



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-219

**Application of the BOARD OF EDUCATION OF THE
BALDWIN UNION FREE SCHOOL DISTRICT for review of
a determination of a hearing officer relating to the provision of
educational services to a student with a disability**

Appearances:

Ingerman Smith, LLP, attorneys for petitioner, by Susan M. Gibson, Esq.

Michael Gilberg, Attorney at Law, attorney for respondents, by Michael Gilberg, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the Fusion Academy (Fusion) for the 2020-21 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[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student in this case attended a district public school for kindergarten, but thereafter, was parentally placed in a nonpublic school for his education from first through fourth grade, and then attended a different nonpublic school for fifth grade (see Parent Exs. A at p. 3; C at pp. 1-2;

see also Tr. pp. 95, 1189-90).^{1, 2, 3} The evidence reflects that the student returned to a district middle school for the 2017-18 school year (sixth grade), and in preparation for his return, a CSE convened in June 2017 to develop an IEP for the student (see Dist. Ex. 4 at p. 1; see generally Dist. Ex. 3). The June 2017 CSE found the student eligible for special education as a student with an other health-impairment and recommended that the student receive integrated co-teaching (ICT) services for instruction in English, mathematics, science, and social studies; one 30-minute session per week of individual counseling; and one 30-minute session per week of counseling in a group (see Dist. Ex. 3 at pp. 1, 6).⁴ In addition, the June 2017 CSE recommended the following as supplementary aids and services, program modifications, and accommodations: the services of a

¹ According to the evidence in the hearing record, the student's fourth grade classroom at the nonpublic school consisted of "approximately 16 to 17 peers with two instructors," and the student was "pulled out for accelerated mathematics instruction at a 6th grade level" (Parent Ex. A at p. 3).

² According to the parents' due process complaint notice, the student received "some services" while attending the nonpublic schools from the districts of location through individualized education services programs (IESPs) (Dist. Ex. 1 at p. 3). The hearing record does not include any IESPs, however, as noted in a privately obtained neuropsychological evaluation of the student (January 2016 neuropsychological evaluation), the student—who was then-currently attending fourth grade at a nonpublic school—was "not receiving any formal supports or accommodations, yet attend[ed] individual psychotherapy, occupational therapy (OT), and pharmacological treatment sessions on a private basis" (Parent Ex. A at pp. 1, 3). At that time, the parents reported concerns with "enduring and persistent temperamental dysregulation, restlessness/fidgeting, oppositionality/defiance, and bouts of inflexibility and rigidity" (*id.* at p. 1). Based on the January 2016 neuropsychological evaluation report, the student had a "chronicled history of Attention-Deficit/Hyperactivity Disorder (ADHD), Combined Presentation; Oppositional Defiant Disorder (ODD); Unspecified Depressive Disorder; Unspecified Anxiety Disorder; Central Auditory Processing Disorder (CAPD); Visual Processing Disorder; and Multisensory Processing Disorder" (*id.*). The January 2016 neuropsychological evaluation report also noted that, at age seven, the student was taken to the hospital after "expressing suicidal ideation," but was not admitted (*id.*). Shortly thereafter, medication treatment was initiated with the student, as well as his participation in a social skills group ("deemed to be of limited effectiveness") (*id.* at p. 2). In addition, as a result of a consultation with a pediatric neurologist during summer 2015, it was determined that the student "evidence[d] characteristics of Asperger's Disorder as a central diagnostic concern" (*id.*). In "mid-December 2015," the student was hospitalized after "experiencing resurgent suicidal ideation" (*id.* at p. 3). Shortly thereafter, the student began weekly psychotherapy services on an individual and family basis (*id.*). At the impartial hearing, the student's mother testified that the student first received an IESP near the conclusion of fourth grade, but services were not implemented, and instead, the student began receiving counseling services and classroom modifications in fifth grade pursuant to an IESP at the second nonpublic school the student attended (see Tr. pp. 1195-96, 1262-54).

³ The evidence reflects that, while attending the second nonpublic school for fifth grade, the student engaged in a "number of conflicts with peers," and in March 2017, the student was "suspended following a physical altercation"; notwithstanding "ending the year in a solid place academically," the nonpublic school informed the parents that the student "would not be permitted to return the following year" (Parent Ex. C at pp. 1-2; see Dist. Ex. 4 at p. 1). The evidence in the hearing record also reflects that the student was similarly asked not to return to the first nonpublic school he attended due to similar behavioral "outbursts during the remainder of 4th grade" (Parent Ex. C at p. 2).

⁴ According to the June 2017 CSE meeting minutes, the parents stated at the meeting that "they want[ed] to send [the student] to Fusion Academy at the district's expense," and in response, it was noted that Fusion was not an "approved [S]tate placement, and could not be considered by [the] CSE" (Dist. Ex. 4 at pp. 2-3).

full-time, individual aide; use of a graphic organizer; a positive reinforcement plan; a special seating arrangement; and the use of a word processor for writing assignments (*id.* at pp. 6-7).^{5, 6}

On or about April 11, 2018, the parents enrolled the student in "supplementary classes for enrichment" at Fusion, which initially consisted of a mathematics class and which the student attended for the remainder of the 2017-18 school year (*see* Parent Ex. G at pp. 7-10).^{7, 8} Shortly thereafter, on April 23, 2018, a CSE convened, and at that time, the CSE declassified the student with the following accommodations and supports: refocusing and redirection during class time as needed, use of a graphic organizer for extended writing assignments, and access to a word processor for lengthy writing assignments or exams (*see* Dist. Exs. 12 at p. 1; 13 at p. 1; 14 at p. 1; *see generally* Dist. Exs. 9-11 [reflecting reports from the student's mathematics teacher, science teacher, and social worker who provided counseling services to student prepared for the April 2018 annual review]).⁹ The April 2018 CSE noted that the student would be "recommended for honors classes in 7th grade" (Dist. Ex. 14 at p. 2).¹⁰

In the student's final report card for the 2017-18 school year (sixth grade), the student received final course average grades that ranged from an 86 in English to a 96 in "Tech 6" (Dist. Ex. 55).

For the 2018-19 school year, the student continued to attend the district middle school for seventh grade (*see generally* Dist. Ex. 35). The student also continued to attend a mathematics enrichment class at Fusion for the entire 2018-19 school year (*see* Parent Ex. G at pp. 1-7).

⁵ As a follow-up from the June 2017 CSE meeting, the district completed a functional behavior assessment (FBA) of the student in September 2017; as a result, it was determined that the student had transitioned smoothly into sixth grade in the district middle school and had responded "well" to the classroom behavior management systems, and therefore, a behavior intervention plan (BIP) was not warranted (Dist. Exs. 4 at pp. 1-2; 5 at pp. 1, 4).

⁶ In March 2018, a CSE convened to modify the student's June 2017 IEP by removing the services of the full-time, individual aide (*see* Dist. Ex. 8 at pp. 1, 6-7; *see generally* Dist. Exs. 7 [reflecting documents supporting removal of individual aide services]; 56 [documenting email exchanges with the parents beginning in January 2018 regarding the removal of the individual aide services]).

⁷ In the amended due process complaint notice, the parents indicated that, due to the student's "need for more academic challenges," they enrolled him in one mathematics class at Fusion on April 11, 2018 (Dist. Ex. 1 at p. 3). 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).

⁸ In an email dated April 9, 2018, a district staff member informed the district's assistant director of pupil personnel services (director) that the student would be attending a parochial, nonpublic school beginning in September (*see* Dist. Ex. 57 at p. 3). After the April 2018 CSE meeting, the parents provided consent for the director to speak to the resource department chairperson at the parochial, nonpublic school (*id.* at pp. 1-2, 5-7).

⁹ According to the April 2018 CSE meeting minutes, the parents "reported that . . . [the student was] doing well in school both socially and academically" (Dist. Ex. 14 at p. 1).

¹⁰ A progress report dated June 25, 2018 reflected that the student achieved all of his annual goals in the June 2017 IEP (*see* Dist. Ex. 6 at p. 1).

In or around January 14, 2019, the parents referred the student to the CSE for an evaluation (see Parent Ex. B at pp. 1-3, 7-8, 14). As noted in the referral packet, dated January 7, 2019, the parents' attorney "indicated that the parent[s] [were] not in agreement with th[e] recommendation [to declassify the student in April 2018] and ha[d] concerns regarding their child's social/emotional and academic functioning" (*id.* at pp. 1-2). In documents completed by the parents, they noted that the student had "exhibited an increase in depression and frustration due to his school setting," he "refused to do classwork and homework assignments," and efforts to encourage the student to complete his work "led to extreme depressive and anger states" (*id.* at p. 7). The parents also reported that the student "expressed frustrations in his classroom settings that it [was] often loud and he [was] unable to concentrate" (*id.*). According to the parents, although the student participated in honors classes, it was "not an appropriate classroom setting for his emotional well[-]being" (*id.*). The parents further noted that the student's "frustration w[ith] his school environment and lack of adequate learning [and] education ha[d] caused him to become depressed and angry," and they, together with the student's "doctors fear[ed]" that the student would begin to experience "suicidal ideations"—as experienced in the past—"if his school setting d[id] not change" (*id.* at p. 13).

On March 14, 2019, a CSE convened for an initial eligibility determination meeting and to develop an IEP for the remainder of the 2018-19 school year (seventh grade; to be implemented from April 8, 2019 through June 8, 2019) (see Dist. Ex. 30 at p. 1; see also Dist. Ex. 29 at p. 1). Finding the student eligible for special education as a student with an emotional disturbance, the March 2019 CSE recommended that the student receive the following related services: one 40-minute session per week of individual counseling and one 40-minute session per week of counseling in a group (see Dist. Ex. 29 at pp. 1, 6). In addition, the March 2019 CSE recommended the following as supplementary aids and services, program modifications, and accommodations: modified homework (up to 50 percent), one 60-minute session per month of parent counseling and training, refocusing and redirection, and use of a graphic organizer (*id.* at p. 6). The March 2019 CSE also developed annual goals for the student (*id.*). The March 2019 IEP reflected that the student "need[ed] strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" and that an FBA would be conducted to determine whether the student required a BIP (*id.* at p. 5). With respect to management needs, the March 2019 IEP noted that the student required a "system for completing homework and classwork on a consistent basis" (*id.*). In addition, the March 2019 IEP indicated that the student had "significant mental health concerns which interfere[d] with participation in age appropriate activities" (*id.*).

On June 20, 2019, a CSE convened for the student's annual review and to develop an IEP for the 2019-20 school year (eighth grade) (see Dist. Ex. 39 at p. 1; see generally Dist. Ex. 38). The June 2019 CSE reviewed the "student's progress," as well as additional evaluative information, including the FBA completed per the March 2019 IEP, a psychiatric evaluation, "additional speech[-]language testing requested by the parents," and a neuropsychological independent educational evaluation (IEE) (June 2019 neuropsychological IEE) that had been requested by the parents (Dist. Ex. 39 at p. 1; see generally Dist. Exs. 32-34; 36; 40). Finding that the student remained eligible for special education as a student with an emotional disturbance, the June 2019 CSE recommended that the student receive one 40-minute session per week of counseling in a group (see Dist. Ex. 38 at p. 7). In addition, the June 2019 CSE recommended the following as

supplementary aids and services, program modifications, and accommodations: modified homework (up to 50 percent); one 60-minute session per month of parent counseling and training; refocusing and redirection; use of a graphic organizer; and for "long-term projects," the student would be given "choices on how he would present the material for his [English language arts (ELA)], [s]cience and [s]ocial [s]tudies classes" (id.). The June 2019 CSE also developed annual goals for the student (id. at p. 6).¹¹ In addition, the June 2019 IEP reflected that the student did not require a BIP at that time (id.; see Dist. Ex. 39 at p. 3).

At the conclusion of the 2018-19 school year, the student's final report card for seventh grade reflected cumulative grade point averages for each marking period, which ranged from 82.25 to 85.25 (see Dist. Ex. 35).

