



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-097

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

### **Appearances:**

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

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, by Michael K. Lambert, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tutoring costs incurred beginning in March 2019 through the 2021-22 school year and for tuition costs for the program at the Winston Preparatory School (Winston Prep) for summer 2021, as well as other relief. The appeal must be dismissed.

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

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

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

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

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

This matter involves four school years: the 2018-19 (the student's fifth grade) through the 2021-22 (the student's eighth grade) school years (see Parent Ex. X; Dist. Ex. 17). The student has been found eligible for special education as a student with an other health impairment and received programs recommended by CSEs or subcommittees on special education (CSE subcommittees) at district public schools for at least the 10-month portion of each school year at issue (see Dist. Exs.

3 at p. 1; 6 at p. 1; 12 at p. 1; 15 at p. 1; see also Parent Ex. X; Dist Ex. 17).<sup>1, 2, 3</sup> For the four school years at issue, the hearing record includes 12 IEPs that reflect the CSEs' recommendations and amendments to the student's annual goals and educational programs (Parent Ex. U; Dist. Exs. 4-8; 10-15). The recommendations and amendments are summarized in detail below but, generally, the CSEs recommended that the student attend special classes for English language arts (ELA) and math, and receive integrated co-teaching services (ICT), aide or teaching assistant services, and related services of speech-language therapy, occupational therapy (OT), and counseling, with some IEPs variably including recommendations for 12-month services, assistive technology devices or services, and/or resource room services, along with other program modifications, accommodations, and supports for school personnel on behalf of the student (Parent Ex. U at pp. 14-16; Dist. Exs. 4 at pp. 11-12; 5 at pp. 12-14; 7 at pp. 12-14; 8 at pp. 10a-11; 10 at pp. 12-14; 11 at pp. 14-16; 12 at pp. 12-15; 13 at pp. 13-15; 14 at pp. 14-17; 15 at pp. 15-18).<sup>4, 5</sup> During and leading up to these years, the district conducted several evaluations of the student and developed several reports describing the student's needs (see Dist. Exs. 18-23; 25-33; 35-44), and the parent obtained private evaluations of the student, including a January 2014 neuropsychological evaluation, a November 2017 neurodevelopmental evaluation, a March 2021 reading evaluation, and a January 2022 reading evaluation (Parent Exs. BB; NN; Dist. Exs. 24; 34).

In or around March or April 2019, the parent hired a private tutor who delivered reading instruction to the student using the "Corrective Reading Comprehension Program" until in or

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<sup>1</sup> Several pages of the hearing record filed with the Office of State Review contain underlined text and notes, which were presumably made by either the attorney for the district or the IHO. The district and/or the IHO is reminded that it is necessary to avoid annotating the documents maintained as the official record of the proceedings as it becomes very difficult during subsequent administrative and judicial review to decipher what notations, if any, should be attributed to the various document authors or to the party offering the exhibit. The notations have been disregarded.

<sup>2</sup> The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

<sup>3</sup> Notwithstanding that several of the meetings that took place for the school years at issue were identified as CSE subcommittees rather than committees (see Dist. Exs. 4 at p. 1; 5 at p. 1; 7 at p. 1; 8 at p. 1; 11 at p. 1; 12 at p. 1; 13 at p. 1; 14 at p. 1; 15 at p. 1), for ease of reference, this decision will refer to the subcommittees as CSEs unless otherwise relevant.

<sup>4</sup> IEPs for the 2018-19 school year were developed or amended on April 5, 2018, October 2, 2018, and May 9, 2019 (see Dist. Exs. 4; 5; 7). IEPs for the 2019-20 school year were developed or amended on January 10, 2019, May 9, 2019, November 8, 2019, and January 10, 2020 (see Dist. Exs. 6; 8; 10; 11). As described further below, the IEP developed on January 10, 2019 for the student's 2019-20 school year, which did not include a recommendation for ICT services, was superseded by an IEP developed on May 9, 2019 before the January 2019 IEP's anticipated implementation date (Dist. Ex. 6 at pp. 1, 3, 11; see Dist. Ex. 8). IEPs for the 2020-21 school year were developed or amended on April 30, 2020, July 27, 2020, October 26, 2020, and March 17, 2021 (Parent Ex. U; Dist. Exs. 12; 13; 14). An IEP for the 2021-22 school year was developed on June 2, 2021 (Dist. Ex. 15).

<sup>5</sup> The copy of the May 2019 IEP entered into evidence during the impartial hearing omitted one of the recommendations pages (see Dist. Ex. 8). The undersigned requested that the district provide a copy of the omitted page and the parties have agreed to its consideration. For purposes of this decision, the page originally omitted from the exhibit in evidence will be cited as page "10a" of District Exhibit 8.

around May 2021 (see Parent Exs. V at p. 2; HH). On June 2, 2021, the parent hired a different private tutor who conducted the aforementioned private reading evaluations and delivered instruction to the student using a "specified teaching and learning approach for dyslexia" and continued to do so at the time of the impartial hearing (see Tr. p. 1072; Parent Exs. BB at p. 1; II; see also Parent Exs. BB; NN).

Following a CSE meeting held on June 2, 2021, the parent sent a letter to the district, dated June 13, 2021, indicating that she was "rejecting the program developed for" the student because it did not offer him a free appropriate public education (FAPE) (Parent Ex. OO at p. 2). She further stated her intent to unilaterally enroll the student "in a private school at public expense effective June 28, 2021" (id.). During summer 2021, the student attended a summer program at Winston Prep (Parent Exs. F-G).<sup>6</sup> For the 10-month portion of the 2021-22 school year, the student returned to the district public school (see Parent Exs. D; W; X; CC; DD).

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

In a due process complaint notice dated August 30, 2021, the parent alleged that the district denied the student a FAPE for the 2018-19, 2019-20, 2020-21, and 2021-22 school years (Dist. Ex. 1).<sup>7, 8</sup> Initially, the parent alleged that, for the four school years at issue, the district failed to appropriately evaluate the student in all areas of suspected disability and failed to consider all evaluative information (id. at pp. 1, 14-15, 16). In addition, the parent argued that the student's IEPs did not reflect the results of evaluations, include an accurate description of the student's needs, or include specific and meaningful annual goals (id. at pp. 1, 15). The parent alleged that, for all four school years, the CSEs failed to recommend appropriate placements in the LRE, with appropriate accommodations, or related services (id. at p. 14). In particular, the parent asserted that the student's IEPs did not include appropriate programming to address the student's attention, speech and auditory processing, or math and English deficits, specifically referencing 1:1 speech-language therapy and reading remediation (id.).

Specific to the 2018-19 school year, the parent argued that, during the April 2018 CSE meeting, the committee dismissed her concerns and the recommendations in the November 2017 neurodevelopmental evaluation relating to the student's dyslexia diagnosis (Dist. Ex. 1 at pp. 2-3). The parent asserted that the CSE should have recommended a reading class or program (id. at p. 3). The parent also alleged that the April 2018 IEP did not provide for individual speech-language therapy sessions notwithstanding the recommendation of the speech-language pathologist summarized in the meeting minutes and the parent's request (id. at pp. 2, 3).

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<sup>6</sup> Winston Prep has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>7</sup> Although the document is titled as an amendment, the hearing record indicates that the parent withdrew an earlier filed due process complaint notice before filing the August 2021 due process complaint notice (see Tr. p. 5).

<sup>8</sup> The parent also alleged that the district discriminated against the student and violated section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a) (Dist. Ex. 1 at pp. 1, 14, 15).

The parent alleged that, during the 2018-19 school year, the student purportedly received some instruction using Wilson methodology but that such a program was not referenced on his IEP and focused on decoding rather than comprehension (Dist. Ex. 1 at pp. 3, 4). In addition, the parent indicated that, according to the student, the other students in the special classes he attended for ELA and math had significant "behavioral issues," which made the class inappropriate for the student (id. at p. 2).

Turning to the 2019-20 school year, the parent argued that, although she informed the January 2019 CSE that the student was no longer making progress and that the recommended program was not addressing his comprehension needs, the CSE did not adjust his programming for sixth grade (Dist. Ex. 1 at pp. 3, 4). The parent argued that the "CSE refuse[d] to provide [the student] with any individual or small group English or Math instruction" and that, for sixth grade, the CSE did not recommend the student continue in a reading program and recommended a 12:1+1 special class, which inappropriately increased the class size compared to the 8:1+1 special class he had been attending during fifth grade (id. at p. 4). The parent argued that the January 2019 IEP failed to identify a methodology with which to implement goals pertaining to comprehension (id. at p. 3). In addition, when the CSE reconvened in May 2019, the parent alleged that the committee inappropriately changed the student-to-adult ratio of the student's ELA and math classes to a less supportive 15:1 special class (id. at p. 4).

The parent alleged that the district's reevaluation of the student in fall 2019 demonstrated that he had regressed during the 2018-19 school year (Dist. Ex. 1 at pp. 4-6). Notwithstanding this information, the parent asserted that, when the CSE convened in October and November 2019, the committee made only "minimal and superficial" changes to the student's programming and failed to include new annual goals or recommend new services such as individual speech-language therapy or remediation for the student in the areas of ELA and math (id. at pp. 6, 15). In addition, the parent argued that, when the CSE convened in January 2020 to consider a December 2019 administration of the Test of Auditory Processing, the CSE declined to recommend individual speech-language therapy despite findings in the evaluation that the student struggled with attention and language (id. at pp. 6-7).

With respect to implementation of the student's IEPs during the 2019-20 school year, the parent argued that the district failed to provide the student with program modifications (Dist. Ex. 1 at p. 7). In addition, the parent alleged that, after the school closure related to the COVID-19 pandemic, the district did not provide any grades for the student or information about the student's reading levels (id.).

With respect to the 2020-21 school year, the parent summarized discussions held and recommendations made at the April 2020 and October 2020 CSE meetings, including the consideration of a 12:1+1 ELA special class for the student (Dist. Ex. 1 at p. 8). The parent indicated that, by February 2021, the student was "nearly failing English" and had not made progress with reading comprehension and that, by the end of the school year, the student had not achieved his annual goals (id. at pp. 8-10).

Turning to the 2021-22 school year, the parent alleged that the June 2021 CSE was improperly composed because it did not include a school psychologist (Dist. Ex. 1 at pp. 1, 15-16). In addition, the parent argued that the June 2021 CSE focused on the student's

social/emotional needs, rather than his academic needs, and added a notation to the student's IEP that he had received a diagnosis of autism but failed to evaluate the student further to determine if the autism "was impacting his ability to access his education" (*id.* at pp. 11, 16). The parent argued that the annual goals included in the June 2021 IEP were vague, overbroad, not aligned with the student's needs, and for reading and writing were "reduced in number and scope even though [the student] did not achieve his goals from the previous year" and inappropriately focused on the student's use of accommodations rather than remediating the student's deficits (*id.* at pp. 12, 15). The parent alleged that, despite data indicating that the student had not made progress during the 2020-21 school year, the June 2021 CSE recommended the same program for the 2021-22 school year (*id.* at p. 12).

The parent described private reading instruction/tutoring services that she arranged for the student beginning in March 2019 and continuing as of the date of the due process complaint notice (Dist. Ex. 1 at pp. 4, 8, 9, 13). In addition, the parent alleged that, for summer 2021, the Winston Prep summer enrichment program, along with private tutoring, constituted an appropriate unilateral placement for the student and that the student made progress (*id.* at p. 13). The parent also alleged that no equitable considerations would warrant a reduction or denial of reimbursement for the costs of the tutoring and tuition (*id.* at pp. 13-14). For relief, the parent requested reimbursement for the student's private reading instruction/tutoring and for the costs of the student's attendance at Winston Prep for summer 2021 (*id.* at p. 17). The parent also sought compensatory educational services in the form of prospective funding of summer programming of the parent's choosing for summers 2022 and 2023, as well as compensatory reading instruction, math tutoring, and neurofeedback therapy, amounting to two sessions of each service per week for two years (*id.* at pp. 17-18). The parent requested that the CSE be required to convene to modify the student's IEP to include daily 1:1 instruction for the student in English, daily direct consultant teacher services for math remediation, daily direct consultant teacher services for pre-teaching and reteaching in social studies and science, and daily 1:1 speech-language therapy services (*id.* at p. 18). Finally, the parent requested district funding of the costs of independent educational evaluations (IEEs), specifically an independent speech-language therapy evaluation and reimbursement for the costs of the March 2021 private reading evaluation obtained by the parent (*id.*).

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

The IHO held a prehearing conference with the parties on October 11, 2021, after which the impartial hearing continued for eight additional dates between November 8, 2021 and February 28, 2022 (Tr. pp. 1-1692).<sup>9</sup>

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<sup>9</sup> The hearing record filed with the Office of State Review also includes a separately paginated transcript of a prehearing conference held on April 23, 2021 (*see* Apr. 23, 2021 Tr. pp. 1-28). However, it appears that the April 2021 prehearing conference related to a due process complaint notice filed by the parent in or around March 8, 2021 and later withdrawn (*see* Apr. 23, 2021 Tr. p. 3; Tr. p. 5).

In a decision dated June 24, 2022, the IHO found that the district provided the student with a FAPE during the 2018-19, 2019-20, 2020-21, and 2021-22 school years (IHO Decision at pp. 38, 50, 55).<sup>10</sup>

Overall, the IHO found no basis for a finding that the district failed to evaluate the student in all areas of suspected disability and noted that the district complied with the parent's requests for different assessments (IHO Decision at pp. 41-43). In addition, the IHO found that the IEPs developed during the four school years at issue accurately described the student's needs and included specific and measurable annual goals that were tailored to meet the student's needs and promote progress (*id.* at p. 44). Further, the IHO opined that, according to the evidence, the student was making slow progress and, with the help of the supports, achieved good grades (*id.*). The IHO determined that the district "was very attuned" to the student's needs and provided appropriate programming and modifications (*id.* at pp. 44-45). As examples of the district's responsiveness to the student's needs, the IHO described the CSEs' different recommendations for support of an aide and/or teaching assistant over the school years, varying from a shared to a 1:1 support for different frequencies, as well as the hybrid programming recommendations for ICT services and special classes along with related services, which the IHO found were adjusted in response to several of the parent's stated concerns and desire for a "mainstream setting" and represented the student's LRE (*id.* at pp. 45-48). The IHO concluded that the IEPs at issue "provided [the student] with comprehensive, thoughtful education programs that were reasonably calculated to meet his unique needs in the [LRE]" (*id.* at p. 48).<sup>11</sup>

The IHO noted the view of district staff that the student did not exhibit deficits consistent with a diagnosis of dyslexia and that evaluative information in the hearing record consistently reflected that the student exhibited deficits in the areas of expressive and receptive language, which impacted his ability to understand information, as well attention and processing speed deficits (IHO Decision at pp. 40-41).<sup>12</sup> In reference to the November 2017 private neurodevelopmental evaluation, the IHO noted that the CSE was not obligated to adopt the recommendation that the student receive instruction from a reading specialist using a multisensory reading program, particularly given the view of its staff that the student exhibited strengths in the areas of decoding and encoding but deficits in the areas of comprehension and attention (*id.* at pp. 41-42). The IHO further reasoned that the district provided the student with instruction using the Wilson methodology and other methods with a focus on comprehension and was not obligated to use the Orton-Gillingham methodology preferred by the parent (*id.* at p. 42). The IHO concluded that

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<sup>10</sup> The IHO also found no evidence in the hearing record to support the parent's allegation that the district discriminated against the student (IHO Decision at p. 50).

<sup>11</sup> The IHO also noted the parent's inconsistent stances, insofar as she rejected the more supportive Perceptions program recommended for the student for middle school in an IEP developed on January 10, 2019, but subsequently alleged that the remaining IEPs were insufficiently supportive and sought 1:1 services (IHO Decision at p. 48).

