



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-142

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

### **Appearances:**

Law Offices of Irina Roller, PLLC, attorneys for petitioner, by Irina Roller, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Hae Jin Liu, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Fusion Academy (Fusion) for the 2019-20 school year. The appeal must be sustained.

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

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

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

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

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

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here in detail. Briefly, the hearing record reflects that the student began experiencing migraine headaches and anxiety in December 2018 while attending ninth grade at a high school (Parent Exs. C at pp. 9-11; T at p. 2). Reportedly, the anxiety persisted and during the winter and early spring of 2019, the student began feeling overwhelmed and started missing school (Parent Ex. D at p. 1). In April 2019, the student's "emotional functioning deteriorated significantly, and he was unable to attend school from April until June 2019" (id.).

In an email dated June 28, 2019 to the student's school counselor and high school principal at the time, the parent requested the student receive "a full evaluation" to determine his emotional and educational needs (see Parent Ex. M). In August 2019 following a private neuropsychological evaluation, the student received diagnoses of obsessive compulsive disorder (OCD), with good insight, unspecified depressive disorder, specific learning disability with specific impairment in reading: rate, specific learning disability with impairment in written expression: organization, and specific learning disability with impairments in mathematics: memorization of arithmetic facts, accurate/fluent calculation, and accurate math reasoning (see Parent Ex. D at p. 8).

In a letter to the student's high school principal dated October 9, 2019 sent via email and certified mail, the parent provided "continued consent" for the district to evaluate the student, and she requested that the CSE provide the student with a free appropriate public education (FAPE) and an individualized education program (IEP) (Parent Ex. B at pp. 1, 3-4). The parent's letter noted that the student "struggled greatly" with severe anxiety whereupon he missed a significant amount of days of school, and she reiterated her previous efforts to obtain services and supports for the student (see *id.* at pp. 1-2). The parent notified the district that on October 3, 2019 the student began attending Fusion and that she "reserve[d] the right to seek tuition reimbursement" for Fusion if the district did not provide an appropriate program for the student (*id.* at p. 2).<sup>1</sup>

The CSE convened a meeting to determine the student's initial eligibility for special education on January 9, 2020 (see generally Parent Ex. V). The CSE found that the student was eligible for special education programming as a student with an other health-impairment and designed an IEP for the remainder of the 2019-20 school year, which recommended interim home instruction and counseling services starting January 23, 2019, and transition to placement in a nonpublic school 12:1+1 special class placement by April 23, 2020 (*id.* at pp. 1, 9).<sup>2</sup>

The parent disagreed with the recommendations contained in the January 2020 IEP and after visiting several State-approved nonpublic schools for the student to attend for the 2019-20 school year, she concluded they would not be appropriate for the student (Parent Ex. A at pp. 6-7). As a result, in a due process complaint notice, dated February 1, 2021, the parent alleged that the district failed to offer the student a FAPE for the 2019-20 school year in which she alleged, among other things, violations of child find, inappropriate evaluation of the student, procedural violations when conducting the CSE meeting, and that numerous components of the student's IEP were inappropriate (see Parent Ex. A). As relief, the parent sought, among other things, funding for the student's unilateral placement at Fusion for the 2019-20 school year, reimbursement for parentally obtained evaluations, and compensatory education services.

An impartial hearing convened on March 8, 2021 and concluded on April 27, 2021 after two days of proceedings (Tr. pp. 1-120). In a final decision dated May 17, 2021, the IHO determined that the district failed to offer any evidence to demonstrate whether it offered the

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<sup>1</sup> The Commissioner of Education has not approved Fusion as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>2</sup> The student's eligibility for special education and related services is not in dispute in this appeal, although concerns as to the category of disability had been raised by the parent previously (34 CFR 300.8[c]; 8 NYCRR 200.1[zz]).

student a FAPE for the 2019-20 school year (IHO Decision at p. 5). Next, the IHO concluded that Fusion was not an appropriate unilateral placement because math was one of the student's most pronounced areas of need and Fusion did not provide math instruction and, furthermore, that Fusion failed to provide appropriate counseling services to the student (*id.* at pp. 5-6). The IHO denied all of the relief requested in the due process complaint notice, including funding for Fusion, compensatory education, and other costs (*id.* at pp. 5-8; *see* Parent Ex. A at p. 10).<sup>3</sup>

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

The parent appeals. The specific details of the parent's arguments in the request for review are familiar to the parties and will not be recited here. Briefly, the parent contends that the IHO misunderstood the student's needs and asserts that the student's emotional and organizational defects were the cause of the student's academic struggles. The parent argues that the IHO overlooked evidence of the student's progress and Fusion's efforts to adapt its programming to address the student's needs. The parent asserts that the IHO erred in applying an improper standard for a unilateral placement and should have weighed the fact that the parent addressed the student's emotional disability with private counseling rather than through Fusion. The parent also asserts that equitable considerations weigh in favor of her request for tuition reimbursement for Fusion for the 2019-20 school year.

In an answer, the district denies the allegations set forth in the parent's request for review and argues that the IHO correctly determined that the parent had failed to meet her burden to show that Fusion was an appropriate unilateral placement. The district also alleges that equitable considerations warrant a denial of reimbursement, as the parent failed to provide the district with notice of the student's unilateral placement prior to his attendance at Fusion.

#### **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

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<sup>3</sup> During the impartial hearing, the parent's attorney indicated the parent was not seeking any compensatory education beyond tuition reimbursement for Fusion for the 2019-20 school year (*see* Tr. p. 36).

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>4</sup>

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

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. Scope of Review**

Initially, I note that the district has not appealed the IHO's finding that it failed to offer the student a FAPE for the 2019-20 school year. Additionally, although the parent sought compensatory education and "[r]eimbursement and/or funding for the cost of any evaluations of the student obtained at [the] parent's expense" (Parent Ex. A at p. 10), the IHO denied all of the relief the parent requested in the due process complaint notice and the parent has not appealed those adverse determinations or advanced any arguments regarding those forms of relief in her request for review other than the costs of Fusion for the 2019-20 school year (see IHO Decision at pp. 4-6). Accordingly, these determinations have become final and binding on the parties and shall not be reviewed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]). Accordingly, the next issue to be determined is whether Fusion was an appropriate unilateral placement for the student for the 2019-20 school year.

