "preplanning process" that entailed obtaining multiple pieces of information about the student to determine what, if any, assessments were needed (Tr. pp. 1349-50, 1356). Specifically, that process included the case manager collecting information from the student's teachers including teacher-made assessments related to each goal area, and the school psychologist reviewing the student's records (*see id.*). The school psychologist testified that she looked at information within the student's records such as prior psychological evaluations, achievement assessments, standardized assessments, State and local assessments, teacher assessments, and curriculum-based assessments, related service evaluations, meeting minutes or outcomes, and prior IEPs related to goal development, as well as the information the teachers provided to the case manager and herself including their direct observations, their interactions with

the student, and any kind of assessments that were conducted within that curriculum (Tr. pp. 1356-57, 1366). Additionally, the school psychologist stated that they reviewed the student's physical and social present levels of performance, at which point all of that information was "aggregated" and compared to the IEP (Tr. pp. 1349-50). They looked at where the student was before and where she was at the time and considered what they needed that would give them information that was not already available (Tr. p. 1350). She testified that they also considered whether they were seeing anything different, that they looked at patterning and whether there was any disparity or significance that would warrant making a recommendation, and that there was conversation and observation that took place to determine whether the team felt there was something that did not make sense or that they needed additional information (Tr. pp. 1350-51). According to the school psychologist, the information was used "holistically" to determine whether additional information was needed or whether it would generate the same outcome (Tr. p. 1357).

The school psychologist testified that the reason no assessment was needed for this student was in part because her cognition was considered to be stable, as it had remained within the borderline to low average range on three prior assessments with some scores suggesting even average ability (Tr. pp. 1361-62, 3002-06; see Dist. Ex. 24 at p. 1). The school psychologist further testified that the student's achievement scores were similar in profile in that, aside from the area of mathematics, they were either commensurate to her intellectual skills or surpassing them (Tr. p. 1362). She indicated that in looking at the student's cognitive and achievement test results, along with curriculum-based and teacher-made assessments, and the direct and indirect observations of others, there was no indication that conducting additional achievement testing of the student would generate different results or provide any new information (Tr. pp. 1362-63). Notably, the school psychologist acknowledged in her reevaluation statement that, based on the assessment of the student's intellectual functioning, the student may experience difficulty with higher level thinking, more advanced, complex or abstract concepts, understanding the meaning of advanced vocabulary, and general language (Dist. Ex. 24 at p. 2).

The school psychologist testified that they also look at the parent's perspective and noted that if a parent has a concern, typically, they indicate it on the form and contact the school psychologist (Tr. p. 1351). In the instant case, the February 2019 "Planning Form to Determine Recommended Assessments" reflected that, with regard to the student's communication status, motor ability, general intelligence, academic performance, social/emotional/behavioral status, social history, physical evaluation, and need for a direct observation, the team and the parent indicated that no additional evaluations were needed (Dist. Ex. 40 at pp. 2-3). The school psychologist's March 13, and 14, 2019 reevaluation statement, which was reviewed at the March 14, 2019 CSE meeting, indicated that based on the academic, behavioral and cognitive information already available in the student's school records, it was decided that new testing was not needed in order to gain more information about the student's academic, social/behavioral or cognitive functioning or to determine whether the student's classification and/or special education program was appropriate (Dist. Exs. 14 at p. 1; 24 at p. 1). Consistent with this, the student's case manager similarly indicated that by spring 2019 the student had had several IQ tests and other testing that was "pretty much the same" and the CSE felt they "had a pretty good handle" on the student's skills and how she was doing in her classes and did not see the need to do any updated testing at that time (Tr. pp. 524, 592-93). In addition, the school psychologist testified that the parent did not raise any objections to the reevaluation plan either prior to or during the March 14, 2019 reevaluation meeting (Tr. pp. 1355-56).