<sup>12</sup> The IHO "did not credit the testimony or findings" of the private reading evaluator who conducted the March 2021 and January 2022 private reading evaluations that characterized the student's attention and behaviors as minor problems, finding it "clear from [the private reading evaluator's] testimony that the evaluations were prepared for the purposes of litigation" (IHO Decision at p. 49).

over the four years at issue the district provided the student with a program reasonably calculated to enable the student to make progress in light of his circumstances (id. at p. 43).

Specific to the 2021-22 school year, the IHO found that, even if the June 2021 CSE meeting lacked a school psychologist, this did not support a finding that the district denied the student a FAPE or impeded the parent's opportunity to participate in the decision-making process (IHO Decision at pp. 49-50). In addition, the IHO found that, contrary to the parent's allegation, leading up to the 2021-22 school year the district did not fail to evaluate the student's needs related to a diagnosis of autism and, further, that there was no indication that the diagnosis would have changed the student's programming (id. at pp. 43-44). The IHO determined that the student received "the necessary modifications and accommodations and his goals reflected his needs and deficits as understood by the CSE team" (id.).

Notwithstanding his finding that the district offered the student a FAPE for all four school years, the IHO also addressed the parent's requested relief (IHO Decision at pp. 50-55). As to the requested reimbursement for private reading instruction/tutoring, the IHO noted that the hearing record did not include "testimony or progress reports" from the tutor or evidence demonstrating that the tutoring met the student's unique needs and that, therefore, the parent failed to show that any of the student's progress was attributable to the tutor instead of the district (id. at pp. 50-51). As for the program at Winston Prep that the student attended during summer 2021, the IHO found that the hearing record lacked evidence that it provided education specifically designed to meet the student's needs, and noted the qualifications of the instructors, the parent's dissatisfaction with and cancellation of the ELA portion of the program, and the lack of assessment of the student or progress reports (id. at p. 53). The IHO found that equitable considerations were "evenly split between the parties," noting that the parents were actively involved in the CSE process and the student's education (id. at pp. 53-54). Ultimately, the IHO denied the parents' requests for reimbursement for reading instruction/tutoring and the Winston Prep summer program (id. at p. 55).

The IHO also denied the parents' request for compensatory education and noted that, during the impartial hearing, the parent withdrew her request for neurofeedback therapy (IHO Decision at p. 51). In addition, the IHO rejected the parent's request that the student's IEP be amended to include a 1:1 ELA class and 1:1 services (id. at p. 48).

As for IEEs, the IHO found that the parent had abandoned her request for a district-funded independent speech-language evaluation by not addressing the request during the hearing (IHO Decision at pp. 51-52). Further, the IHO denied the parent's request for reimbursement of the March 2021 private reading evaluation, noting that it was completed "for the purpose of litigation and not for a solely educational purpose" (id. at p. 52).

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

The parent appeals, arguing that the IHO erred in finding that the district provided the student a FAPE for the 2018-19, 2019-20, 2020-21, and 2021-22 school years and in denying the parent's requested relief. The parent alleges that the IHO erred in finding that the district provided appropriate reading instruction from March 2019 onward. In addition, the parent takes issue with the IHO's lack of analysis relating to the appropriateness of the CSEs' recommendations for the



student relating to math. The parent argues that the IHO erred in attributing the student's lack of progress while attending the district placements to the student's disability and finding that the district did all it could for the student. Specific to the 2021-22 school year, the parent asserts that the IHO erred in finding that the lack of a school psychologist at the June 2021 CSE meeting did not result in a denial of a FAPE.

In addition, the parent alleges that the IHO erred in denying reimbursement for the student's private reading instruction/tutoring and attendance at Winston Prep during summer 2021. The parent argues that the IHO erred in denying her request that the student's IEP be amended to include 1:1 "remediation" on the basis that, if the parent wanted a more supportive program, she should have accepted the district's suggestion that the student attend the Perceptions program. The parent also alleges that the IHO erred in denying the student math remediation without an analysis that the student made appropriate progress in the district.

For relief, the parent requests reimbursement for the costs of private reading instruction/tutoring and the student's tuition at Winston Prep for summer 2021. The parent also seeks prospective funding for a summer program of the parent's choosing for summer 2023 and 2024, prospective and/or compensatory reading and math tutoring, and compensatory speech-language therapy services.

In an answer, the district responds to the parent's material assertions and argues that the IHO's decision should be upheld in its entirety. In addition, the district argues that the parent's request for review should be rejected for failing to comply with the practice regulations.

## **V. Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999

[2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>13</sup>

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

The district argues that the parent's request for review is deficient in that it only challenges broad determinations of the IHO, does not identify grounds for reversal or modification, and does not include citations to the hearing record.<sup>14</sup>

State regulation provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Further, the request for review "must conform to the form requirements in section 279.8 of this Part" (id.). Section 279.8 requires that a request for review shall set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with

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<sup>13</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

<sup>14</sup> The district also argues that the parent's memorandum of law should be rejected for exceeding the 30-page limitation; however, as only the date and the attorney's signature appear on page 31, I decline to exercise my discretion to reject the parent's memorandum of law in its entirety (8 NYCRR 279.8[b]).

each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and

(3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]-[b]; see Davis v. Carranza, 2021 WL 964820, at \*12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at \*23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]).

Here, relevant to the district's provision of a FAPE to the student, the parent briefly and in a conclusory fashion alleges that the IHO erred in her determination that the lack of attendance of a school psychologist at the June 2021 CSE meeting did not result in a denial of a FAPE and her determinations relating to the district's provision of appropriate reading instruction, the appropriateness of the CSEs' recommendations for the student relating to math, and the degree to which the student made progress while attending the district placements. The parent's request for review fails to fully comply with the practice regulations as the parent has not in all instances identified the specific findings of the IHO which she challenges or the specific reasons for modification or reversal (see 8 NYCRR 279.4[a], 279.8[c][2]). Additionally, the request for review completely fails to identify relevant citations to the hearing record in support of the parent's allegations or the relevant page numbers of the IHO's decision (8 NYCRR 279.8[c][3]). Moreover, to the extent the parent's memorandum of law raises issues that are not set forth in the request for review, it has long been held that a memorandum of law is not a substitute for a pleading (8 NYCRR 279.4; 279.6; 279.8[c][3]; [d]; see Davis, 2021 WL 964820, at \*11; see, e.g., Application of a Student with a Disability, Appeal No. 15-070). Thus, any arguments included solely within the memorandum of law have not been properly raised.<sup>15</sup> However, issues relating to the district's provision of a FAPE that the parent identifies in her request for review (i.e., the student's progress, the appropriateness of recommended reading and math instruction, and the composition of the June 2021 CSE) are addressed below notwithstanding that the parent's request for review does not

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<sup>15</sup> For example, in her memorandum of law, the parent argues that the district failed to present evidence relating to the appropriateness of recommended 12-month services for the student (Parent Mem. of Law at pp. 14-15); however, as there is no reference to this issue in the request for review, which only appeals the IHO's denial of relief for summer 2021, the parent has not sufficiently challenged the IHO's purported failure to address this issue.

include sufficient elaboration or citation. With that said, I will not sift through the due process complaint notice, the hearing record, and the IHO's decision for the purpose of identifying further issues for appeal on the parent's behalf.

In light of the parent's limited request for review, several of the IHO's determinations are unchallenged. These include the IHO's findings that the district conducted sufficient evaluations of the student, accurately described the student's needs in the IEP, and developed specific and measurable annual goals tailored to the student's needs (see IHO Decision at pp. 41-44). In addition, with the exception of the parent's challenge to the reading and math components, the parent does not appeal from the IHO's findings that the CSEs' recommendations, including the programs, placements, and services were appropriate and offered the student a placement in his LRE (see id. at pp. 44-48). The parent also does not appeal that portion of the IHO's decision which denied her request for district funding of IEEs (id. at pp. 51-52). Therefore, these determinations have become final and binding on the parties and will not be further discussed.

In addition, on appeal, the parent has not pursued several issues raised in the due process complaint notice which the IHO did not specifically address, such as the parent's allegation that the CSEs failed to recommend 1:1 speech-language therapy for the student and that the district failed to implement the IEPs in all respects, including with respect to the functional grouping of the student's special class during the 2018-19 school year, implementation of program modifications during the 2019-20 school year, and provision of progress reports or grades during the school building closure related to the COVID-19 pandemic (see Dist. Ex. 1 at pp. 2, 3, 6-7, 14). Accordingly, these claims are also deemed abandoned and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

The time period at issue and, in particular, which portion, if any, of the 2018-19 school year is subject to review, is discussed further below. Additionally, the parent's appeal fails to meaningfully challenge all of the IHO's determinations relevant to her requests for relief; however, as there is insufficient basis to disturb the IHO's finding that the district offered the student a FAPE for the 2018-19, 2019-20, 2020-21, and 2021-22 school years, it is unnecessary to further discuss the sufficiency of the parent's appeal relating to relief.

## **B. Reading and Math Instruction**

In her memorandum of law, the parent elaborates on her allegations that the IHO erred in finding that the district appropriately addressed the student's reading needs and failed to examine the appropriateness of the recommended math instruction. The parent asserts that the district continued to offer the same program year after year despite the student's lack of progress and that the IHO erred in finding the student's progress sufficient to meet the threshold set in Andrew F. In addition, the parent argues that her requests to the district for a higher level of the Wilson reading program, a tailored program to address comprehension, a corrective reading program, Orton Gillingham, and math remediation for the student were denied because the district did not offer the programs and/or could not accommodate 1:1 delivery of instruction. The parent opines that, contrary to the IHO's characterization that the student's progress was commensurate with his abilities, the student could have made progress in a 1:1 setting, which would have addressed the student's attention deficits.

Before turning to examine the evidence in the hearing record, I note that as to the parent's arguments about the student's rate of progress over the four years in question, a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <https://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided if it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]).

Relevant to the parent's allegations about the CSEs' failures to address the student's reading needs, State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a resource room program, as a consultant teacher service, in a special class, or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>). In addition, the guidance specifies that the CSE should "consider what prior instructional methods and strategies have been utilized with the student to avoid reinstating programs that have not proven effective in the past" and further indicates that "[i]nstructional methodology may be discussed at the [CSE] but is not specified on an IEP" (*id.*).

With regard to the position that the district was obligated to provide the student with a specific methodology to address needs related to dyslexia, State guidance specific to students with disabilities resulting from dyslexia, dysgraphia, and dyscalculia emphasizes that "[t]he specially designed instruction that is appropriate to the unique needs of each student with a disability resulting from dyslexia, dysgraphia, and/or dyscalculia may vary across individual students with each of these specific learning disabilities" and that "[b]ecause of this, there is no single approach, product, or method of delivering specially designed instruction to such students that is required in

federal or State law and regulations" ("Students with Disabilities Resulting from Dyslexia, Dysgraphia, and Dyscalculia: Questions and Answers, at p. 6, Office of Special Educ. [Aug. 2018], available at <http://www.p12.nysed.gov/specialed/publications/documents/q-and-a-students-with-dyslexia-dysgrahia-dyscalculia.pdf>; see generally Educ. Law § 305[56]; Dear Colleague Letter, 66 IDELR 188 [OSERS 2015]).

In addition, generally, the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).

Broadly speaking, the student presented with deficits in the areas of attention, executive functioning, reading comprehension, and receptive, expressive, and pragmatic language. According to the November 2017 private neurodevelopmental evaluation report, the evaluators determined that the student met the criteria for diagnoses of mixed receptive-expressive language disorder; reading disorder; dyslexia; attention deficit hyperactivity disorder (ADHD), combined type; and executive function deficit (Dist. Ex. 34 at p. 16). The hearing record indicates that the student presented with challenges with attention and focus, which negatively impacted his academic performance (Parent Ex. U at pp. 1, 9; Dist. Exs. 4 at pp. 6-7; 8 at pp. 6-7; 12 at p. 8; 15 at p. 10). With respect to his challenges with ADHD, the student was reportedly internally distracted and also affected by environmental distractions and presented with executive functioning difficulties (Tr. pp. 1008-09; Dist. Exs. 4 at p. 6; 15 at pp. 10-12). The student was known to need significant amounts of structure, clear expectations, and visual supports throughout the day and benefited from small group settings to increase focus (Dist. Exs. 4 at pp. 1, 5; 5 at pp. 1-2, 6-7; 6 at p. 6; 12 at pp. 2, 8). The student also required individual or small group instruction, a multisensory approach to learning, and a predictable routine (Dist. Exs. 4 at p. 5; 6 at p. 5; 8 at p. 5; 11 at p. 7). Although the student's decoding and encoding were considered to be relative

strengths, the student's reading was significantly below grade level expectations due to his difficulty with reading comprehension, particularly as it related to making connections throughout the text, his inability to make inferences using the evidence from the text, and vocabulary (Dist. Exs. 4 at pp. 2, 6; 5 at p. 6; 6 at p. 1; 12 at p. 7). The student's writing lacked a consistent focus, appropriate sequencing, and elaboration, and he required multiple supports including visual and oral planning and graphic organizers due to his difficulty in translating his thoughts into written communication (Dist. Exs. 4 at pp. 5-6; 5 at p. 2; 6 at pp. 1, 5). In the area of mathematics, the student struggled to make sense of problems and persevere in solving them and benefited from a multisensory approach and visual supports as well as manipulatives when engaging in mathematic activities (Dist. Exs. 4 at p. 5; 5 at pp. 2, 6; 6 at p. 6). He needed support to determine what operation to use and also needed to work on his mathematic vocabulary and fact fluency (Dist. Ex. 6 at p. 6).

The student needed speech-language therapy to address his receptive, expressive, and pragmatic language delays as well as to support his needs related to joint attention, listening skills, social thinking skills, inferencing, vocabulary, and topic maintenance (Parent Ex. U at pp. 2, 9; Dist. Exs. 4 at p. 6; 5 at p. 2; 6 at p. 6). With respect to the student's social/emotional needs, his conversational skills were reportedly impacted by his inability to maintain joint attention for reciprocal conversations, and he needed counseling to support his ability to cope with frustration and manage his struggles with peer social interactions (Parent Ex. U at p. 10; Dist. Exs. 4 at p. 6; 5 at pp. 7-8; 12 at p. 9). In this area, the student also benefited from support for practicing social skills and responding appropriately to adults, clearly defined rules of classroom behavior, verbal reminders to attend to tasks, and limited distractions (Dist. Exs. 4 at p. 6; 5 at p. 8; 6 at pp. 6-7). Regarding the student's physical needs, the hearing record indicated that the student needed OT due his difficulty with sustained attention and focus, sensory seeking behavior, challenges with self-regulation, executive functioning difficulties, and strength and endurance, as well as a support for handwriting skills (Parent Ex. U at p. 11; Dist. Exs. 4 at p. 7, 5 at pp. 2, 8; 6 at pp. 2, 7; 12 at pp. 9-10; 15 at p. 11). The student also needed assistive technology to support his academic performance (Parent Ex. U at p. 16; Dist. Exs. 7 at p. 13; 11 at p. 15; 14 at p. 17; 15 at p. 2, 17).

### **1. 2018-19 School Year—Fifth Grade**

Initially, the parent has limited the scope of her challenge to the 2018-19 school year to the period beginning after approximately March 8, 2019. For example, in the request for review, the parent challenges the IHO's finding that the district provided appropriate reading instruction "from March 2019 onwards" (Req. for Rev. ¶ 9). During the impartial hearing, the parent's attorney specified that the "time period" at issue ran from "approximately March 8th of 2019 through . . . the day of the filing of the . . . second [August 2021] due process complaint" (Tr. p. 4). It appears that the parent's rationale in limiting the time period may have related to the statute of limitations insofar as March 8, 2019 was two years prior to the parent's original due process complaint notice dated March 8, 2021, which was later withdrawn (see Apr. 23, 2021 Tr. p. 3; Tr. p. 5).<sup>16</sup> Moreover,

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<sup>16</sup> The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know"



the private tutoring for which she seeks reimbursement did not commence until March 22, 2019 (see Parent Exs. V at p. 2; HH). While the entirety of the 2018-19 school year is not at issue in this matter, the student's progress leading into this year and the recommendations and rationales underlying the recommendations made at the April 2018 annual review CSE meeting are relevant to framing the remaining issues to be decided.