For the 2019-20 school year (eighth grade), the student continued to attend the district middle school, and, at the start of the 2019-20 school year, the student began attending two classes at Fusion—mathematics and English—on a weekly, alternating basis (i.e., one class per week) (see Parent Exs. D-F; Dist. Ex. 1 at p. 3; see generally Dist. Exs. 49 [reflecting an academic summary of the student's classes at Fusion, dated June 5, 2020]; 53).

On October 24, 2019, a CSE convened for a program review and to review a September 2019 psychiatric IEE that had been requested by the parents (see Dist. Ex. 44 at p. 1; see generally Dist. Exs. 42-43; 45). Finding that the student remained eligible for special education as a student with an emotional disturbance, the October 2019 CSE recommended one 40-minute session of group counseling per week and included the following as additional supplementary aids and services, program modifications, and accommodations in the student's IEP: encouraging the student to seek extra help "in the areas he f[ound] challenging, and access to a computer to type lengthy assignments" (compare Dist. Ex. 43 at pp. 7-8, with Dist. Ex. 38 at p. 7). The October 2019 CSE also recommended access to a computer for all classwork and exams as assistive technology devices and services and recommended that the student receive a Chromebook (see Dist. Ex. 43 at p. 8).¹²

On June 9, 2020, a CSE convened to conduct the student's annual review and to develop his IEP for the 2020-21 school year (ninth grade) (see Dist. Ex. 51 at p. 1; see generally Dist. Ex. 50; 52).¹³ Finding that the student remained eligible for special education as a student with an emotional disturbance, the June 2020 CSE recommended that the student receive one 40-minute session per week of counseling in a group (see Dist. Ex. 50 at pp. 1, 7). In addition, the June 2020 CSE recommended the following as supplementary aids and services, program modifications, and

¹¹ A progress report dated June 26, 2019 reflected that the student achieved his annual goal targeting his ability to "foster and maintain [two] positive relationships with peers" and made progress on the two additional annual goals from the March 2019 IEP (compare Dist. Ex. 37 at pp. 1-2, with Dist. Ex. 29 at p. 6).

¹² According to the October 2019 CSE meeting minutes, the parents and their attorney indicated that they "were not in agreement with the current placement and reason that the student should be placed at Fusion, a private, non-[S]tate approved school with 1:1 teaching" (Dist. Ex. 44 at p. 7).

¹³ Evidence in the hearing record reflected that, prior to the June 2020 CSE meeting, the parents filed a due process complaint notice, dated April 6, 2020 (see Dist. Ex. 1 at p. 1).

accommodations: modified homework (up to 50 percent for AP classes); one 60-minute session per month of parent counseling and training; refocusing and redirection; use of a graphic organizer; for "long-term projects," the student would be given "choices on how he would present the material for his ELA, [s]cience and [s]ocial [s]tudies classes"; encouraging the student to seek extra help "in the areas he f[ound] challenging, and access to a computer to type lengthy assignments"; providing the parents with bi-weekly updates on all class assignments "due or missed" and discussing the same at parent counseling and training; for "long-term projects," provide the student with due dates for each component, especially in ELA and social studies, so the student had "clear check points for long term projects"; and special seating arrangements (*id.* at pp. 7-8). In addition, the June 2020 CSE recommended assistive technology and devices, i.e., access to a computer for "all classwork, notetaking and exams that require[d] writing" and to provide the student with a Chromebook (*id.* at p. 8). As supports for school personnel on behalf of the student, the June 2020 CSE recommended an initial team meeting with support staff within the first week of school to discuss support the student needed to "be successful in high school" and quarterly team meetings thereafter to discuss the student's "academic and social progress" (*id.* at pp. 8-9). Finally, the June 2020 CSE developed annual goals for the student (*id.* at p. 6).¹⁴

According to the student's final report card for the 2019-20 school year (eighth grade), the student's cumulative marking period averages ranged from 79.00 to 88.14 and his final course average grades ranged from 73 (health) to 98 (Algebra 1 Honors) (*see* Dist. Ex. 53).¹⁵

On July 8, 2020, the parents executed an enrollment contract with Fusion for the student's attendance during the 2020-21 school year, beginning on September 1, 2020 (*see* Parent Ex. M at pp. 1, 3-4, 6-7, 11; *see generally* Parent Exs. N-O). The evidence in the hearing record reflects that the student attended Fusion for the 2020-21 school year (*see generally* Parent Exs. JJ-KK; MM; OO-PP).

A. Due Process Complaint Notice

In an amended due process complaint notice dated July 12, 2020, the parents alleged, as relevant to his appeal, that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 (eighth grade) and 2020-21 (ninth grade) school years (*see* Dist. Ex. 1 at pp. 1-2).¹⁶ Initially, the parents indicated their disagreement with the "IEPs or placements" offered to the student, including the "present recommended program and placement," and alleged that the

¹⁴ According to the June 2020 CSE meeting minutes, Fusion had been invited to the meeting but could not attend; the minutes also reflected comments from the student's then-current counselor from outside school, who stated that "the student wants to do what he wants to do" and "[h]e wants Fusion, because he has control there" (Dist. Ex. 51 at pp. 2-3). The meeting minutes also noted that, "[a]t the end of the discussion on Fusion, it [was] not something that the CSE would recommend because it [was] not an approved setting" and the "CSE always look[ed] for the least restrictive environment (LRE)" (*id.* at p. 3).

¹⁵ A progress report dated June 23, 2020 reflected that the student achieved all of his annual goals in the June 2019 IEP (*compare* Dist. Ex. 54 at pp. 1-2, *with* Dist. Ex. 38 at p. 6).

¹⁶ According to the amended due process complaint notice, the parents' original due process complaint notice, dated April 6, 2020, was amended to include allegations concerning the 2020-21 school year and the student's annual review held at the June 2020 CSE meeting (*see* Dist. Ex. 1 at p. 1).

"program, related services and accommodations fail[ed] to address [the student's] specific academic, social, emotional, and physical needs" (*id.* at p. 1). The parents asserted that the district failed to "develop and implement an appropriate IEP," and failed to "offer an appropriate IEP without a proper placement such as Fusion" to address the student's "academic and emotional needs for a highly individualized self-paced academic program as well as a social environment that [was] both smaller and more individualized" than a public school (*id.* at p. 2).

Finally, the parents indicated that, at a June 2020 CSE meeting, the district offered the "same program that had already been offered and implemented and was already not working" for the student (Dist. Ex. 1 at p. 7). According to the parents, the district refused to consider "any other options or alternative placements," and only modified the student's IEP to include a "quarterly team meeting between [the student's] mother and teachers" (*id.*). The parents notified the district of their intentions to unilaterally place the student at Fusion for the 2020-21 school year, beginning on September 1, 2020, by email dated July 7, 2020 (*id.*).¹⁷

Next, the parents indicated that Fusion was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of their requested relief (*see* Dist. Ex. 1 at pp. 7-9). As relief, the parents requested to be reimbursed for the costs of the student's classes taken at Fusion during the 2017-18, 2018-19, and 2019-20 school years (\$6,200.00), as well as for the costs of the student's tuition at Fusion for his attendance during the 2020-21 school year (\$76,543.02); and for the student's continued placement at Fusion until he graduated from high school (*id.* at p. 9). In addition, the parents requested round-trip transportation to Fusion (*id.* at p. 10).

B. Impartial Hearing Officer Decision

On October 27, 2020, the parties proceeded to an impartial hearing, which concluded on May 3, 2021, after a total of 25 days of proceedings (*see* Tr. pp. 1-1904). In a decision dated September 24, 2021, the IHO initially determined that the parents' claims for the 2020-21 school year, as a tuition reimbursement case, would be analyzed pursuant to the Burlington/Carter, "three prong analysis" (IHO Decision at pp. 2-3). However, for the 2017-18, 2018-19, and 2019-20 school years—while "involving a claim for reimbursement of tutoring costs"—the IHO found "guidance" from Reid v. District of Columbia, (401 F.3d 516 [D.C. Cir. 2005]), a case concerning compensatory educational services (*id.* at p. 3). Ultimately, the IHO concluded that the parents were entitled to reimbursement for the costs of the student's tuition at Fusion for the 2020-21 school year, and for the costs of the Fusion classes the student took, but the IHO limited that reimbursement to the costs of the classes incurred after the October 2019 CSE meeting, because the district "acknowledged that the [p]arents would be seeking tuition reimbursement for [the] same" (*id.*).

¹⁷ The evidence in the hearing record does not include an email dated July 7, 2020 stating the parents' intention to unilaterally place the student at Fusion for the 2020-21 school year at district expense (*see generally* Tr. pp. 1-1904; Parent Exs. A-I; K-Z; AA-PP; Dist. Exs. 1-57; IHO Exs. I-III). Instead, the hearing record includes an email dated July 8, 2020, which noted that the parents had "enrolled [the student] elsewhere for the fall" without any further information (Parent Ex. BB at p. 4).

In the decision, the IHO concluded that the district failed to offer the student a FAPE in the least restrictive environment (LRE) for the 2019-20 and 2020-21 school years (see IHO Decision at pp. 19-29). In reaching these conclusions, the IHO turned initially to the question of whether the district programs met the student individualized needs and whether those programs "correspond[ed] to the concept of the [LRE]"—and, after briefly summarizing the ups and downs of the student's educational history at the district, the IHO found that the district, as of the October 2019 CSE meeting, was "in a position to know that prospectively," the district's programming was "not appropriate" for the student (*id.* at pp. 19-22). In particular, the IHO determined that, as summed up by the student's treating psychiatrist, despite medication treatments for his depression and ADHD, the student only began "doing his homework again" after "there was an environmental intervention" by attending Fusion (*id.* at p. 22).

In support of these conclusions, the IHO first found that although the student had the "ability to perform at a high level," the student had been unable to "harness his potential" (IHO Decision at p. 25). The IHO noted, for example, that the student "'ke[pt] his head down [in English class] and ha[d] to be prompted multiple times to complete classwork'" (*id.*). However, the IHO also noted that, when participating in English class, the student "'offer[ed] outstanding responses and engage[d] in the class in debate about analyzing the book'" (*id.*). The IHO also pointed to the student's testing results in the June 2019 neuropsychological IEE, which reflected that the student was "well above average in various areas," and which resulted in the evaluator finding the student was a "'twice exceptional youngster in that he possesse[d] abounding assets, but [was] not delivering at a level anywhere close to his abilities'"—and as such, the "'traditional academic formula and group instruction ha[d] been ineffective'" for the student, who, according to the evaluator, was "'motivated and successful in an individualized learning environment less constrained by regulations'" (*id.*, citing to Parent Ex. C at p. 17).¹⁸ In addition, the IHO noted that, according to the evidence, the same evaluator described the student as "emotionally fragile and dysregulated," and thus, recommended that the student attend a nonpublic school setting (see IHO Decision at p. 26). The IHO also pointed to a letter from the student's treating psychiatrist, who opined that the student "struggled socially and emotionally" in the district's academic environment, and who recommended that the student attend an out-of-district placement to "support his emotional and academic needs" (*id.*). The IHO found that, according to the treating psychiatrist, the student's "'mood and anxiety symptoms significantly interfere[d] with his ability to reach his academic potential and l[ed] to social challenges that further exacerbate[d] his mood and anxiety symptoms'" (*id.*). In addition, the treating psychiatrist indicated that the student "'cit[ed] his school environment as the main stressor'" and that, if the student remained at the district public school, the student—who was "severely depressed"—would be "vulnerable to decompensation" (*id.*, citing Dist. Ex. 19).

According to the IHO, the student's treating psychologist echoed the psychiatrist's sentiments in a letter to the district and recommended that the student attend an academic

¹⁸ Guidance regarding what are sometimes referred to a "twice exceptional" or gifted students from the United States Department of Education's Office of Special Education Programs (OSEP) reiterates that the IDEA is silent on the topic of gifted students, and "gifted" is not a qualifying disability requiring special education and related services (see Letter to Anonymous, 55 IDELR 172 [OSEP 2010]). Thus, intellectually gifted students are not considered disabled solely on the basis of intellectual giftedness.

environment where he "did the best academically," meaning a "small class size with an individual teacher who also was able to dedicate time to work with [the student] to give him assignments and materials that were generally of interest to him" (IHO Decision at p. 26). The treating psychologist also noted that the student's "social-emotional needs [were] not being met" and his "current school environment seem[ed] to be a major factor in maintaining [the student's] depression" (id. at pp. 26-27, citing Dist. Ex. 15).¹⁹ Next, the IHO noted that, "[d]espite the student's potential, during the 2018-19 school year, when the [s]tudent was in seventh grade, at the mid-term he was receiving grades of 65 in social studies, honors and a 69 in English; he ended the year with a 70 in English and a 75 in social studies [h]onors" (IHO Decision at p. 27). According to the IHO, the district failed to offer the student a FAPE by "placing him in an inappropriate environment which ha[d] resulted in his social, emotional, and academic downfall" (id.).