### **B. Unilateral Placement-Fusion**

Turning to the parent's unilateral placement of the student, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private

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<sup>4</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

## 1. The Student's Needs

Although not in dispute in this appeal, a discussion of the student's special education needs is beneficial to evaluate the evidence regarding the appropriateness of the parent's unilateral placement of the student at Fusion for the 2019-20 school year.

According to the direct testimony via affidavit by the student's mother, the student began attending ninth grade at a district high school during the 2018-19 school year (Parent Ex. T at pp. 1-2). She testified that although initially enthusiastic to begin high school, the student began having intrusive thoughts and uncontrollable worries, he then began having multiple panic attacks every week, and his mental health began to deteriorate (*id.* at p. 2). The parent stated that the student started private individual therapy and psychiatric treatment in January 2019 (*id.*). Although some improvement was noted after starting medication in February 2019, the student continued to have panic attacks, headaches, and feelings of having an altered mental state (*id.*). The parent stated that neurological examinations of the student were conducted in March and April 2019, at which time he received a diagnosis of migraines associated with anxiety (Parent Ex. T at pp. 2-3; *see* Parent Ex. C at pp. 7-12). She further indicated that in April 2019, the student "was unable to attend school due to his intolerable anxiety symptoms" (*id.* at p. 2).

The parent testified that she obtained a private neuropsychological evaluation of the student in August 2019 at the suggestion of the student's treating psychiatrist to assess the student's emotional, academic, and cognitive strengths and weaknesses and inform his educational planning (Parent Ex. T at p. 3; *see* Parent Ex. D). The neuropsychological evaluation report indicated that "[r]elevant information was obtained from a review of the history and medical records" (Parent Ex. D at p. 1). In addition, the neuropsychologist conducted an interview with the student and his parent, and had a phone conversation with the student's psychiatrist (*id.*). The student's mother completed the Behavior Assessment System for Children-Third Edition (BASC-3), the Behavior Rating Inventory of Executive Functioning-Second Edition (BRIEF-2) and the SNAP-IV (*id.*). The student completed the Symptom Checklist-90-Revised (SCL-90R) and the Yale Brown Obsessive Compulsive Symptom Checklist (YBOCS) (*id.*). In addition, the student was administered a variety of neuropsychological tests (*id.*).<sup>5</sup>

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<sup>5</sup> Formal neuropsychological testing included administration from the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V): Vocabulary, Similarities, Block Design, Visual Puzzles, Matrix Reasoning, Figure Weights, Digit Span, Arithmetic, Coding, and Symbol Search, and from the WISC-Third Edition: Processing Instrument: Spatial Span (Parent Ex. D at p. 1). Additional testing included administration of the Boston Naming Test (BNT); administration from the Wide Range Assessment of Memory and Learning-Second Edition (WRAML-2): Verbal Learning and Story Memory; administration from the Test of Memory and Learning-Second Edition (TOMAL-2): Abstract Visual Memory, the Visual Sequential Memory; administration of the Integrated Visual and Auditory Continuous Performance Test-Second Edition (IVA-2); administration of the Rey-Osterreith Complex Figure Test-Meyers and Bernstein Scoring (ROCFT); administration from the Delis Kaplan Executive Function System (DKEFS): Verbal Fluency and Color Word Interference; administration of the Tower of London-DX – Second Edition; administration of the Nelson Denny Reading Test (NDRT); administration from the Woodcock Johnson Tests of Achievement-Fourth Edition (WJ-IV-Achievement): Sentence Reading Fluency, Calculations, and Math Facts Fluency, and administration of the Test of Written Language-Fourth Edition (TOWL-4) (*id.* at pp. 1-2). The neuropsychological evaluation report included an appendix of administered test results that contained the student's performance data in the form of standard scores, percentile rankings, and other scores (*id.* at pp. 12-13).



The neuropsychologist reported that during the evaluation the student presented as a polite, well-related and compliant (Parent Ex. D at p. 6). According to the evaluation report, the student was motivated to perform well; however, due to heightened anxiety and intrusive thoughts some of the student's scores could be an under-representation of his true cognitive abilities and should be interpreted with caution (id.). The neuropsychologist concluded that the student's overall cognitive abilities were in the average range on then-current examination (id.). Psychologically, the neuropsychologist reported that the student continued to experience intrusive thoughts and compulsive behaviors was very well-aware that those thoughts were irrational, and was constantly bothered by them as he had no control (id. at pp. 6-7). The obsessions and compulsions interfered with his day-to-day functioning and due to those struggles, the student had started feeling unhappy, questioned his abilities, and was also constantly overwhelmed and stressed (id. at p. 7). Furthermore, the separation and divorce of the student's parents was traumatic for him for many years (id.). In the neuropsychologist's opinion, the symptoms of depersonalization, derealization and dissociation were the student's way to cope with his anxiety and past trauma (id.). His symptoms met the criteria for OCD with good insight and unspecified depressive disorder (id. at pp. 7-8).

The neuropsychological evaluation report indicated that the student struggled in some areas of executive functioning including complex organization and visual working memory, and slowness on complex tasks (Parent Ex. D at p. 7). According to the neuropsychologist, the student's significant anxiety symptoms and difficulty with emotion regulation could lead to difficulties in those areas (id.). Furthermore, due to the student's executive functioning difficulties, he struggled with sorting, organizing, and prioritizing information and over focused on details, while struggling to identify the big picture (id.). As a result, he struggled with completing tasks on time and shifting flexibly among alternative approaches (id.).<sup>6</sup>

Academically, the student's underlying cognitive and emotional weaknesses were "impacting" his ability to learn up to his potential (Parent Ex. D at p. 7). The neuropsychologist reported that with regard to reading, the student's comprehension was good, but he was a very slow reader (id.). Due to the student's struggles with working memory and organization, he took time to integrate the text he was reading (id.). According to the neuropsychologist, those symptoms were consistent with the diagnosis of specific learning disorder with impairment in reading (reading rate) (id. at pp. 7-8). With regard to math, the student struggled with memorizing math facts and completing multistep problems (multiplication, division, fractions, percentages) and his symptoms fit the criteria for specific learning disorder, with impairment in mathematics (memorization of arithmetic facts, accurate and fluent calculation and accurate math reasoning) (id.). The student's writing skills were in the low average range as he had some difficulty with elaborating on his ideas, which likely was the result of his weak executive functioning skills (id.