During the 2017-18 school year, the parent obtained the November 2017 private neurodevelopmental evaluation of the student, which, as noted above, offered several diagnoses including dyslexia, and recommended strategies for improving the student's reading, such as slowing down or having words highlighted, and being provided with reading instruction by a reading specialist using a multisensory approach such as Orton-Gillingham, Wilson, or Lindamood-Bell (Dist. Ex 34 at pp. 16, 21). Specific to the student's difficulty understanding the language of math word problems, the neurodevelopmental evaluation recommended that word problems be reworded, elaborated upon, and talked about, and that tactics for selecting the right strategies to solve the problems be practiced (*id.* at p. 21). On January 18, 2018, a CSE reviewed the private neurodevelopmental evaluation, discussed the strategies recommended therein, and agreed to administer the Word Identification and Spelling Test (WIST) or Wilson Assessment of Decoding and Encoding (WADE) to determine if the student would benefit from the Wilson program (Dist. Ex. 3 at p. 2; see Tr. pp. 57-58).

Leading up to the April 2018 CSE meeting, the student was attending an 8:1+1 special class for ELA and math and general education classes for his remaining academic and nonacademic classes with ICT services; for related services he attended small group and individual speech-language therapy and OT and individual counseling sessions (Dist. Ex. 2 at pp. 11-12). As noted in the April 2018 IEP, the student's reading program during the 2017-18 school year included various activities that related to presented text including sequencing, referencing all text features, and structured conversations guided by questions, which had proven to be helpful in building up the student's comprehension (Dist. Ex. 4 at p. 5). In addition, in math, the student's teacher employed number lines, as well as visual representations and visual prompts, and used carefully selected visual aids to meet the student's individual needs, and he was showing improvement in using them (*id.*).

In preparation for the fifth grade (2018-19 school year), a CSE convened on April 5, 2018 to conduct the student's annual review (see Dist. Ex. 4). The CSE meeting information notes indicated that the student had "made nice progress from last year in all academic areas" (*id.* at p. 1). According to the April 2018 IEP the student had grown in his reading skills and, particularly improved in his fluency as he was pausing appropriately for punctuation (*id.* at p. 5). In addition, he was adequately using the information offered in the book through utilizing the text features (*id.*). The student reportedly made gains in his ability to locate pertinent text information rather than guessing but his comprehension decreased with content that was not of his interest and his

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standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; *M.D. v. Southington Bd. of Educ.*, 334 F.3d 217, 221-22 [2d Cir. 2003]; *G.W. v. Rye City Sch. Dist.*, 2013 WL 1286154, at \*17 [S.D.N.Y. Mar. 29, 2013], *aff'd*, 554 Fed. App'x 56, 57 [2d Cir Feb. 11, 2014]; *R.B. v. Dept. of Educ.*, 2011 WL 4375694, at \*2, \*4 [S.D.N.Y. Sept. 16, 2011]; *Piazza v. Florida Union Free Sch. Dist.*, 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]). New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

ability to make connections throughout the text was weaker as the text became more complex (*id.*). The April 2018 IEP indicated that the student showed progress in foundational multiplication facts (0s, 1s, 2s), and accurately identifying the operation given a "key words" visual reference (*id.*).

With respect to reading, the April 2018 CSE meeting information notes indicated that on the WADE assessment, which evaluates a student's ability to decode and encode words, the student did well, spelling many different words and "overall, he ha[d] nice strategies for decoding and encoding" which appeared to be a strength (Dist. Ex. 4 at p. 2). The student struggled, however, to come up with the additional sounds some vowels made (*id.*). In response to the parent's concern that the student presented with dyslexia, the CSE discussed that the student's strength in reading was in decoding, clarifying that he did not have "difficulty reading words, but more with attention and focusing which ma[d]e[] it difficult for him to comprehend what he [wa]s reading" (*id.*). The meeting information notes stated that the WADE did not indicate the student had difficulty with phonemic awareness and understanding the rules of breaking down words, rather he was making progress in that area of reading (*id.*). The district elementary school supervisor of special education, who served as the CSE chairperson of the committees that were convened while the student attended elementary school (elementary school CSE chairperson), testified that the student's reading challenges pertained to his receptive and expressive language difficulties, attention to the text, and ability to stay focused while reading, noting that he could decode the words but that meaning "got lost somehow in the translation" (Tr. p. 67; *see* Dist. Exs. 4 at p. 1; 5 at p. 1; 6 at p. 1; 7 at p. 1; 8 at p. 1).

The April 2018 CSE recommended a program similar to the program the student was receiving in fourth grade with some adjustments, including a change in the frequency of speech-language therapy (more individual sessions and fewer group sessions in a 2:1 group reduced from a 5:1 group) and the addition of group counseling (*compare* Dist. Ex. 4 at pp. 11-12, *with* Dist. Ex. 3 at pp. 11-12). Specifically, the CSE recommended an 8:1+1 special class daily for an hour and 30 minutes for ELA and one hour for mathematics, a general education class with ICT services for social studies and science, and the following related services on a yearly basis: 30 30-minute sessions of small group (2:1) speech-language therapy; 60 30-minute sessions of individual speech-language therapy; 30 30-minute sessions of small group OT; 30 30-minute sessions of individual OT; 30 30-minute sessions of individual psychological counseling, and 10 30-minute sessions of small group counseling (Dist. Ex. 4 at p. 11).<sup>17</sup> Additionally, the CSE recommended the support of a full-time 1:1 aide (*id.* at p. 12).<sup>18</sup>

To address the student's needs with respect to attention and focus, the April 2018 IEP recommended modifications including: breaking down assignments into smaller segments; checks for understanding; directions repeated; refocusing and redirection; access to a sensory diet; special seating; and wait time (Dist. Ex. 4 at p. 11). The student's technology needs were addressed through access to an iPad and software (*id.*). Testing accommodations were also recommended to

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<sup>17</sup> The April 2018 CSE recommended support for school personnel in the form of OT consultations five times per year for 30 minutes per session (Dist. Ex. 4 at p. 12).

<sup>18</sup> The April 2018 IEP recommended an extended school year program consisting of a 12:1+1 special class for three hours per day, one 30-minute session of individual speech-language therapy per week, and one 30-minute session of individual counseling services per week (Dist. Ex. 4 at p. 12).

support the student including: extended time (2.0 times); tests administered in a separate location (allowing for the use of other accommodations); refocusing and redirection; language in directions simplified; flexible scheduling to allow for breaks during testing; and test passages, questions, items and multiple-choice responses read to the student to improve focus (id. at p. 13). In addressing the student's reading needs the April 2018 IEP included a goal for attention, two reading comprehension goals, and one goal for vocabulary (id. at p. 9). A speech-language goal was also developed to address the student's inferencing skills based on written text, read aloud, or information in diverse media and formats (id.). The April 2018 IEP included three mathematics goals which targeted solving two-step word problems using subtraction and multiplication, as well as skills involved in multiplying two-digit whole numbers by two-digit whole numbers (id.).

The elementary school CSE chairperson testified that the student's needs for structure and clear expectations in the classroom were addressed by the 8:1+1 special class (Tr. p. 63).<sup>19</sup> She indicated that the program also provided built-in skills on "how to be a student," along with a 1:1 aide who helped the student maintain his focus and attention, reminded him of the rules and expectations, and prompted him as needed (Tr. pp. 63-64). She indicated that the "anchor charts" provided personalized visual supports (Tr. pp. 64-65).

Based on the view that the student's reading challenges stemmed from his difficulties with language, attention, and focus, the elementary school CSE chairperson stated that the district continued to work with the student on speech and language skills (Tr. p. 67). In addition, the district continued to have the student participate in a double block of reading that addressed encoding and decoding more difficult words, but also worked on building his language capacity, which would translate into reading and writing (Tr. pp. 67-68).<sup>20</sup>

The April 2018 CSE chairperson testified that, having reviewed the student's functioning and goals, the CSE recommended an hour and 30-minute special class for ELA because "there [was] a lot to cover" for both reading and writing and that the time was used to teach and provide specialized instruction in a smaller setting (Tr. p. 87). Further, she stated that the ELA recommendation was appropriate because the special class teachers were trained in Wilson and multi-sensory reading, so they used components of Wilson if that was what was needed during the hour and a half period of ELA as it was built into that time (Tr. pp. 94, 134).<sup>21</sup> She indicated that text-to-speech technology was used to help the student with reading and writing, listening to the book first, shared reading, and to build his capacity for comprehending what he read (Tr. p. 94). Overall, she testified that the recommended IEP for the 2018-19 school year effectively supported the student in both the small class (8:1+1) and ICT class, the student's special education teachers knew him well, and the occupational therapist, speech-language pathologist, and counselors had

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<sup>19</sup> The elementary school CSE chairperson stated that the structure of the ICT class also included "a lot" of small group instruction which benefited the student (Tr. p. 63).

<sup>20</sup> The April 2018 IEP indicated that in speech-language therapy, the student's program addressed listening skills, joint attention, and answering WH questions (Dist. Ex. 4 at p. 6).

<sup>21</sup> The elementary school CSE chairperson testified that both the student's special class special education teacher and the special education ICT teacher were certified in the Wilson Reading System (Tr. pp. 133-34).

established trusted relationships with the student, so the CSE believed the program had all the components for the student to continue to make progress (Tr. pp. 95-96).

As noted above, the parent's challenge to the 2018-19 school year is limited to that period of time after March 2019 and, therefore, the April 2018 IEP discussed above is not specifically challenged. As the parent's general claims on appeal are directed at programming recommendations—as opposed to the implementation of the programming—it is not entirely clear where the parent's challenge lies for the 2018-19 school year. The only amendment to the IEP during the challenged time period was made at a meeting held on May 9, 2019 (see Dist. Ex. 7).<sup>22</sup> The May 2019 CSE met for a requested review to add annual goals directed at time and money to the IEP based on input from the parent and teacher that the student continued to demonstrate deficits in the area of time and understanding the concept of money (Tr. pp. 106-07; Dist. Ex. 7 at pp. 1, 11). The parent does not challenge this change or argue that the May 2019 CSE should have made different or additional amendments to the student's programming at this time.

In her memorandum of law, the only references to evidence relating to this time period are cited in the context of stating the student did not make progress (see Parent Mem. of Law at p. 18). However, while the student's progress or lack thereof during fifth grade might be relevant to an analysis of the educational planning that took place thereafter (i.e., for the 2019-20 sixth grade school year), it is not a sufficient ground for a finding of a denial of a FAPE for the 2018-19 school year. That is, progress, although an important factor in determining whether the student is receiving educational benefit, is not dispositive of all claims brought under the IDEA (see M.S. v. Bd. of Educ. of the City Sch. Dist. of the City of Yonkers, 231 F.3d 96, 103-04 [2d Cir. 2000], abrogated on other grounds, Schaffer v. Weast, 546 U.S. 49 [2005]). The goal of the IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the extent possible (20 U.S.C. §§ 1400[d]; 1414[d][1][A]). Most recently, the Supreme Court 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" (Andrew F., 137 S. Ct. at 999). 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). Moreover, the IDEA provides no guarantee of any specific amount of progress, so long as the district offers a program that is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192). "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 [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). Further, an IEP must be evaluated prospectively as of the time it is created and the parents may not rely on

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<sup>22</sup> The CSE had also amended the IEP on October 2, 2018, without a meeting upon agreement with the parent (Tr. p. 97; Dist. Ex. 5 at p. 1). With the parent's written consent, the committee amended the IEP to include access to a personal FM system (Dist. Ex. 5 at p. 1). The elementary school CSE chairperson testified that the FM system was added to help the student block out background noise that might be distracting for him (Tr. p. 90). She stated that the FM system allowed the student to directly tune into the teacher's voice to drown out some of the environmental distractions as a means to address the student's attention challenges as well as auditory processing (Tr. pp. 90-91, 97).

evidence that the student did not make progress to establish that the IEP pursuant to which the student received services was not appropriate (R.E., 694 F.3d at 186-88; see C.S. v. Yorktown Cent. Sch. Dist., 2018 WL 1627262, at \*18-\*27 [S.D.N.Y. Mar. 30, 2018]).

With that said, I now turn to examine the progress the student made during the 2018-19 school year in order to review whether the CSEs' recommendations for the 2019-20 school year were appropriate.

## **2. 2019-20 School Year—Sixth Grade**

### **a. January 2019 IEP**

A CSE convened again on January 10, 2019, for an annual review and to recommend a program for the student for the 2019-20 school year (sixth grade) (Dist. Ex. 6 at p. 1). The committee reviewed the student's progress toward his annual goals, related services, program and testing accommodations and modifications, as well as the proposed annual goals for the upcoming school year (id. at p. 1).<sup>23</sup>

According to notes from the January 2019 CSE meeting the student had progressed from a Fountas and Pinnell reading level J to level L and was one level away from reaching a third grade reading level (Dist. Ex. 6 at p. 1).<sup>24</sup> He reportedly was independent on a second-grade level and scored higher on nonfiction as opposed to fiction text (id.). The meeting notes and IEP present levels of performance reflected that, during the 2018-19 school year, the student had been receiving instruction using the Wilson program daily in a 1:1 setting, demonstrated strengths in decoding and sight words, and was able to decode words at a higher level than he was able to understand (id. at pp. 1, 5). According to the IEP, the student demonstrated the ability to use decoding rules and strategies to accurately read new words, but his fluency decreased when working with words with more than two syllables (id. at p. 5). His program focused on building vocabulary and visualization strategies to increase comprehension (id.). In addition, the student worked on comprehension and vocabulary to help close his reading gap (id. at p. 1; see Tr. p. 560). The student was getting better at retelling stories, although he was reluctant to do so, and had difficulty in finding evidence in nonfiction text to support his answers (Dist. Ex. 6 at p. 1). The IEP noted that to learn new words the student benefited from creating an entry into a personal dictionary to create a visual representation which had helped him master new words and expand his vocabulary (id. at p. 5). The student also participated in guided reading groups, and it was noted that when reading short chapters on his independent reading level he was able to answer questions about what he had just read (id.). In the ICT class, the CSE notes indicated that the student was working at instructional level M and that, for reading comprehension, he benefited from spiraling back to previously read chapters (id. at p. 2).

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<sup>23</sup> Although the January 2019 IEP indicated that the CSE reviewed the proposed goals for first grade, it is presumed to be a typographical error as the January 2019 CSE meeting was an annual review to develop the student's sixth grade program (Tr. p. 98, Dist. Ex. 6 at p. 1).

<sup>24</sup> Consistent with this, the elementary school CSE chairperson indicated that the student was close to reading at the third-grade level by January 2019 (Tr. p. 128).

The January 2019 CSE meeting notes indicated that the student was working at a third-grade level with respect to mathematics and was making gains as he was able to multiply using pictures and manipulatives but that he made counting errors (Dist. Ex. 6 at p. 1). The January 2019 IEP indicated that the student had improved his fact fluency and ability to complete addition and subtraction problems accurately (id. at p. 6). He could count when adding numbers together and used varied strategies for multiplication such as an array of models or creating pictures to multiply numbers with factors up to 12 (id.). The IEP indicated that the student inconsistently calculated the product, despite creating accurate visual models, but still he benefited from a multisensory approach in mathematics that incorporated the use of manipulatives and visual models (id.).