Based on the above, the CSE had a clear understanding of the student's needs and had sufficient information about the student to develop her IEPs without further evaluation. The evidence in the hearing record does not warrant reversal of the IHO's findings that the district sufficiently evaluated the student for all three school years at issue. The hearing record clearly demonstrates that the district was aware of the student's needs and further evaluative information would not have altered or significantly expanded that knowledge.

## 2. Annual Goals

On appeal the parent alleges that the annual goals contained in the student's 2018-19 and 2019-20 IEPs lacked specificity, were immeasurable, and were "so vague as to be meaningless." (Req. for Rev. ¶ 27). The parent questions a reading goal; asserting that the goal was included in prior IEPs, showing that the student had not achieved the goal "after nearly two years," which calls into question the efficacy of the district's recommended programming (*id.*). Additionally, the parent asserts that the goal progress reports did not "communicate [the student's] progress with any specificity" (*id.* ¶ 28).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; *see* 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

First, while the parent is correct that the student worked on the same reading annual goal from year to year, specifically, that the student would utilize active reading strategies such as highlighting and chunking to answer 3/5 comprehension questions correctly using the text to find the answer, the parent's claim that the student had not achieved this goal after nearly two years, is not supported by the evidence in the hearing record. As noted above, the student received instruction in a non-modified general education curriculum each year while also receiving ICT services (Tr. pp. 728-30, 780, 830, 1936). Although the reading annual goal remained similar from year to year, the difficulty of the work presented to the student increased each year and the student was able to make progress toward her reading annual goal at a new level each year (Tr. pp. 983-85; Dist. Ex. 41 at pp. 1, 2, 6, 7). In addition, the student's June 12, 2020 progress note indicated that, based on a "Global project" that the student completed she was able to answer the questions with 80 percent accuracy, thereby meeting this goal in that particular context (Dist. Ex. 41 at p. 2).

Next, a review of the student's annual goals reveals that contrary to the parent's claim, they met State regulation requirements with regard to measurability in that each annual goal included the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal (*see* NYCRR 8 200.4[2][iii][a, b]). For example, the student's annual goals reflected evaluative criteria such as 80 percent accuracy on three of five comprehension questions and 75 percent accuracy on three of four problems, evaluation procedure or methods used to measure the student's progress including samples of completed reading and writing, activities, teacher made materials, and teacher made tests, checklists, and observation with notes,

and that the student's progress would be measured on a monthly basis (Parent Ex. F at p. 7; Dist. Exs. 33 at p. 7; 44 at pp. 7-8; Joint Ex. 1 at pp. 5-6).

With regard to the parent's contention that the annual goals failed to include "concrete baselines," the applicable State regulations cited above do not require "baseline" functioning levels to be included in annual goals in an IEP (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*13 [S.D.N.Y. Sept. 27, 2013] [noting that with respect to drafting annual goals "[c]ontrary to Plaintiffs contention . . . , nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured]). Instead, the annual goals must meet a simpler criterion—which is the annual goal must be "measurable." Moreover, then-current baseline data related to the student's annual goals was included in the student's October 18, 2019 IEP (Dist. Ex. 44 at p. 3). The present levels of performance section of the March 14, 2019 IEP also reflected the student's then-current functioning on her goals (Dist. Ex. 33 at p. 3). While this information was not included in the student's November 2017 and October 25, 2018 IEPs, the student's functioning toward her annual goals throughout the years at issue, was reflected in her progress reports (Dist. Exs. 36; 41; see Parent Ex. F; Joint Ex. 1). Therefore, evidence in the hearing record does not support the parent's claims regarding the adequacy of the student's annual goals.<sup>15</sup>

### 3. Specialized Reading Instruction

The parent points to statements in the October 2018, March 2019, and October 2019 IEPs that the student was "unable to consistently read a longer passage by herself and arrive at the correct answer" or "answer comprehension questions correctly" to support her position that the IEPs acknowledged the student's struggles in reading (Req. for Rev. ¶ 15-17, citing Joint Ex. I; Dist. Exs. 33; 44). Further, the parent alleges that although the student was receiving reading instruction via the Read 180 program during the 2017-18 school year, the district failed to offer any specialized reading instruction for the 2018-19 or 2019-20 school years.