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<sup>6</sup> The neuropsychologist opined that as the academic curriculum became more complex and conceptually demanding, requiring the student to organize and synthesize large amounts of information, he would likely struggle more with keeping up with his academic work (Parent Ex. D at p. 7). She further indicated that independent studying and projects would be particularly challenging for the student, as those tasks were highly dependent on planning ahead, predicting outcomes, and setting long-term goals (id.). Further, independent projects required organization, time management, sequencing information, and acquiring the materials and information needed to complete tasks, which would be a struggle for the student, particularly as the demands of the project increased through high school (id.).

at p. 7). In order to plan his thoughts in preparation for writing, he needed to evaluate and rephrase and paraphrase the assigned topic, a task that presupposed the ability to think flexibly (id.). The student's symptoms were consistent with diagnoses of specific learning disorder with impairment in written expression (clarity and organization) (id. at p. 8).

According to the neuropsychologist, in sum, the student's neurocognitive profile indicated that he was bright and had solid verbal skills (Parent Ex. D at p. 8). However, due to his emotional struggles and deficits in executive functioning it was difficult for him to process information quickly and efficiently (id.). This further increased his anxiety as task demands increased and as he needed to work independently, quickly and organize and plan a larger load of information (id.). The neuropsychologist opined that, with support, services, and accommodation, she had no doubt that the student would be able to progress academically (id.).

The neuropsychological evaluation report included approximately four pages of recommendations for the student (Parent Ex. D at pp. 8-11). According to the neuropsychologist, the student was unable to function in a bigger school due to his significant anxiety and OCD symptoms and due to his increased anxiety and significant school refusal, he required a small (i.e. small teacher to student ratio), structured, and supportive classroom setting housed within a small and nurturing school environment that could provide him with ample support for his unique areas of difficulty (id.). The neuropsychologist recommended that student's program should be comprised of students with cognitive functioning at par with the student and with students who were invested in learning (id.). She emphasized that the student's program should not include students with behavioral issues and should have minimal distractions/disruptions, as this would be detrimental to the student's learning and emotional functioning (id.).

Further, as the student had difficulty establishing trusting therapeutic relationships with professionals, the neuropsychologist recommended that the student should be able to take breaks and reach out to his psychiatrist when he felt overwhelmed and needed therapeutic support (Parent Ex. D at p. 8). She also recommended that there be consistent communication and collaboration between the student's school personnel and outside providers, as it was extremely important for his progress and to ensure his needs were met (id.). Further, the student's teachers should be aware of how the student's anxiety affected his academic performance and how to support him when he felt overwhelmed (id.).

The neuropsychological evaluation report included recommendations with regard to the student's deficits in math and writing (Parent Ex. D at p. 9). Recommendations specific to math intervention were that instruction should focus on the student's basic math facts and assist his conceptual understanding (id.). A recommended accommodations was for the use of manipulatives to make abstract mathematical concepts more concrete (id.). Further, underlying deficits in executive functions (e.g., problem solving) were likely to exacerbate problems in this area, particularly with "word problems" or other problems that did not merely rely on calculations (id.). Other recommendations were for the student to be taught to approach complex problems using 'recipes,' including steps to identify important information, eliminate extraneous information, recognize 'key words' that intimated which mathematical operation was necessary, and sequence the problem toward the result (id.).

Recommendations for writing interventions included specific strategies to help the student formulate and express his ideas into writing and remediate his skills related to how to approach, edit, and revise written assignments (Parent Ex. D at p. 9). For example, recommended remediation strategies included steps such as "writing" (i.e., gathering information, taking notes, forming an outline, etc.), "drafting" (i.e., getting ideas on paper without much attention paid to grammar, spelling, organization), "revising" (i.e., editing the aforementioned characteristics of writing, reorganizing paragraph and sentence structure, cleaning up grammatical errors, etc.), and "finalizing" (i.e., preparing the work for its final presentation as a paper or speech with special attention to editing mistakes in grammar and spelling) (id.).

The neuropsychological evaluation report further indicated that in light of the student's academic and learning difficulties, specific and individualized assistive technology was highly recommended to ameliorate his learning weaknesses and help him manage the workload of high school years (Parent Ex. D at p. 9). Recommended technology support was for a laptop and headphones used for all his academic work, technological support for writing (i.e., "Write: OutLoud 6" to support the student with expressive written language and remediate skills including sentence structure and editing of written text, and "Inspiration 9" to help the student plan and organize his ideas prior to writing a first draft) (id.).

Additional accommodations to facilitate the student's progress in school were for extended time (1.5x) for all schoolwork and testing, use of calculator, use of graphic organizers, preferential seating, provision of a space with minimal distractions, and administration of tests in a small group setting (Parent Ex. D at p. 9). The neuropsychological evaluation report further indicated that given the student's slowness, he would struggle to write down notes during class as well as essays during written examinations, such that the student should be allowed to use a note taker for those purposes (id. at p. 10). The report noted that without a note taker, the student would miss out on a good portion of lecture material (id.). Also, the neuropsychological evaluation report indicated the student required more time than his peers to absorb and process new material and the neuropsychologist recommended that he be given plenty of notice for project deadlines and allot himself more time than his peers to study for tests (id.).