The January 2019 CSE recommended the student attend the Perceptions program, which consisted of a 12:1+1 special class for core academic classes (Tr. p. 111; Dist. Ex. 6 at p. 11).<sup>25</sup> Specifically, the CSE recommended the 12:1+1 special class for English daily for an hour and 22 minutes each period, and for mathematics, social studies, and science each daily for 41 minutes per period (Dist. Ex. 6 at pp. 1, 11).<sup>26</sup> The CSE also recommended the following related services on a yearly basis: 50 30-minute sessions of small group (2:1) speech-language therapy; 25 30-minute sessions of small group OT; and 25 30-minute sessions of small group psychological counseling (id. at p. 11).<sup>27</sup> The January 2019 CSE maintained the student's accommodations as recommended for the 2018-19 school year with the exception of special seating and added breaks as needed (compare Dist. Ex. 6 at p. 11, with Dist. Ex. 4 at p. 11). Access to an iPad, software, and personal FM trainer were continued but the January 2019 CSE did not recommend the support of a 1:1 aide for any portion of the day (compare Dist. Ex. 6 at pp. 11-12, with Dist. Ex. 4 at p. 12). The student's testing accommodations remained the same (compare Dist. Ex. 6 at p. 13, with Dist. Ex. 4 at p. 11).

According to the January 2019 meeting information notes, the parent inquired during the meeting whether instruction using Wilson was working for the student and whether he needed more of it (Dist. Ex. 6 at p. 2; see Tr. pp. 1352-53). The teacher responded that the program was working but that the student needed to work on his comprehension skills (Dist. Ex. 6 at p. 2). The parent testified that she also requested that the student receive instruction using the Orton-Gillingham program but that this request was denied on the basis that the district didn't provide it and didn't "prescribe to any one specific remediation or intervention in this district" (Tr. pp. 1353-54). According to the meeting information notes, the parent shared her view that, although the student had made more progress in reading in the beginning of the school year, his progress seemed to have "leveled off" (Dist. Ex. 6 at p. 2). She also indicated that he still struggled with math (id.). She expressed concern about the student's transition to middle school (id.). After the January 2019 CSE recommendations were discussed, the parent requested time to research the middle school Perceptions program before making a final decision (id.).

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<sup>25</sup> The IEP also lists the special class as the "Perceptions Resource Room" (Dist. Ex. 6 at p. 11).

<sup>26</sup> The January 2019 IEP indicated that the 12:1+1 special class, Perceptions program, was a Regents track program (Dist. Ex. 6 at p. 2).

<sup>27</sup> The January 2019 CSE also recommended an OT consult five times per year for 30-minutes a session (Dist. Ex. 6 at p. 11).

On April 20, 2019, in an email to the district school psychologist, who provided the student with counseling services during third through fifth grade (elementary school psychologist), the parent indicated that she had not yet visited the middle school but that she did not anticipate her position on placing the student in an ICT classroom to change "especially since [the student] [had] made more progress in the last semester than he ha[d] before both socially and academically" (Parent Ex. V at pp. 1-2; see Tr. pp. 979-80). The parent stated that a "more restrictive environment would not be appropriate" and that "[i]t may be that we finally found the right balance for him with Wilson, counseling and encouraging his independence" (Parent Ex. V at p. 2).<sup>28</sup> She also informed the school psychologist that, at that time, she had hired a tutor to provide the student with instruction "using Corrective Reading/Direct Instruction" (id.). The elementary school psychologist responded that she believed she and the student's fifth grade special education ELA teacher "could support placement in a more mainstream setting" for the student (id. at p. 1).

### **b. May 2019 IEP**

The CSE reconvened for a requested review on May 9, 2019, to discuss the recommendations made at the annual review meeting (Dist. Ex. 8 at p. 1). The May 2019 CSE changed the program and placement recommendations for the student (compare Dist. Ex. 8, with Dist. Ex. 6). The May 2019 CSE recommended a daily 15:1 special class for English for an hour and twenty-two minute period (i.e., a "double block" or two periods), a daily 15:1 special class for mathematics, ICT services for science and social studies, and the following related services on a yearly basis: 60 30-minute sessions of small group speech-language therapy; 25 30-minute sessions of small group OT; and 25 30-minute sessions of small group counseling (Dist. Ex. 8 at pp. 1, 10a; see Tr. p. 646). The support of a 2:1 shared aide was recommended for the student during science and social studies periods to foster independence by using proximity and limited interventions whenever possible while providing redirection and refocusing to support the student's engagement during class lessons (Tr. pp. 544-45; Dist. Ex. 8 at p. 11). The CSE also recommended a classroom iPad, software, personal auditory trainer/FM system, and electronic

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<sup>28</sup> On appeal, the parent takes issue with the IHO's observation that the parent rejected the more supportive Perceptions program recommended for the student but subsequently alleged that the remaining IEPs were insufficiently supportive and sought 1:1 services (IHO Decision at p. 48). In making this argument, the parent alleges that the district failed to show that the Perceptions program was appropriate for the student. However, as the January 2019 IEP was superseded by the May 2019 IEP prior to it being implemented, it was never an operative IEP, and the district did not have to defend the recommendations at the impartial hearing (see McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at \*8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]). As to the IHO's observations about the parent's supposedly contradictory stances, it does not appear that this factor was determinative to the IHO's findings (see IHO Decision at p. 48). Moreover, the January 2019 CSE meeting was held before the time period at issue in this matter, which as discussed above is that time after March 2019 (see Tr. p. 4; Req. for Rev. ¶ 9). Accordingly, it is unnecessary to further consider the parent's arguments on this point other than to note that the parent's expressed preference did not relieve the district of its obligation to ensure that the student's special education program and related services aligned with the student's needs (Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657-58 [8th Cir. 1999] [noting that although the district's obligation "to permit parental participation in the development of a child's educational plan should not be trivialized . . . , the IDEA does not require school districts simply to accede to parents' demands"]; cf. Loretta P. v. Bd. of Educ. of the Cheektowaga Cent. Sch. Dist., 2007 WL 1012511, at \*6 [W.D.N.Y. Mar. 30, 2007] [observing that no party claimed "that the [d]istrict's acquiescence to the parents' request for home instruction was compatible with the IDEA or [the student's] right to an IEP which satisfied the [d]istrict's obligation to provide a [FAPE]"]).

textbooks (Dist. Ex. 8 at p. 11). The fifth-grade special education ELA teacher testified that the assistive technology software was to help the student with writing and the FM system was to avoid environmental distractions (Tr. pp. 545-46).<sup>29</sup>

The elementary school CSE chairperson testified that the student had made good progress in his fifth-grade program and that the CSE found that the student needed review and scaffolding to maintain attention and to stay focused (Tr. p. 110). She also stated that the student was more independent in the special class setting and they did not think, in that setting, the student needed an aide (Tr. p. 112).

The fifth grade special education ELA teacher, who attended the May 2019 CSE meeting, testified that the annual goals addressed the student's: attention to task, reading comprehension, vocabulary, response to questions, inferencing, writing research and building paragraphs, and storytelling (Tr. pp. 538-40). The mathematics goals targeted addition, subtraction, place value awareness, multiplication, and word problems (Tr. p. 540).

The 15:1 special class for English, recommended for the 2019-20 school year, was a "double block" and the student's fifth grade ELA teacher testified that this would allow for small group instruction—a program similar to his fifth-grade program—which would provide support for the student with regard to reading comprehension (Tr. pp. 169-70, 547, 566). The student's fifth grade special education ELA teacher testified that, by the end of fifth grade, the student had progressed from a reading level J to a level O which demonstrated progress because he was moving forward in his ability to independently apply skills in his reading (Tr. pp. 574-75). Although the student received Wilson instruction in fifth grade, his teacher testified that it was reading comprehension that was holding the student back and that Wilson was not exceptional at targeting the comprehension portion of reading, so Wilson was not recommended for sixth grade (Tr. pp. 546-47). He testified that the program could provide guided reading, group reading, book discussion, book clubs, and small group instruction and that Wilson was not necessary (Tr. pp. 547-48). The student's fifth grade special education ELA teacher testified that the recommended sixth grade program was appropriate for the student in that the aide would provide him with support in terms of navigating the social world of middle school, and the combination of ICT services and a special class would provide the student with a "safety net," in that if he was struggling in the ICT setting he had the small group special class to support him (Tr. pp. 549, 557).<sup>30</sup> He stated that the program was designed to provide the necessary supports for the student to be successful (Tr. p. 548).

Regarding the shift from the Perceptions program with the 12:1+1 special classes to the combination of ICT services and 15:1 special classes, the elementary school psychologist testified that she had felt that the shift to middle school was going to be a challenge for the student,

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<sup>29</sup> At this time, the CSE also added time and money goals to the 2019-20 IEP, as were added to the student's then-current IEP for the remainder of the 2018-19 school year (Tr. pp. 108-09; Dist. Exs. 7 at pp. 1, 11; 8 at pp. 1, 10).

<sup>30</sup> The elementary school CSE chairperson testified that the student was recommended for a 2:1 aide because he did not require the full attention of an aide but still needed someone to support him (Tr. p. 112). The elementary school CSE chairperson indicated that at that point the student was independent in his special classes, and the 2:1 aide was a support to help him with organization as he moved from class to class (Tr. pp. 112-13).



particularly with the shifts in routine and the class changes, and that, therefore, she had been "leaning towards" the Perceptions program (Tr. p. 1019). However, she acknowledged that the CSE had been "going round and round" about the best program and that, ultimately, the ICT services along with the 15:1 special class for ELA and math was a compromise that she believed the parent could be comfortable with (Tr. pp. 1019, 1022-23). The fifth-grade special education ELA teacher similarly felt that the Perceptions program would have been more supportive but that the ICT services with the 15:1 special classes could have also provided supports for the student to be successful (Tr. pp. 548, 557).

### **c. November 2019 and January 2020 IEPs**

During the student's sixth grade school year a CSE convened again on October 31, 2019, to review the results of the district's reevaluation of the student (Dist. Ex. 9 at p. 1). The committee reviewed a psychological evaluation, an academic evaluation, an OT evaluation, a speech-language evaluation, a social history, a classroom observation, academic progress, and parental input (Dist. Ex. 9 at p. 1; see Dist. Exs. 38-42). According to the CSE meeting notes, administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) as part of the October 2019 psychological evaluation yielded a full-scale IQ of 74 and indicated that the student demonstrated relative weaknesses in working memory and processing speed (Dist. Ex. 9 at p. 1). The CSE reviewed the results from an administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III), which indicated the student exhibited weaknesses in reading comprehension (68), math problem solving, (68), sentence composition (50), and numerical operations (67) (id.).<sup>31</sup> The updated speech-language evaluation indicated that, on the Clinical Evaluation of Language Fundamentals - Fifth Edition (CELF-5), the student presented overall developmental language abilities below the average range for most areas but demonstrated language memory scores within the average range for his age (id.). The CSE meeting notes stated that the student presented with language strengths relative to building sentences as well as explaining and describing but struggled most significantly with subtests that required him to listen to information and use that information to reason and answer questions (id.). The meeting notes indicated that the student had difficulty learning without the support of visuals, and the CSE determined that the speech-language pathologist would administer the Test of Auditory Processing to rule out a deficit in that area (id.). The meeting notes further indicated that later in the spring a social language assessment would be conducted (id. at pp. 1-2). The October 2019 CSE meeting was tabled as more time was needed for the reevaluation review (id. at p. 2).

The CSE then reconvened on November 8, 2019, as a continuation of the October 2019 meeting (Dist. Ex. 10 at p. 1). At that time, the CSE discussed the OT evaluation, which indicated that on the Sensory Processing measure the student did not have any scores in the clinically significant range, but he had some problems with social participation and hearing and planning

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<sup>31</sup> The ELA special class teacher testified that the results of the WAIT-III indicated that reading comprehension was a real area of weakness for the student, noting that his scores for decoding and word reading and spelling were in the average range so those were strengths (Tr. p. 592). She stated that they could get past the decoding because he could read words, but they needed to build his ability to gain meaning from the words and that the comprehension piece was impactful (id.). She also testified that mathematics was an area of weakness for the student as "[h]e had difficulty with the word problems and the images and with the numerical operations" (Tr. pp. 592-93).

ideas (id.). According to the CSE meeting notes, the student frequently paced in the classroom, and appeared more internally distracted by his own thoughts and ideas (id.). The student had difficulty when there were breaks in routine and he was working on increasing his flexibility in thinking (id.). The IEP indicated that due to the student's improvement in handwriting, his goal in that area was discontinued (id.). The IEP stated that as determined through standardized testing and clinical observations the student demonstrated good fine motor, visual motor, and visual perceptual skills with which to access the school environment but showed some deficit in manual coordination and self-regulation (id.). His sensory diet was updated by removing the brushing and cushion but adding crunchy food/snacks, gum/candy, music for focus, and bright colored materials, as well as a checklist for handing in assignments (id.).

To address the student's weaknesses in reading and writing, the November 2019 CSE added "Read and Write" to his program, his iPad was changed to a Chromebook, and three assistive technology consultations were added to support the Chromebook use and software (Dist. Ex. 10 at p. 1; compare Dist. Ex. 10 at p. 13, with Dist. Ex. 8 at p. 11). The FM trainer was removed due to its apparent lack of benefit with respect to improving the student's focus and attention (Tr. p. 180; Dist. Ex. 10 at p. 1; compare Dist. Ex. 10 at p. 13, with Dist. Ex. 8 at p. 11). The CSE also recommended the addition of repeating directions back to staff, providing a copy of class notes, and use of a word bank for vocabulary assessments to the modifications and testing accommodations (Dist. Ex. 10 at p. 2; compare Dist. Ex. 10 at pp. 12-14, with Dist. Ex. 8 at pp. 10a-12). The student's shared 2:1 aide was increased in time to support the student in his ICT classes as well as mathematics, band, and home and career skills (Dist. Ex. 10 at p. 2; compare Dist. Ex. 10 at p. 12, with Dist. Ex. 8 at p. 11).

A CSE convened again on January 10, 2020, for a requested review to discuss challenges the student was having in physical education and to review the results of the Test of Auditory Processing and program modifications (Tr. pp. 179, 611-12; Dist. Ex. 11 at p. 1). At that time, the student's physical education teacher reported that the student presented with challenges regarding class preparedness, physical ability, the ability to follow directions, overstimulation triggered by noise and class size, as well as general safety concerns (Dist. Ex. 11 at p. 1). The teacher indicated that the student's executive functioning skills were impeding his success (id.). Due to safety concerns, the CSE recommended adapted physical education, which the meeting notes indicated would provide the student with modified lessons, a smaller class size, and the ability to improve his skills and meet expectations (Tr. p. 612; Dist. Ex. 11 at p. 1). The speech-language pathologist's review of the student's performance on the Test of Auditory Processing reflected his difficulty with attention and weak language scores (Tr. p. 180; Dist. Ex. 11 at p. 2). Notably, the January 2020 CSE recommended the addition of a daily resource room with a 5:1 student-to-teacher ratio to the student's program (Dist. Ex. 11 at p. 2). According to the CSE meeting notes, the resource room was intended to focus on re-teaching concepts, academic goals, use of language and direct instruction of vocabulary (id.). The IEP noted that the student benefitted from repetition to support his retention of the material (id.).