Next, relying on the "facts and outcomes of Hartmann v. Loudoun County Board of Education, 118 F.3d 996 (4th Cir. 1997), cert. denied, 522 U.S. 1046 (1998)," the IHO found that the district failed to offer the student a FAPE "for each school year dating back to when he was in eighth grade" (2019-20 school year) (IHO Decision at pp. 27-28). The IHO indicated that the district had "downplayed the severity" of the student's "circumstances on multiple occasions," noting that in one instance, the district psychiatric evaluation "insinuated that the [s]tudent's struggles were a result of him being a narcissist" (id. at p. 28). The IHO also indicated that that was not his own impression of the student, who testified on two separate occasions at the impartial hearing (id.).

The IHO further noted that when the CSE developed the student's IEP for the 2018-19 school year (seventh grade), the CSE considered a letter from the student's treating psychiatrist, who "suggested" that the student be placed outside of the district because the district's "academic environment was not specialized enough to provide the student with the attention that he required" (IHO Decision at p. 28, citing Dist. Ex. 19). The IHO found that the IEP developed for the 2018-19 school year did not "add any specialized services for the [s]tudent's unique needs" (IHO Decision at p. 28, citing Dist. Ex. 29). However, the IHO noted that the IEP included recommendations for "modified homework and parent training and counseling" (IHO Decision at p. 29, citing Dist. Exs. 8; 29).

For the following school year—2019-20 (eighth grade)—the IHO found that the program recommended for the student was not appropriate (see IHO Decision at p. 29). Here, the IHO found that at the October 2019 CSE meeting, the CSE reviewed the September 2019 psychiatric IEE, which recommended that the student be "placed in an individualized learning program with 1:1 teaching," as well as "1:1 education to support his areas of weakness such as his writing skills" (id.). As a result, the IHO concluded that the district "disregard[ed] the multiple opinions that the [s]tudent required a different educational environment," which resulted in the district failing to offer the student an IEP that met his unique needs (id.).

¹⁹ In the decision, the IHO noted that, given the student's long-standing treatment with both the treating psychiatrist (five years) and the treating psychologist (three years), he afforded "great weight to their opinions" (IHO Decision at p. 27).

Having found that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years, the IHO turned to examine whether the parents sustained their burden to establish that Fusion was an appropriate unilateral placement for the student (see IHO Decision at pp. 29-34).²⁰ Relying on information gleaned from the student's academic summary describing his individualized program, as well as testimonial evidence from the head of Fusion and from the student, the IHO found that Fusion was appropriate to meet the student's needs (id. at pp. 29-33). In addition, the IHO reviewed and considered the student's progress at Fusion compared to when he attended the district and found that the student was "making great progress in writing ability, social skills, and his ability to connect to peers" (id. at pp. 33-34).

Next, the IHO turned to equitable considerations (see IHO Decision at pp. 34-37). The IHO found that the parents and student cooperated with the district, participated in CSE meetings, hired an attorney, and provided the district with proper notice of their intentions to unilaterally place the student at Fusion (id. at p. 36). In addition, the IHO found that the district's argument that the parents did not have an "open mind" was without merit (id.). Instead, the IHO noted that the parent (student's mother) was "forthright in her testimony and steadfast in her long-term advocacy for her child," cooperating with the district from the "beginning," but "simply expressed that they preferred a private school placement" (id.).

In light of the IHO's findings, the IHO ordered the district to either reimburse the parents or directly pay Fusion for the costs of the student's tuition at Fusion for the 2020-21 school year upon presentation of invoices for the same (see IHO Decision at p. 37). The IHO also ordered the district to reimburse the parents for the costs of the "tutoring/classes" at Fusion "incurred after October 24, 2019, until the [s]tudent was enrolled" at Fusion for the 2020-21 school year, but at a cost not to exceed \$3,000.00 (id.).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by finding that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years. With respect to the 2019-20 school year, the district argues that the student's IEP developed at the March 2019 and June 2019 CSE meetings was appropriate to meet his needs, that the June 2019 CSE's recommendation for group counseling addressed the student's emotional needs, and that both CSEs properly concluded that the student did not demonstrate any academic needs warranting annual goals. The district also argues that the IHO's finding was not supported by the evidence in the hearing record, which indicated that the student was "doing much better socially, emotionally and academically" during the 2019-20 school year. In addition, the district asserts that a CSE convened in October 2019 to review the September 2019 psychiatric IEE of the student, and that, although the independent evaluator believed the student required a "one-to-one school setting or small group setting," the

²⁰ To be clear, the IHO's decision did not specifically address the June 2020 IEP or analyze whether the special education program recommended in that IEP offered the student a FAPE in the LRE (see IHO Decision at pp. 19-29). Instead, the IHO appeared to confine his FAPE analysis to the 2019-20 school year by referencing the 2018-29 school year—or more specifically, the IEP developed at the March 2019 CSE meeting when the student was found eligible for special education as a student with an emotional disturbance and which included recommendations for the remainder of the 2018-19 school year (April 2019 through June 2019)—and by focusing on the October 2019 CSE meeting (id. at pp. 25-29).

evaluator "conceded" at the impartial hearing that the student's "behavior had improved," he was "making progress," and he had "at least one good friend." The district also argues that the IHO's finding that the district failed to offer the student a FAPE in the LRE, and more specifically, that the student's IEPs were "not sufficient to confer meaningful educational benefits" to the student in the LRE, was not supported by the evidence in the hearing record.

With respect to the 2020-21 school year, the district contends that the student was recommended to attend "advanced or honors classes and eventually, [advanced placement (AP)] level classes" at the district high school, with counseling, a Chromebook for writing, modified homework for non-AP courses, extra help and various other supplementary aids and services."²¹ The district further contends that, given the student's progress during the 2019-20 school year, the evidence in the hearing record demonstrates that the recommendations for the 2020-21 school year were appropriate. The district points to testimonial evidence, which established that the student earned "excellent final grades in all classes except for ELA and Health" and that he "made social-emotional progress during the year and achieved his IEP goals." The district argues, therefore, that the evidence in the hearing record does not support the IHO's finding that the district failed to offer the student a FAPE for the 2020-21 school year, and moreover, the IHO's "apparent" finding that the student's 2020-21 IEP was not the student's LRE was error.

In addition, the district contends that the IHO "erred on the law and facts" in finding that the district failed to offer the student a FAPE in the LRE for the 2019-20 and 2020-21 school years. The district argues that a placement in a general education setting with related services in a public school was "significantly less restrictive than placement at Fusion which is a 1:1 teaching setting." The district also argues that the IHO's finding that, notwithstanding the student's ability to perform at a high level, the student could not harness his potential, is not supported by the evidence. Instead, the district argues that the student made progress during the 2019-20 school year and received "mostly A's and B's and he achieved his IEP goals." The district further contends that school districts are not obligated to "ensure students 'harness their potential.'"

With respect to the IHO's reliance on recommendations from the evaluator who conducted the 2019 neuropsychological IEE of the student, the district asserts that the evaluator failed to speak with any district staff, other than receiving checklists he provided, and primarily based his recommendations on "student and parent perceptions." With respect to the IHO's reliance on the opinions of the student's treating psychiatrist and treating psychologist, the district notes that both "coincidentally opined" that the student required an "individualized setting," which the parents seek as relief. The district also argues that, contrary to the IHO's decision, the evidence does not support a finding that the student's placement within the district resulted in his "social, emotional and academic downfall."

Next, the district argues that the IHO erred by finding that Fusion was an appropriate unilateral placement and that the IHO ignored the fact that the parents failed to provide the required 10-day notice prior to the student's placement at Fusion for the 2017-18, 2018-19, and 2019-20

²¹ At the impartial hearing, the director testified that AP courses were "college level classes" (Tr. p. 297).

school years when analyzing equitable considerations. As relief, the district seeks to reverse all of the IHO's findings adverse to the district.

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's decision in its entirety.²²

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

²² The parents' answer was not properly verified; State regulation requires that, even if represented by an attorney, the parents—and not their attorney—must verify pleadings, including an answer (see 8 NYCRR 279.7[b]). In addition, to the extent that the parents do not cross-appeal the IHO's findings or lack thereof regarding the district's offer of a FAPE for the 2017-18 (sixth grade) and 2018-19 (seventh grade) school years, the IHO's decision on these issues has become final and binding on both parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Furthermore, the parents affirmatively state in the answer that the information in the amended due process complaint notice regarding the 2017-18 and 2018-19 school years was only included as "background," and that, therefore, an SRO ruling on these two school years is "unnecessary and irrelevant" (Answer at ¶¶ 46-47). The parents' statement in the answer directly contradicts a plain reading of the amended due process complaint notice, which included the following, in bold text, as the first heading: "Failure to provide a [FAPE] for the 2017-18, 2018-19, 2019-20, and 2020-21 school years" (Dist. Ex. 1 at p. 2). However, for the reasons stated, the 2017-18 and 2018-19 school years will not be further discussed.

Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).²³

²³ 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

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. The IHO's Decision and Legal Standards Applied

In this case, the crux of the parties' dispute focuses on the student's placement on the continuum of services—or, as the IHO initially inquired, the student's placement in the LRE. This is especially true where, as here, the amended due process complaint notice included two general allegations upon which to conclude that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years: the district failed to "develop and implement an appropriate IEP" and the district failed to offer an "appropriate IEP without a proper placement such as Fusion that would meet [the student's] academic and emotional needs for a highly individualized self-paced program as well as a social environment that [was] both smaller and more individualized th[a]n in the public school" (Dist. Ex. 1 at p. 2). Other than these general allegations, the parents' amended due process complaint notice did not include any procedural or substantive allegations pertaining to the following: the CSE processes related to the June 2019, October 2019, or June 2020 CSE meetings; the evaluative information relied upon and considered by the CSEs in reaching the recommendations in the student's resulting IEPs; any portions of the student's resulting IEPs, including the description of the student's present levels of performance, his management needs, the annual goals, the related services recommendations, the supplementary aids, services, and program modifications; the recommendations for assistive technology devices and services; or the recommendations for school personnel on behalf of the student (compare Dist. Ex. 1 at pp. 2-7, with Dist. Exs. 38; 43; 50).

Therefore, given that the parents did not raise any other issues in the amended due process complaint notice, the IHO properly identified the student's educational placement and its relationship to the LRE requirement as the issue to be resolved to determine whether the district offered the student a FAPE for the 2019-20 and 2020-21 school years (see IHO Decision at pp.

ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

19-20). Here, the IHO cited to Newington and Hartmann for the legal proposition that "[i]f a student's placement d[id] not confer a 'meaningful benefit' to the student and a more restrictive program [wa]s likely to provide such benefit, the student [wa]s entitled to be placed in that more restrictive program" (id. at p. 20).²⁴ After reciting some of his own thoughts about the evidence presented by the district and revealing that he was, at least initially, swayed by that evidence to find in favor of the district, the IHO altered his opinion, noting that the "full expression" of the student's disability was not revealed until after the "dramatic problems that l[ed] to the March 2019 CSE meeting" (id. at p. 21). In particular, the IHO found traction in the reasoning offered by the student's treating psychiatrist, who testified that it only after "'an environmental intervention'" occurred—the student attending Fusion—that accounted for the student's turnaround with respect to doing his homework again (id. at p. 22).