The neuropsychological evaluation report included a list of recommended strategies to assist the student with his executive functioning and reducing anxiety (Parent Ex. D at pp. 9-11). Specific strategies recommended included creating a mental "to do" list of tasks to assist the student with rote learning, using calendars to keep track of his schedule (i.e., studying and completion of homework assignments), allowing models to guide problem solving, provide a structure to work within and cues to facilitate recall, and providing visual and auditory input to help with encoding and consolidation of information (id.). Additional recommended strategies were for previewing of upcoming information, and using concept maps, sequence charts, cause/effect charts, plot outlines, and study guides (id.). To address the student's central difficulties related to time management of complex assignments, recommended strategies were for teaching him some organized (i.e., a clearly defined outline) and systematic approaches for breaking down lengthy or ambiguous tasks into smaller, specific steps, each with an associated timeline (id.). Other recommended strategies included that the student should review content notes and materials daily, summarize and paraphrase information in order to develop study guides (i.e., consolidating and integrating class notes, handouts, textbook notes, chapter quizzes and assignments, other references and resources), and reformulate information into visual graphic

organizers (maps, charts, outlines) (id.). Also, the neurological evaluation report included recommendations for the student to use study guides for spaced study and cumulative review, spiraling approaches for the review and rehearsal of information, and cumulative review to identify how skills and information were related and build upon each other (id.). Additionally, the neuropsychologist recommended that the student develop reading note taking skills (i.e., text highlighting, underlining, outlining, mapping) and use metacognitive reading approaches including: (1) previewing chapter questions before reading; (2) drawing conclusions, generating a hypothesis prior to reading based on existing knowledge base; (3) generating visual graphic organizers such as semantic maps, schematic outlines, and concept atlases to be elaborated as information was obtained from the chapter; (4) highlighting text using color coding to reflect key vocabulary, basic concepts and supporting details; (5) using color codes to develop outlines and to fill in semantic maps; (6) using margin note taking to summarize and paraphrase information while reading (id. at pp. 10-11).

In addition, the neuropsychological evaluation report included recommendations for the student to receive direct assistance in developing time management protocols, including: (1) prioritizing assignments based upon length, complexity, familiarity, need for assistance and additional materials; (2) breaking long range assignments into smaller, more manageable tasks utilizing an assignment pad or calendar to keep track of deadlines for the completion of component tasks; (3) using a daily planner to accurately estimate and schedule needed study and work periods (i.e., regular review of this work schedule and "to do plans") (Parent Ex. D at p. 11). Further, recommendations also included individual tutorials aimed at the student learning how to use flow charts and diagrams, systematically reviewing lessons, developing superordinate and subordinate grouping strategies, using structured cues to guide processing, and condensing information ("chunking") to manageable units (id.).

With regard to the student's need for continued therapeutic support, the neuropsychologist recommended continued individual therapy to help with anxiety, depression, and OCD symptoms, and continued medication management (Parent Ex. D at p. 11).

During the impartial hearing, the neuropsychologist who conducted the August 2019 neuropsychological evaluation testified that she initially received a phone call from the student's psychiatrist, referring the student to her because the psychiatrist was very concerned about the student's emotional functioning which was interfering with his learning (Tr. p. 87). At that time, the student refused to go to school, and it was not certain that there were other cognitive or learning difficulties that were adding to his emotional difficulties (id.). Although the student had already received diagnoses, the psychiatrist called the neuropsychologist to discuss the possible need for her to differentially diagnose the student further (id.). The neuropsychologist noted that a few days later the student's parents called her as they were very concerned that the student's emotional functioning was deteriorating, something they did not know how to handle (id.). The neuropsychologist reported that in addition to the cognitive and educational aspects of a psychoeducational evaluation, a neuropsychological evaluation took into account different cognitive functioning that could be affected by the student's emotional functioning, which could then interfere with learning (Tr. p. 88).

The neuropsychologist testified that she spoke with the student's parent and step-parent, the student's psychiatrist, and with the student in collecting information about the student's history

(Tr. p. 89). The parent reported to the neuropsychologist that the student was "extremely stressed and anxious" at six or seven years of age, and although he attended therapy, he was sad and angry but could not express those feelings (*id.*). By the time he was in eighth grade, the student started feeling really unhappy (Tr. pp. 89-90). At that point, it was reported that the student was being bullied in school and "there were some things happening" between the student and his peers that resulted in him having a hard time engaging socially (Tr. p. 90). The student started complaining of stomachaches and headaches, and he started missing multiple days of school (*id.*).

According to the neuropsychologist's testimony, when the student began ninth grade during the 2018-19 school year, his emotional functioning deteriorated significantly (Tr. p. 90). The student started having intrusive thoughts that he had difficulty controlling (*id.*). He started worrying a lot, had panic attacks, and for a time, he was dissociating, whereas reported by the student, he did not know where he was, at times he did not know where the time went and what he did during those times, or that his limbs were his own (*id.*). According to the neuropsychologist, the student displayed depersonalization, derealization, and disassociation symptoms with panic attacks (*id.*).

The neuropsychologist further testified that in April of the 2018-19 school year, the student "just could not bear to go to school, was extremely overwhelmed, and then also started exhibiting some depressive symptoms because of his inability to engage in school" (Tr. p. 90). The student wanted to do well and finish school but felt "really stuck," and questioned his ability to go to school because of that stress (Tr. pp. 90-91, 93). The neuropsychologist reported that the student was physically unable to make himself get up and go to school, even with scaffolded support offered by the parents (Tr. p. 93).

The neuropsychologist's testimony indicated that the student never processed the trauma of his parents' separation (Tr. p. 94). The neuropsychologist's noted the student's psychiatrist was extremely concerned about some of the symptoms he saw psychologically that were leading to the depersonalization and dissociation (Tr. pp. 94-95). Therefore, according to the neuropsychologist's testimony, the psychiatrist's biggest concern was how to engage the student in school and provide support, so that the student felt he could trust and go to school and feel like he would be supported if he went through any of those emotional difficulties in school (Tr. p. 95).

Regarding the diagnoses included in her evaluation report, specific to the student's diagnosis of OCD with good insight, the neuropsychologist reported that OCD had two different parts (Tr. p. 95). One part involved the student's intrusive thoughts about his health (i.e., will he get sick/will he get others sick, making mistakes, violent images) (Tr. pp. 95-96). The neuropsychologist reported the intrusive thoughts were rumination, in that they did not stop, and they continuously tended to come and go, even when the student tried to engage in any kind of work (Tr. p. 96). In the classroom, those thoughts increased the student's anxiety to the point where he was unable to function (*id.*). The next part of the OCD diagnosis involved that to decrease the anxiety created by the intrusive thoughts, the student engaged in compulsive behaviors such as, when he thought about whether he would get sick or make others sick, he would excessively wash his hands to make sure that did not happen (Tr. pp. 96-97). Another compulsive behavior was counting; the student wanted things to be even numbered, and if he got an odd number, he thought something bad was going to happen (*see* Tr. p. 96). In his mind, the student wanted to make things symmetrical, such as when the student was in her office, he noticed there

were two or three books not in order and he could not focus on anything until he told her that and then they put the books in order (id.).

With regard to the student's diagnosis with an unspecified depressive disorder, the neuropsychologist testified that although the student had no control over his intrusive thoughts and compulsive behaviors, he was aware that his intrusive thoughts and compulsive behaviors were not rationale and would not make things better (Tr. p. 97). The student's lack of control over those thoughts and behaviors led to his feeling unhappy, questioning his abilities, and becoming overwhelmed and stressed, knowing that he could not do anything about it (id.). All of that led to the student feeling sadness and helplessness (id.).

Turning next to the student's diagnosis of unspecified learning disability with specific impairment in reading rate, the neuropsychologist noted that as she included in the evaluation report, that the student's psychological difficulties led to some difficulties with the student's executive functioning (Tr. p. 98). The intrusive thoughts affected the student's processing speed, complex organization, and visual working memory, which led to his difficulties with academics because organization was needed, and if processing was slow, reading was slow (id.).

Regarding his diagnosis of unspecified learning disability with specific impairment in written expression organization, the neuropsychologist indicated the student had good ideas and wanted to write, but that his thoughts were going all over the place (Tr. p. 99). The student was not putting his ideas down in a cohesive way or elaborating on his ideas enough, indicative of executive function difficulties (id.).

With regard to his diagnosis of unspecified learning disability with specific impairment in mathematics—memorization of arithmetic facts, accurate fluent calculation, and accurate math reasoning—the neuropsychologist testified that difficulties with executive functioning really "hit hard" when it came to math, because memorization of math facts required working memory, and then consolidation of that working memory into long-term memory, which was retrieved at a speed to complete the math problem (see Tr. pp. 99-100). She indicated that due to the student's slowness and difficulties with working memory and organization, he had difficulties in all areas of math (Tr. p. 100). The student made mistakes with "multiple math problems" because he was not able to hold on to what the next step would be, and he had a hard time retrieving math facts in a fluent way (id.).

## **2. Fusion**

Turning next to evidence proffered by the parent regarding the special education services available through Fusion, a two-page prospectus of the Fusion campus that the student attended indicated that Fusion was a private, comprehensive school for grades 6 through 12 that was part of a nation-wide network of schools (Parent Ex. K at p. 1; see Parent Ex. G at p. 1). Courses listed were at essential, college prep, and honors levels (id.). The document included an extensive list of "sample" course offerings, some of which were honors courses and/or Regents Lab courses (id. at p. 2). According to the document, Fusion's holistic curriculums promoted self-awareness, resourcefulness, creativity, and critical thinking (id. at p. 1). In addition, the school offered 1:1 instruction, meaning one student and one teacher in every classroom, a "homework café" which was described as "[h]omework doesn't go home," and personalized scheduling (id.).

The head of school of the Fusion campus that the student attended provided direct testimony by affidavit indicating that Fusion is a private middle and high school (Tr. pp. 59-60; Parent Ex. U at pp. 1-2, 10; see Parent Ex. F at p. 1). According to the head of school, all classes were provided in a 1:1 learning environment, in that the classrooms were small office areas with whiteboards and other forms of technology that teachers used to teach (Parent Ex. U at p. 2). Some classes were taught more typically with the teacher at the board providing instruction and some classes were taught with the teacher and student sitting at a desk next to one another (id.). According to the head of school, with the 1:1 instruction, Fusion was able to customize each student's program based on his or her individual needs (id.). For example, if a student was struggling with a math concept, the teacher could slow down the instruction, and ensure the student mastered the concept before moving on to something else (id.). On the other hand, if a student was advancing faster than expected, the teacher could modify the instruction to make sure the student was being challenged (id.).

According to the head of school, Fusion provided an educational program to a broad range of students such as professional athletes, students with high IQs and disabilities (i.e., "twice exceptional" students), students who had been bullied in a public school, or students who had anxiety and refused to attend a public school (Parent Ex. U at p. 2). The head of school believed that Fusion's program attracted students whose needs did not fit into a typical student mold and for various reasons, their needs could not be addressed in a previous setting (id.).

The head of school also described the general approach and procedures used by Fusion. With regard to curriculum, the head of school testified that Fusion used a curriculum accredited by the New York State Middle States Association and Advanced Ed (Parent Ex. U at p. 2). The curriculum also followed State curriculum standards (id. at p. 4). All teachers at Fusion had a minimum of a bachelor's degree in the area they teach, and many held a masters degree (id. at pp. 4, 8; see Tr. pp. 61, 64).<sup>7</sup> Teachers were provided with a curriculum but were given flexibility to determine how to best deliver instruction (id. at pp. 2, 8; see Tr. pp. 65-66). According to the head of school, when a student enrolls at Fusion, the school creates a formal education program (FEP), a document which provides educational history and relevant information to help the student's team customize their approach to optimize the student's engagement and learning outcomes (id. at pp. 2-3). An FEP is synthesized from student and parent interviews and any supporting documentation (i.e., 504 plans, neuropsychological exams, previous teacher reports, etc.), and captures

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<sup>7</sup> The Fusion head of school also testified that in order to become a teacher at Fusion, all teachers attended a mandatory training called "New Fusionite Orientation (NFO), where the teachers learned about Fusion's culture, curriculum, and pedagogy (Parent Ex. U at pp. 5-6). Teachers also spent between 10 and 20 hours of training in learning how to use Fusion's learning and management system (BrainHoney and Genius) (id. at p. 6). In addition, Fusion offered online training using different modules or online courses in areas such as crisis management, modified instruction, and teaching rubrics (id.). Fusion offered these trainings to teachers on an ongoing basis to provide support and resources in creating and differentiating the curriculum (id.). Fusion provided ongoing professional development targeted towards teacher needs and implemented under the guidance of Fusion's special education lead and assistant director (id.; see Tr. p. 62). The head of school testified that the professional development trainings ranged from those that were pedagogical in nature, supporting students of various cognitive profiles with various learning differences, to those that he opined were more focused on supporting both teachers and students through various aspects of mental health (Tr. p. 62). For example, the head of school stated that Fusion had a presenter come in and conduct a presentation on the principles of mentalization, the efficacy and how to incorporate mentalization-based techniques into the classroom for the benefit of the student (id.).

information about the student's disabilities, learning needs, and recommendations and accommodations (*id.* at p. 3). FEPs are developed and implemented with the guidance of the Fusion campus special education lead teacher who is State certified and who consults, develops IEP notes, differentiates instruction strategies, and helps calibrate student social/emotional and academic goals (*id.* at pp. 3, 4).