The district middle school supervisor of special education, who served as the CSE chairperson for CSEs convened while the student attended middle school (middle school CSE chairperson), testified that the student was struggling with his academic goals, use of language, and direct instruction of vocabulary, and that the resource room would give the student a 41 minute period each day with a special education teacher to work on the areas that were presenting the

student with challenges (Tr. pp. 181-82).<sup>32</sup> The sixth grade special education ELA teacher testified that the student needed a smaller class setting as the reteaching was more challenging in mainstream classes and even special classes (Tr. p. 618). According to the January 2020 IEP, the parent indicated that the student was an auditory learner and learned best from watching videos, visual supports were deemed necessary to support the student's learning, and the CSE discussed the resources available in the school and using the library and resource room teacher to suggest auditory supports such as BrainPop, YouTube, and Playbacks (Dist. Ex. 11 at p. 2). The middle school CSE chairperson testified that the January 2020 CSE recommended program was appropriate for the student because he struggled with executive functioning skills and attention, and the program provided settings with smaller student-to-teacher ratios, the support of an aide, resource room for reteaching, visual supports, modifications, and assignments broken down into smaller parts (Tr. pp. 179, 183-84).<sup>33</sup>

The student's sixth grade special education ELA teacher testified that accommodations were intended to address the student's needs with respect to attending and included breaking down assignments, as looking at the whole assignment was overwhelming; taking movement breaks; repeating directions; including less items on a page; refocusing; redirection; asking the student to repeat directions back to staff; and the provision of visual support and wait time to help with attention (Tr. p. 615). She testified that the aide assisted the student with attending by providing nonverbal prompts, and the resource room provided reteaching of missed concepts, work with vocabulary development, and assisted the student with studying for tests (Tr. pp. 616-17).

On January 17, 2020, the parent forwarded the student's sixth grade special education ELA teacher an email from the student's private tutor (Parent Ex. LL at pp. 2-3). In the forwarded message, the private tutor inquired whether the student's resource room teacher could utilize the "Corrective Reading Comprehension Program," which the parent echoed in her message to the teacher (*id.*). The sixth grade special education ELA teacher responded that they could discuss it with the resource room teacher and that relevant materials or skills could possibly be reinforced in resource room but that the provision of 1:1 instruction "would be difficult" given the other students in the resource room (*id.* at p. 2).

#### **d. Conclusion**

Having reviewed the programming recommendations for the 2019-20 school year (sixth grade) and the concerns stated by the parent, on appeal, there is insufficient basis in the hearing

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<sup>32</sup> The January 2020 CSE also added a speech-language goal and a vocabulary goal (Tr. pp. 182, 427-28; Dist. Ex. 11 at pp. 2, 13). According to the speech-language pathologist, the speech-language goals were intended to support the student in building self-awareness about his attention, so they incorporated activities derived from the middle school version of the whole body listening approach (Tr. pp. 429-30). She also testified the student used active listening strategies, highlighting, chunking, taking in information in small pieces, self-questioning, paraphrasing, and summarizing, all of which supported the building of skills for stamina for attention for listening (Tr. p. 430).

<sup>33</sup> The student's sixth grade resource room teacher testified that the focus of the resource room was to support the development of the student's vocabulary to reinforce lessons learned during his classes (Tr. p. 684). She believed the student benefited from the resource room because his attention impacted his ability to complete class work or sustain attention to class work so it was an opportunity to reinforce material that he may have missed (Tr. p. 688).

record to disturb the IHO's determinations. The CSEs had before them reports of the student's progress in both math and reading, including the parent's view that the student had made progress during fifth grade (see Tr. pp. 110, 574-75; Parent Ex. V at p. 2; Dist. Ex. 6 at pp. 1-2, 5-6). The main shift in the program recommendations from the 2018-19 school year was the move from the 8:1+1 special classes to the 15:1 special classes for ELA and math (compare Dist. Ex. 8 at pp. 10a-11, with Dist. Ex. 4 at pp. 11-12). In addition, with the shift to middle school, the district did not offer the Wilson program for the student (see Tr. pp. 546-47). However, the fifth grade special education ELA teacher articulated the rationale underlying the district's decision not to offer Wilson instruction for the sixth grade and described the type of specialized reading instruction the student would receive in the recommended program (Tr. pp. 546-48). As discussed above, generally an IEP need not identify a particular methodology and, while the parent inquired about the possibility of the district using Wilson, Orton-Gillingham, or the "Corrective Reading Comprehension Program," beyond the parent's general inquiry, there was no documentation before the CSEs recommending a particular methodology or demonstrating the student would only receive benefit via a particular methodology, let alone a clear consensus that the student required a particular approach (A.M., 845 F.3d at 544-45).<sup>34</sup> Moreover, with respect to the parent's request that the district use the "Corrective Reading Comprehension Program" in the resource room, this request did not come until after the relevant CSE meetings for the 2019-20 school year and, therefore, may not be relied on to assess the appropriateness of the IEPs developed for the student for sixth grade (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]). For both math and reading, the evidence in the hearing record shows that the annual goals, strategies, and the special class recommendations included in the IEPs were appropriately designed to enable the student to make progress, and review of the several CSE meetings held to review the student's educational programming leading up to and during the 2019-20 school year shows that the CSEs were responsive to the student's needs and the parent's expressed concerns.

### **3. 2020-21 School Year—Seventh Grade**

#### **a. April 2020 IEP**

The student's sixth-grade report card indicated that by the end of the second marking period the student was passing all his core subject areas with a cumulative average of 83.60 with a grade of 81 in English and 91 in mathematics (Dist. Ex. 17 at p. 9).<sup>35</sup>

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<sup>34</sup> As summarized above, the November 2017 private neurodevelopmental evaluation of the student recommended reading instruction with a reading specialist using a multisensory approach such as Orton-Gillingham, Wilson, or Lindamood-Bell (Dist. Ex. 34 at p. 21). As the evaluators just offered some examples of approaches and did not recommend one particular methodology, this does not support a finding that there was a consensus that a particular approach was necessary for the student (id.).

<sup>35</sup> For reasons related to school building closures due to the COVID-19 pandemic, there were no grades reported for the third and fourth quarters (Tr. p. 656; Dist. Ex. 17 at p. 9).

On April 30, 2020, a CSE convened to conduct an annual review for the student and recommend a program for the 2020-21 school year (seventh grade) (Dist. Ex. 12). The student's sixth grade special education ELA teacher testified that the ELA special class consisted of whole group lessons centered around a novel and small group lessons focused on spelling, grammar, writing, vocabulary, and time for independent reading or work on an activity (Tr. pp. 585-86). The teacher described her sixth grade reading approach as "balanced literacy" which she described as using many resources and types of literature (nonfiction, fiction, prose) to build comprehension skills (Tr. pp. 669-70). To address the student's needs in reading comprehension, the teacher testified that she worked on identifying the main idea and theme, vocabulary, inferring, retelling, and sequencing, all of which were practiced continually through classroom discussion, writing activities, or 1:1 activities (Tr. p. 587). She stated that everything read in the class centered on pulling out those key details and identifying those pieces with continual practice, with the end result being to show the student's knowledge on an assessment (*id.*). The teacher provided scaffolding to help the student read complex texts, read the texts aloud, and led class discussions; to help the student provide explicit responses to the text, she provided "questioning and practice and written responses," she guided the student through the process and offered modeling, practice time, and independent time (Tr. pp. 588-89, 593-94). The student's sixth-grade special education ELA teacher testified that, although the student had good days and bad days, he was making progress overall (Tr. p. 619). She indicated that she wanted to build the student's skills to the next level so he could apply information, synthesize information, and infer information (Tr. p. 593). Progress during sixth grade was noted in the increase in his scores on the Fountas and Pinnell reading assessment where he progressed from a level M as his initial instructional level to a level O in February (Tr. pp. 589-90).<sup>36</sup>

Consistent with the teacher's testimony, the April 2020 CSE meeting notes indicated that the student's reading lexile level—comprehension—was 180 and his Fountas and Pinnell instructional level was O, which "combined indicate[d] that his current reading level [wa]s on approximately second grade" (Dist. Ex. 12 at pp. 1, 7). The meeting notes also indicated that, on the SRI computer-based comprehension assessment, the student's initial score was 117, which reportedly demonstrated progress (*id.* at pp. 1, 7).<sup>37</sup> Although the SRI assessment placed the student at the first-grade level, the Fountas and Pinnell assessment administered 1:1 showed better performance at level O, which placed the student at the mid to end of third grade regarding his reading ability (*id.* at p. 7).<sup>38</sup> As reflected in the IEP, the student's teacher reported that the assessments reflected the student's scattered reading abilities and noted that several factors impacted his performance including deficits in reading comprehension and challenges with

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<sup>36</sup> Further assessment was not conducted due to the class being conducted remotely (Tr. p. 590).

<sup>37</sup> The middle school CSE chairperson testified that the SRI was a building level assessment given to all students quarterly in middle school as another measure to assess how students are performing in reading and writing (Tr. p. 226).

<sup>38</sup> The parent also points to the student's results on i-Ready assessments, administered in spring and fall 2021, to argue that the student did not demonstrate progress (Parent Exs. H-K); however, there is no indication that the June 2021 CSE had the spring 2021 results before it and the fall 2021 results post-date the meeting (*see* Tr. pp. 233, 734; Parent Exs. H-K). Accordingly, as they were not before the CSE, they may not be relied on to evaluate the appropriateness of the IEP.

language acquisition and attention (id.). According to the IEP, the student was often lost in his own thought process and even when given 1:1 support to answer comprehension questions, the student required multiple look backs to find the correct information (id.). In addition, he had difficulty placing himself in the role of a character, and he needed 1:1 prompting to discuss answers to questions that assessed the main idea, details, or theme of a reading (id.). Abstract concepts such as theme and inferences were difficult, but the student presented with even and steady fluency when reading aloud (id.). However, the IEP indicated that the student did not process the words, suggesting that reading was a rote skill (id.). According to the student's sixth grade special education ELA teacher, the greatest contributing factor inhibiting the student's ability to access the curriculum was his challenge with attention, regardless of the manner in which information was presented (id. at p. 8; see Tr. pp. 620-21). The IEP indicated that the student needed prompts to watch videos or "brainpops," verbal and nonverbal prompts to follow along when listening to a story, and prompts to remain with the small group and to participate (Dist. Ex. 12 at p. 8). The teacher reported that in ELA she spent a "great deal of time" 1:1 with the student repeating, rereading, and prompting for written responses (id.). The April 2020 IEP indicated that the student needed to improve his self-regulation to improve his participation in his academic environment (id. at p. 10).

The student's sixth grade special education mathematics teacher testified that she used multiple strategies with the student like a multiplication chart, calculator, repetition, consistency, and prompts for on task engagement (verbal cues) (Tr. pp. 838-39). They reviewed homework, took notes, and provided copies of notes (Tr. pp. 840-42). She stated that the student had a successful year in mathematics noting that the multiplication chart was a "wonderful visual" and the calculator relieved stress and pressure (Tr. pp. 843, 848-49). She indicated that she took what was being taught in the ICT classes, broke it down into smaller pieces, easier to understand, and possibly not as in depth, and provided check-ins, rather than big tests and quizzes (Tr. pp. 844-45). She noted that the student was advanced to seventh grade mathematics for the following year (Tr. p. 846).

Consistent with this description, the CSE meeting notes indicated that the student transitioned well into the special mathematics class and noted that when prompted he participated and gave answers to questions (Dist. Ex. 12 at p. 2). The meeting notes also indicated that the student's basic computation facts remained weak, yet he utilized his strategies of the multiplication chart as well as the calculator daily (id.). The student reportedly used repetition of tasks to prepare for assessments which helped him find success on the "check ins" done in class (id.).

The IEP indicated that the parent had a high level of concern regarding the student's vocabulary and his ability to put thoughts into sentences (Dist. Ex. 12 at p. 8). The parent also expressed concern regarding the disconnect the student exhibited during conversations (id.). The IEP further indicated that the parent expressed concern about the "chunk size" of the student's work (needing fewer items on a page), and repetition of basic facts (id.).

Compared to the student's program for the 2019-20 school year, the April 2020 CSE again recommended a 15:1 special class for English and mathematics but, for the 2020-21 school year, the special class for English was only recommended for a single period instead of the double-block (compare Dist. Ex. 12 at p. 12, with Dist. Ex. 8 at p. 10a). In addition, the April 2020 CSE continued the recommendations for ICT services for science and social studies, adapted physical

education, and daily resource room in a 5:1 group, with the additional notation in the April 2020 IEP that the purpose of the resource room would be to support science and social studies (compare Dist. Ex. 12 at pp. 12-13, with Dist. Ex. 11 at p. 14). The April 2020 CSE continued the recommendation for a 2:1 shared aide but for four hours per day (compared to three hours and 30 minutes) for mathematics, science, social studies, resource room, art/home and career skills, academic intervention services (AIS), and study hall (compare Dist. Ex. 12 at p. 13, with Dist. Ex. 11 at p. 14). The CSE continued to recommend speech-language therapy, OT, and counseling services with the only change compared to the January 2020 IEP being that, instead of 25 sessions of group counseling services per year, the April 2020 IEP recommended five yearly sessions of individual counseling and 15 yearly sessions of small group counseling (compare Dist. Ex. 12 at p. 13, with Dist. Ex. 11 at p. 4). The April 2020 CSE continued the program modifications and accommodations, assistive technology, assistive technology consultation, and testing accommodations included in the January 2020 IEP (compare Dist. Ex. 12 at pp. 13-15, with Dist. Ex. 11 at pp. 14-16).<sup>39, 40</sup>To address the student's needs the April 2020 CSE recommended a number of annual goals (Dist. Ex. 12 at pp. 11-12). Two study goals were recommended to address the student's need for breaks and to maintain attention (Dist. Ex. 12 at p. 11). To address his reading needs, the April 2020 CSE developed three annual goals related to the student's ability to connect text with his background knowledge to make an inference, to identify a theme or central idea with three supporting details at his instructional reading level, and to define words and phrases with multiple meanings (id.). His two writing goals targeted writing complex sentences with a variety of vocabulary and punctuation, and composing a five sentence paragraph with a clearly stated opinion, supporting facts, linking words, and a conclusion statement (id.). His two mathematics goals focused on real-world math problems involving fractions, multiplication, and division (id.). The CSE recommended five speech-language goals that targeted the student's need to analyze and make inferences by answering questions about presented materials, demonstrate auditory comprehension by answering questions and discussing topics verbally presented, accurately and logically provide explanations, use context clues to determine meaning of target words and phrases in conversation and text, and interpret social language and make judgements to enhance his communication with peers and adults (id. at p. 12). The student also had two social/emotional goals to designed to foster his adaptability to changes in his environment and his ability to express negative emotion at school by identifying and appropriately using coping skills to maintain acceptable school behavior (id.).<sup>41</sup>

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<sup>39</sup> With respect to breaks, the April 2020 IEP added a note that, at the beginning of the school year, a schedule would be developed to specify appropriate times for the student to take a break, noting that, otherwise, the student would "leave every period of the day to take a walk" (Dist. Ex. 12 at p. 13).

<sup>40</sup> The April 2020 CSE also recommended the student for a 12-month program that consisted of three hours of instruction per day in a 12:1+1 special class for July and August 2020 (Dist. Ex. 12 at p. 15). According to the student's sixth grade ELA special education teacher, the 12-month program was recommended due to concerns that the student might experience substantial regression in mathematics, reading, and writing (Tr. p. 635). The program was recommended to continue to build skills and give the student the opportunity in the summer to grow and not fall further behind (Tr. pp. 635-36).

<sup>41</sup> On July 27, 2020, the April 2020 IEP was amended with the parent's written consent without a meeting to add an additional writing goal as well as two daily living skills goals relating to time and money (Dist. Ex. 13 at pp. 1, 11-12).