The IHO then turned to the substantive legal standard upon which to analyze whether the district offered the student a FAPE (see IHO Decision at pp. 22-25). Initially, the IHO noted that "past decisions" concerning a FAPE had "solely been interpreted under Rowley" (id. at p. 23). According to the IHO, the Supreme Court's decision in Endrew F., issued in 2017, clarified the substantive standard by focusing on "progress in light of the child's circumstances" (id. at pp. 23-24). However, the IHO also pointed out that "[d]espite this new standard," Rowley remained firmly intact and, thus, substantively, in order to "'meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances'" (id. at p. 24). More specifically, the IHO noted that Endrew F. drew attention to the fact that students had "specific and individualized needs" and that a "program's measure of success with a specific child [wa]s measured by whether it [wa]s ' . . . appropriately ambitious in light of his circumstances, just as advancement from grade to grade [wa]s appropriately ambitious for most children in the regular classroom'" (id. at pp. 24-25).

With this legal framework in mind, the IHO indicated that his determination with regard to whether the district offered the student a FAPE for the 2019-20 and 2020-21 school years rested on essentially three factors: the student was considered twice-exceptional with high intellectual potential, the student was fragile (i.e., emotionally fragile and dysregulated), and the student had a long history of medication and therapy (see IHO Decision at pp. 25-27). Ultimately, the IHO concluded that the district's recommendations underestimated the student's vulnerabilities, and, without expressly stating so, appeared to find that the district erred—similar to the district court's error in Hartmann—by elevating LRE principles over the student's "very unique learning characteristics," and ignored letters penned, respectively, by the student's treating psychiatrist and treating psychologist, who both opined that the student required a placement outside of the district

²⁴ In Hartmann, the Fourth Circuit Court of Appeals overturned the federal district court's decision with respect to the student's placement in the LRE (Hartmann, 118 F.3d at 1001). The Fourth Circuit found that the district court ignored evidence in the hearing record that demonstrated that the student would derive virtually no benefit from attending a mainstream classroom and would essentially be "monitoring" the classes, and furthermore, that the school district took extensive measures—i.e., the implementation of supplementary aids and services within a mainstream setting—on the student's behalf (id. at 1001-04). In conclusion, the Fourth Circuit found that although the IDEA "encourage[d] mainstreaming," it d[id] so to the extent that it "d[id] not prevent a child from receiving educational benefit," and the student in that case "was not making any progress in a regular education classroom despite the provision of adequate supplementary aids and services"; therefore, the school district "properly proposed to place [the student] in a partially mainstreamed program" (id. at 1005).

to meet his needs; and by ignoring the opinions of the evaluators who conducted the June 2019 neuropsychological IEE and the September 2019 psychiatric IEE of the student, who respectively recommended a "private academic setting" for the student and an "individualized learning program with 1:1 teaching" for the student (*id.* at pp. 27-29). Thus, in addition to LRE principles, it appears that the IHO also implicitly found that the CSE failed to give adequate weight to the viewpoints submitted, in part, by the parents—meaning, the letters from the student's treating psychiatrist and psychologist—and as set forth in the June 2019 neuropsychological and September 2019 psychiatric IEE reports, when the IHO found that the district "disregard[ed] the multiple opinions" that the student required a "different educational environment" (*id.* at p. 29).

I have some concerns with the application of the IHO's legal framework insofar as he seems to have adopted the parents' viewpoint regarding the obligations of a CSE in New York to create and integrate twice-exceptional programming into a student's IEP under the IDEA if the student is also an intellectually superior student. The IHO accomplished this by adopting into his application of the law to the facts the "twice exceptional" moniker proffered by the independent evaluator in the June 2019 neuropsychological IEE when determining whether the district offered appropriate specially designed instruction to the student. In New York, policymakers have opted to use the term "gifted" and have not, to date, employed the term "twice exceptional" (*see, e.g.*, 8 NYCRR Part 142). While twice-exceptional, or gifted students with a disability—such as the student in this case—can present a challenge when teachers have a range of student learning rates within the same classroom, there is no per se federal requirement for gifted education. The decisions regarding any gifted programming are made at the state and local level. New York State, unlike some other states, has not developed explicit standards for gifted programming in statute or regulation.²⁵ Instead, the legislature made some funding available to "encourage the development of programs to ensure that gifted students reach their full potential, [but] it does not specify or mandate that any particular type of program be implemented. The decision as to the type of program to be implemented (provided the program comports with the Commissioner's guidelines) and its operation and management, is vested in the discretion of the governing boards of local school districts" (*Bennett v. City Sch. Dist. of New Rochelle*, 114 A.D.2d 58, 63 [2nd Dep't 1985]). Furthermore, it is not impermissible for a school district in New York to impose neutral limits on the number of students eligible to participate in a school district's gifted programming or to limit the type of programming offered (*id.* at pp. 68-69).

What is clear is that a student may not be excluded from eligibility for special education merely because the student also has academic strengths (*see Letter to Anonymous*, 55 IDELR 172 [OSEP 2010]), but this case presents a dispute over whether the proposed special education programming by the district is likely to provide sufficient educational benefits. The Supreme Court explained long ago that whether "children are receiving sufficient educational benefits ... presents a ... difficult problem" *Endrew F.*, 137 S. Ct., at 998 quoting *Rowley*, 458 U.S., at 192). And to be sure, there is some language in the Supreme Court's decision in *Endrew F.* that warrants further consideration in the case of a student having superior intellectual ability. That is, the Supreme

²⁵ In Florida for example, school districts are mandated to develop specific plans for students who are both identified as gifted and eligible for special education as a student with a disability, even going as far as to require planning for a dually eligible student's giftedness in the student's IEP (*see Fla. Admin. Code. R. 6A-6.030191; 6A-6.03028[3]*).

Court in Endrew F. indicated that "every child should have the chance to meet challenging objectives" and that an educational program must be "must be appropriately ambitious in light of [the student's] circumstances" (137 S. Ct. at 1000). In the case of a student who may be gifted, a strict reading of such language in isolation could be interpreted to require districts to offer something more challenging than the programming that it offers to nondisabled students. However, the Court utilized this language to clarify the standard for "closer cases" such as Endrew F.; specifically considering the standard as applied to students that were not meeting grade level standards and who were attending special classes; i.e., despite that such a student might be making limited progress, a program would meet the FAPE standard so long as the student was offered the opportunity to meet challenging objectives (id.).

In contrast to the close case scenario addressed by the Supreme Court in Endrew F., the Court in Rowley considered whether a student who was succeeding academically was receiving a FAPE notwithstanding that her IEP did not include the services of a sign-language interpreter (Rowley, 458 U.S. at 184-87). The Court explicitly rejected the idea that a FAPE required a district to ensure that a student's full potential be realized (id. at 198-99). The Court in Endrew F. reaffirmed some of the points articulated in Rowley, such as the fact that, for a student fully integrated in the general education classroom, an IEP would be appropriately ambitious if it was "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade" (137 S. Ct. at 992, quoting Rowley, 458 U.S. at 204). Based on this precedent, an interpretation that would require the district to ensure better educational outcomes (i.e., more than advancement from grade to grade) than those promised to nondisabled peers would not be in line with the underlying goals of the IDEA—i.e., to offer a basic floor of opportunity for students with disabilities (Rowley, 458 U.S. at 201). The Supreme Court in Endrew F. did not go so far as to create a new requirement that mandated school districts to develop enhanced programming for gifted students because they also happen to be disabled under the IDEA when it held every child should have the chance to meet challenging objectives.²⁶

Along these lines, in Wong v. Board of Education, 478 F. Supp. 3d 229, 249 (D.Conn. 2020), a federal district court dealt with the substantive issue of whether the district offered a twice-exceptional student a FAPE (see Wong, 478 F. Supp. 3d 229).²⁷ In concluding that the district offered the student a FAPE, the court relied on the more familiar markers of progress within the Second Circuit for students with disabilities in mainstream settings—notably, the "attainment of passing grades and regular advancement from grade to grade"—as evidence to support a finding that the student's "IEP was individually tailored to [the s]tudent and reasonably tailored to allow him to progress" (id. at 249, quoting Cerra, 427 F.3d at 196). The court further noted that the parents had "pointed to no evidence that [the s]tudent was regressing" and that the student's "grades

²⁶ On the other hand, it would be problematic for a school district under the IDEA if a student was excluded from otherwise available gifted programming by reason of the student's disability. But in this case, there is no claim by the parents, much less evidence in the hearing record, that the district had gifted programming that was made available to other students that the student was being excluded from due to his disability. Rather it appears that the parents wanted, and the IHO held, that the district was required to create a unique, more challenging classroom environment for the student, similar to Fusion.

²⁷ Similar to this case, Connecticut uses the term "gifted" in its regulations, but in Wong, the parents employed the term "twice exceptional."

at the end of sixth grade 'ranged from B+ to A+' (Wong, 478 F. Supp. 3d at 249). In addition, the court indicated that "[g]rades [wer]e an 'important indication' of progress" (id. at 249, quoting Mr. & Mrs. G v. Canton Bd. of Educ., 2019 WL 1118094, at *15 [D.Conn. Mar. 11, 2019]).

Here, although the IHO recognized that the standard articulated in Rowley remained intact after the Supreme Court's decision in Endrew F. and that the IDEA does not require a school district to maximize the potential of a student with a disability (IHO Decision at pp. 22-25), he nevertheless went too far in applying the standard, referencing at times the student's inability to "harness his potential" in the district recommended program (IHO Decision at p. 25, 27), which would necessitate creating a IEP that provided programming to address the gift aspects of the student's potential; however as described above, such a mandate has not been imposed by New York policymakers. Further, the IHO drew the conclusions about the 2019-20 and 2020-21 school years by applying a FAPE standard that, by all appearances, required the district to recommend a more restrictive placement because the student was not reaching his potential in terms of his academic performance and without actually undertaking an analysis of the two-prong test set forth in Newington (see IHO Decision at pp. 19-29). Before turning to the evidence in hearing record, I will set forth the LRE standard to be applied.

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (T.M., 752 F.3d at 161-67 [applying Newington two-prong test]; Newington, 546 F.3d at 119-20; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to

(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with nondisabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).²⁸

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

Upon review and applying the relevant legal standards herein, the evidence in the hearing record does not support the IHO's conclusions that the district failed to offer the student a FAPE in the LRE for the 2019-20 and 2020-21 school years. Rather, the evidence in the hearing record, as explained herein, demonstrates that the student made meaningful progress while attending a regular education setting, with special education supports, related services, and supplementary aids and services designed to address his emotional issues, during the 2017-18, 2018-19, 2019-20, and 2020-21 school years, and therefore, the district was not required to consider a more restrictive environment for the student as urged by the student's treating psychiatrist and treating

²⁸ The Second Circuit left open the question of whether costs should be considered as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

psychologist, or as recommended by IEE evaluators. Understandably, the parents desired that a more educationally rigorous environment should have been made available to the student, but the IDEA did not impose such a requirement upon the district in this case. Consequently, the IHO's findings that the district failed to offer the student a FAPE in the LRE for the 2019-20 and 2020-21 school years must be reversed.

B. 2019-20 School Year—June 2019 IEP, Eighth Grade

Because the development of the student's June 2019 IEP for the 2019-20 school year did not occur in a vacuum or devoid of information leading up to its creation, it is helpful to review the student's performance in the 2017-18 school year (sixth grade) and the 2018-19 school year (seventh grade).

Based on the evidence in the hearing record, it is undisputed that the student possessed significant cognitive and academic abilities—with a particular strength in mathematics—as well as social/emotional struggles, which, throughout the student's educational history, manifested within the school and the classroom as difficulties with both in-class work and homework completion, work involving written expression, and difficulty making and maintaining peer friendships. According to the evaluative information in the hearing record, the student was a highly intelligent, with overall scores in cognitive testing that consistently fell within the average to the very superior range and with overall scores in academic achievement testing that consistently fell within the average to very superior range, with one exception in essay writing, which fell in the below average range when assessed as part of the June 2019 neuropsychological IEE (see generally Parent Exs. A at pp. 1, 3-7; C at pp. 1, 5-7, 16; Dist. Ex. 28 at pp. 2-6, 8-11).