The head of school also testified that Fusion follows a schedule similar to a college program so that students attend the same classes on Monday/Wednesday and Tuesday/Thursday each week (Parent Ex. U at p. 3). Each student schedule is based on their individual needs; some students arrive early in the day, and some arrive later and finish later in the day (*id.*). Students take classes they need to graduate and that meet their individual needs and interests (*id.*). According to the head of school, every student attends a homework café, an area in the school where students complete their homework under the supervision of the director of homework café and supporting teachers (*id.*). One homework café allows students to talk and discuss the work, and another homework café is conducted in silence (*id.*). Students use either café depending on how they work best or depending on the work they need to complete that day (*id.*). There is at least one teacher in each homework café, which the head of school stated is similar to the set-up of a resource room in public school (*id.*). The monitor was described as supporting students who need help with homework and monitoring whether they completed the homework before they can check out of the café (*id.*). Students' teachers and lead teacher also have to review and confirm that students complete their homework before they leave for the day (*see id.* at pp. 3-4). The homework café also helps students advocate for themselves and that if they have questions about their homework, the monitor helps them draft emails to teachers or confer with other students (*id.* at p. 4). Further, students have access to clubs during lunch (i.e., gaming, social activism, music club) and they receive individualized physical education as the school has a gym, a dance studio, and a yoga studio (*id.*). Fusion also has an average of two field trips per month whereby some trips focus on community involvement or educational topics and some trips are purely recreational (*id.*).

The head of school testified that the school addresses its students' social needs holistically within the program (Parent Ex. U at p. 4). Every student has individualized goals for their academic, social, and emotional success in the program (*id.*). According to the head of school, the 1:1 support provides individualized instruction that allows for differentiated support based on a student's needs (*id.*). In the homework café, students have opportunities to socialize with other students, and the homework monitor can support and provide structure for social opportunities in the homework café (*id.*). Fusion staff can immediately address peer issues that arise in the homework café (*id.*). The homework monitor can also communicate with teachers through the Fusion management system, so that those teachers can provide additional support and reinforcement (*id.* at pp. 4-5). Fusion also provides a community minds class that helps prepare students to engage in appropriate social interactions, and a life skills class that helps students prepare for more independent living (i.e., prepare resumes, write professional emails, prepare a budget) (*id.* at p. 5). In order to teach the community mind course, teachers received additional training at Fusion (*id.*).

Additionally, the head of school testified that Fusion's teachers communicate and often collaborate with each other and the students' families (Parent Ex. U at p. 6). The school uses a learning management software program that provides information on students' classes, assignments, grades, and progress (*id.*). Students can access the program to review their grades or



their missing assignments, something that helps build their independence and advocacy skills (id.). As Fusion emphasizes communication with parents, each teacher provides a daily note to parents and how the student did in class that day (id.). If parents have a question or want to follow up on something, they can email the teacher directly from a note (id.). Teachers also meet regularly as a team under the supervision of the special education lead, to discuss observations, celebrations, and to share best practices (id.).

#### **a. Specially Designed Instruction**

Turning to the student's placement, the Fusion head of school testified that the student attended Fusion from October 2019 through June 2020 for the 2019-20 school year (Parent Ex. U at p. 7). According to the head of school, the student presented with strengths in verbal skills (the student did well in discussion-based classes and he made informed and insightful connections); creativity (the student was very creative and interested in social justice; he did well when teachers could relate course content to the larger world, particularly when connections could be made with current events and social justice); and reading comprehension (when reading at a reduced pace) (id.). The head of school also noted the student presented with weaknesses and deficits as he struggled with anxiety, executive functioning, reading pace, OCD, confidence, writing (organization and fluency), and math (math facts, fluency, and reasoning) (id.).

Consistent with the recommendations included in the neuropsychological evaluation report previously discussed, the affidavit testimony from the head of school indicated that Fusion used a variety of strategies with the student to support his learning (see Parent Exs. D at pp. 9-11; U at pp. 8-9). Specifically, those strategies included chunking of new material, explicitly breaking down large assignments into shorter, defined explicit tasks, use of a planner to track assignments and due dates, read alouds, active reading strategies (mapping, character traits, annotation), incorporation of writing systems tracking discrete parts of the writing process, cuing, prompting, extra time to process new material, explicit models, visual aids such as guided notes, flow charts, mapping, and graphic organizers, extra time on testing, and use of computer for all writing assignments/notetaking (Parent Ex. U at pp. 8-9; see Parent Ex. D at pp. 9-11).

Additionally, the Fusion head of school also testified that the school developed individual goals for the student including that the student would use his love of music to connect with other students by collaborating with at least three other musicians during the semester (Parent Ex. U at p. 9; see Tr. p. 106). Other goals were that the student would self-advocate by giving feedback to teachers both when things were moving too fast and when things were paced properly for his learning style, and that the student would work with his teachers to develop and implement organizational strategies that worked well for him in each class, including overall systems and strategies that could be applied to multiple classes (id.). In its answer, the district points out that the head of school noted the creation of an FEP at Fusion for each student, describing his or her history and needs as well as the interventions used by Fusion to address those needs. I agree that it is odd that the parent elicited a significant amount of generalized direct testimony by affidavit from the head of school that was not specific to the student in this case, especially when a document such as the FEP purports to be more specific to the student and should, at least in theory, be available. However, an IEP-like document is not specifically required when a student has been unilaterally placed in a private school by a parent, and therefore this flaw is not fatal to the parent's case in this particular instance. This is particularly so when the district failed to further develop

the record by cross examining the head of school on the topic of this student's missing FEP.<sup>8</sup> Thus the available evidence in the record tends to support the parent's viewpoint that the instruction was individualized to the student, even if that evidence is less than overwhelming.

Turning to the challenges to the IHO's decision on appeal, the IHO reasoned that the neuropsychologist believed that math was one of the student most pronounced areas of deficit and that it was unclear why the neuropsychologist believed that Fusion's curriculum was an appropriate fit for the student when the student was not provided with math instruction (IHO Decision at p. 5). However, the parent is correct that upon review of the portions of the hearing record that the IHO cited to in the decision reflects that the IHO placed undue weight on that aspect of the neuropsychologist's testimony about the student's difficulties with math, as it was the student's difficulties with executive functioning and working memory that contributed to his difficulties in math.