The middle school CSE chairperson testified that the April 2020 CSE reviewed the most recent changes that were made to the student's program during the 2019-20 school year, reviewed the annual goals and related services, and indicated that the student was making progress in the different areas, he was using the Chromebook put in place in sixth grade, and was beginning to use the Read and Write program (Tr. p. 185). She testified that the recommended program was appropriate to meet the student's needs because the 15:1 special classes supported the student's reading, writing, and mathematics goals, the integrated classes for science and social studies had a teacher and special education teacher to support him, the resource room recommended for one period a day provided reteaching, visual supports, assignments broken down into smaller segments, and the opportunity to work on any academic areas where he needed additional support, and the resource room also afforded the student the opportunity to use assistive technology (Tr. pp. 189-90). The middle school CSE chairperson noted that the student also had adapted physical education, and related services of speech-language therapy, OT and counseling (Tr. p. 190).

The student's sixth grade special education ELA teacher testified that the recommended program would have been appropriate for the student because it was as much support as could be provided while trying to push the student toward a level of success and independence (Tr. p. 636). She testified that the modifications and accommodations were recommended to support the student's need to develop independence and the aide was recommended as a means for the student to be in the LRE, as well as to help manage the student's break periods to help keep him on task as much as possible and redirect when necessary (Tr. pp. 632-33). She testified that the recommended special class for the student's seventh grade was structured the same way as the student's sixth grade special class and would follow the general education curriculum but at a modified pace and in a scaffolded way so the student would have supports built in to help him build his knowledge without being completely independent (Tr. p. 626). She testified that the goal of was to move toward applying answers to knowledge-based questions and synthesizing information (Tr. p. 626). She indicated that they would also work on pulling out inferences and main ideas through repeated practice and the use of various types of texts, reading and writing, and learning vocabulary through the use of visuals and written examples to help students come to "understand the word and put it in context" (Tr. pp. 626-27).

Regarding the appropriateness of Wilson, the student's sixth grade special education ELA teacher testified that she still did not believe that Wilson would be appropriate for the student, as he had decoding and encoding skills and comprehension was the main area where he struggled in reading (Tr. pp. 594, 627-28). She indicated that Wilson comprehension was only one part of a nine-part lesson so most of the lesson would have been on skills the student already knew (Tr. pp. 594, 628).

During the impartial hearing, the parent testified that "aside from the school not providing for interventions [and] addressing [the student's] dyslexia," she felt the program recommended at the April 2020 CSE meeting was appropriate (Tr. pp. 1369-70). However, without interventions to address reading comprehension and math skills, the parent felt that the student would not be able to make progress (Tr. pp. 1370-71).

In an email dated May 1, 2020 and addressed to the middle school CSE chairperson and the student's sixth grade special education ELA teacher, the parent stated her concern about the student's lack of progress in reading (Parent Ex. QQ at p. 3). Specifically, the parent indicated that



"[t]he district ha[d] tried several different programs to address [the student's] Reading deficiency" (noting, however, that it was not clear if "any program" had been used in sixth grade) but the student was "still reading at a second grade level" (id.). The parent expressed concern that the April 2020 CSE did not make a recommendation to address the student's reading comprehension needs (id.). The parent requested that the student's IEP be amended to include the program used by the student's private tutor, specifically, the "Corrective Reading Direct Instruction program" (id.).

The student's special education teacher responded to the parent's email, indicating that the corrective reading program appeared to be taught 1:1 and that she was "not able to teach 1:1 in Special Class ELA" (Parent Ex. QQ at p. 2). However, she went on to summarize the supports she did provide to the student (id.). She indicated that she provided individual conference time, as well as small group and whole group lessons (id.). The teacher stated that, while she did not utilize a specific "program," she explicitly taught reading skills through different text types and levels, vocabulary instruction, and questioning (id.). The teacher described that she addressed decoding and encoding skills through spelling and fluency through opportunities to read aloud (id.). With respect to comprehension, she indicated that students worked on these skills through guided reading, class discussions, and analysis of the text (id.).

On May 3, 2020, the parent responded reiterating that the student had "a unique need" that the CSE had not addressed on his IEP (Parent Ex. QQ at p. 1). The parent noted that the student had received "individual reading instruction in the past" including Wilson and Leveled Literacy Intervention (LLI), which had not worked, that he was still reading at a second-grade level, and that it was "time to try a different intervention" (id.).

For summer 2020, the student attended the district recommended program (see Parent Ex. L). In a progress report, the student's summer special education teacher explained that lessons focused on increasing comprehension, and identifying the main idea, characters, and other details from reading (Parent Ex. L at p. 1). The teacher reported that the student demonstrated comprehension, strengthened his knowledge of literary elements, improved his ability to identify important details, and demonstrated a good vocabulary base (id.). During summer 2020, the student worked on strengthening his math computation skills, solving word problems, increasing his fluency with multiplication facts, borrowing and carrying numbers, and understanding place values (id.). The teacher reported that the student required frequent reminders to keep pace with the class (id.).<sup>42</sup>

In a September 29, 2020 email to the middle school CSE chairperson, the parent summarized a telephone conversation about implementation of some of the student's

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<sup>42</sup> In her memorandum of law, the parent argues that there is "no evidence in the record that [the student] made any progress during the summer session" and that the district "did not introduce any evidence of progress that summer" (Parent Mem. of Law at p. 6). However, the parent offered the summer 2020 progress report into evidence and, as summarized above, the report demonstrates that the student made progress (Parent Ex. L). Moreover, rather than to produce progress, the purpose of 12-month services is to prevent substantial regression" (8 NYCRR 200.6[k][1]; see 8 NYCRR 200.1[eee]). Accordingly, there is no support for the parent's allegation in this regard.

accommodations and reiterated her request that the district use the "Corrective Reading Direct Instruction program" to address the student's comprehension needs (Parent Ex. RR at p. 2).

### **b. October 2020 IEP**

On October 26, 2020, a CSE convened for a requested review (Parent Ex. U at p. 1). The parent testified that she requested the meeting and attended with an attorney because she had "been asking for the school district to address [the student's] dyslexia for years" and he had not made progress (Tr. pp. 1374-75). She testified that she wanted "intensive . . . 1:1 instruction for [the student] in both English and math and in speech" (Tr. pp. 1375-76).

The CSE reviewed the student's program, goals, program modifications, accommodations, and related services (Parent Ex. U at p. 1).<sup>43</sup> The student's seventh grade special education ELA teacher reported that the student responded well to verbal cues and prompts to refocus, engaged in the stories read in English class, and used background information to participate in class discussion and engage further in the lesson (*id.* at p. 2). The teacher indicated that the student responded better to reading comprehension questions when he could verbally share information rather than write his answers (*id.*). The student's resource room teacher reported that she provided pre-teaching, re-teaching, supplemental instructional materials, supplemental videos, and visual support to reinforce the student's learning, and that the student was receptive to the supplemental supports (*id.*).

The October 2020 CSE increased the student's aide support from a 2:1 shared aide 20 hours per week to a 1:1 teaching assistant on a full-time (30 hours per week) basis to provide refocusing/redirection, verbal and nonverbal prompts, modeling, guided support, and to assist the student in maintaining attention (Parent Ex. U at p. 1; compare Parent Ex. U at pp. 14-15, with Dist. Ex. 12 at p. 13). The CSE clarified that the student's aide support was being provided by a teaching assistant who could provide pre-teaching and re-teaching under the guidance of the special education teacher (Parent Ex. U at p. 2; see Tr. p. 195).<sup>44</sup> The middle school CSE chairperson testified that the CSE decided to increase teaching assistant support because the student was struggling with the completion of the assignments, and he needed more support throughout the day for his executive functioning skills (Tr. p. 194). According to the CSE chairperson, the teaching assistant was also recommended to provide the student with support with organization and planning, to provide redirection and refocusing when appropriate to help the student stay engaged, and to help the student understand the lessons and complete assignments when the lesson was over (Tr. pp. 195-96).

In addition, the October 2020 CSE modified the student's accommodations to provide the student with visual supports consisting of supplemental videos or visuals, fewer items on PowerPoints and handouts, check-ins with teacher by way of additional practice activities in math,

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<sup>43</sup> The October 2020 CSE also reviewed the July 2020 amendment (no meeting) that had been previously approved but not yet processed (Parent Ex. U at p. 1; see Dist. Ex. 13).

<sup>44</sup> Pursuant to State regulations, while a teacher aide may assist teachers in nonteaching duties such as "attending to the physical needs" of students or "supervising students," a teaching assistant may provide "direct instructional services to students" while under the supervision of a certified teacher (8 NYCRR 80-5.6[b], [c]).

science, and social studies to support rote learning and memorization skills (Parent Ex. U at pp. 1-2; compare Parent Ex. U at pp. 15-16, with Dist. Ex. 12 at pp. 13-14). The CSE meeting notes indicated that, at that time, the student had been receiving speech-language therapy in a group of two and the CSE recommended an increase in the ratio to 3:1 although the parent requested individual speech-language therapy which the CSE denied because the student had been "very successful in a small group ratio of 3:1" and he was "making nice progress toward his goals in this group setting" (Parent Ex. U at p. 2; compare Parent Ex. U at p. 14, with Dist. Ex. 12 at p. 13).<sup>45</sup> The October 2020 CSE also agreed that an assistive technology evaluation would be conducted and increased the number of assistive technology consultation sessions from three to five sessions per year (Parent Ex. U at p. 2; compare Parent Ex. U at p. 13, with Dist. Ex. 12 at p. 14).

The October 2020 CSE discussed the student's low reading comprehension scores and noted that, for the 2020-21 school year, AIS was added to the student's schedule to support reading comprehension needs (Parent Ex. U at p. 2). The CSE discussed changing the student's ELA special class from one period of a 15:1 special class per day to a double block of a 12:1+1 special class per day to better support the student's reading needs (id.). The 12:1+1 special class reportedly employed the Read 180 program to support reading comprehension (id.).<sup>46</sup> According to the parent, the CSE denied her request for 1:1 instruction for English and math and, instead, recommended "the Perceptions classroom" (Tr. p. 1376). The parent's attorney requested profiles of the students in the proposed 12:1+1 special class and, according to the CSE meeting notes, the CSE indicated it would follow up (Parent Ex. U at p. 2). Ultimately, the October 2020 CSE did not make the change to the 12:1+1 special class on the student's IEP (id. at p. 14).<sup>47</sup>

The middle school CSE chairperson testified that the parent "was completely not supportive" of a recommendation for a 12:1+1 special class for ELA (Tr. p. 376). The student's seventh grade special education ELA teacher testified that the 12:1+1 special class for ELA would have offered the student "a more supportive classroom" but that the parent rejected the program (Tr. p. 710). Nevertheless, the teacher testified that the October 2020 IEP included special classes and ICT services, along with program modifications, accommodations, AIS supports, and resource room services that together offered "the most support that would be beneficial" to the student in the LRE (Tr. pp. 710-11).

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<sup>45</sup> Although the IEP stated that the student was successful in a small group ratio of 3:1 it also indicated that the student was receiving speech-language therapy in a group of 2:1 at the time (Parent Ex. U at p. 2).

<sup>46</sup> The parent focuses a great deal of her memorandum of law on whether the Read 180 program was actually available in the 12:1+1 special class or if it had been phased out (see Parent Mem. of Law at p. 8, citing Tr. pp. 803-05). However, since the CSE did not ultimately recommend this class, the appropriateness or availability of the Read 180 program is not at issue.

<sup>47</sup> After the October 2020 CSE meeting, a CSE convened on March 17, 2021 and further amended the student's IEP for the 2021-22 school year (Dist. Ex. 14). The March 2021 CSE reviewed an assistive technology evaluation and developed a COVID-19 safety plan with mask exemptions for the student (Tr. pp. 201-203; Dist. Ex. 14 at p. 1). At that time, a notation was added to the student's IEP that he had received diagnoses of executive function deficits/disorder and autism spectrum disorder, level one, which could interfere with the student's ability to wear a mask at all times (Dist. Ex. 14 at pp. 1-2).

### c. Conclusion

Overall, the evidence in the hearing record shows that the CSEs had information available reflecting that the student made progress during the 2019-20 school year in math and reading (see Tr. pp. 185, 619, 843, 846, 848-49; Parent Ex. L; Dist. Exs. 12 at pp. 1-2, 7; 17 at p. 9) such that recommending a similar program for the 2020-21 school year was appropriate. While the parent more specifically communicated her request that the district use the "Corrective Reading Comprehension Program" with the student leading up to the CSE meetings convened to plan for the student's seventh grade school year (see Parent Exs. QQ; RR), the parent did not provide the CSE with any documentation from the student's private tutor reflecting that he had made progress because due to use of that specific approach or other recommendations suggesting use of that approach with the student from any private or district professionals. Thus, while it is understandable that the parent wished that the CSE would adopt the particular methodology from which she believed the student would receive the most benefit, there was no "clear consensus" before the CSEs that the student required this methodology. Additionally, review of the IEPs developed for the student for the 2020-21 school year shows that the combination of supports, including the special classes, teaching assistant, resource room, and related services, along with accommodations and modifications, were reasonably calculated to enable the student to make progress appropriate in light of his circumstances.

#### 4. 2021-22 School Year—Eighth Grade

During the 2020-21 school year, the parent obtained a private reading evaluation of the student in order to determine the student's level of functioning; the evaluation was conducted on March 20 and March 27, 2021 (see Parent Ex. NN). The evaluator noted the student's diagnosis of "[s]pecific [l]earning [d]isability, [d]yslexia and opined that his weaknesses could be "addressed effectively through specified approaches to teaching that directly involve a systematic sequential diagnostic-prescriptive language training imbedded through direct-explicit cumulative, multisensory scientific Structured Literacy Approach (formerly known as an intensive Orton-Gillingham Approach) by intensively trained teachers/practitioners" (*id.* at p. 8). As set forth below, the June 2021 CSE satisfied its obligation to consider the private evaluation; however, in so considering it, the CSE was not required to adopt the recommendations of the evaluator (*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 v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], *aff'd*, 142 Fed. App'x 9 [2d Cir. July 25, 2005]). Rather, as discussed below, the evidence in the hearing record shows that the CSEs considered the student's needs and recommended supports to address his reading deficits. That the CSEs did not adopt a recommendation identical to the methodology proposed by the private evaluator does not, without more, support a finding that the district failed to offer the student a FAPE.

A CSE convened on June 2, 2021, for an annual review to develop an IEP for the student for the 2021-22 school year (eighth grade) (Dist. Ex. 15 at p. 1). The CSE meeting information notes indicate that the student was kind, polite, thoughtful, and a hard worker who benefited from

the support he received from a teaching assistant with respect to concentration and attention (Dist. Ex. 15 at p. 1).<sup>48</sup> The June 2021 CSE meeting notes reflect the committee's review of the student's performance in science, speech-language therapy, counseling, OT, and assistive technology, along with its consideration of the March 2021 private reading evaluation report (id. at p. 2).

The June 2021 IEP noted that the student was a hard worker and reliable once a routine or expectation was established and his cumulative averages were 77 in ELA, 86 in social studies, 81 in mathematics and 79 in science (Dist. Ex. 15 at p. 7). The IEP stated that the student benefited from routines, visuals, concrete approaches, structure, support, tasks broken down into small steps, and consistent continual prompting throughout instructions (id. at pp. 1, 7). Homework completion was supported by the teaching assistant during study hall and home communication (id. at p. 7). In the classroom, the student continued to present with difficulty sustaining attention, which made learning and practicing new concepts difficult (id.). The IEP indicated that, as a visual learner, the student benefited from organizers, pictures, models, and videos (id.). He required numerous verbal and nonverbal focusing prompts to remain engaged and attentive, and the teaching assistant provided this support throughout whole group, small group, and independent tasks (id.). According to the IEP, the student's concerns regarding health and safety made it difficult for adults to provide him with effective support because they could not get close enough to his papers or computer to monitor his progress and provide visual and verbal prompts, which resulted in the need for additional verbal reassurance, verbal prompting, breaking down of assignments, and wait time that then slowed the student's progress during class time (id. at pp. 7, 12). The student benefited from wait time and repetition to help him understand questions, process, and respond (id. at p. 7). The IEP noted that the student showed some progress in his willingness to participate in class discussions as well as share his background knowledge with the class (id. at pp. 1, 7). The student reportedly struggled with tasks that required him to remember and complete multiple steps as well as on cumulative assessments that required him to recall and make connections between more than one topic (id. at p. 7). He showed mastery at a basic level with recall using rote memory but higher-level questions that required inference, prediction, analysis, or synthesis were extremely challenging for him (id.). With regard to the student's daily living goals, the IEP indicated he was successfully able to tell time to the nearest five minutes, exchange coins up to a quarter, and bills up to 20 dollars to make purchases (id.).

According to the CSE meeting notes, the student was in two different rotating speech-language therapy sessions, individual and small group, which he participated in and he was making progress toward his goals (Dist. Ex. 15 at p. 2).<sup>49</sup> In the group sessions he needed prompting and reminders to stay on task and benefited from learning through conversation and discussion but presented with less interest and engagement with pen and paper tasks (id.). The IEP noted that the student's motivation and interest in an activity affected his performance (id.). The student required

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<sup>48</sup> As previously noted in the March 2021 IEP, the June 2021 IEP also reflected that the student had received diagnoses of executive function deficits/disorder, and autism spectrum disorder, level 1, as well as cough variant asthma treated with medication (Dist. Ex. 15 at p. 11; see Dist. Ex. 14 at p. 1). Due to these medical concerns the student was recommended for scheduled mask breaks (Dist. Ex. 15 at p. 11).

<sup>49</sup> The speech-language pathologist testified that the June 2021 CSE meeting notes summarized the report that she provided to the CSE (Tr. p. 444). She indicated that because the student was not progressing as much as expected, he was receiving one of his group sessions as an individual session (Tr. pp. 444-45).

support to find important information, found main ideas with scaffolding, and utilized a graphic organizer which helped him have a "laser focus in answering questions" (*id.*). According to the IEP, the student had achieved 80 percent mastery on his annual goal directed at using context clues to find meaning and, with respect to his social communication, he was doing "really well" answering questions about rote material but continued to struggle with perspective taking during speech-language sessions (*id.*). Additionally, the June 2021 IEP present levels of performance indicated that the student required teacher prompting to engage in learning and follow along with information on paper (*id.* at p. 7). The IEP stated that the student was making progress with tasks that measured his ability to analyze and make inferences and he was working toward building his skills for isolating important information and putting it together to draw conclusions but continued to need support to close gaps in that area (*id.*). The student responded well to teacher prompting prior to listening tasks, which was required to establish and maintain attention (*id.*). The IEP noted the student was actively working to make progress in developing explanations and benefitted from visual supports that helped him organize his ideas (*id.*). He required support for using context clues to understand word meanings and demonstrated steady but slow progress in this area (*id.*). The student needed additional support to identify and isolate details and independently draw conclusions about their relationships but, as noted in the IEP, he showed continuous growth in skill building activities which tapped into his skills for developing and recalling target vocabulary for concrete and abstract concepts (*id.*). The student continued to need support with the application of word skills for developing and recalling target vocabulary but had made nice progress regarding social communication as he demonstrated the ability to accurately answer questions measuring social inferencing, particularly about more concrete situations (*id.*).

The June 2021 CSE reviewed the March 2021 private reading evaluation obtained by the parent (Dist. Ex. 15 at p. 2; *see* Parent Ex. NN).<sup>50</sup> The June 2020 IEP reflected results from the reading evaluation, which indicated that on the Word Identification and Spelling Test (WIST), the student's spelling abilities were almost at the seventh grade level (6.9), his sound-letter knowledge was below the fifth grade level, his core word identification was at the fifth grade nine month level, and his fundamental literacy index was at the sixth grade level (Dist. Ex. 15 at p. 8). The IEP indicated that the student had relative strengths in spelling irregular words as well as reading irregular words and pseudo-words but weaknesses in the area of reading regular words, spelling regular words, and letter sounds (*id.*). Letter reversals were observed during the assessment (*id.*). On the Gray Oral Reading Test-Fifth Edition (GORT-5) the student's reading rate, accuracy, and fluency were in the below average range and his score in reading comprehension indicated he was at a first grade reading level at that time (*id.*). As reflected in the IEP, the results of the Comprehensive Test of Phonological Processing-Second Edition (CTOPP-2) indicated that the student's strongest area was phonological memory, and it was below average, his phonological awareness was in the very poor range, and his symbolic naming was in the poor range (*id.*). The June 2021 IEP further reflected the reading evaluator's interpretation of the student's results, notably that the student's difficulties in reading stemmed from insufficient active strategies to construct meaning from print, the skills and knowledge to understand how phonemes (speech sounds) were connected to print regarding letter sounds, the ability to encode (spell) regular but unfamiliar words, and the ability to decode regular but unfamiliar words (Dist. Ex. 15 at p. 8; *see*

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<sup>50</sup> At the June 2021 CSE meeting, the parent indicated that the student had been working with a tutor in the corrective reading program since March 2019 (Dist. Ex. 15 at p. 2).

Parent Ex. NN at p. 10). The IEP indicated the student lacked some fundamental elements of the complex reading system and comprehensive phonological processing, including phonological awareness and phonetic decoding (Dist. Ex. 15 at p. 8). According to the IEP, the student was stronger in his ability to read fluently, albeit his performance was below average (id.). Further, the IEP indicated that the student's reading comprehension was very poor, and he needed to know why words were as they were and how to deal with new and unfamiliar advanced word structures (id.). Consistent with the reading evaluator's report, the IEP noted that the student needed to improve and develop skills and knowledge to understand how speech sounds were connected to print regarding letter sounds, phonological processing related to language information, and retrieval of language information (Dist. Ex. 15 at p. 8; see Parent Ex. NN at p. 11). The IEP reflected that, the evaluator concluded that the student required specific interventions, and she recommended that they be provided "through direct-explicit diagnostic-prescriptive scientific sequential cumulative multi-sensory approaches, such as a Structured Literacy Approach (intensive Orton-Gillingham Approach)" (Dist. Ex. 15 at p. 8).

Based on reports from the student's seventh grade special education ELA teacher, report cards, and a progress monitoring report, the June 2021 IEP indicated that, within the special class setting, the student presented with gradual progress (Dist. Ex. 15 at pp. 8-9). The IEP noted that, with support, the student demonstrated skills that were "partially proficient at grade level in mastering the 7th grade curriculum" as measured by his performance on class activities, projects, and assessments using fiction and nonfiction texts (id. at p. 8). The IEP noted that the student's mastery of content area and academic vocabulary was partially proficient (71 percent) but his comprehension measuring analytical and inferential skills using text-based details was below proficient (63 percent) based on classroom assignments and assessments (id.). The IEP indicated that the student's deficits were related to his reading comprehension, language acquisition, and challenges with sustaining attention (id.). The IEP noted that with instructional scaffolding the student was making gradual progress in his ability to correctly identify the theme or central idea in a story (id.). However, he required 1:1 support in order to answer comprehension questions and benefited from teacher assistance utilizing look backs in order to locate information (id.). According to the IEP, when fully focused and engaged, the student was able to answer questions regarding concrete explicit information such as who, what, where, and when but he had difficulty answering implicit questions that required inference, analyzation, or synthesis, of information (id.). The IEP stated that the student was able to memorize vocabulary and perform well on assessments that required him to connect vocabulary terms with their definitions; however, the student struggled with deeper comprehension of vocabulary terms requiring him to identify words in relationship to their antonyms/synonyms or filling in correct terms in a sentence using context clues (id.). The student benefited from being presented with reading materials in both auditory and visual formats but his attention during read alouds varied; when he was engaged, the student demonstrated the ability to make text-to-self connections and connect to characters feelings, responses, and experiences (id.). According to the June 2021 IEP the student benefited from highly differentiated and individualized special education support such as 1:1 prompting and being able to respond after being given limited multiple-choice options rather than open-ended questions (id. at pp. 8-9).

With respect to writing, the June 2021 IEP reflected results from the March 2021 private reading evaluation, as well as information from the student's April 2021 report card and progress monitoring report (Dist. Ex. 15 at p. 9). According to the private evaluation, as memorialized in

the IEP, the results from the Test of Written Language-4 (TOWL-4) indicated that the student's spelling was considered average, and his vocabulary and punctuation were in the low average range (id.). The student's spontaneous writing composite indicated abilities within the average range but his performance in logical sentences was in the very poor range and his performance on the contrived writing composite was in the below average range (id.). The IEP stated that the student's spelling in context appeared to be related to visual memory/memorization instead of knowledge of the phonetic code of the English language (id.). The IEP indicated that March 2021 reading evaluation report recommended the use of direct instruction, and encouragement to use cursive alphabetic letters with correct formation, paper, and pencil position in order to correct his tendency for reversals (id.).

The June 2021 IEP indicated that in the special class setting the student was performing at 71 percent proficiency, with support, which was partially proficient in seventh grade writing skills as measured by his ability to create a claim and support it with evidence on writing assignments and assessments (Dist. Ex. 15 at p. 9). The IEP stated that the student liked to write creatively and share his ideas and was making gradual progress in his ability to write sentences with a variety of vocabulary and punctuation (id.). The student was making gradual progress in his ability to write paragraphs with a clearly stated opinion and supporting facts linking words and a conclusion statement (id.). When responding to expository writing prompts, the student needed highly scaffolded graphic organizers, sentence starters, examples, breakdown of expectations into individual steps, and individual writing conferences in order to ensure that his written responses addressed all components of an assignment's expectations (id.). The student used basic sentence structure and his written responses required 1:1 prompting from one sentence to the next (id.). According to the IEP, the student was using the Chromebook with the Read and Write program to support his writing (id.). The student was able to use voice-to-text, which was sometimes frustrating for him if he had to edit information (id.). The student preferred typing over voice-to-text software or handwriting (id.). The IEP noted that the student worked hard and willingly engaged with adults, responding to their feedback, but needed 1:1 prompting and discussions in order to make revisions (id.).

For mathematics the June 2021 IEP reflected information obtained from a report card and progress monitoring report (Dist. Ex. 15 at p. 9). As noted in the IEP, the student had been effectively using the touch pad mouse to draw numbers, and Tt buttons to type numbers when working in Classkick and Peardeck while building familiarity with a touchscreen Chromebook (id.). He had an 80 percent average in mastering the seventh-grade curriculum based on assessments and application skills with a 57 percent average on cumulative standard-based mathematics assessments, which were reported to be challenging for the student (id.). The IEP stated that the student responded to 1:1 support and interventions provided during testing where he put forth consistent effort (id.). The student performed well on math application skills, maintaining an average of 82 percent, as measured by formative assessments with short quizzes, projects, or in-class activities, and the IEP noted that the student sought help when needed and maintained excellent class participation, attendance, and engagement (id.). The IEP indicated that the student made steady and satisfactory progress toward his IEP mathematics goals and achieved a cumulative average of 85 percent (id.).

The June 2021 IEP documented the parent's concern regarding the student's reading comprehension and fluency development and her request that he receive specific, individualized



instruction to remediate his deficits (Dist. Ex. 15 at p. 10). The IEP noted that a significant contributing factor to the student's access to the curriculum was his difficulty concentrating and sustaining attention in the classroom, regardless of the modality of instruction (id.). The IEP reiterated that the student needed verbal and nonverbal prompts in order to engage in learning activities, watch videos, listen and follow along visually with a story, and respond to visual cues in order to complete tasks (id.). He needed continual 1:1 prompting to focus and engage, as well as 1:1 prompting with repeating, rereading, and breaking down work into individual steps in order for him to complete written responses (id.). He benefited from walking breaks as needed within a set schedule, and visual cues in order to manage health and safety routines, such as using hand sanitizer in the classroom (id.).

The June 2021 IEP included two annual goals for study skills which focused on the student's attention to task and assignment completion and self-regulation during transitioning; two reading goals, the first focused on using reading strategies to locate information, answer questions, and support conclusions, and the second goal to address his ability to identify the central message or theme from a list of options when presented with a story in auditory and visual format (Dist. Ex. 15 at p. 13). The student's seventh grade special education ELA teacher testified that the reading goals were designed to help the student develop specific strategies to support his reading comprehension (Tr. pp. 717-18). The IEP incorporated two writing goals to address the student's writing needs that targeted the student's ability to use assistive technology to correct capitalization, spelling, and grammar, and when given a writing assignment to use strategies to edit, revise, and organize his thoughts in a logical, sequential manner (Dist. Ex. 15 at p. 13). Two mathematics goals focused on the student's ability to evaluate an expression when a variable was given and simplify and solve a two-step equation (id.). Four speech-language goals were included to target the student's needs related to analyzing and making inferences by answering questions about presented information and word meanings, comprehending auditorily presented information by accurately answering questions and discussing topics that have been verbally presented, demonstrating skills for organizing language by using graphic organizers prior to writing, and demonstrating an age appropriate ability to make judgments and communicate appropriately for social interactions with peers (id. at pp. 13-14). Two social/emotional goals focused on developing the student's ability to communicate and interact in a positive manner with peers and fostering and maintaining positive relationships with peers (id. at p. 14). In addressing the student's motor needs the June 2021 IEP included two goals to address the student's need to improve his self-regulation skills (id.).

The June 2021 CSE continued the programming recommendations from the 2020-21 school year, including the 15:1 special class for English and math, ICT services for science and social studies, daily resource room services, adapted physical education, and full-time 1:1 teaching assistant support (compare Dist. Ex. 15 at pp. 15, 17, with Dist. Ex. 14 at pp. 14, 16). For related services, the June 2021 CSE shifted from 60 yearly sessions of group (3:1) speech-language therapy to 30 yearly sessions each of individual and 30 yearly sessions of group (4:1) speech-language therapy, specified that the 25 annual sessions of OT would be in a small group with a 2:1 ratio, and changed the counseling services from five individual and 15 group sessions per year to ten yearly sessions each of individual and group services (compare Dist. Ex. 15 at p. 15, with Dist.

Ex. 14 at p. 14).<sup>51</sup> The CSE recommended the continuation of most classroom and testing accommodations and assistive technology devices and services, with the exceptions of close captioning for videos, movies, and films during Google meets and the COVID-19 safety plan, and additionally recommended a medical plan to provide for possible treatment for asthma exacerbation and mask breaks and, for assistive technology added an adaptive mouse (compare Dist. Ex. 15 at pp. 15-17, 19, with Dist. Ex. 14 at pp. 15-18). The June 2021 CSE recommended a 12-month program for July and August 2021 consisting of a 12:1+1 special class for three hours per day and a 5:1 special reading class twice a week for an hour and thirty minutes each session (Dist. Ex. 15 at p. 18).

The middle school CSE chairperson testified that the committee reviewed the progress the student was making in the different areas and discussed that the change to a full-time teaching assistant was working out well for the student as her role was clearly defined and she believed it played a role in the student's progress (Tr. pp. 205-06). The CSE chairperson indicated that the Read and Write program that had been added was used in the resource room and it was supporting the student (Tr. pp. 206-07). The student's seventh grade special education ELA teacher testified that as of the date of the CSE meeting the student was making progress in his seventh grade program with the supports he was provided (Tr. p. 712). The special education teacher indicated that the special class for ELA in eighth grade would take the core curriculum and break it down, chunk it, provide the graphic organizers, and the scaffolded notes the student required (Tr. pp. 718-19). She also stated that the eighth grade ELA class would provide differentiation in terms of building the student's skills related to understanding theme and central message and provide a slower pace, with smaller chunks, and highly scaffolded support embedded within the structure of the class (Tr. pp. 718-19). The teacher testified that the June 2021 IEP was the "best and most support" that the district could provide the student in the LRE he was in (Tr. p. 721). The student's seventh grade resource room teacher testified that the June 2021 IEP continued the seventh grade program into eighth grade because the student was demonstrating success (Tr. p. 873).

With respect to the March 2021 private reading evaluation, the CSE chairperson recalled that the student was working on a corrective reading program at home, and they reviewed the evaluation that the parent shared (Tr. p. 209). She indicated that the report showed the student presented with a relative strength in decoding, reading fluency below the average range, and a deficit in reading comprehension, which was consistent with the district's understanding of the student's needs (Tr. pp. 209-10). Regarding the June 2021 CSE's program recommendation, she indicated that no one asked for a different program or for the student to be placed out of district (Tr. pp. 213, 216-17). She also testified that, with respect to the 12-month services, the parent asked if the reading would be or could be provided by someone trained in the Orton-Gillingham approach, to which the CSE chairperson responded that the district did not prescribe the methodology (Tr. p. 217). However, the CSE chairperson told the parent that she would look to

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<sup>51</sup> The June 2021 IEP reflected that the student would get group and individual speech-language therapy sessions because during the student's seventh grade year, his speech-language pathologist testified that the student showed more ability when she worked with him 1:1 to address his speech-language goals (Tr. p. 461). However, she testified that it was more effective to address the student's social language needs in a group (Tr. p. 462). She was able to teach explicitly in the 1:1 session, but the group was crucial for targeting the goals for social skills and building the student's independence for employing the strategies that were being built in the 1:1 session (Tr. pp. 462-63).

see if there was anyone in the district certified in Orton-Gillingham and there was not (Tr. pp. 217-18).

In an email addressed to the middle school CSE chairperson dated June 11, 2021, the parent inquired whether the district had a teacher trained in Orton-Gillingham for the summer 2021 (Parent Ex. OO at p. 5). In response, the CSE chairperson, summarized the June 2021 CSE's recommendations for the student for the summer and indicated that, as discussed at the meeting, the reading support would be "small group multi sensory reading (5:1)" and that the district did not "prescribe to a specific methodology, such as Orton Gillingham" and did not have a teacher trained in Orton Gillingham available for the summer program (*id.* at pp. 3-5). In response to further inquiry from the parent, the CSE chairperson also confirmed that the reading support would be provided in a group, not 1:1, and that the teacher had certification in the Wilson reading program (*id.* at p. 1). While the parent seems to argue that this demonstrates that the district inappropriately intended to provide the student with instruction using Wilson, the email exchange does not support this conclusion. Instead, the CSEs stances have been consistent that the student's teachers would be provided the discretion to choose a suitable methodological approach to address the student's needs.

The parent points to the testimony of the eighth grade special education teacher regarding offerings at the district middle school to support her argument that the district did not have an appropriate program to offer the student (*see* Parent Mem. of Law at p. 4). The eighth grade special education teacher testified that the middle school offered special classes for ELA, as well as "separate sections" for the Wilson program which would consist of "an additional class built into [a student's] schedule" (Tr. p. 805). However, she testified that the student would not have benefited from the Wilson class since his deficit was not in the area of decoding (*id.*). She testified that for students with delays in comprehension, there was no separate class but, instead, the needed support was "built into the special class program" (Tr. p. 806). She further indicated that neither Wilson nor Orton-Gillingham would remediate a deficit in reading comprehension (Tr. p. 802).

The parent opines that the district should have recommended "tailored instruction" to meet the student's needs similar to that offered to students with decoding weaknesses. While the district did not specify a methodology for the student, there was no consensus that a particular methodology was necessary (*A.M.*, 845 F.3d at 544-45). The June 2021 CSE did have the recommendation for a structured literacy approach / Orton-Gillingham set forth in the March 2021 private reading evaluation.<sup>52</sup> However, the IHO accorded the opinions of the private reading evaluator less weight than judgments of district staff and generally found the private reading evaluator to lack credibility and, in so finding, casted down on the validity of her recommendations (*see* IHO Decision at p. 49). Generally, district staff may be afforded some deference over the views of private experts (*see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; *J.E. & C.E. v. Chappaqua Cent. Sch. Dist.*, 2016 WL 3636677, at \*16 [S.D.N.Y. June 28, 2016], *affd.*, 2017 WL 2569701 [2d Cir.

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<sup>52</sup> The private reading evaluator conducted a subsequent evaluation of the student in December 2021 and January 2022 (Parent Ex. BB); however, as that evaluation post-dates the relevant June 2021 CSE meeting for the 2021-22 school year, it may not be relied upon to undermine the appropriateness of the CSE's recommendations (*see C.L.K.*, 2013 WL 6818376, at \*13).

June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at \*6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]). Further, an SRO generally gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at \*16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this instance, as discussed above, a review of the hearing record does not compel such a conclusion, but rather supports the IHO's weighing of the evidence.

While the June 2021 CSE did not specify a methodology, the instruction recommended by the June 2021 CSE was tailored to address the student's needs insofar as it consisted of annual goals targeting the student's specific areas of weakness such as comprehension and mathematics and special class programming with instruction tailored by delivering the curriculum broken down and scaffolded at a slower pace with supports and accommodations specifically designed to address the student's attention deficits. Based on the foregoing, there is insufficient basis in the hearing record to disturb the IHO's determination that the June 2021 IEP offered a program reasonably calculated to enable the student to make progress in light of his circumstances.

## 5. Summary

Contrary to the parent's allegation that the CSEs offered the student the same programming every year despite the student's lack of progress, the foregoing evidence shows that the CSEs modified the program recommendations frequently in a manner responsive to the student's needs and the parent's concerns. While the core programming included special classes for ELA and math and ICT services for science and social studies, the remaining aspects were in flux and the CSEs added supports and accommodations including support from an aide or teaching assistant and resource room services (Parent Ex. U at pp. 14-16; Dist. Exs. 4 at pp. 11-12; 5 at pp. 12-14; 7 at pp. 12-14; 8 at pp. 10a-11; 10 at pp. 12-14; 11 at pp. 14-16; 12 at pp. 12-15; 13 at pp. 13-15; 14 at pp. 14-17; 15 at pp. 15-18). Moreover, the evidence in the hearing record shows that, while the student's progress was slow, particularly in reading, he did demonstrate improvement, achieving or making gradual progress towards annual goals, and achieving passing grades each year (Dist. Exs. 16-17).

The parent points to the student's difficulties with attention to support her view that the student required instruction in a 1:1 setting. In particular, the parent notes testimony and evaluative information indicating that the student would have an easier time attending in a 1:1 setting (see Parent Mem. of Law at pp. 1, 25, citing Tr. pp. 733, 874-75); however, reviewing the portions of the transcript cited, the teachers testified that the student relied on the teaching assistant in order to focus and sustain attention and that, with modifications, the student was able to engage (Tr. pp. 733, 875-76). There is no dispute that the student benefited from the aide or teaching assistant support, as well as the several accommodations designed to help him sustain attention. This does

not support the parent's view that the student required 1:1 instruction. Further, the evaluative information cited by the parent (i.e., the January 2014 neuropsychological evaluation, the November 2017 neurodevelopmental evaluation, and the March 2021 private reading evaluation) "do not specify the nature, duration, or extent of teacher support required, or explain why other personnel . . . would be unable to offer sufficient support" (see J.R. v New York City Dep't of Educ., 748 Fed. App'x 382, 386 [2d Cir. Sept. 27, 2018] [upholding an SRO's opinion with request to the adequacy of 1:1 support for a student from "non-teacher personnel, as opposed to 1:1 teacher support"]; see Parent Mem. of Law at p. 25; see also Parent Ex. NN; Dist. Exs. 24; 34). Thus, there is insufficient basis in the hearing record to conclude that the supports set forth in the IEPs, including the recommendations for an aide or teaching assistant and resource room services along with the recommended accommodations and strategies, were insufficient to address the student's attention deficits or that the student required 1:1 instruction in order to receive an educational benefit.

With respect to methodology, the shifting of the parent's proposals—from Wilson, to the "Corrective Reading Comprehension Program," to Orton-Gillingham (see Tr. pp. 1352-54; Parent Ex. V at p. 2; LL at pp. 2-3; MM at p. 8; QQ at pp. 1, 3; RR at p. 2; Dist. Ex. 6 at p. 2)—tends to support the CSEs' decisions to avoid specifying a particular methodology on the student's IEPs. As discussed above, there was no clear consensus that the student required a particular methodology (A.M., 845 F.3d at 544-45). Further, the evidence in the hearing record does not support a finding that the student made noteworthy progress via the methodologies utilized in the private tutoring services such that it would trigger the CSEs' responsibility to recommend that the student receive instruction using that particular approach in the public school setting.

While it is understandable that the parent is frustrated by the student's slow progress, the CSEs' recommendations over time were designed to address the student's areas of weakness and produce progress based on the information that was in front of them at the time the decisions were made. Review of the hearing record, as a whole, shows that the district responded to the information available to it about the student's needs and the student's learning profile. Thus, based on the foregoing, the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2018-19 through the 2021-22 school years.

### **C. June 2021 CSE Composition**

There is one remaining issue to discuss, relating to the composition of the June 2021 CSE. The IHO did not explicitly find that a school psychologist was a required member of the June 2021 CSE and, instead, found that, although a school psychologist did not attend the CSE meeting, this did not amount to a denial of a FAPE (IHO Decision at pp. 49-50). On appeal, the parent asserts that the IHO erred in finding that the lack of a school psychologist at the June 2021 CSE meeting did not result in a denial of a FAPE, arguing that a school psychologist was necessary as a "service provider," and that, given the lack of attendance of a school psychologist, it was unclear from what source the CSE obtained information about the student's social/emotional needs. The parent also questions the basis for the change in the counseling recommendation made at the June 2021 CSE meeting without input from "the person who implemented this service." The district argues that the CSE was a subcommittee that was not reviewing a new psychological evaluation of the student or considering the student for a more restrictive program and, therefore, was properly composed.

The IDEA requires a CSE to include the following members: the parents; one regular education teacher of the student (if the student was, or may be, participating in the regular education environment); one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a district representative; an individual capable of interpreting instructional implications of evaluation results; at the discretion of the parent or district, other persons having knowledge or special expertise regarding the student; and if appropriate, the student (see 20 U.S.C. § 1414[d][1][B]; see Educ. Law § 4402[b][1][a]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). While not explicitly required in the IDEA, State law and regulation also requires that a CSE include a school psychologist (Educ. Law § 4402[b][1][a][iv]; 8 NYCRR 200.3[a][1][i]; see 20 U.S.C. § 1414[d][1][B]).

However, State law and regulation provide that a school district may appoint a subcommittee on special education (CSE subcommittee) (Educ. Law § 4402[b][1][d]; 8 NYCRR 200.3[c]). Under applicable State law and regulations, a CSE subcommittee has the authority to perform the same functions as a CSE, with the exception of instances in which a student is considered for initial placement in a special class, or a student is considered for initial placement in a special class outside of the student's school of attendance, or whenever a student is considered for placement in a school primarily serving students with disabilities or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4]). A CSE subcommittee need only include a school psychologist as a member if a new psychological evaluation is being reviewed or a change to a more restrictive program option is being considered (Educ. Law § 4402[b][1][d]; 8 NYCRR 200.3[c]).

The meeting notes attached to the June 2021 IEP indicate that a subcommittee on special education met on June 2, 2021, to conduct the student's annual review (Dist. Ex. 15). Attendees at the June 2021 CSE meeting included the middle school CSE chairperson, the student's seventh grade special education ELA teacher, the student's seventh grade regular education science teacher, the student's speech-language pathologist, the student's occupational therapist, two social workers who worked directly with the student during seventh grade, a guidance counselor, an assistive technology specialist from a Board of Cooperative Educational Services (BOCES) who had evaluated the student in February 2021, the student, and the parent (Dist. Ex. 15 at pp. 1-2; see Tr. pp. 153; 396; 683-84; 1648; Dist. Ex. 43 at p. 1). The CSE subcommittee did not review a new psychological evaluation of the student and did not consider a more restrictive program for the student (see generally Dist. Ex. 15 at pp. 1-3).<sup>53</sup> Therefore, the district is correct that a school psychologist was not a required member of the CSE subcommittee.

Even if a school psychologist had been a required member, there is no basis in the hearing record to disturb the IHO's finding that the absence of a school psychologist did not support a finding that the district denied the student a FAPE. As noted, the parent's main argument on appeal relates to her view that a school psychologist would have provided input about the student's counseling services.

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<sup>53</sup> Prior to the June 2021 CSE subcommittee meeting, the last psychological evaluation of the student was conducted in September 2019 (Dist. Ex. 29) and was considered at CSE (not CSE subcommittee) meetings held on October 31 and November 8, 2019 (Dist. Exs. 9-10).

During seventh grade, leading up to the June 2021 CSE meeting, the student had been receiving 15 30-minute sessions of group psychological counseling per year (i.e., approximately one session every other week) and five 30-minute sessions of individual counseling per year (i.e., approximately one session every other month) (Parent Ex. U at p. 14; Dist. Exs. 12 at p. 13; 13 at p. 13; 14 at p. 14). With respect to the student's social/emotional needs, the June 2021 CSE meeting notes and present levels of performance reflect that the social worker shared with the committee that the student responded well to feedback, had been receptive to mediation and handled peer conflicts with support, and had demonstrated more empathy toward peers in group counseling sessions (Dist. Ex. 15 at pp. 2, 10). In addition, the social worker shared that, in group counseling sessions, the student had made progress with self-regulation, and that, in individual counseling sessions, the student had improved his self-advocacy skills and would check in with the other social worker who attended the CSE meeting if he needed advice problem-solving a situation (*id.* at pp. 2, 10-11). The IEP reflected the social workers' view that the student "would benefit from ongoing counseling to strengthen his social skills, his responses to peer communication, and to strengthen his self confidence" (*id.* at p. 11). While the parent argues that "[i]t is unclear who contributed" the input in the IEP (Parent Mem. of Law at p. 27), the present levels of performance identify after each paragraph the source of the information contained therein; in this case, the IEP identified the names of the two social workers who attended the CSE meeting (Dist. Ex. 15 at pp. 10-11).

The June 2021 CSE recommended that the student receive 10 30-minute sessions per year of group psychological counseling services and 10 30-minute sessions per year of individual psychological counseling services (Dist. Ex. 15 at p. 15). Relative to what the student was receiving during seventh grade, the recommendation represents the same number of yearly sessions of counseling services, but an increase in individual services and a decrease in group services (compare Dist. Ex. 15 at p. 15, with Dist. Ex. 12 at p. 13). While the hearing record does not articulate the basis for the shift to more individual sessions, the parent has not argued that the change was inappropriate.

Based on the foregoing, the evidence in the hearing record shows that the CSE had input from the student's counseling provider at the time of the CSE meeting, namely the social worker, thereby undermining the parent's argument that the CSE lacked information that could have only been provided by a school psychologist as a "service provider" of the student's counseling services (Dist. Ex. 15 at p. 2). In addition, the parent has made no allegation in this matter that the June 2021 IEP inaccurately described the student's social/emotional needs or included inappropriate recommendations for counseling services (see generally Dist. Ex. 1). Thus, there is no basis in the hearing record to find that the lack of a school psychologist at the June 2021 CSE meeting constituted a procedural violation or, even if it did, that such a violation significantly impeded the student's right to a FAPE, impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]).

## **VII. Conclusion**

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2018-19, 2019-20, 2020-21, and 2021-22 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether the

private reading instruction/tutoring that the student received was appropriate for the period of March 2019 through the 2021-22 school year or whether Winston Prep was an appropriate unilateral placement for the student for summer 2021 (Burlington, 471 U.S. at 370). It is also unnecessary to consider other forms of relief sought by the parents.

**Dated:**            **Albany, New York**  
                         **September 1, 2022**

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**