Behaviorally, the evidence in the hearing record reflects that the student struggled with, and could be resistant to, completing activities involving writing and spelling; he could be defiant and oppositional when transitioning or completing low interest tasks; he would rest his head on his desk or would not ask for help with difficult tasks; and he was unable, and reluctant, to complete his assignments independently (see Parent Ex. A at pp. 1, 3, 6-7, 17; see also Dist. Ex. 32 at pp. 1-3). However, the same evidence reflected that, while the student was able to complete homework assignments independently, his instructors had, at times, characterized his efforts as sloppy, rushed, careless, and as an underrepresentation of his capabilities (see Parent Ex. A at pp. 1, 3, 6-7, 17; see also Dist. Ex. 32 at pp. 1-3).

With respect to the student's social/emotional functioning prior to returning to the district middle school for sixth grade (2017-18 school year), teacher reports and a classroom observation of the student indicated that he had "meltdowns" and emotional outbursts, appeared self-directed and non-compliant with teacher directives, showed difficulty controlling physical and verbal impulses related to his peers and was unable to interact with peers appropriately, and had difficulty understanding another person's perspective (Parent Exs. A at p. 1; P at pp. 1-2; see Dist. Ex. 32 at pp. 2-3).

Overall, the evidence in the hearing record describes the student as very bright, but "socially challenged," and that while perceived as quite capable academically, the student's dysregulation had posed a disruption to classroom functioning and had resulted in disciplinary actions prior to returning to the district middle school for sixth grade (see Parent Ex. A at pp. 1,

3). In addition, the evidence revealed that, collectively, his parents and teachers described the student's dysregulation behavior as the most substantive impediment to his scholastic engagement and performance (id.).

As the evidence in the hearing record reflects, the student transitioned smoothly to the district middle school and that, during the 2017-18 school year, performed well academically and socially, completed homework, put forth a good effort in all areas, achieved all of his annual goals in the June 2017 IEP, and had not exhibited any interfering behaviors (see Tr. pp. 140-41, 446; Dist. Exs. 3 at pp. 1, 5-6; 5 at pp. 2, 4; 6 at pp. 1-3; see generally Dist. Exs. 9-11; 55-56).²⁹

Notwithstanding the student's positive adjustment to the district middle school, the evidence in the hearing record also reflects that, during the 2017-18 school year, the parents were investigating nonpublic schools for the student to potentially attend during the 2018-19 school year (seventh grade), which coincided with the parents questioning the ongoing necessity of the student's 1:1 aide and which culminated in the decisions to remove this service from his then-current IEP, and to ultimately declassify the student in or around April 2018 (see generally Dist. Exs. 7-14; 56-57).³⁰ In at least one email exchange between the parents and the district at that time, the parents indicated that they were "considering other schools again b[ecause] [the student] [wa]s still extremely frustrated with his lack of learning and want[ed] to be challenged more" (Dist. Ex. 56 at p. 8). The parents also indicated in the same email, however, that the "school and princip[al] [wer]e doing a great job in trying to accommodate [the student] but there [wa]s only so much they c[ould] do" (id.). In addition, the parents noted that the "poor kid [wa]s bored" and he "deserve[d] to be able to advance and learn and [they would] hate it if his frustrations w[ould] lead to him no longer wanting to learn" (id.). The parents also shared with the district that they wished the student had "more opportunities . . . to learn or to learn at a faster pace, to reach his fullest potential" (id. at p. 5).

At the conclusion of the 2017-18 school year (sixth grade), the student's final report card reflected final grades that ranged from an 86 in English to a 96 in "Tech 6" (Dist. Ex. 55).

Turning to the 2018-19 school year (seventh grade), the student was enrolled in honors classes for social studies, mathematics, and science, but with the parents' agreement, attended a regular class for ELA (see Tr. pp. 140, 156, 177, 185; Dist. Ex. 35; see generally Parent Exs. DD-FF). At the impartial hearing, the director testified that, at the beginning of the 2018-19 school

²⁹ At the impartial hearing, the student admitted in his testimony that he gave up doing homework toward the end of sixth grade because it was repetitive and further acknowledged that, by not doing homework, his grades were affected; he also admitted that not completing homework lowered his grades in seventh grade (see Tr. pp. 1732-33).

³⁰ At the impartial hearing, the district social worker who provided counseling services to the student during the 2017-18 school year testified that, in April 2018 when the CSE and the parents agreed to the declassification, the student had "met all of his social-emotional and his academic goals" and thus, he no longer needed special education services (Tr. p. 1028). She further testified that the student had "integrated very well into the middle school," he had "made some friendships," he had "initiated new friendships," and "all of his former behaviors were never exhibited in our school" in sixth grade (Tr. p. 1028). More specifically, the social worker testified that the student had "no outbursts"—or anything similar in nature—in sixth grade (Tr. p. 1028).

year, the student had some difficulty completing homework, but the student had not demonstrated any behavioral issues (see Tr. p. 162).

The district social worker who provided counseling services to the student during the 2017-18 school year testified that she met occasionally with the student in the beginning of the 2018-19 school year, and the student told her he was "unhappy"; she clarified, however, that he did not make this statement "every day" (Tr. p. 1060). She also testified that she was "surprised to see him in seventh grade because when [the student] ended sixth grade, he pretty much felt confident that he was going to go to [a nonpublic school]," which the student had relayed to her (Tr. pp. 923-24). During seventh grade, the social worker met with the student on an as-needed basis, checked on the student in his classes, and occasionally met with him at lunch to "discuss things" (Tr. p. 924). When she asked the student about the nonpublic school, the student indicated that his acceptance was "pending," and he was disappointed (Tr. p. 924; see Tr. pp. 1029-30, 1060). The student also told her he was unhappy, and the social worker testified that she "observed . . . a shift" in the student, that he reported being more irritable, and that, in her opinion, he "struggled . . . during that time" (Tr. p. 924; see Tr. pp. 1029-30). She also testified that the student looked tired and sometimes slept, and per the student's own report, his medications were being changed (see Tr. p. 925; see also Tr. p. 164). The social worker noted that, based on her "18 years" of experience working with middle school students, she understood that middle school students changed a "great deal" in seventh grade physically and physiologically, as well biochemically; as a result, the social worker believed that the student "had a lot of the normative adolescent things going on," in addition to his "diagnoses, [and] his medication" (Tr. p. 925; see Tr. pp. 1029-30, 1060-61).

The district social worker also testified that, during seventh grade, she first heard about issues concerning the student's classroom performance around the time of the parent-teacher conferences in November 2018 (see Tr. pp. 925-26). At that time, per teacher report, the student was putting his head down in class, fell asleep, and would go to the nurse's office (see Tr. p. 926; see also Tr. pp. 163-64).³¹ In addition, she was told that the student would not "engage as much" (Tr. p. 926). The district contacted the parents, and in school, the nurse allowed the student to "kind of regroup if he needed to" but would not send him home, and his classroom teachers would "gently try to wake him up" or asked him to keep his head up (Tr. p. 926). According to the social worker, the teachers tried "to be very individualized in how to work with him" because they understood he could "handle the academic challenges put in front of him" and "felt it was more emotional for him" (Tr. pp. 926-27).

With regard to the student's classroom performance, the evidence indicates that, in a progress report dated November 12, 2018 through December 14, 2018, teacher comments indicated that the student's work and/or effort needed improvement in ELA (noting a current grade between 70 to 79), social studies (noting a current grade between 65 and 69), and science (noting a current grade between 80 to 89) (see Parent Ex. DD at p. 1). Only one teacher indicated that, at that time, the student had not completed all of his homework for his Introduction to Italian class

³¹ During cross-examination, the district social worker testified that the student's emerging behaviors at that time—meaning, putting his head down and going to the nurse's office—were not signs of depression, but rather, were signs of the student avoiding work (see Tr. pp. 1060-61). She also emphasized that the student's medication changes played a role in these behaviors as well (see Tr. pp. 1060-61).

(id.). And one teacher commented that the student was not meeting the course requirements for social studies (id.). In contrast, the student's "Great Books" teacher commented that the student showed good effort and was a pleasure to have in class (noting a current grade between 90 to 100); his mathematics teacher also noted that the student was a pleasure to have in class and that he was attentive and cooperative (noting a current grade between 90 to 100); in band, the student needed to be more consistent but performed satisfactorily (noting a current grade between 80 to 89); and in physical education, the student's performance was satisfactory (noting a current grade between 80 to 89) (id.).

According to the director, the district first learned about the student's social/emotional difficulties occurring at home in January 2019—which had included physical altercations—from the district's attorney, who had been contacted by the parents' attorney (see Tr. pp. 162-63). At that time, the district reached out to encourage the parents to initiate a referral of the student to the CSE for an evaluation (see Tr. p. 163). The director testified that "[w]e needed to look at him in a new light because these were new features coming up" (Tr. p. 163). The director also testified that, prior to the contact initiated by the parents' attorney in January 2019, the student had not shown symptoms of anxiety or depression in the classroom or in the school setting (see Tr. pp. 163-64).

After the parents referred the student to the CSE, the district completed the initial evaluation of the student and received letters from the student's treating psychologist and treating psychiatrist (see Tr. pp. 164-65; see generally Dist. Exs. 15-28).³² During this period, and prior to the March 2019 CSE meeting held to determine eligibility, the district issued another progress report about the student's classroom performance, dated January 28, 2019 to March 4, 2019 (see Parent Ex. EE). Teacher comments in ELA indicated that the student's grades were inconsistent and that he was "[f]ailing for the quarter," but that the student had shown an improvement behaviorally (id.). In social studies, the teacher comments similarly indicated that the student's grades were inconsistent, he was "[f]ailing for the quarter," and he did not complete all of his homework (id.). For band, the teacher comments noted that the student needed to attend make-up lessons, he needed to improve his effort, and that his current grade was "below 65" (id.). In contrast, the teacher comments for Great Books reflected the student's excellent class participation, he was a pleasure to have in class, and his current grade was between 90 to 100 (id.). For mathematics, the teacher comments reported the student's work was commendable, but his homework required monitoring; at that time, the student's current grade was between 90 to 100 (id.). In science, the teacher comments also reported that the student's homework required monitoring and his classwork needed to improve; the student's current grade was between 80 to 89 (id.). In his Introduction to Italian class, the teacher comments indicated the student's current grade was between 90 to 100, and for the student to keep up the good work (id.). Finally, in physical

³² The district social worker testified that, after the parents referred the student to the CSE in January 2019, the district wanted to support the student even before an IEP had been developed and she began seeing the student on a more regular basis; the social worker noted that the student's presentation was different than in sixth grade (see Tr. pp. 928-29). The social worker testified that the student was, "at times," sad, weepy, and disengaged in class (Tr. p. 929). It was also reported at that time that the student was distracted by his cell phone in class (see Tr. pp. 929-31).

education, the teacher comments reported his current grade as between 80 to 89, with a satisfactory performance (id.).

A review of the student's seventh grade report card revealed that the student's final averages declined slightly in ELA from a 73 in the first marking period to a 69 in the second marking period; in social studies, the student's final average declined more precipitously from an 81 in the first marking period to a 65 in the second marking period (see Dist. Ex. 35). The student's final average in his Introduction to Italian class also declined slightly from a 95 in the first marking period to a 92 in the second marking period (id.). Otherwise, the student's final grades in Great Books, mathematics, science, band, and physical education improved or remained the same (id.). The student also received a final average of 88 in art, which he had not taken in the first marking period (id.). As a result, the student's overall average from the first marking period declined by 1.03 points, from an 85.25 to an 84.22 in the second marking period (id.).

As already described, a March 2019 CSE convened for the student's initial eligibility determination meeting and developed an IEP to be implemented for the remainder of the 2018-19 school year (April 2019 through June 2019) (see Dist. Ex. 30 at p. 1; see also Dist. Ex. 29 at p. 1). At that time, the CSE found the student eligible for special education as a student with an emotional disturbance and put special education supports and services back in place for the student (see generally Dist. Exs. 29-31).