The neuropsychologist went into greater details that the IHO did not address. According to the neuropsychological evaluation report, the student's knowledge of mathematical calculations was in the low average range (Parent Ex. D at pp. 5, 13). The student was unable to do basic multiplication, division, percentages, and fractions, and his math fluency was in the average range (*id.*). With regard to the student's diagnosis of unspecified learning disability with specific impairment in mathematics, memorization of arithmetic facts, accurate fluent calculation, and accurate math reasoning, the neuropsychologist testified that "difficulties with executive functioning really hit hard when it c[ame] to math, because memorization of math facts require[d] working memory, and then consolidation of that working memory into long term memory, and then you c[ould] retrieve it at a speed" that the math problem could be completed (Tr. pp. 99-100). She indicated that due to the student's slowness and difficulties with working memory and organization, he had difficulties in all areas of math (Tr. p. 100). With multiple math problems, the student made mistakes because he was not able to hold on to what the next step would be, and he had a hard time retrieving math facts in a fluent way (*id.*). Accordingly, the student's deficits affected numerous areas of instruction due to his executive functioning and organization.

The IHO also indicated that Fusion provided "absolutely no documented math instruction" to the student (IHO Decision at p. 5). The IHO's finding in that regard is more sound. Review of the evidence in the hearing record reflects that the student did not receive math instruction at Fusion during the 2019-20 school year. Specifically, during the first semester of the 2019-20 school year the student's course load was comprised of English 10 A, Independent PE 1 A, Spanish 2 A, and World History A, along with a homework café for each course, but did not include a math course (Parent Exs. E at pp. 1-5; G at pp. 1-2; F). Documentary evidence revealed that during the second semester of the 2019-20 school year the student's course load was also comprised of World

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<sup>8</sup> The district engaged in very little development of the record during the impartial hearing presenting no case of its own and engaging in only nominal and largely irrelevant cross-examination of the parent's witnesses. The district's cross-examination helped the parent establish that many of Fusion's teachers had advanced degrees and that the parent cooperated with the district by visiting nonpublic schools proposed by the district, a point that is relevant to their qualifications (Tr. pp 61, 62, 72-78). The cross-examination regarding teacher certification and Fusion's lack of status as a State-approved school was a largely irrelevant line of inquiry in a unilateral placement case. The district did establish that Fusion did not conduct group instruction (Tr. p. 61), but this flaw is not fatal to the parent's unilateral placement in this case, especially when Fusion was able to help the student overcome some of his school refusal.

History B, Spanish 2 B, and English 10 B, but did not include a math course (Parent Exs. E at pp. 6-8; G at p. 3).

While the IHO was factually correct that the student was not enrolled in a math course during the 2019-20 school year, the IHO did not explain why that led, under the totality of the circumstances in this case, to the conclusion that Fusion was an inappropriate unilateral placement for the student. Unlike courses such as ELA and social studies, high school students are not expected to take math courses in all four years of high school in order to receive a Regents or local diploma (see, e.g., New York State Diploma Requirements Applicable to All Students Enrolled in Grades 9-12, available at <http://www.nysed.gov/common/nysed/files/currentdiplomarequirements.pdf>). Many high school students across the State do not take every subject every school year. The fact that the student had—just prior to attending Fusion—refused to attend instruction of any kind at all suggests that a delay in completing any remaining math requirements did not, by itself, render the unilateral placement inappropriate.<sup>9</sup>

To that end, the neuropsychologist's unrebutted testimony indicated that she and Fusion personnel discussed her concern about the student's need for an intimate program with individualization and flexibility where they would "ease him in" rather than give him a full load of coursework as soon as he arrived (Tr. p. 105). The hearing record included an unofficial school transcript for the 2019-20 school year which reflected that the student was enrolled in three content area classes per semester, along with an independent PE class (Parent Ex. F). The student completed and earned credits for all the aforementioned courses in which he was enrolled during the 2019-20 school year (*id.*). The same unofficial transcript reflected that the number of courses the student was in the process of taking during 2020-21 increased (*id.*). Ordinarily, evidence subsequent to the school year in question would not be relevant, but in this case it is relevant for the limited purpose of establishing that the student could permissibly return to math instruction at a later date at Fusion.<sup>10</sup> For the 2020-21 school year, the student was enrolled in "Consumer Math A," as well as in US History A, English A, Recording Arts A, Independent PE 1 B, and Independent PE 2 B (*id.*). This increase in course load at a later date was consistent with the neuropsychologist's testimony about "easing him in" during the 2019-20 school year rather than giving the student a full load of coursework as soon as he arrived at Fusion (Tr. p. 105). The IHO failed to address these facts and the conclusion that Fusion was inappropriate due to the lack of enrollment in a math course must be reversed under these particular circumstances.

Turning to the IHO's determination that Fusion failed to provide weekly counseling services to the student, the IHO indicated that Fusion had the services of a post-secondary counselor available, but that "no plan incorporating counseling service hours for the [s]tudent was presented" (IHO Decision at pp. 5-6). The IHO also cited to the head of school's testimony by affidavit that the post-secondary counselor's role was to meet with students and their families to develop plans after they graduate (*id.* at pp. 2-3; see Parent Ex. U ¶ 22). Further, the IHO indicated

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<sup>9</sup> If Fusion had enrolled the student in one of its math courses, I would expect such instruction to be specially designed to address the student's deficits in executive functioning and organization.

<sup>10</sup> The question of whether the delivery of math instruction in the 2020-21 school year was specially designed or appropriate is not properly the subject of this proceeding.

that the due process complaint notice stated that the neuropsychologist had recommended "therapeutic support in-school with a qualified counselor to help [the student] cope with anxiety (id. at p. 2; see Parent Ex. A at p. 3). However, review of the neurological evaluation report revealed that the student was in individual treatment with his psychiatrist on a weekly basis (Parent Ex. D at pp. 3, 6). The neuropsychologist's recommendations included that due to the student's increased anxiety and significant school refusal, he required a small (i.e. small teacher to student ratio), structured, and supportive classroom setting housed within a small and nurturing school environment that could provide him with ample support for his unique areas of difficulty, something Fusion offered (compare Parent Ex. D at p. 8, with Parent Ex. U ¶ 5, 6, 12). Further, as the student had difficulty establishing trusting therapeutic relationships with professionals, the neuropsychologist recommended that the student should be able to take breaks and reach out to his psychiatrist when he felt overwhelmed and needed therapeutic support (Parent Ex. D at p. 8). She also recommended that there be consistent communication and collaboration between the student's school personnel and outside providers, as it was extremely important for the student's progress and to ensure his needs were met (id.). Further, the student's teachers should be aware of how the student's anxiety affected his academic performance and how to support him when he felt overwhelmed (id.).

The parent testified that the student's teachers at Fusion tailored instruction to his needs and would slow or increase the pace of instruction, something which allowed the student to remain calm and organized (Parent Ex. T at p. 8). She stated that having instruction move at the student's pace also allowed him to get more out of his mental health treatment consisting of individual therapy and psychiatric support, which continued unabated throughout the school year (id. at pp. 8-9). In addition, according to the parent, the student's mental health treatment supported his academic learning, and the individualized program at Fusion allowed the student to benefit more from his treatment (id. at p. 9).

With regard to the student receiving virtual instruction provided by Fusion during the 2019-20 school year, the parent testified that shortly after starting Fusion in October 2019, the student's anxiety increased again and he was unable to attend instruction in person (Parent Ex. T at p. 8). Direct testimony by both the parent and the Fusion head of school indicated that when the student had difficulty attending Fusion in person due to his anxiety, Fusion arranged for him to continue accessing academic instruction by creating "virtual school" using Zoom instruction in all of his content areas (Parent Exs. T at p. 8; U at p. 9). I note that the provision of virtual instruction at that time demonstrated Fusion's ability to be flexible with the student. Later, by the time all schools, including Fusion, were shut down by executive order because of the COVID-19 pandemic, the issue became moot and the student required no transition to virtual learning and experienced no interruption or disruption (Parent Exs. T at p. 8; U at p. 9). The hearing record contained a document that indicated throughout the COVID-19 pandemic, Fusion would continue to provide instruction virtually and follow in line with then-current best practices established by the "State and the City" (Parent Ex. L at p. 1). Using Zoom conferencing, classes at the school would continue to be conducted on a 1:1 basis according to the plan set forth at the time of enrollment and only when a student was present (id. at pp. 1, 2). In addition to a detailed list of what Fusion would deliver virtually, the document indicated that through its detailed virtual learning system, students on private placement plans would continue to receive the same quality education that they received though on-campus learning (see id.).

## **b. Progress**

While a student's progress is not dispositive of the appropriateness of a unilateral placement, a finding of some progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at \*11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]). According to the unrebutted testimony from the Fusion head of school, the student made significant progress during the 2019-20 school year (Parent Ex. U at p. 9). The student remained engaged in virtual learning and attended and progressed through instruction in all his classes (*id.*). The head of school indicated that the student engaged in learning and maintained excellent grades throughout the school year, earning a GPA of 3.67 (*id.* at p. 10; see Parent Ex. F; see also Parent Ex. E). A Fusion unofficial high school transcript indicated the student earned 32.5 high school credits that school year (see Parent Ex. F).

Although the IHO raised several areas of potential concern, the two that bear out factually in the hearing record were the lack of enrollment in a math course, and a slight deficit of evidence showing strong coordination between the student's weekly therapy outside and the school personnel at Fusion as recommended by the neuropsychologist. The lack of math instruction was adequately explained and the lack of coordination regarding the student's therapeutic support is insufficient to find Fusion inappropriate. I would have preferred a better explanation as to why Fusion believed resorting to virtual instruction was the best course to address the student's school refusal. However, the evidence of the student's progress at Fusion further bolstered the parent's case and was unrefuted by the district. The evidence shows that Fusion provided appropriate specially designed instruction for the student and that he made progress during the 2019-20 school year. Accordingly, under the totality of the circumstances, the evidence weighs in favor of the conclusion that Fusion was an appropriate unilateral placement for the 2019-20 school year. Consequently, the IHO's decision must be reversed.

## **C. Equitable Considerations**

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school

tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]]).

Because the IHO concluded that Fusion was not appropriate, the IHO did not make findings regarding equitable considerations in his decision (see IHO Decision at pp. 5-6). In the request for review, the parent argues that equitable factors support full payment of the student's tuition at Fusion, citing to the parent's cooperation with the CSE process, and that the district did not offer any evidence to the contrary (Req. for Rev. at p. 5). In an answer, the district asserts a defense that the student was unilaterally placed at Fusion on October 3, 2019, and the parent did not provide notice to the district of that placement until her letter dated October 9, 2019; as such, because "no prior notice was given, reimbursement should be denied in its entirety" (Answer at p. 9).

As noted above, the evidence shows that the parent participated in the CSE process and visited nonpublic schools proposed by the district, thus cooperating in the development of the public school's proposed programming. The district is corrected that the parent failed to give 10 days' notice prior to removing the student from the public school and seeking tuition reimbursement. However, the district overlooks the fact that this was an initial classification of the student under IDEA, which had yet to occur, and the district did not establish in the hearing record that it had followed the procedures for providing the State's procedural safeguards notice to the parent which outlines the 10-day notice requirements (see 34 CFR 300.148[e][1][ii]). At this juncture in the litigation, the parent is well aware of the requirement, but the evidence of her awareness at the time of the student's removal, constructive or otherwise, is lacking. Accordingly, I decline to reduce or deny reimbursement in this instance on that basis.

## **VII. Conclusion**

In view of the forgoing determinations that the district denied the student a FAPE, that Fusion was an appropriate unilateral placement, and that equitable considerations favor the parent, I find that reimbursement for Fusion is appropriate equitable relief for the 2019-20 school year.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated May 17, 2021 is modified by reversing that portion which found that Fusion was not an appropriate unilateral placement for the 2019-20 school year; and,

**IT IS FURTHER ORDERED** that the district shall reimburse the parent for the cost of the student's tuition at Fusion for the 2019-20 school year.

**Dated:** Albany, New York  
August 26, 2021

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