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a

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<sup>15</sup> One of the parent's claims in the request for review regarding "transition services" is actually an allegation that although the student's March 2019 IEP included a statement for the student to improve, among other things, her math skills, "the district did not provide [the student] with any math instruction during the 2019-20 school year" (Req. for Rev. ¶ 22). However, the March 2019 IEP indicated that the student had received credit for her Algebra Regents exam towards her graduation requirements; therefore, the lack of a specific math class on the IEP does not amount to a denial of FAPE (Dist. Ex. 33 at p. 3). The parent also asserts that the student's transition planning was based on an outdated vocational assessment, and that the "transition" goals—citing to post-secondary goals in the March 2019 and October 2019 IEPs—were vague and immeasurable (Req. for Rev. ¶ 23). However, the transition planning reflected in those IEPs was based on information from an October 2018 interest inventory and student interviews (see Dist. Ex. 33 at pp. 3, 6; 44 at pp. 4, 7). Further, review of the March and October 2019 IEPs shows that the CSE sufficiently identified the student's post-secondary goals as that she would receive on the job training, be employed within the community, and live at home after graduation (Dist. Exs. 33 at p. 6; 44 at p. 7).

resource room program, as a consultant teacher service, in a special class, or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>).

During the 2017-18 school year (tenth grade), the special education co-teacher in the student's English class provided the student with instruction using the Read 180 program, which she described as a reading program to help students who struggled with reading and reading comprehension (Tr. pp. 500, 503).<sup>16</sup> She testified that Read 180 was made up of two parts, a computer-based program and another part that utilized a workbook and groupings to work on "actual reading skills" and reading comprehension skills (Tr. pp. 636-37). The special education teacher further testified that the district used the Read 180 program at the high school level for the first time during the 2017-18 school year and only offered it at the tenth grade level (Tr. pp. 504, 634-36). Read 180 was embedded into the English 10 curriculum and it was implemented to all the students in the classroom as a year-long program instead of a semester long program (Tr. pp. 504, 634). She further testified that the student did "fairly well" in the Read 180 program, ending the class with a final average of 81 (Tr. p. 506; Dist. Ex. 45 at p. 2).

According to the special education teacher, the district did not offer Read 180 to students in eleventh or twelfth grade and therefore during the 2018-19 and 2019-20 school years the student did not receive instruction using that program (Tr. pp 635-36).<sup>17</sup> The special education teacher testified that she did not see any basis for the requirement of a program such as Read 180 for the student during eleventh or twelfth grade and accordingly, the issue was not ever discussed at her CSE meetings (Tr. p. 1003).

The parent maintains that the present levels of performance sections of the student's 2018-19 and 2019-20 IEPs noted that the student struggled in reading as she was unable to consistently read a longer passage by herself and arrive at the correct answer or answer comprehension questions correctly (Dist. Exs. 33 at p. 3; 44 at p. 3; Joint Ex. I at p. 3). She argues that despite this, the annual goals in the student's 2018-19 and 2019-20 IEPs did not address teaching the student how to read (see Dist. Exs. 33 at p. 7; 44 at p. 7; Joint Ex. I at p. 5). However, as described in the present levels of performance in the student's IEPs, the student's reading needs related to reading comprehension were identified and accordingly, the annual goal developed to increase the student's use of active reading strategies to improve her ability to correctly answer comprehension questions related to text read was appropriate (compare Dist. Exs. 33 at p. 3; 44 at p. 3; Joint Ex. I at p. 3, with Dist. Exs. 33 at p. 7; 44 at p. 7; Joint Ex. I at p. 5).