As a result of the March CSE meeting, the district conducted an FBA of the student to determine if he engaged in behaviors that impeded his (or other students') learning and to explore how the student related to his school environment, which was completed by May 2019 (see Dist. Exs. 29 at p. 5; 30 at p. 3; 34 at p. 1). The resultant May 2019 FBA report cited the student's history of not completing homework and classwork, his strained relationships at home and in school, his history of aggression at his previous schools, and noted that there had been no discipline concerns throughout his time at the district middle school (see Dist. Ex. 34 at p. 1). For the May 2019 FBA, data collection focused on the following behaviors: off-task behavior (i.e., putting his head down in class, refusing to complete classwork, and being distracted by his cell phone), responsiveness to teacher redirection (i.e., verbal prompts to pay attention to complete his work), completion of classwork by the end of the period, falling asleep during instruction, and engagement with peers (i.e., participation in reciprocal conversation, making eye contact with peers) (id. at pp. 2-10). The data reflected that the student exhibited the most frequent off-task behavior during English (80 percent frequency), mathematics (72.7 percent frequency), and Great Books (66.6 percent frequency) (id. at p. 3). As a hypothesis or perceived function of the student's off-task behavior, the evaluator concluded it served as an "escape behavior for situations or work that [the student] perceive[d] as boring or irrelevant" (id. at p. 4). The evaluator also noted that the student's English class was a first period class, but not an honors class, and it was suggested that changing the student's English class environment—for example, to either an honors class or to occur later in the day—would "alleviate some of the off-task behavior" (id.). The evaluator opined that a change in environment would improve the student's success in English because the student's Great Books class was an "honors literature elective" (id.).

With respect to the completion of classwork by the end of the period, the data reflected that, with redirection, the student completed classwork "with 87.5 [percent] (completion) accuracy" (Dist. Ex. 34 at pp. 3-4). The evaluator also noted that the student's "personal strengths

and qualities also appear[ed] to compensate for off-task behavior" (id. at pp. 2-4). Data further revealed that sleeping occurred "less than [seven percent] of the time," and the student was engaging with peers 72 percent of the time (id. at pp. 3-4). The evaluator indicated, however, that it was "difficult to ascertain whether this infrequent [sleeping] behavior [wa]s the result of developmentally appropriate behavior or side effects of [the student's] daily medication regiment," and the student's engagement with peers "may [have] be[en] indicative of the effective combination of outside therapy, medication, and in-school counseling appropriately targeting his emotional needs" (id. at p. 4). As a result of the FBA data collected, it was noted that he did not require a BIP, as he "respond[ed] well to classroom behavior management systems" (id. at p. 5).

While the district conducted the FBA of the student, the district issued another progress report dated April 4, 2019 through May 15, 2019 (see Parent Ex. FF). Teacher comments in ELA indicated that since the last progress report, with an end date of March 4, 2019, the student's current grade improved from "[f]ailing for the quarter" to his then-current grade of 70 to 79 (compare Parent Ex. FF, with Parent Ex. EE). In addition, the teacher comments in ELA reported that the student had shown an improvement behaviorally (see Parent Ex. FF). In social studies, the teacher comments similarly indicated an improvement in the student's grade, from "[f]ailing for the quarter" to his then-current grade of 65 to 69; the student also demonstrated good class participation in social studies (compare Parent Ex. FF, with Parent Ex. EE). For band, the teacher comments noted that the student's current grade remained the same, "below 65," the student continued to need to attend make-up lessons, and he needed to "improve his peer interaction" (compare Parent Ex. FF, with Parent Ex. EE). In contrast, the teacher comments for Great Books reflected that, compared to the prior progress report, the student need to participate in class more, but that his then-current grade remained between 90 to 100 (compare Parent Ex. FF, with Parent Ex. EE). For mathematics, the teacher comments reported the student's work was outstanding, he was a pleasure to have in class, and his then-current grade remained between 90 to 100 (compare Parent Ex. FF, with Parent Ex. EE). In science, the teacher comments continued to report that the student's homework required monitoring, his work needed to be submitted on time, and his then-current grade declined slightly and was between 70 to 79 (compare Parent Ex. FF, with Parent Ex. EE). In his Introduction to Italian class, the teacher comments indicated the student's then-current grade remained between 90 to 100, and for the student to keep up the good work (compare Parent Ex. FF, with Parent Ex. EE). Finally, in physical education, the teacher comments reported his then-current grade as between 80 to 89, with a satisfactory performance (compare Parent Ex. FF, with Parent Ex. EE).

A review of the student's seventh grade report card revealed that the student's final averages declined slightly in ELA from a 69 in the second marking period to a 67 in the third marking period; in social studies, the student's final average improved from a 65 in the second marking period to a 70 in the third marking period (see Dist. Ex. 35). The student's final average in his Introduction to Italian class improved slightly from a 92 in the second marking period to a 95 in the third marking period (id.). In addition, the student's final average in science declined slightly from an 86 in the second marking period to an 80 in the third marking period, and his final average in band declined more precipitously from an 87 in the second marking period to a 64 in the third marking period (id.). Otherwise, the student's final grades in Great Books, mathematics, and physical education improved or remained the same (id.). As a result, the student's overall average from the third marking period—82.25—declined by 1.97 points from an 84.22 overall average in

the second marking period (id.). The student's report card also reflected the following mid-term grades: ELA, 72; social studies, 72; mathematics, 91; and science, 88 (id.).

With this as backdrop, a CSE convened June 2019 for the student's annual review and developed an IEP for the 2019-20 school year (eighth grade) (see Dist. Ex. 39 at p. 1; see generally Dist. Ex. 38). The evidence in the hearing record includes a copy of the June 2019 CSE meeting minutes (as well as the meeting minutes for each CSE held for the student) (see Dist. Ex. 39 at p. 1; see generally Dist. Exs. 4; 14; 30; 39; 44; 51). According to the meeting minutes, the CSE reviewed and discussed the June 2019 neuropsychological IEE of the student with the evaluator who completed the IEE and who participated at the meeting (see Dist. Ex. 39 at pp. 1-2). After reviewing the testing results, the evaluator indicated that, at one point, the student "seemed deflated"; the parents noted that the student "felt stupid, because he could not answer all the questions"—to which the evaluator responded that the student's "perception was incorrect" (id. at p. 2). The evaluator indicated that the student reported being "under-stimulated," noting further that the "pacing" in the honors classes was "all that was different" (id.). The student also told the evaluator that he enjoyed the "coding class" at Fusion (id.). According to the evaluator, the student had "limited interactions with friends outside of school," and his "[o]nly relatively weak area was writing," as he had difficulty "getting his thoughts on paper" (id.). With respect to the behavior checklists, the evaluator stated that the "parents and school saw [the student] very differently" (id.).

After reviewing his recommendations, the evaluator noted "concerns" with the student's "placement meeting his needs" (Dist. Ex. 39 at p. 2). The evaluator was asked the basis for his conclusion, especially when the evaluator had not "spoken to [anyone] at the middle school," the teachers "only filled out check lists," the curriculum was "never asked about," and the evaluator "never came or spoke to any pertinent staff," but instead, relied solely on the parents' and the student's "perceptions" (id.). In addition, it was noted that the student "historically avoided work he d[id] not like to complete such as home work [sic]" (id.). Although the evaluator indicated that "they try to get information from the school," "[s]chool was never contacted" and the evaluator had no further comments (id.). At this juncture, the parents indicated that the student "love[d] science but [was] not doing well"; but, if the "student d[id] not connect with the teacher, he w[ould] not complete the work" (id.).

According to the evaluator, the student "would benefit from a therapeutic learning environment due to his emotional barriers," as the student had "experienced many failures" and the student "d[id] not want history to repeat itself" (Dist. Ex. 39 at p. 2). The evaluator also explained that, by the term "individualized," he meant that the student should have "[m]ore flexibility in how things [wer]e completed" (id.). The social studies teacher attending the CSE meeting then explained "what and how things [wer]e differentiated and how the student's preferences [wer]e taken into account," how the student completed a recent project, and how the student worked well with another student (id.). At that point, the evaluator's time for the meeting ended (id.).

Next, the June 2019 CSE reviewed and discussed the psychiatric evaluation of the student with the evaluator who conducted the evaluation and who participated at the meeting (see Dist. Ex. 39 at p. 2; see generally Dist. Ex. 32). In addition, the June 2019 CSE reviewed and discussed the FBA completed in May 2019; as noted in the meeting minutes, the parents agreed that the student did not require a BIP (see Dist. Ex. 39 at p. 3; see generally Dist. Ex. 34). At that point,

the social studies teacher at the CSE meeting reviewed the student's performance in class, noting that he "interact[ed] well with his peers," and his grades were "not as high" because homework remained an issue (Dist. Ex. 39 at p. 3). The teacher also noted, however, that the student received a grade of 100 on the project he completed with a peer (id.).

Next, the student's ELA teacher "reported that since the last meeting, [the student wa]s doing very well," he had friends in class, he was "always respectful," he "w[ould] engage in class discussion and d[id] his work"; however, the student's homework was "rarely done" (Dist. Ex. 39 at p. 3). With respect to counseling, it was reported that, at the student's request, he invited "two of the students from his ELA class [to] come to group with him" (id.). In addition, the student also "invited [the same two students] to his concert" in the city (id.). Although the student did not like to attend the "weekly 1:1 counseling," the student would attend when he "need[ed] to talk privately" (id.). It was further noted that the student was "now listening to what others ha[d] to say, even if it [wa]s not his preferred topic," and overall, staff was observing "some 'normal' adolescent behaviors" (id.).

To address the student's needs, the June 2019 CSE determined that the student should continue to receive one 40-minute session per week of counseling in a group and that individual counseling should be discontinued (see Dist. Exs. 38 at p. 7; 39 at p. 3; 40 at p. 1). To address the student's social, emotional, and behavior needs, the June 2019 CSE developed two annual goals (see Dist. Ex. 38 at p. 6). In addition, the June 2019 CSE recommended supplementary aids, services, and program modifications that included: modified homework up to 50 percent; parent counseling and training; refocusing and redirection; the use of graphic organizers; and presentation choices for long-term projects in ELA, science, and social studies (id. at p. 7).

At the conclusion of the 2018-19 school year, a progress report dated June 26, 2019 reflected that the student achieved his annual goal targeting his ability to "foster and maintain [two] positive relationships with peers" and made progress on the two additional annual goals from the March 2019 IEP (compare Dist. Ex. 37 at pp. 1-2, with Dist. Ex. 29 at p. 6). In addition, the student's final report card for seventh grade—which it appears that the June 2019 CSE had access to at the meeting—reflects that the student's final average remained the same in ELA from a 67 in the third marking period to a 67 in the fourth marking period, and he achieved a 73 on his final exam and a final overall average of 70 (see Dist. Exs. 35; 38 at p. 1). In social studies, the student's final average improved slightly from a 70 in the third marking period to a 71 in the fourth marking period, and he achieved a 98 on his final exam and a final overall average of 75 (see Dist. Ex. 35). The student's final average in his Introduction to Italian class declined slightly from 95 in the third marking period to a 91 in the fourth marking period, and he achieved a 90 on his final exam and a 93 final overall average (id.). In addition, the student's final average in science improved slightly from an 80 in the third marking period to an 83 in the fourth marking period, and he achieved a 93 on his final exam and an 85 final overall average (id.). In Great Books, the student's final average declined from a 98 in the third marking period to a 92 in the fourth marking period, and he achieved a 93 overall final average (no final exam noted) (id.). The student's report card did not include a fourth marking period grade, but the student achieved an 85 average in the fourth marking period for art, and an 87 as a final overall average in art and a 78 as a final overall average in band (id.). Finally, in physical education, the student's final average improved slightly from a 90 in the third marking period to a 92 in the fourth marking period, with an 88 as a final overall average (id.). As

a result, the student's overall average for the fourth marking period—83.88—improved by 1.63 points from an 82.25 overall average in the third marking period (id.).

C. 2020-21 School Year—June 2020 IEP, Ninth Grade

During the 2019-20 school year (eighth grade), the student returned to the district middle school and continued to be enrolled in honors classes for social studies, mathematics, and science (see Dist. Ex. 53; see generally Parent Exs. CC; GG-II). In a progress report dated September 3, 2019 through October 4, 2019, teacher comments for ELA noted that the student needed to use his time more efficiently and to submit work on time (current grade between 65 to 69); similarly, in social studies, the teacher comments indicated that the student did not attend extra help and had poor test scores (current grade between 70 to 79) (see Parent Ex. GG). In contrast, the teacher comments for both mathematics (Algebra I) and science (Earth Science) noted the student's outstanding work (current grades between 90 to 100); and in Italian 1, the teacher comments indicated that the student had good class participation and should keep up the good work (current grade between 90 to 100) (id.). Teacher comments in health noted that the student needed to submit work on time, but had good class participation; and finally, in physical education, teacher comments reported that the student needed to improve his effort (current grade between 80 to 89) (id.).

According to the evidence in the hearing record, a CSE convened on October 24, 2019 to conduct a program review and to review a September 2019 psychiatric IEE that had been requested by the parents (see Dist. Ex. 44 at p. 1; see generally Dist. Exs. 42-43; 45). As noted previously, the October 2019 CSE modified the student's IEP to include the following: encouraging the student to seek extra help "in the areas he f[ound] challenging," and "access to a computer to type lengthy assignments"; access to a computer for all classwork and exams as assistive technology devices and services; and providing the student with a Chromebook (compare Dist. Ex. 43 at pp. 7-8, with Dist. Ex. 38 at p. 7). At that time, the October CSE had access to, and discussed, the student's progress report, dated October 24, 2019 (see Dist. Exs. 43 at p. 1; 44 at pp. 5-6; see generally Parent Ex. CC). Based on the progress report and the CSE discussion, in ELA, it was noted that a "disconnect happen[ed] when [the student] ha[d] to read and take notes," noting however that it was "not natural for any student at th[at] age to read and take notes" (Dist. Ex. 44 at p. 6). The student's then-current grade for ELA, "without [a homework adjustment]," was 64.98 (id.; see also Parent Ex. CC at p. 4 [reflecting averages for each component of ELA that comprised the student's overall average at that time, including a test/project average of 85, a quiz/reading/writer's notebook average of 50, a workshop/habits/participation average of 53.13, and a homework average of 21.67]). At the CSE meeting, the district school psychologist suggested encouraging the student to attend extra help for "more 1:1 attention," and the parents responded, "[h]e w[ould] not go" (Dist. Ex. 44 at pp. 1, 6).

With respect to science, it was reported at the October 2019 CSE meeting that the student was "doing great and participate[d]"; he completed "all the homework," and often raised "topics and share[d]"; and the student often spoke with the teacher after class (Dist. Ex. 44 at pp. 1, 6). His then-current grade in science was a 96, without a homework adjustment (id. at p. 6; see also Parent Ex. CC at p. 3 [reflecting averages for each component of Earth Science that comprised the student's overall average at that time, including an assessments average of 97.75, a lab average of 92.75, and a homework average of 100]). The director then commented at the CSE meeting that

it seemed as though the student had "made a lot of connections with teachers" and had been offered the chance to enroll in an ELA honors class; however, the parents stated that the student declined to do so because he was "afraid" (Dist. Ex. 44 at pp. 1, 6). At that point in the CSE meeting, the parents' attorney noted that there was a difference between social/emotional and academic achievement and that the evaluator who conducted the September 2019 psychiatric IEE reviewed at the meeting "said the issue [wa]s less academic and more emotional" (*id.*).³³ The parents also commented that the student said he completed his mathematics and science homework "in the classroom because it [wa]s too easy" (*id.*).

In addition to reporting the student's then-current averages in ELA and Earth Science, discussed above, the October 2019 CSE documented the following in the meeting minutes as the student's then-current grades, without homework adjustments: health, 66.27 (with averages for each component of health that comprised the student's overall average at that time, including a classwork/participation average of 90.67, a quizzes average of 100, and a tests/projects average of 0); Italian, 92 (with averages for each component of Italian that comprised the student's overall average at that time, including an alternative assessment average of 100, a homework average of 95, and a tests average of 89); social studies, 69 (with averages for each component of social studies health that comprised the student's overall average at that time, including a classwork/participation average of 80, a homework average of 90, and a quiz average of 36.5); and mathematics, 99.9 (with averages for each component of Algebra I that comprised the student's overall average at that time, including a participation average of 100, a homework average of 93.75, a quiz average of 101.67, and a test average of 100) (*see* Dist. Ex. 44 at p. 6; *see also* Parent Ex. CC at pp. 1-2, 5-6).

The October 2019 CSE meeting minutes noted that the CSE, in addition to discussing the student's grades, reviewed the annual goals, as well as the rest of the IEP, despite comments from the parents' attorney that the CSE "did not have to review [the] document" (Dist. Ex. 44 at p. 6). Turning to the recommendations, the parents agreed to continue with the parent counseling and training, but indicated that they would not be able to get the student to school early enough for extra help (*id.*). The October 2019 CSE discussed providing the student with access to a computer for all written assignments, and the parents noted that the student would "stop writing unless he c[ould] type it" (*id.*). When asked if the student would be interested in a "peer tutor," the parents expressed uncertainty, "due to [the student's] feelings about others who [wer]e not as smart as he" (*id.*). As a final point, the CSE indicated that the student had gone to the nurse "frequently with a headache or stomach ache" the previous year, but, at that time, had only gone to the nurse twice, briefly, but not due to being ill (*id.* at pp. 6-7). The parents acknowledged this, but then noted that "he w[ould] be starting to go a lot again soon" (*id.* at p. 7). After reviewing the recommendations, the parents and their attorney disagreed with the recommendations for the "current placement" and asserted that, instead, the student "should be placed at Fusion, a private, non-[S]tate approved

³³ Earlier at the October 2019 CSE meeting, when discussing the September 2019 psychiatric IEE and the evaluator's recommendation for the student to attend a "1:1 setting" because, according to the evaluator, the student "needed a program that would meet his special needs"; the student was "so smart and capable but not as engaged, and not getting much out of school"; and moreover, because the evaluator thought the student "could not fit into a public school," the parents' attorney commented that the "student was so unique that he would need too many accommodations necessary to fit into a public school" and that the student was "too smart and ha[d] too many social needs to fit in" (Dist. Ex. 44 at pp. 1-2).

school with 1:1 teaching" (id.). The parents also noted that they would be seeking "tuition and back payment for classes taken" at Fusion (id.).

In comparison to the student's grades reported at the October 2019 CSE meeting, the student's report card reflected that he received the following as final averages for the first marking period in eighth grade: ELA, 70; social studies, 81; mathematics, 96; science, 96; Italian 1, 92; health, 62; and physical education, 80 (compare Dist. Ex. 53, with Dist. Ex. 44 at p. 6). For the first marking period, the student achieved an overall average of 82.43 (see Dist. Ex. 53).

Subsequently, the district issued another progress report dated November 12, 2019 through December 13, 2019 (see Parent Ex. HH). In ELA, teacher comments indicated that the student's grades were inconsistent, and he had not completed projects or reports (noting a current grade below 65) (id.). Similarly, in social studies, teacher comments noted the student was in danger of failing for the quarter and was working below his ability (noting a current grade below 65); in health, teacher comments reflected that the student had not completed projects or reports, he was in danger of failing for the quarter, and that his work and effort needed improvement (noting a current grade below 65) (id.).³⁴ In mathematics (Algebra 1), teacher comments reported that the student was highly motivated with commendable work (noting a current grade between 90 to 100); teacher comments in science (Earth Science) similarly reported that the student had outstanding work and was excellent with class participation (noting a current grade between 90 to 100) (id.). For Italian 1, the teacher comments reflected that the student had good class participation, but did not complete all of his homework (noting a current grade between 80 to 89) (id.). Finally, for physical education, the teacher comments noted that the student needed to improve his effort (noting a current grade between 90 to 100) (id.).

The student's report card reflected the following final averages for the second marking period: ELA, 73; social studies, 70; mathematics, 93; science, 94; Italian 1, 88; health, 55; and physical education, 80 (see Dist. Ex. 53). As a final overall average for the second marking period, the student achieved a 79 (id.).

In March 2020, the district's schools closed due to the Covid-19 pandemic, and the student began receiving remote instruction (see generally Parent Exs. R-S). During this time, difficulties arose with respect to schoolwork completion (see Parent Ex. R at p. 1). For example, the student's ELA teacher sent an email, dated March 25, 2020, to the parents to inform them about a message he had received from the student, which indicated that the student no longer cared about school and that the teacher should "expect to see a bunch more missing work" (id.). The ELA teacher noted that the student had been "making a great deal of progress th[a]t quarter completing his assignments" and so he was "sadden[ed] to have [the student] so explicitly give up" (id.). Since the ELA teacher could not "have [the] usual heart-to-heart pep talks [with the student] that ha[d]

³⁴ At the impartial hearing, the director testified that the student performed poorly in health at the beginning of the 2019-20 school year because "he was bored, or it was tough for him, the topics"—which included discussions about "depression and those things in adolescence"—and it may have been difficult for the student to listen to those topics (Tr. pp. 291-92). She also testified, however, that the student showed improvement in his health course, to the extent that he was "given an award" for the "most improved" by the end of the school year (Tr. pp. 291-92). Similarly, in social studies, the director testified that the student showed a "major improvement" because he sought out extra help and participated, which resulted a grade of "A" (Tr. p. 291).

been making a difference," the teacher asked the parents to speak with the student to encourage him to not give up, noting further that report cards were due out the following week (id.).

The parents explained, in an email response to the ELA teacher on the same day, that the student was "extremely frustrated as each teacher [wa]s posting things differently and [he was] having a difficult time finding all the assignments"; however, they also noted that once the student found the assignments, "he c[ould] do them with ease" (Parent Ex. R at p. 2). The parents explained that both continued to work at that time, and by the time they arrived home, the student was "so beyond frustrated [they] c[ould] not help him," but they were encouraging him and the district social worker had spoken with the student the prior day (id.).

When the district issued report cards the next week, the student's report card reflected the following final averages for the third marking period: ELA, 75; social studies, 90 (midterm grade, 69); mathematics, 85 (midterm grade, 93); science, 86 (midterm grade, 92); Italian 1, 83; health, 89; and physical education, 80 (see Dist. Ex. 53). As a final overall average for the third marking period, the student achieved an 84 (id.).

The evidence in the hearing record demonstrates that, in April 2020, the district social worker reached out to the parents via emails dated April 1 through April 7, 2020, to express concerns about some of the student's responses on his health class assignments (see generally Parent Ex. S).³⁵

Subsequently, the district issued a progress report dated April 4, 2020 through May 15, 2020 (see Parent Ex. II). The teacher comments did not include current grades for any of his courses during this timeframe (id.). In ELA, teacher comments indicated that the student needed to follow instruction in Google Classroom, he needed to check Google Classroom for assignments, and he inconsistently completed eLearning assignments (id.). In social studies, teacher comments noted the student was an inactive participant in live video-conferencing sessions, his work and effort needed improvement, and he was failing for the quarter (id.). In health, Italian 1, and science (Earth Science), teacher comments reported that the student was completing assignments successfully (id.). In addition, for science, teacher comments noted that the student's work was outstanding and that he showed a great deal of responsibility during eLearning (id.). In mathematics (Algebra 1) and physical education, teacher comments reflected that the student's performance was satisfactory (id.).

As noted previously, a CSE convened on June 9, 2020 to conduct the student's annual review and develop his IEP for the 2020-21 school year (ninth grade) (see Dist. Ex. 51 at p. 1; see generally Dist. Ex. 50; 52). The June 2020 CSE discussed the student's social/emotional needs, which included input from the student's outside counselor (see Dist. Ex. 51 at pp. 1-2). According to his outside counselor, the student had been diagnosed as having major depressive disorder, an ADHD, and ODD (id. at p. 2). The counselor reported that he worked with the student on "how he react[ed] to social situations," and noted that the student had an "emotional reaction to school"

³⁵ It appears that, although schools would remain open during "Spring break," the parents advised the district that they were considering having the student take that time off from school (Dist. Ex. 47). The district social worker asked the parents to have the student complete "as much work as possible during th[at] time," as the teachers would continue to assign work (id.).