Furthermore, with regard to the parent's contention that the student required specialized reading instruction, the evidence in the hearing record does not bear this out. Testimony by the student's special education teacher indicated that all tenth grade students received Read 180

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<sup>16</sup> In addition to being the student's tenth grade special education co-teacher for her English 10 Read 180 class, the witness was also the student's case manager during tenth, eleventh and twelfth grades (Tr. pp. 500, 631). During tenth grade when she had the student in class, she saw the student every single day (Tr. p. 501).

<sup>17</sup> The special education teacher testified that she did not know if the district could provide Read 180 instruction to students in eleventh or twelfth grade if they needed it (Tr. p. 636).



instruction during the 2017-18 school year (Tr. pp. 635-36). She also opined that the student's progress in reading during tenth grade was not solely due to the Read 180 program but rather was due to a combination of the Read 180 program along with the English 10 curriculum (Tr. pp. 637, 639). According to the special education teacher, although the student had participated in Read 180 and had made some progress in the program, she testified that she did not know if the student "required" Read 180 the following school year (Tr. p. 639).

Moreover, during the 2018-19 and 2019-20 school years, the student received instruction using the general education curriculum, not a modified curriculum, and was passing her classes and making progress working toward the criteria for mastery of her reading goal in the absence of Read 180 instruction (Tr. pp. 728-30, 780, 830, 1936; Dist. Exs. 36 at p. 2; 41 at pp. 1, 2; 45 at p. 2). Although the reading goal remained similar from year to year, as discussed above, the difficulty of the work presented to the student increased each year and the student was able to make progress toward her reading goal each year (Tr. pp. 983-85; Dist. Exs. 36 at p. 2; 41 at pp. 1, 2, 6, 7).

Based on the above, the parent's claim that the student required specialized reading instruction in order to receive a FAPE is not supported by the evidence in the hearing record.

#### **4. Related Services**

The parent alleges that the district failed to offer the student any related services during the 2018-19 and 2019-20 school years despite the present levels of performance acknowledging deficits in speech-language and social skills (Req. for Rev. ¶ 18). The parent asserts that the failure to offer the student related services deprived her of a FAPE for these school years.

An IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" and includes speech-language therapy, PT, OT, including orientation and mobility services, parent counseling and training, school health services, school nurse services, assistive technology services, and other appropriate developmental or corrective support services (20 U.S.C. § 1401[26][A] [emphasis added]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]). State regulation provides that the CSE must base its recommendations for related services as well as the frequency, duration, and location of the provision of related services on the specific needs of a student with a disability and those recommendations must be set forth on the student's IEP (8 NYCRR 200.6[e][1]).

The parent's claims regarding related services relate mostly to the district's failure to address the student's needs with regard to her language and social skills, based on comments in the present levels of performance sections of her 2018-19 and 2019-20 IEPs. The parent indicated that the district had not evaluated the student's language skills since 2013 (see Ex. HH) and that although the parent supplied an independent speech-language evaluation report, the IHO refused to enter it into the hearing record.

The student's needs for the 2018-19 and 2019-20 school year have been discussed above and therefore, it is unnecessary to repeat them here. The IEPs acknowledge that the student had some level of deficit in language and socialization skills; however, an independent review of the

evidence in the hearing record does not demonstrate that the level of need warranted the provision of related services, supporting the IHO's finding that, "nothing in the record – not even in the testimony of the psychologist who testified on behalf of the []parents – suggests that the student required such services to progress in the general education curriculum during the years in question" (IHO Decision at p. 17; see Dist. Ex. 45 at p. 2). Therefore, the evidence in the hearing record does not support a finding that the student was denied a FAPE by the lack of speech-language services or counseling services as the district was aware of the student's deficits in those areas and in both the 2018-19 and 2019-20 school year, the student was able to make progress with supports and strategies provided to her in the classroom, access the general education curriculum, and continue to move towards graduation. As such, there is no basis to overturn the IHO's decision to exclude the independent speech-language evaluation report from the hearing record.

### 5. 12-Month School Year Services

The parent argues that the district's testing results demonstrated that the student regressed over school breaks, yet the district did not offer the student 12-month services on any of her IEPs (Req. for Rev. ¶ 26).

State regulations require that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more ("Questions and Answers Extended School Year 2017," Office of Special Educ. [Feb. 2017], available at <http://www.p12.nysed.gov/specialed/applications/ESY/esy-2017/documents/questions-and-answers-extended-school-year-2017.pdf>).<sup>18</sup>

The evidence in the hearing record shows that the student exhibited retention skill deficits (see Tr. pp. 725, 1023, 1030; Dist. Exs. 33 at p. 3; 34 at p. 2; 44 at p. 3; 49); however, that difficulty did not equate with the need for extended school year (ESY) services (see Tr. p. 2929; Dist. Ex. 45 at p. 2). Review of the student's IEPs shows that the CSE did not recommend 12-month programming for any of the school years in question (Parent Ex. F at p. 9; Dist. Exs. 33 at p. 9; 44 at p. 9; Joint Ex. 1 at p. 8). The supervisor of special education and student related services (supervisor) testified that the parent had not made a statement to the effect that she believed that the student was in need of 12-month programming (Tr. pp. 4, 2933). According to the supervisor, during the March 2019 CSE meeting the qualifications for ESY services were discussed (Tr. pp. 2915, 2929). Specifically, the supervisor testified that she explained that "it had to do with significant regression over breaks," and that it was "the ability to recoup lost skills" (Tr. p. 2929). She continued that "we didn't have any evidence that that was the case for [the student]" (id.; see Dist. Ex. 22 at p. 1). Review of the evidence in the hearing record shows that while the student

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<sup>18</sup> District courts in New York have followed the eight-week standard set forth in guidance when determining whether substantial regression has occurred (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*15-\*16 [E.D.N.Y. Sept. 2, 2011]; see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 2d 94, 125 [E.D.N.Y. 2017]).

exhibited some difficulties with retention, she nonetheless continued to progress fairly successfully from year to year and ultimately able to obtain all the credits necessary to graduate without having received 12-month services, thereby evidencing that any limited episodes of regression she experienced did not impact her academic functioning to the degree that extended year services were necessary (Tr. pp. 121-22, 322-23; see Dist. Ex. 45 at p. 2). As discussed above, the student's performance was commensurate with her ability, and the supervisor and the director of educational services indicated that district staff viewed the student's relatively consistent ability to stay on course to graduate with her peers by obtaining the requisite credits to graduate and completing her Regents exams as evidence that she was able to obtain educational benefit from a 10-month school year (see Tr. pp. 90, 97, 121-22, 291, 300, 322-23; Dist. Ex. 45 at p. 2).

### **C. Independent Educational Evaluation**

The parent alleges that the IHO erred in failing to order an independent functional vocational assessment.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at \*5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]). Here, in December 2014, after the student turned 13, the district conducted a vocational assessment of the student (Parent Ex. GG). The parent's first request for a vocational IEE in the hearing record was contained in the due process complaint notice (see IHO Ex. II at p. 8). Here, as found by the IHO,

the hearing record does not support the need for a vocational IEE as the student was on track to graduate and had completed all of her credits to graduate, except for one Regents exam (Tr. pp. 323-25; Dist. Ex. 13 at pp. 1-2). Moreover, during the impartial hearing the student was attending an Economic Opportunity Program (EOP), which the parent described as a program that taught the student life skills, including handling money (Tr. pp. 2636-37). This program was being provided through the school district and included the student's transportation (Tr. p. 2637). There is no indication in the hearing record that the parent objected to the EOP program. The hearing record does not support a reversal of the IHO's decision that the failure to conduct a vocational assessment denied the student a FAPE or any educational benefits (IHO Decision at p. 23). Further, there is no allegation in the hearing record that the district failed to properly respond to the parent's request for the IEE. As such, I decline to disturb the IHO's decision on the matter.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the IHO's determination that the student was offered a FAPE for the 2017-18, 2018-19, and 2019-20 school years, the necessary inquire is at an end.

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

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
August 19, 2021**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**