(id.). The counselor indicated that he often assisted the parents with "how to work with the student at home" and that they had "implemented new ways to motivate [the student] at home with consequences"—including removing the student's access to his laptop and phone while his parents were at work, and having the student complete his homework assignments (id.). According to the counselor, these newly implemented interventions appeared to be working with the student (id.).

The district social worker who provided in-school counseling services to the student prepared an annual review recommendation, dated May 1, 2020, which was reviewed by the June 2020 CSE, and she also provided her input at the meeting about the student's social/emotional functioning (see Dist. Exs. 48; 50 at p. 1; 51 at pp. 1-2). The social worker noted that she observed growth in the student since sixth grade, and she "focuse[d] on his accomplishments and achievements both socially and academically" (Dist. Ex. 51 at p. 2). The social worker indicated that she discussed the student's "frustration at school and at home," he maintained "good attendance" at school, and that he was the type of "child that d[id] not need to have kids around him" (id.). She also noted that the student had made friendships, but that "they d[id] not carry over to him" (id.).³⁶ The social worker also pointed out that "[t]echnology [wa]s important to him" and he presented as "proud of his choices and interests" (id.).

According to the meeting minutes, the CSE discussed how the student had "moved from avoidance behaviors like going to the nurse frequently," the parents continued to use the parent counseling and training, and that the "[r]eal issue [wa]s watching his depression and his mental health, which [were] still areas of need for him" (Dist. Ex. 51 at p. 2).

The May 2020 annual review recommendation completed by the district social worker commented on the student's "growth and change" since sixth grade, noting that that he "successfully integrated himself in a large public-school setting" and "demonstrated maturity and growth with his goals" (Dist. Ex. 48). The social worker described the student as an "active participant in counseling" and reported that he "relie[d] on the therapeutic relationship to express his feelings and emotions" (id.). According to the social worker, the student was "content with minimal social interactions and prefer[red] to surround himself with his interests and passions," and he needed to "work on opening himself up more and developing stronger peer connections" (id.). She also reported that the student needed to "recognize that he [wa]s resilient and c[ould] be successful in any situation" (id.). As a final comment, the social worker indicated that the student had "all the tools to achieve academic success and emotional well-being due to the support system

³⁶ At the impartial hearing, the student testified that when he returned to the district in sixth grade, it was difficult to make friends and he began to dislike being at the district within four or five months (see Tr. pp. 1725-26). The student also testified, however, that he had two friends from his neighborhood and saw them occasionally in the hallway, and that in sixth grade, he made one friendship that was maintained throughout his three years at the district middle school and that friend was in some of his classes in seventh and eighth grades (see Tr. pp. 1726-29). The student further testified that he occasionally went to the same friend's house to "hang out for a bit" (Tr. p. 1729). According to the student, he stopped trying to make friends toward the end of sixth grade, and did not attempt to make friendships in seventh and eighth grade (see Tr. pp. 1729-30). In addition, the student testified that his difficulty focusing "definitely d[id]n't] help during conversations," and his "mood swings and depression" made it harder for him to "socialize that much," noting that he "just want[ed] to be alone" (Tr. p. 1699).

in place" and she recommended that the student continue with counseling services for the 2020-21 school year (id.).

When reviewing the student's academic performance, his ELA teacher reported that it had been "inconsistent," noting that the student was "reluctant to write or communicate" his thoughts in the beginning of the school year (Dist. Ex. 51 at p. 1). The student was, however, "eager to read to and to discuss orally" what he read "if it [wa]s of interest to him" (id.). According to the ELA teacher, the student was "reluctant to put his ideas in writing" and was "very resistant to editing his work" and "wait[ed] until the last minute to hand in an assignment," which precluded editing (id. at pp. 1-2). As a result, he made "less progress in this area" (id.).

The student's science teacher reported that the student was "doing very well in her class" and had "completed 38/39 assignments through this pandemic"—and that the student had a "great year" (Dist. Ex. 51 at p. 2).

In the student's remaining courses, mathematics remained a "strong" area for him but he "need[ed] to show his work" (Dist. Ex. 51 at p. 2). For Italian 1, the student had "been doing well all year" and had completed his homework" (id.). In social studies, it was reported that the student's "class performance [wa]s good, but homework could use improvement," and that for the third quarter, the student's performance improved because he attended "extra help" (id.). With respect to health, it was reported that the student was "most improved" and had "greatly improved as the year" progressed (id.). According to the parents, the student had difficulty with the topics discussed earlier in the school year in health, but was now more interested (id.).

In addition to the foregoing, the June 2020 CSE also discussed a report issued by Fusion with regard to the mathematics class and English class the student had taken during the 2019-20 school year (see Dist. Exs. 49 at pp. 1-2; 50 at p. 1; 51 at p. 2). As reflected in the May 2020 Fusion report, the student's mathematics class encompassed higher level mathematics, such as calculus topics ("Limits and Derivatives") and discrete mathematics ("Boolean Algebra"), because as a "tutoring" class, it allowed for more flexibility (Dist. Ex. 49 at p. 1). The report indicated that there was "no need" to continue to review Algebra 1 concepts with the student, but noted that the student was encouraged to "show more work when solving problems," as it would be "extremely important" to show his work on the "NYS Regents" (id.). In addition, the report indicated that, "to boost his ELA skills," the math tutor would begin working on word problems with the student (id.).

With regard to his English class at Fusion, the May 2020 report indicated that, similar to the difficulties encountered at the district, the student's social/emotional needs "sometimes effect[ed] his ability to focus on class work" and he "sometimes struggle[d] with using descriptive language in his writing" (Dist. Ex. 49 at p. 1). According to the report, the student—when he was "unhappy or want[ed] to focus on something else"—would "give push back or become non-communicative" (id.). It was also noted that the student "work[ed] best when given multiple choice reading comprehension questions and grammar or literary devices exercises," noting further that

the student "expressed that he prefer[red] this instead of writing and reading/annotating passages" (id. at pp. 1-2).³⁷

After discussing the student's academic and social/emotional functioning for the past school year, the June 2020 CSE turned its attention to a discussion of the student's current needs (see Dist. Ex. 51 at pp. 2-3). The student's outside counselor noted his depression as the "biggest concern" and noted that "not being in school" improved his mood (id. at p. 3). According to the outside counselor, a "traditional school setting [wa]s not good for [the] student's depression, and when he attended a "1:1" environment, the student returned home "happy and compliant" (id.). The counselor described the student's depression as though the student was "allergic to his educational setting," noting further that the student's depression went away during summer (id.).

The district school psychologist noted "that this behavior sound[ed] like defiance" and questioned that the outside counselor had "reduced the amount of therapy" during that school year (Dist. Ex. 51 at p. 3). The outside counselor confirmed that the student's therapy had been reduced because "his mood was more status quo" and indicated that "what help[ed] his mental health [wa]s not being in a traditional school" (id.). The June 2020 CSE then discussed that it was "normal" for students to be "happier over the summer months," and acknowledged that while the student's depression required monitoring, the student had been in nonpublic schools previously—i.e., "non traditional"—and that the student's behavior had "changed for the positive now" (id.).

At that point in the CSE meeting, the parents noted that "this setting [wa]s not working" and the student's "depression [wa]s still there" (Dist. Ex. 51 at p. 3). The outside counselor indicated that the student performed better at Fusion, noting additionally that the student had a "great outside psychologist and proper medication" (id.). The district social worker noted, however, that the "student want[ed] to do what he want[ed] to do," and he "want[ed] Fusion, because he ha[d] control there" (id.). The June 2020 CSE indicated that, at the district, the student had been "making connections with teachers and his counselors," and although the student's outside counselor "agree[d] he [wa]s making growth," it was not the "right setting for him" and "[s]uggested to test his theory and put him in [Fusion]" (id.). The June 2020 CSE continued to discuss Fusion and the 1:1 setting it offered the student, but ultimately concluded that "it [wa]s not something the CSE would recommend, because it [wa]s not an approved setting" and that the CSE "always look[ed] for the [LRE]," which the CSE saw as a public school setting (id.).

The June 2020 CSE made its recommendations for the 2020-21 school year, which included a continuation of counseling, annual goals that focused on "resilience and social interactions," modifications for homework (except for AP courses), providing the student with due dates for project components to assist with long-term project completion, adding bi-weekly updates to the parents to assist the student's work completion, and quarterly team meetings (see Dist. Ex. 51 at p. 3). The CSE also determined, after discussion, that the student's writing needs did not required special education or an annual goal, and it was noted that the parents agreed (id.).

³⁷ This is an example of how merely changing a student's environment does not constitute a plan to address a refusal to sufficiently engage in homework, classwork or testing. It is unclear how Fusion's programming was designed to address the student's lack of resilience in these areas other than to eliminate demands that the student found depressing.

at p. 4). In addition, the guidance counselor from the district high school was present and discussed the courses the student could take, as the student had been "accepted to the engineering program" (*id.*). At the conclusion of the meeting, the parents indicated that they felt "this [wa]s not the right placement for the student, and Fusion, a 1:1 setting, would be better for his emotional health" (*id.*).

The evidence in the hearing record reflects that, for the fourth marking period of the 2019-20 school year, the student achieved the following final averages: ELA, 78; social studies, 78; mathematics, 99; science, 92; Italian 1, 94; health, 86; and physical education, 90 (*see* Dist. Ex. 53). The same evidence reflected the student's final overall averages as the following: ELA, 77; social studies, 84; mathematics, 98; science, 97; Italian 1, 89; health, 73; and physical education, 83 (*id.*). In addition, the student achieved all of the annual goals targeting the student's social/emotional needs for the 2019-20 school year (*see* Dist. Ex. 54 at pp. 1-2).

D. Summary

As described above, the crux of the dispute in this matter relates to the parents' view that the district was required to create or offer the student a 1:1 flexible setting in a nonpublic school in order to make progress, versus the CSE's opinion that the student could receive meaningful educational benefit while attending a general education class placement with counseling and accommodations within a district public school. Both the June 2019 and June 2020 CSEs considered both views but had information before them demonstrating that the student was advancing grade to grade and making academic progress in the district curriculum, albeit modest progress if compared with his intellectual giftedness or potential. However, as discussed above, the district was not required to maximize the student's potential (*Rowley*, 458 U.S. at 189, 199). In addition, although the parents would have preferred that the student attend a smaller program in a nonpublic school, the student had attended this type of setting prior to attending the district public school but also struggled there, which would tend to weigh in favor of the district program. While the IHO accorded greater weight to the recommendations of the student's outside providers who had been treating the student (*see* IHO Decision at p. 27), the CSEs were not obligated to adopt the recommendations of private evaluators or providers in this instance (*J.C.S. v. Blind Brook-Rye Union Free Sch. Dist.*, 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; *Watson*, 325 F. Supp. 2d at 145 [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]). This is particularly so given that, in addition to considering what supports and services the student needed in order to receive educational benefits, the district was mandated to consider placing the student with his nondisabled peers in light of the IDEA's LRE requirements. Where, as here, the student could be educated satisfactorily in a general education classroom with supplemental aids and services, the placements recommended in the June 2019 and June 2020 IEPs represented the student's LRE (*see T.M.*, 752 F.3d at 161-67; *Newington*, 546 F.3d at 119-20).

VII. Conclusion

Having determined that the evidence in the hearing record establishes that, contrary to the IHO's decision, the district offered the student a FAPE in the LRE for the 2019-20 and 2020-21 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether

Fusion was an appropriate unilateral placement for the student for the 2020-21 school year (Burlington, 471 U.S. at 370).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated September 24, 2021, is modified by reversing the IHO's findings that the district failed to offer the student a FAPE in the LRE for the 2019-20 and 2020-21 school years; and,

IT IS FURTHER ORDERED that the IHO's decision, dated September 24, 2021, is modified by reversing the IHO's order directing the district to reimburse the parents for the costs of the student's attendance at Fusion for the 2020-21 school year; and

IT IS FURTHER ORDERED that the IHO's decision, dated September 24, 2021, is modified by reversing the IHO's order directing the district to reimburse the parents for the costs of the Fusion courses the student took after October 2019.

Dated: **Albany, New York**
 December 22, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER