



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-021

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

Appearances:

Guercio & Guercio, LLP, attorneys for petitioner, by Frank G. Barile, Esq.

Law Offices of H. Jeffrey Marcus, PC, attorneys for respondent, by H. Jeffrey Marcus, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) daughter for the 2018-19 and 2019-20 school years were not appropriate. The parent cross-appeals from those portions of the IHO's decision which found that the educational program and services the CSE recommended for the student for the 2017-18 school year were appropriate and failed to grant her requested relief. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The hearing record reflects that the student has received diagnoses of a specific learning disorder with impairment in reading (dyslexia), specific learning disorder with impairment in written expression, and specific learning disorder with impairment in mathematics, as well as an attention deficit hyperactivity disorder (ADHD), combined type (Parent Ex. H at p. 8). At the time of the impartial hearing, the student was approaching 13 years old and had been determined eligible

by the CSE for special education as a student with a learning disability (see Dist. Ex. 50 at p. 1).¹ The student's full scale IQ of 100 indicated cognitive functioning in the average range as determined by a November 2017 administration of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V), although more recent administration of the same measure in May 2019 indicated a full scale IQ of 87, in the low average range of functioning (Parent Ex. H at p. 12; Dist. Ex. 68 at pp. 2, 3).

The student began receiving response to intervention (RtI) services in reading and math during kindergarten (2011-12 school year) (Parent Ex. C at p. 1). After struggling academically from first grade through third grade (2012-13 through 2014-15 school years), the parent sent a letter to the district dated March 3, 2015, requesting that it conduct a psychoeducational evaluation of the student "together with appropriate testing for learning disabilities" based on the recommendations of the student's developmental behavioral pediatrician ("developmental pediatrician") (id. at pp. 1-2; see Dist. Ex. 66 at p. 2).² Subsequently, the district conducted a psychoeducational evaluation of the student in March 2015 (Dist. Ex. 63). In addition, based on the recommendation from the student's developmental pediatrician, the parent obtained a private speech-language pathology assessment on March 24, 2015 (Dist. Ex. 64). The district also conducted a speech-language evaluation on May 13, 2015 (Dist. Ex. 65). The student was first found eligible for special education as a student with a learning disability in May 2015 (Tr. pp. 21, 759; see Dist. Ex. 65 at p. 1).

Based on the recommendation from the student's developmental pediatrician, the parent obtained a private neuropsychological evaluation dated July 6, 2016 (Dist. Ex. 66). On September 21, 2016, a CSE convened at the parent's request to review the evaluation (Tr. pp. 27-30; see Dist. Exs. 2; 4 at p. 1).³ Finding the student remained eligible for special education and related services as a student with a learning disability, the September 2016 CSE recommended that the student continue to receive integrated co-teaching (ICT) services in English language arts (ELA) (five 90-minute sessions per week) and math (five 60-minute sessions per week), along with supplementary aides and services/program modifications/accommodations (Dist. Ex. 2 at pp. 1, 9).⁴

In an email to the district dated March 19, 2017, the parent indicated that she was concerned with the student's lack of progress and requested that the CSE convene in order to discuss "making some changes in [the student's] IEP" (Dist. Ex. 76 at p. 1). The parent also requested that the

¹ The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

² The parent also attached the diagnostic impressions and recommendations from the student's developmental pediatrician to her request (Parent Ex. C at pp. 1-2).

³ Although not indicated in the September 2016 IEP, the CSE meeting minutes indicated that the student would be set up to participate in the "Reading Horizons" program, which is a building level support for reading (Dist. Ex. 4 at p. 2; see Tr. pp. 31-33). The minutes also reflected that the student would "possibly get pulled out for 'Do the Math,'" which was another building-level program "being used by" the district's academic intervention services (AIS) teacher (Dist. Ex. 4 at p. 2; see Tr. p. 34).

⁴ A subcommittee of the CSE convened on November 16, 2016 and recommended a continuation of the same services (compare Dist. Ex. 9 at p. 9, with Dist. Ex. 2 at p. 9).

director of pupil personnel services, a speech-language pathologist, and a reading specialist attend the CSE meeting (id.). On March 24, 2017, a subcommittee of the CSE convened and recommended that the student continue to receive ICT services in ELA and math and also recommended a push-in reading program for 30 minutes per day in a group of five, which was reflected in the student's IEP (Dist. Ex. 15 at p. 9). The CSE also agreed to conduct a speech-language evaluation of the student (Dist. Ex. 17 at p. 2).

The district conducted a speech-language evaluation on April 10, 2017 (Dist. Ex. 67). On May 11, 2017, a subcommittee of the CSE convened to review the April 2017 speech-language evaluation (Dist. Ex. 24 at p. 1). The May 11, 2017 CSE subcommittee recommended the same program as the March 2017 IEP but modified the student's IEP to include daily 10-minute speech-language consultations to address the student's phonemic awareness weaknesses (Dist. Ex. 22 at pp. 9-10).

On May 23, 2017, a CSE convened to conduct the student's annual review and develop an IEP for the 2017-18 school year (sixth grade) (see Dist. Exs. 29; 31 at p. 1). The May 2017 CSE recommended ICT services in ELA, math, social studies, and science, consisting of five 42-minute sessions per week in each subject area, as well as supplementary aides and services/program modifications/accommodations (Dist. Ex. 29 at pp. 9-10). In addition, the May 2017 CSE recommended one 15-minute speech-language consultation per month with the teacher in order to address the student's phonemic awareness needs (id. at p. 10). The May 2017 CSE meeting minutes indicated that the student would receive either "Read 180" or "System 44" during the 2017-18 year (Dist. Ex. 31 at p. 1).

On November 16, 2017, the district conducted a psychoeducational evaluation of the student as part of the mandatory three-year reevaluation (Dist. Ex. 68). On March 15, 2018, the district conducted an educational reevaluation of the student (Dist. Ex. 69).

On April 25, 2018, a CSE convened to conduct the student's annual review and develop an IEP for the 2018-19 school year (seventh grade) (see Dist. Ex. 36; 38 at p. 1). The April 2018 CSE continued to recommend ICT services in ELA, math, social studies and science but discontinued the monthly speech-language consultation services (compare Dist. Ex. 36 at p. 7, with Dist. Ex. 29 at p. 7). A CSE convened on September 25, 2018 to discuss the student's dyslexia diagnosis and programs or services that might benefit the student but the CSE meeting was "tabled" so that the parent could get more information from the student's developmental pediatrician about his recommendation for language-based therapy (Dist. Exs. 91; 92; see Tr. pp. 266-67, 902-06; Dist. Ex. 87 at pp. 2-3).

A subcommittee of the CSE convened on October 10, 2018 to discuss the student's struggle with academics and work avoidance behavior (Dist. Exs. 43; 45 at p. 1). The October 2018 CSE continued to recommend ICT services in ELA, math, social studies, and science and made no changes to the student's recommended program (compare Dist. Exs. 43 at p. 7, with Dist. Ex. 36 at p. 7; see Dist. Exs. 46 at p. 1; 47). The October 2018 CSE included a definition of dyslexia on the October 2018 IEP at the parent's request (Dist. Exs. 43 at pp. 4-5; see Tr. pp. 102-104). According to the meeting minutes, the parent expressed concern that the student didn't "understand/comprehend what she read[]" and exhibited a growing frustration with school work

(Dist. Ex. 45 at pp. 2, 3). The parent expressed that she wanted the student to receive special instruction and shared with the CSE information about a few programs that addressed dyslexia, including Lindamood-Bell (id. at pp. 1, 3).

On February 19, 2019, a CSE convened to conduct the student's annual review and develop an IEP for the 2019-20 school year (eighth grade) (see Dist. Exs. 50; 52 at p. 1). The February 2019 CSE continued to recommend ICT services in ELA, math, social studies and science (compare Dist. Ex. 50 at p. 7, with Dist. Ex. 43 at p. 7). In addition, the February 2019 CSE tracking form indicated that the student's diagnosis of dyslexia would be reflected on the February 2019 IEP (Dist. Ex. 53 at p. 1; see Dist. Ex. 50 at p. 4).

On March 12, 2019, the student underwent testing by Lindamood-Bell (Parent Ex. G). The parent also obtained a private updated neuropsychological assessment of the student, which was conducted on May 16, 2019 (Parent Ex. H).

A. Due Process Complaint Notice

In an amended due process complaint notice dated August 1, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) "since at least May 2017" (Parent Ex. B at pp. 1, 10).⁵

First, the parent generally asserted that the district committed procedural violations by "fail[ing] to adhere to the timelines for evaluation of the student, convention of CSEs, and implementation of IEPs," as well as by failing to convene properly composed CSEs, provide the parent with prior written notices, and obtain board approvals for and provide the parent with copies of the student's IEPs in a timely manner (Parent Ex. B at p. 10).

Next, the parent asserted that the May 2017, April 2018, and February 2019 CSEs predetermined the student's programs by failing to conduct sufficient evaluations, "adopt the recommendations of outside evaluators," or recommend appropriate supports or services (Parent Ex. B at pp. 9-10). "For all relevant times," the parent alleged that the district conducted insufficient evaluations of the student (id. at p. 7). In particular, the parent alleged that the district failed to conduct a neuropsychological evaluation by July 2018 as recommended by the 2016 neuropsychological evaluation report (id.). The parent also alleged that the district failed to conduct assistive technology, central auditory processing, and occupational therapy (OT) evaluations (id.). Moreover, the parent indicated that, despite "the increasing severity of [the student's] academic needs," the district failed to reconvene the CSE or consider relevant information as requested by the parent (id. at p. 10).

With respect to the May 2017, April 2018, and February 2019 IEPs, the parent alleged that the IEPs all included statements of the student's needs that were "inaccurate, insufficient, and/or obfuscatory" and minimized the severity of the student's needs (Parent Ex. B at pp. 8-9). The parent outlined specific examples of standardized test results that she argued were insufficiently

⁵ The parent's original due process complaint notice was dated May 22, 2019 (see Parent Ex. A). The district submitted a response dated June 3, 2019 (see Dis. Ex. 101).

reported in the IEPs and alleged that the CSEs failed to reflect the student's performance on State assessments (*id.*). The parent argued that the May 2017 and April 2018 IEPs failed to state the student's dyslexia diagnosis and that, although the February 2019 IEP identified the student's diagnosis, it still failed "to state [the student's] dyslexia-specific needs" (*id.* at p. 9). The parent further alleged that the IEPs included inadequate annual goals that were not aligned with the student's needs, were "carry-overs from prior IEPs," and/or which could not be objectively measured (*id.*). In addition, the parent alleged that the IEPs "fail[ed] to provide appropriate placements, supports, and services, and/or inappropriately offer[ed] no related services" and that the CSEs failed to amend the student's IEPs "to provide appropriate supports and remediation despite clear evidence of her failure to make meaningful progress" (*id.* at pp. 8, 9, 10).

For relief, the parent requested that the district be required to fund neuropsychological, central auditory processing, assistive technology, and OT independent educational evaluations (IEEs), as well as fund the costs of any further evaluations that may be recommended by the evaluator who conducts the neuropsychological IEE (Parent Ex. B at p. 11). The parent further requested that the district be required to fund the costs incurred by the parent associated with the evaluation and consultation provided by Lindamood-Bell (*id.*). Next, the parent sought an order requiring the district to reconvene the CSE to develop an appropriate IEP, incorporate the recommendations made by the requested neuropsychological IEE, and include the 14 to 16-week training program recommended by Lindamood-Bell (*id.*). In addition, the parent requested that the district be required to fund the 14 to 16-week training program recommended by Lindamood-Bell (*id.*). Finally, the parent sought compensatory education and services to remedy the district's failure to offer the student a FAPE since May 2017 (*id.*).

In a response dated August 12, 2019, the district set forth an explanation of why the February 2019 CSE proposed or refused to take the actions raised in the parent's amended due process complaint notice, a description of other options considered by the February 2019 CSE and the reasons why those options were rejected, a description of each evaluation, record, or report relied upon by the February 2019 CSE, and a description of factors relevant to the CSE's proposal or refusal (*see* Dist. Ex. 102 at pp. 2-4). The district then generally denied the parent's allegations as set forth in the amended due process complaint notice and asserted that the district offered the student a FAPE in the LRE for the school years at issue (*id.* at pp. 4-12). The district further alleged that any allegations raised by the parent relating to events occurring prior to the 2017-18 school year were barred by the applicable statute of limitations (*id.* at pp. 6, 11).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on August 27, 2019, which concluded on October 17, 2019, after five days of proceedings (*see* Tr. pp. 1-1071).⁶ In a decision dated January

⁶ According to the IHO's decision, the IHO held one or more prehearing conferences (*see* IHO Decision at p. 12); however, the hearing record does not include any summaries or transcripts of the prehearing conference(s). The IHO and the parties are reminded that State regulation requires that a "transcript or a written summary of the prehearing conference[s] shall be entered into the record by the [IHO]" (8 NYCRR 200.5[j][3][xi]).

12, 2020, an IHO found that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years (IHO Decision at p. 24).⁷

Initially, regarding the "procedural violations" alleged by the parent, the IHO found that the claim that the district denied the parent the opportunity to meaningfully participate in the development of the student's IEPs was "without merit" (IHO Decision at p. 11). The IHO noted that although the parent "ha[d] not receiving everything that she wanted for her child," the district had acceded to several of her requests (*id.* at p. 12). Further, the IHO found that, although the CSE had not adopted all the recommendations of the private evaluations, it was only required to consider the private evaluations (*id.*).

Next, as relevant to all school years at issue, the IHO found that the district delivered several "building level services" to the student during the school years in question that were not listed on the student's IEP, including Reading Horizons, Math 180, Read 44, and Read 180 (IHO Decision at p. 10). The IHO indicated that the IEPs did not have to set forth methodology and, moreover, that there was no dispute that the student received the services and that the services were discussed at "the IEP meeting" with the parent (*id.* at pp. 10-11). Accordingly, the IHO found that the "failure to list these services on the IEP [wa]s not itself a FAPE violation" (*id.* at p. 11).

With specific respect to the May 2017 IEP, the IHO found that the recommendations for ICT services with "significant accommodations and modification[s]," including the addition of "reading instruction and support, as well as . . . math support" offered the student a FAPE for the student's 2017-18 school year (IHO Decision at p. 16).⁸

However, the IHO found that the April 2018 and February 2019 IEPs developed for the student's 2018-19 and 2019-20 school years denied the student a FAPE (IHO Decision at pp. 16, 24). The IHO indicated that there was "a vast difference in opinion regarding [the] [s]tudent's progress over the years" and "differing interpretations" of lexile scores (*id.* at pp. 11, 13-15). The IHO found that, although the "district made a concerted effort to address [the] [s]tudent's needs" and that the student made "some minimal progress," the "objective test scores" reflected that the student had made little progress over the course of "the last two years" (*id.* at pp. 11, 13-16). While acknowledging that the February 2019 CSE could not have had lexile scores from spring 2019, the IHO nonetheless found that the scores demonstrated that the student had "stagnat[ed] during these school years" (*id.* at p. 15). The IHO noted the district's "more subjective" reports of the student's progress but found that none of the district witnesses could explain the student's "lack of growth over time," which the IHO indicated was demonstrated by the lexile scores and "other statewide assessments," as well as by testing conducted by the private neuropsychologist and Lindamood-

⁷ The IHO's January 12, 2020 decision was missing pages 5 and 10. Subsequently, on January 20, 2020, the IHO issued an "amended" decision that included the missing pages (*compare* Jan. 12, 2020 IHO Decision, *with* Jan. 20, 2020 IHO Decision). As the January 20, 2020 amended decision corrected omission of pages—an amendment that was clerical in nature—citations to the IHO's decision herein shall be to the pages as numbered in the January 20, 2020 decision.

⁸ In addition, the IHO noted that the district had properly reconvened a CSE to consider the private neuropsychological evaluation (IHO Decision at p. 16). In this observation, it would seem that the IHO was referring to the September 2016 CSE (*see* Tr. pp 28-30, 480-82; Dist. Exs. 2; 4 at p. 1).

Bell, which was available to the CSE(s) (id. at pp. 15-16). Based on the district's erroneous "interpretation of standardized test results" and failure to take into account other objective measures of the student's progress, the IHO found that the CSEs had incorrectly identified the student's present levels of performance in the IEPs, which, in turn, impacted the appropriateness of the annual goals and recommendations in the IEPs, thereby denying the student a FAPE for the 2018-19 and 2019-20 school years (id. at p. 16).

Turning to relief, the IHO first addressed the parent's request for the costs of the student's attendance at Gow as compensatory education (IHO Decision at pp. 18). The IHO indicated that the relief sought was unlike tuition reimbursement for a unilateral placement and seemed to treat it more akin to a request for direct funding of tuition and/or prospective placement (id. at pp. 19-20). The IHO found that Gow was appropriate to address the student's dyslexia and language-based learning disability (id. at p. 18). Notwithstanding the appropriateness of Gow, the IHO indicated that an award of tuition as compensatory education was not warranted under the circumstances because the parent did not request nonpublic school placement in her original or amended due process complaint notices and, in any event, the relief was not appropriate (id. at pp. 19-20). Acknowledging that she had "agreed to consider" awarding Gow as relief,⁹ the IHO nonetheless found that "there [wa]s no apparent reason for [the] [p]arent to omit the request from her" original and amended due process complaint notices since the parent had visited Gow in August 2019, the student had been accepted into the program, and, although the parent testified she did not enroll the student because she could not afford the tuition, the parent did not submit other evidence regarding her financial status and a witness from Gow testified that financial aid could have been available (id. at p. 19). Moreover, as related to a request for the CSE to prospectively place the student in Gow, the IHO found that the parent never asked the CSE to consider a nonpublic school placement for the student (id.). Based on the foregoing, the IHO denied the parent's request for the costs of tuition at Gow (id. at p. 20).

Next, the IHO turned to the parent's request for a program from Lindamood-Bell consisting of either the 14 to 16-week training program (delivered for four hours per day) or the remote 1:1 program (delivered for two to three hours per day) (IHO Decision at pp. 20-22). The IHO indicated that the parent requested the training program at the October 2018 CSE and that, while the district indicated that it could not fund the private program, it did arrange for a teacher to complete training to provide instruction to the student using "Seeing Stars," a reading program developed by Lindamood-Bell (id. at p. 20). The IHO acknowledged the parent's concern that the training of the district teacher would be insufficiently "vigorous" and incomplete since "Seeing Stars" was just one component of the Lindamood-Bell program but found that district teachers were trained in various reading programs (id. at pp. 20-21). With respect to the program, the IHO also set forth

⁹ In September 2019, the parent sought an opportunity to amend her due process complaint notice a second time or to file a new due process complaint notice and seek consolidation with the pending matter in order to include a request for a nonpublic school placement (see Tr. pp. 241-46; IHO Ex. I; see also IHO Decision at pp. 12-13). The IHO denied the parent's request to amend or consolidate, noting in the final decision that the IHO could "determine relief as necessary" (IHO Decision at pp. 12-13). The parent's due process complaint notice that was purportedly filed and requested to be consolidated is not included in the hearing record and, although the IHO describes the denial of the parent's request for consolidation in the final decision, the hearing record does not otherwise include a written order denying consolidation (see IHO Decision at p. 13; see also 8 NYCRR 200.5[j][3][ii][a][3]).

concerns regarding the remote delivery of the instruction (i.e., on the television screen), how the program would be delivered in conjunction with the student's regular school day, and whether the student required instruction "one on one" (id. at p. 21).

The IHO concluded that the student "need[ed] more support, both during the school day, and after school to reach grade level functioning" (IHO Decision at p. 20). The IHO found that the evidence in the hearing record did not support a finding that Lindamood-Bell was the best program to help the student improve in reading and math (id. at p. 21). However, finding no other evidence regarding the number of hours of tutoring that the student needed, the IHO calculated an award of compensatory education based on the recommendation of Lindamood-Bell (id. at pp. 20-21). Specifically, the IHO ordered that the district locate a teacher "certified in reading and/or math" and "trained in a research-based proven methodology" to provide the student with 280 hours of 1:1 tutoring either at home or at school (id. at pp. 22, 24).¹⁰

Finally, the IHO turned to the parent's request for IEEs (IHO Decision at pp. 22-23). As for the parent's request for reimbursement for the costs of the May 2019 private neuropsychological evaluation, the IHO found that it was unclear why the evaluation was relevant or why the district should fund it since the district conducted a psychological evaluation of the student "within the three-year evaluation period" that yielded results consistent with the May 2019 private neuropsychological evaluation and since the neuropsychologist relied on achievement testing conducted by Lindamood-Bell (id. at p. 22). However, given the "varying reports" of the student's achievement, the IHO found that "further independent testing [wa]s warranted" and ordered the district to fund an evaluation at Center for Discovery, consistent with the district's proposal to fund the same during the resolution session (id. at pp. 22, 24).¹¹

With respect to OT and assistive technology evaluations, the IHO found that, since there was no evidence that such evaluations were sought from the district or that the parent requested IEEs in these areas prior to the filing of the due process complaint notice, the parent was not entitled to IEEs (IHO Decision at p. 22). However, finding that the evaluations in these areas were warranted, the IHO ordered the district to conduct the evaluations within a specified number of days (id. at pp. 22-23, 24). Finally, the IHO denied the parent's request for a central auditory processing IEE, finding that the evidence in the hearing record did not support a finding that testing in this area was needed (id. at p. 23). The IHO acknowledged the recommendation for an auditory processing evaluation in the March 2015 private speech-language evaluation but found that the

¹⁰ The IHO specified that tutoring services be available for two years from the date that the district located the provider (IHO Decision at pp. 22, 24).

¹¹ The IHO further found that, if Center for Discovery was not available to complete the evaluation within a specified number of days from the date of the decision, the parties could agree on a similar private evaluator (IHO Decision at p. 24). The IHO ordered that the evaluator interview the parent and a staff member from the district and review relevant records and conduct testing and, further, that the evaluation include "specific baseline data regarding [the] [s]tudent's abilities in reading, writing and spelling skills," as well as recommendations for a program and placement of the student (id.).

recommendation was based on the student's score on one subtest and that the district conducted other relevant testing and provided supports to address the underlying weaknesses (id.).¹²

The IHO ordered that, upon completion of all the ordered evaluations, the CSE should reconvene and "adopt, to the greatest extent possible, the recommendations of the evaluations" and include "reading and math services" on the student's IEP (IHO Decision at p. 24).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that it denied the student a FAPE for the 2018-19 and 2019-20 school years and in ordering relief in the form of compensatory education and evaluations. First, the district alleges that the IHO erred in finding that the student's standardized test scores in reading and math reflected stagnation or a lack of progress and, further, that the IHO erred in limiting her assessment of the student's progress to the consideration of standardized test results. The district also asserts that the IHO erred in finding that the CSEs incorrectly identified the student's present levels of performance, which, in turn, impacted the appropriateness of the annual goals. The district also argues generally that the IHO's findings were unsupported by the hearing record, internally inconsistent, and based upon information not available to the CSEs at the time the IEPs were developed.

As for the relief, the district asserts that the IHO's award of compensatory education was arbitrary and unrelated to the student's individualized needs. In addition, the district alleges that the IHO erred in ordering the district to fund or conduct neuropsychological, OT, and assistive technology evaluations.

In an answer and cross-appeal, the parent responds to the district's request for review with admissions and denials and argues to uphold the IHO's decision that the district failed to offer the student a FAPE during the 2018-19 and 2019-20 school years. The parent further argues to uphold the IHO's order directing the district to conduct OT and assistive technology evaluations and for the CSE to reconvene to adopt the recommendations from the OT and assistive technology evaluations.

The parent cross-appeals from that portion of the IHO's decision which found that the district offered the student a FAPE for the 2017-18 school year. More specifically, the parent argues that the IHO erred in finding that the "district made a concerted effort to address [the] [s]tudent's needs." The parent further argues that, despite the student's failed school tests and State assessments and lack of meaningful growth on standardized measures of academic progress, the district provided the student with the same educational program. In addition, the parent argues that the IHO failed to analyze evidence demonstrating that the district ignored the nature and seriousness of the student's needs while planning for the 2017-18 school year and, instead, simply concluded that the student was appropriately placed in a general education class setting with ICT

¹² While the IHO refers to a "May" 2015 private speech-language evaluation, it is presumed that this was a typographical error and that the IHO intended to refer to the March 2015 private speech-language evaluation (IHO Decision at p. 23; see Dist. Ex. 64).

services with accommodations and modifications. Next, the parent asserts that the IHO erred in finding that her claims regarding lack of meaningful participation were without merit.

Finally, the parent further appeals the IHO's failure to address allegations of other procedural violations on the grounds that they were not elaborated upon in the parent's closing brief. Turning to relief, the parent argues that the IHO erroneously ordered the district to fund 280 hours of compensatory education services for math and reading "to be provided by the [s]chool [d]istrict by a provider who is certified and/or licensed in their respective fields" as such award is vague, arbitrary and unlikely to restore the students educational losses. The parent asserts that the IHO erred in declining to award the Lindamood-Bell program as relief as the parent established that it was appropriate.¹³ The parent also asserts that the IHO erred in denying her request for compensatory education in the form of tuition at Gow. The parent asserts that the IHO's decision to decline ordering the district to fund Gow was improper because the IHO admitted her disinclination to award a residential school placement as relief. The parent further asserts that the IHO erred in finding that Gow would have been appropriate but then denying the relief because the parent did not request it in her amended due process complaint notice. In addition, the parent asserts that the IHO inappropriately suggested that the cost of tuition at Gow was not reasonable and was "egregious" in finding that she might have reached a different result under the Burlington/Carter analysis had the parent enrolled the student unilaterally and sought tuition reimbursement. Next, the parent asserts that the IHO erred in declining to reimburse the parent for the costs of the May 2019 private neuropsychological evaluation. The parent also argues that the IHO erred in declining the parent's request for an independent central auditory processing evaluation. In addition, the parent argues that the IHO erred in ordering that the IEP include math and reading services as the award was arbitrary and such "reading and math services" had failed the student for the past three years.

In an answer to the parent's cross-appeal, the district asserts general denials and argues to uphold the IHO's determinations that the district provided the student with a FAPE for the 2017-18 school year, that the parent was not denied meaningful participation in the development of the student's IEPs, and that the district did not commit any procedural violations with respect to any of the student's IEPs. The district also asserts that the record supports the IHO's determinations denying the parent's requests for prospective placement at Gow, Lindamood-Bell tutoring services, funding for a central auditory processing evaluation, and the costs of the independent neuropsychological evaluation. The district then sets forth various defenses, including that the parent's cross-appeal should be dismissed based on improper service of the parent's notice of intention to cross-appeal. Lastly, the district asserts that, "to the extent the Cross-Appeal contains 'child-find' claims" from the student's kindergarten through third grades and any claims with respect to the student's initial eligibility CSE meeting in 2015, such claims are untimely and should be dismissed.

In a reply, the parent responds to the district's procedural defenses and argues that the SRO should exercise discretion to review the determinations of the IHO raised in the cross-appeal, notwithstanding the improper service of the notice of intention to seek review. Further, the parent

¹³ In addition, the parent seeks reimbursement for the costs of the evaluation and consultation conducted by Lindamood-Bell.

denies that the cross-appeal included any child find claims or allegations regarding the initial eligibility meeting.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹⁴

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).

¹⁴ 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).

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

VI. Discussion

A. Preliminary Matters

1. Service of the Notice of Intention to Cross-Appeal

As an initial matter, the district asserts that the parent's cross-appeal should be dismissed because the parent served the notice of intention to cross-appeal upon an individual not authorized to accept service under State regulations.

State regulation requires that "a respondent who wishes to cross-appeal to seek review by a State Review Officer of the decision of an impartial hearing officer shall personally serve upon the opposing party, in the manner prescribed for the service of a request for review pursuant to section 279.4 of this Part, a notice of intention to cross-appeal within 30 days after the decision of the impartial hearing office" (8 NYCRR 279.2[d]). Personal service on a school district is made "by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service" (8 NYCRR 279.4[b]). An SRO "may, in his or her discretion . . . review the determination of an impartial hearing officer notwithstanding a party's failure to timely serve a notice of intention to seek review" (8 NYCRR 279.2[f]).

Here, the parent concedes that the notice of intention to cross-appeal was served upon the district's executive director of special, summer, and after school programs at the district's office, an individual not authorized to accept service under State regulations (Parent Reply ¶ 2; see Dist. Answer to Cross-Appeal ¶14; see also 8 NYCRR 279.4[b]).¹⁵ The purpose of the notice of the intention to cross-appeal (along with the accompanying case information statement) is to provide a petitioner with advance notice of a respondent's intention to challenge aspects of an IHO's decision, which may give a petitioner additional time to contemplate a position to be stated in a responsive pleading—time that is particularly valuable in light of the short time frame allotted for a petitioner to answer the cross-appeal (see 8 NYCRR 279.2[e]; N.Y. State Register Vol. 38, Issue 26, at p. 50 [June 29, 2016]; see also 8 NYCRR 279.5[b]). Here, the district was put on notice of the parent's intention to challenge aspects of the IHO decision because the district interim superintendent, who was authorized to accept service on behalf of the district, received the notice of intention to cross-appeal on the next business day after the parent attempted to effectuate service (Feb. 14, 2020 Aff. ¶ 4).¹⁶ Further, the parent subsequently served the answer and cross-appeal on

¹⁵ Although the parent filed the notice of intention to cross-appeal with the Office of State Review, it was not accompanied by proof of service thereof.

¹⁶ With the district's answer to the cross-appeal, the district attaches an affidavit from the district's executive director of special, summer and after school programs (Feb. 14, 2020 Aff.). In addition, with the parent's reply to the answer to the cross-appeal, the parent attaches an affirmation from the parent's attorney (Apr. 27, 2020 Aff.) and an affidavit from the process server who served the parent's notice of intention to cross-appeal (Apr. 20,

the district and, in turn, the district timely prepared and filed an answer to the parent's cross-appeal. As the district has not offered evidence that it has been prejudiced by the improper service, I exercise my discretion and decline to reject the parent's answer and cross-appeal on the grounds of improper service of the notice of intention to cross-appeal.

2. Scope of Review

As an initial matter, it is necessary to identify which of the parties' arguments are properly before me on appeal. First, the parent raised a number of claims in her due process complaint notice that were not addressed by the IHO, and the parent has not specifically cross-appealed from the IHO's failure to address these claims or otherwise asserted them in the request for review as bases for reversing the IHO's determination that the district offered the student a FAPE for the student's 2017-18 school year or for upholding the IHO's determinations that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years.

In particular, the IHO did not address the parent's claims relating to the timelines for evaluation of the student, convention of CSEs, and implementation of IEPs or the adequacy of the evaluative information available to the CSE. In addition, the IHO did not address claims related to improper composition of the CSE committees, lack of prior written notices, and the district's failure to provide copies of the student's IEPs to the parent in a timely manner. The IHO also did not address the parent's claims with respect to the predetermination of the student's program or the district's failure to reconvene the CSE.

The regulations governing practice before the Office of State Review require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served within the time permitted by section 279.5 of this Part. A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer'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 the relief sought by the respondent" (8 NYCRR 279.4[f] [emphasis added]). Furthermore, the practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]).

2020 Aff.). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). As the additional evidence pertains, not to the merits of the matter, but to the parent's service of the notice of intention to cross-appeal, it was not available at the time of the impartial hearing and is necessary to review the district's defense regarding improper service; accordingly, the evidence will be reviewed for this purpose.

Although the parent asserts in her cross-appeal that "[t]he IHO failed and/or declined to address the remainder of Parent's procedural allegations made in the Complaints and substantiated by evidence at hearing" (Req. for Rev. ¶ 27), the use of broad and conclusory statements or allegations within a pleading does not act to revive any and all procedural violations the parent believes the IHO erroneously addressed or failed to address without the parent specifically identifying which procedural violations meet this criterion (M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [finding that "the phrase 'procedural inadequacies,' without more, simply does not meet the state's pleading requirement"]).¹⁷ Accordingly, the claims set forth above have been abandoned and will not be further discussed.

B. May 2017 IEP

1. Parental Participation (CSE Process)

In the parent's cross-appeal, the parent asserts that the IHO erred in finding her claims regarding the lack of meaningful participation to be without merit. More specifically, the parent asserts that the district failed to collaborate with the parent and that the parent lacked confidence in the district's aptitude for meaningful participation.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). Moreover, the IDEA does not require parental consent to an IEP, but rather "only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17-*18 [E.D.N.Y. Aug. 19, 2013] [explaining that "as long as the parents are listened to," the parents' right to participate in the development of an IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see

¹⁷ In her memorandum of law filed with her answer and cross-appeal, the parent asserts that the IHO failed to address the parent's "failure to evaluate/insufficient evaluation" claims, "[f]ailure to [r]econvene/[c]onsider [a]ll [r]elevant [m]aterials/[a]ppropriately [a]mend IEPs" and "[p]redetermination of [p]rogram" claims (Parent Mem. of Law at pp. 17-18). However, it has long been held that a party is required to set forth the challenges to the IHO's decision in their pleading and that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see, e.g., Application of a Student with a Disability, Appeal No. 19-021; Application of the Bd. of Educ., Appeal No. 16-080). Therefore, as these claims were not raised in the answer and cross-appeal, they will not be further discussed.

also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

In the instant case, a review of the hearing record shows that the district afforded the parent a meaningful opportunity to participate in the development of the student's May 2017 IEP for the student's 2017-18 school year. The May 23, 2017 CSE attendance sheet indicates that the parent attended the CSE meeting, and the parent testified that she expressed her concern to the CSE that the student was not at grade level based on reading assessments that indicated the student was performing at the fourth grade level at the end of the fifth grade (Tr. pp. 894-95; Dist. Ex. 30). The parent reported that, in response, the May 2017 CSE offered the student the "READ 180" program because the district thought it, along with other accommodations, would help close the "gap" between the student's performance and her grade level (Tr. p. 895). Further, the parent testified that, although she was not familiar with the "READ 180" program, she heard "it was a good program" and agreed with the CSE's recommendation (*id.*). Correspondingly, the May 2017 IEP indicated that the student was performing at a "2.33 grade level" in the "Read Theory program," which was low for the student, and the CSE meeting minutes indicated that the district would provide the READ 180 or System 44 program to the student for the 2017-18 school year (Dist. Exs. 29 at p. 6; 31 at p. 1). In addition to discussing the student's reading instruction, the May 23, 2017 CSE recommended one 15-minute speech-language consultation per month with the teacher in order to address the student's weaknesses in phonemic awareness (Dist. Ex. 29 at p. 10). Furthermore, the May 23, 2017 IEP reflects the parent's concerns about the student's academic progress and that the student was taking risks that were not always "good ones" (*id.* at p. 6). Thus, the evidence in the hearing record, and in particular the testimony of the parent, reflects that the CSE listened to the parent's concerns and there was a collaboration between the parent and the district during the May 2017 CSE meeting with regard to the student's reading program. Therefore, the hearing record does not support the parent's contention that the district significantly impeded her opportunity to participate in the drafting of the student's May 2017 IEP and the IHO's finding that the parent's claims with respect to parent participation are without merit must not be disturbed.

2. Progress Leading Up to the May 2017 CSE Meeting

The parent asserts in her cross-appeal that the IHO erred in finding that the district made a concerted effort to address the student's needs for the 2017-18 school year. The parent further asserts that the district provided the student the same program as in prior years, despite the student's failed school tests and state assessments, lack of meaningful growth on standardized measures of academic progress, and failure to achieve her goals.

A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (*see H.C. v. Katonah-Lewisboro Union Free Sch. Dist.*, 528 Fed. App'x 64, 66 [2d Cir. Jun. 24, 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, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; *see also* "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [Dec. 2010]). Furthermore, "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 a subsequent 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. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]). Thus, while the IEPs during the 2016-17 school year are not at issue in this case, a review of the student's progress during the 2016-17 school year provides the necessary context for the discussion of the parent's claim with respect to the student's progress and the appropriateness of the May 2017 IEP.

A review of the hearing record reveals that, during 2016-17 school year (fifth grade), the CSE recommended that the student receive one hour and 30 minutes per day of ICT services in ELA and one hour per day of ICT services in math (Dist. Ex. 2 at p. 9).¹⁸ The CSE also recommended numerous program modifications/accommodations as well as testing accommodations to support the student's learning (*id.* at pp. 9-11). During the 2016-17 school year, the CSE met several times to review the student's educational program (*see* Dist. Exs. 1 at p. 1; 2; 9; 10; 15; 22).¹⁹ In November 2016 the CSE met and clarified the student's testing accommodations (Dist. Ex. 9 at p. 11). In March 2017 the CSE added daily small group reading instruction to the student's IEP (Dist. Ex. 15 at p. 9). In addition, as a result of an April 10, 2017 speech-language evaluation, 10-minute daily drills to address the student's weaknesses in phonemic awareness were added to the student's IEP in May 2017 (Tr. p. 609; Dist. Exs. 22 at p. 10; 24 at p. 1; 25 at p. 1; *see* Dist. Ex. 17 at p. 2).²⁰ Therefore, because the IEPs developed during

¹⁸ The student's IEP that was in place at the start of the 2016-17 school year is not part of the hearing record. The earliest IEP included in the hearing record for the 2016-17 school year is dated September 21, 2016 (Dist. Ex. 2 at p. 2). Minutes of the September 2016 CSE meeting and the CSE meeting notice indicate that on that day a program review was held at the request of the parent (Dist. Exs. 1 at p. 1; 4 at p. 1).

¹⁹ While each of the subsequent IEPs reflected that no changes were made to the student's ICT services, the hearing record indicates that other "building level supports" were provided to the student to address her reading needs such as the Reading Horizons program for use at home or school (30 minutes per day push in), AIS support, as well as reading instruction using Lexia, Orton-Gillingham, and Read Theory, and Moby Max and the Do the Math program for math (Tr. pp. 462-64; Dist. Exs. 4 at p. 2; 15 at p. 9; 17 at p. 1; 29 at p. 6; 67 at p. 5).

²⁰ A review of the April 10, 2017 speech-language evaluation revealed that the student's scores on the Test of Integrated Language and Literacy Skills (TILLS) were "borderline/not consistent with the presence of a language/literacy disorder" and that her deficits were in subtests that measured her abilities in phonemic awareness and sound word skills; specifically, phonemic awareness (1st percentile), nonword spelling (12th percentile), nonword reading (12th percentile), and written expression words (6th percentile) (Tr. p. 605-08; Dist. Ex. 67 at pp. 2-5). The speech-language evaluation report, as well as testimony by the district speech-language pathologist who conducted the assessment, indicated that the student's performance in these four areas was "more indicative of trouble with phonemic and phonological awareness" than a language literacy disorder and that deficits in these subtests "really spoke to more of . . . a specific learning disability, perhaps dyslexia" (Tr. pp. 608-09; *see* Dist. Ex. 67 at p. 5). The speech-language evaluation report indicated that the student received a low score (2nd percentile) on a subtest measuring her short-term memory, which the evaluator noted was needed to recall sound/letter relationships, word patterns, and sight words (Dist. Ex. 67 at pp. 2, 5). The speech-language pathologist opined that the student needed to improve her phonemic awareness skills as these skills had a direct impact on her reading decoding, reading fluency, and spelling skills (*id.* at p. 5). Despite the speech-language pathologist's emphasis on the student's deficits in phonemic and phonological awareness, her report characterized the student's deficits in sound/word skills as a "relative weakness" (*id.*; *see* Tr. pp. 51-52). The speech-language pathologist further indicated that, despite these deficit areas, the student demonstrated several integrated

the 2016-17 year were not completely identical to each other, progress under any one IEP from the 2016-17 school year cannot be used in isolation as a yardstick by which to gauge whether the May 2017 IEP adequately reflected the student's progress or lack thereof during the previous year in its program recommendations; however, a review of the 2016-17 school year as a whole, as further discussed below, reflects that the student made some degree of progress during the 2016-17 school year pursuant to the recommendations contained in the various IEPs in effect for that time period.

The hearing record contains several measures of the student's academic progress during the 2016-17 school year including a Measures of Academic Progress (MAP) growth report, which reflected the student's progress on NWEA reading and math assessments; scores from Read Theory, which monitored the student's reading comprehension; scores from Moby Max, which tracked the student's fluency of basic math facts; an IEP progress report, which tracked the student's progress toward her IEP goals; and testimony from district staff who worked with the student (Tr. pp. 462, 609-10; Dist. Exs. 24 at p. 2; 56; 70; see Dist. Ex.72 at p. 1). The hearing record also includes the student's lexile scores from the Houghton Mifflin Harcourt (HMH) Reading Inventory (Dist. Exs. 24 at p. 2; 29 at p. 6).

The MAP growth report²¹ indicated that the student's RIT scores for reading increased from 200 in fall 2016 to 215 in spring 2017 (Dist. Ex. 70). The MAP report further indicated that this increase of 15 points reflected that the student had exceeded her growth projection of 7 points (id.). The 15 point increase represented a corresponding increase in the student's percentile rank from the 36th to the 59th percentile (id.; see Dist. Ex. 24 at p. 2). With regard to mathematics, the MAP growth report reflected that the student's RIT score increased from 193 in fall 2016 to 207 in spring 2017, with a corresponding increase in the student's percentile rank from the 11th to the 19th percentile (id.). The student's overall growth of 14 points in math exceeded her growth projection expectation of 10 points (id.).

In addition to the MAP growth report, the May 23, 2017 IEP indicated that the student had been utilizing the Read Theory program and had scored at the first-grade level on the pretest and at the 2.33 grade level at the time of the meeting (Dist. Ex. 29 at p. 6).²² However, the IEP indicated that this was a low score for the student probably because the student rushed through the text and did not focus while taking the assessment (id.). Minutes of the May 23, 2017 CSE meeting

language/literacy skills (Dist. Ex. 67 at p. 5; see Ex. 67 at p. 2).

²¹ Testimony by the student's special education teacher during the 2017-18 school year indicated that the NWEA was an assessment that adjusts itself based on how the student is doing, explaining that as the student does better the questions get harder; however, if the student has difficulty, the questions scale back down to where the student's skill set is (Tr. p. 369). Testimony by the district director of curriculum was consistent with this and added that the NWEA is a computerized, normed assessment that the district conducted at the beginning and end of the school year, although some buildings conducted mid-year as well (Tr. p. 678). She indicated that because the test is normed the district got a sense of how its students were performing compared to students nationally and that because NWEA had done a linking study to the New York State assessments, the district could also get projected proficiency reports for its students (Tr. pp. 678-79).

²² The Read Theory program is described in the May 23, 2017 IEP as a reading comprehension program that provides assessments at the "just right" level for each student (Dist. Ex. 29 at p. 6).

indicated that in the classroom the student's functioning in reading was at the beginning of the fourth-grade level (Dist. Ex. 31 at p. 1). With regard to mathematics, the May 23, 2017 IEP and CSE meeting minutes reflected that the student could multiply fractions as long as the factors were basic and could multiply multi-digit multiplication problems but struggled with math facts fluency, long division, remembering how to divide fractions, and adding and subtracting fractions with unlike denominators (Dist. Exs. 29 at p. 6; 31 at p. 1). According to the IEP, on Moby Max fluency the student received a 74 percent on addition and 40 percent on subtraction (Dist. Ex. 29 at p. 6).

The May 11, 2017 CSE meeting minutes indicated that the student's HMH Reading Inventory lexile level was 870, noting that the average lexile for fifth graders was 850 (*id.*). Similarly, the May 23, 2017 IEP stated that the student's "new" lexile level was 770-920 and that the student had made great improvement (Dist. Ex. 29 at pp. 5-6).

A review of the student's IEP progress report for the 2016-17 school year shows that the student was assessed as progressing gradually for all three of her reading goals through April 2017, the third marking period of the 2016-17 school year (Dist. Ex. 56 at p. 2; *see* Tr. pp. 467-68).²³ The report indicated that the student needed prompting to identify the main idea in content areas and noted that she could provide some key details but others were irrelevant to the main idea (Dist. Ex. 56 at p. 2). With regard to the student's four writing goals, the student was reported to be progressing inconsistently for two goals and progressing gradually for two goals through April 2017 (*id.* at pp. 2-3). The report indicated that the student needed to recheck sentences she wrote to make sure they were logical, as she left out important words, which made her writing confusing (*id.* at p. 2). For her four math goals, the progress report reflected the student was progressing gradually for three goals through the April marking period and for the fourth math goal, was progressing satisfactorily in November and January and progressing gradually in April (*id.* at pp. 3-4).²⁴ For goals on which the student was progressing satisfactorily the IEP progress report indicated that the student was expected to achieve the goal (*id.* at p. 3). For goals on which the student was progressing gradually the report indicated that the student was making less than anticipated progress but still might achieve the goal (*id.* at pp. 2-4). For goals on which the student was progress inconsistently the report indicated that the student was making inconsistent progress and might not achieve the goal (*id.* at p. 2).

According to the speech-language pathologist who attended the May 11, 2017 program review, the student's academic intervention services (AIS) teacher indicated the student was "making steady growth over the school year" based on the measurements they had done (Tr. p. 609). Her testimony indicated that she believed the Reading Inventory was one of the measurements used by the teacher and that it indicated the student was making progress (Tr. p. 609; *see* Dist. Ex. 24 at p. 2). Her testimony further indicted that she believed the student was in the top six of her class for reading and that she had met her NWEA goal for ELA (Tr. pp. 609-10;

²³ Testimony by the CSE chairperson at the May 23, 2017 CSE meeting indicated that the CSE would have discussed the student's progress through the April marking period but not the June marking period because the meeting was prior to June (Tr. p. 467).

²⁴ The progress report indicated that the student's grade had gone down to progressing gradually because after the student moved to a new unit she required reminders on how to round numbers to various places but was able to answer these questions correctly (Dist. Ex. 56 at p. 4).

see Dist. Ex. 24 at p. 2). Additionally, the speech-language pathologist documented in her April 10, 2017 evaluation report that "specific, evidence-based programs to help with phonological/phonemic awareness skills [were] currently being used with [the student]" including "Lexia, Reading Horizons, [and] Orton-Gillingham" and that "[s]low and steady growth in [the student's] Reading Lexile ha[d] been made since the beginning of the school year with these programs in place" (Dist. Ex. 67 at p. 5).

Testimony by the CSE chairperson from the May 23, 2017 CSE meeting indicated that, based on input from the student's special education teacher and literacy instructor, the student had made progress during the 2016-17 school year; however, she also testified that the student still had areas to work on and that the CSE identified goals to target those areas (Tr. p. 462; Dist. Ex. 56 at pp. 2-4; compare Dist. Ex. 22 at pp. 8, with Dist. Ex. 29 at pp. 8).

Accordingly, the hearing record contains sufficient evidence upon which to conclude that the student demonstrated some degree of progress during the 2016-17 school year receiving ICT services in ELA and math, daily small group reading instruction, and a 10-minute daily speech-language consultation. With the foregoing in mind, the next issue to address is whether the educational program offered to the student in the May 23, 2017 IEP—which largely continued the special education services the student received during the 2016-17 school year—was reasonably calculated to enable the student to receive educational benefits for the 2017-18 school year.

Although past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10, citing Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153 [10th Cir. 2008]; see also H.C., 528 Fed. Appx. at 67 [upholding district court's conclusion that, because the student made progress in previous years, the later, similar IEPs were reasonably calculated to enable progress]; C.S. v. Yorktown Cent. Sch. Dist., 2018 WL 1627262, at *18 [S.D.N.Y. Mar. 30, 2018]; D.D-S., 2011 WL 3919040, at *12 [determining that evidence of likely progress was "the fact that the [challenged IEP] was similar to a prior IEP that generated some progress"]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011] [finding that when the student made some progress under a previous IEP, it was not unreasonable for the CSE to propose an IEP "virtually identical to" the previous one]; M.C., 2008 WL 4449338, at *16 [determining that when the IEP at issue mirrored a past IEP under which the student "demonstrated significant progress," the IEP at issue was reasonably calculated to afford the student educational benefit]; see generally Application of a Student with a Disability, Appeal No. 12-064; Application of the Bd. of Educ., Appeal No. 11-128).

Based on the student's performance during the 2016-17 school year, when the CSE met on May 23, 2017 to develop the student's IEP for the 2017-18 school year, the committee recommended a ICT services in ELA and math and further recommended the student also receive ICT services in social studies and science (Dist. Ex. 29 at p. 9). To address the student's phonemic awareness concerns, one 15-minute speech-language consultation per month with the teacher was recommended while the daily drills with the speech-language pathologist were discontinued (id. at p. 10). Minutes of the CSE meeting indicated that the student would receive either Read 180 or System 44 during the 2017-18 year (Dist. Ex. 31 at p. 1). The CSE chairperson indicated that,

with regard to specialized reading instruction, the student was recommended to receive one of the programs discussed at the meeting and that baseline testing at the start of the school year would be conducted to determine which one (see Tr. pp. 470-71). She indicated that the reading programs were not included in the student's IEP as special education services because the district provided them as an extra layer of support for all students who demonstrated a need (Tr. pp. 471-72). The CSE chairperson testified that the CSE recommended ICT services for the four core subjects because the student was transitioning to middle school and that a speech-language consult was recommended to address phonemic awareness concerns (Tr. pp. 469-70). She further testified that the CSE recommended ICT services for the student because she was making steady progress throughout the year in the "ICT classes" and they seemed appropriate (id.).²⁵ She indicated that the student was well adjusted and that her (the chairperson's) notes reflected the student's classwork, homework, and behavior were all going well and that the CSE felt ICT classes would meet the student's needs (Tr. p. 470; Dist. Ex. 31 at p. 1). In addition, the CSE chairperson indicated that the accommodations of modified class work and extended time to complete assignments were removed from the student's IEP because her teacher reported that the student did not need these anymore (Tr. pp. 472-73). The student's IEP goals were modified for the 2017-18 school year, particularly in math (compare Parent Ex. 22 at p. 8, with Dist. Ex. 29 at pp.8-9). With regard to summer school, testimony by the chairperson indicated the CSE did not discuss the special education service of an extended school year for the student but did discuss a half-day option of the summer learning academy, a district program that provided support for students (Tr. p. 473).²⁶ Based on the MAP report, the student did demonstrate significant regression the prior summer (2016) that would have suggested she required 12-month services (see Dist. Ex. 70).

The Second Circuit has held that, in determining whether a student made progress, the SRO must examine the record for objective evidence (E.S. v. Katonah-Lewisboro Sch. Dist., 487 Fed. App'x 619, 622 [2d Cir. July 6, 2012]). However, a variety of measures may be considered and a student need not demonstrate consistent progress in all areas of functioning for a finding of overall progress to be made; rather, it is acceptable to consider the totality of the record evidence – including both objective measures and subjective input of providers and teachers to determine whether, on the whole, a student has made some demonstrable progress pursuant to the district's recommendations (see E.S., 487 Fed. App'x at 622 [finding evidence of progress "despite . . . low test scores"]; C.S., 2018 WL 1627262, at *19-*24 [finding various sources of evidence about a

²⁵ The director of pupil personnel services testified that the CSE recommended the student for ICT services for social studies and science because there was a lot of literature and a lot of text in content area classes in middle school and the support of special education teacher was needed to make sure all of the student's accommodations could be addressed (Tr. pp. 59-60).

²⁶ The director of pupil personnel services testified that the attendance form for summer 2017 indicated that the student did not attend summer school for math but possibly attended for ELA (Tr. pp. 206-08; Dist. Ex. 62). However, the parent testified that the student attended summer school in 2017, as well as in 2018 (Tr. p. 898). The parent explained that she and the district agreed that the student would attend summer school half days in the morning so that the student could attend camp in the afternoon (Tr. pp. 898, 992). Her testimony indicated that the district was supposed to accommodate the student's camp schedule by providing both math and ELA in the morning (id.). The parent noted that she was able to drop the student at summer school and bring her to camp afterwards (Tr. p. 898). When it was brought to the parent's attention that the student was absent during the fourth and fifth periods of the day (see Dist. Ex. 62), the parent indicated that the student's absences during that time would make sense since the student only attended summer school half day (Tr. pp. 992-93).

student's progress (including testimony of the student's teacher, evidence of progress on annual goals, and other measures) sufficient despite standardized test scores]; M.H. v Pelham Union Free Sch. Dist., 168 F. Supp. 3d 667, 676-77 [S.D.N.Y. 2016] [finding based on the record "as a whole" that the student made progress despite evidence of declining test scores]; H.W. v New York State Educ. Dep't, 2015 WL 1509509, at *17 [E.D.N.Y. Mar. 31, 2015] [upholding the SRO's determination that, "even assuming that the [standardized] tests showed minimal progress," testimony from teachers and evidence of progress towards achieving annual goals showed that the student made meaningful progress]). Accordingly, although the student continued to struggle with phonemic and phonological awareness, in sum, as described in detail above, the student demonstrated overall progress during the 2016-17 school year, including with respect to NWEA scores which indicated that she was showing growth in reading and math, such that the CSE's decision to recommend a similar program and placement for the 2017-18 school year was reasonably calculated to enable the student to receive educational benefits. Accordingly, the IHO's determination that the district offered the student a FAPE for the 2017-18 school year will not be disturbed.

C. April 2018 IEP

1. Parental Participation (CSE Process)

Turning to the issue of parental participation during the 2018-19 school year, the parent argues that the IHO erred in finding no merit to her claims that she was denied meaningful participation. A review of the hearing record reflects that the CSE convened on April 25, 2018 to develop the student's IEP for the 2018-19 school year and the parent and student attended and participated during the CSE meeting (Dist. Ex. 37).²⁷ The April 2018 CSE meeting minutes indicated that the student presented her strengths, weaknesses, preferences, and needs during the CSE meeting (Dist. Ex. 38 at p. 1). The parent testified that she expressed to the April 2018 CSE that she was concerned that the student "was still behind" and that there "wasn't enough growth" (Tr. p. 896). Notwithstanding her concerns, the parent testified that she agreed with the CSE's recommendations (Tr. p. 897).

The parent further testified that the CSE convened at her request in September 2018 to add the diagnosis of dyslexia to the student's IEP (Tr. pp. 901-02; Dist. Ex. 91). The parent reported that, during the September 2018 CSE meeting, the CSE discussed the student's frustrations and struggles (Tr. p. 902). In addition, the parent reported that she asked the CSE if the student could attend a special class for math and English because she was struggling (*id.*). The parent described the meeting as "long" and indicated that the CSE decided to "table" the meeting and reconvene in October because the parent was meeting with the student's developmental pediatrician and did not want to just place the student in a special class (Tr. p. 903; Dist. Ex. 91). The parent also testified that the supervisor of special education who chaired the September 2018 CSE meeting informed her that the student's teachers were not experienced with a student with dyslexia and if she could do anything that could help the student's teachers, they were more than willing to consider it (Tr.

²⁷ The director of pupil personnel services testified that the district "always want[ed] [its] students to attend all of their meetings" (Tr. p. 63). She indicated that in 2017 the district was engaged in a "pilot program" aimed at developing student-directed IEPs and students' self-advocacy skills (Tr. pp. 63-64).

pp. 903-904). The hearing record shows that the CSE reconvened on October 10, 2018 with the parent in attendance (Dist. Ex. 44). At the parent's request, the CSE added a definition of dyslexia to the student's October 2018 IEP (Dist. Ex. 43 at pp. 4-5; see Tr. pp. 102-104). The parent testified that she requested that Lindamood-Bell instruction be provided to the student during the day at school but the CSE informed her that it would not be possible (Tr. p. 907).

Contrary to the parent's claims, the hearing record shows that the district afforded the parent a meaningful opportunity to participate in the development of the student's IEPs during the 2018-19 school year. In addition, the parent and the district worked in a collaborative manner to understand the student's dyslexia diagnosis and the district listened to the parent's concerns regarding the student's weaknesses. Although the CSE disagreed with the parent's request to have Lindamood-Bell instruction on the student's IEP, this does not mean that the parent was denied an opportunity to participate in the CSE meeting (see P.K., 569 F. Supp. 2d at 383). Accordingly, the record amply demonstrates that the parent was given a sufficient opportunity to participate and the hearing record does not support the parent's contention that the district significantly impeded her an opportunity to participate in the drafting of the student's IEPs for the 2018-19 school year. Accordingly, the IHO's finding that the parent's claims with respect to parent participation are without merit and must not be disturbed.

2. Progress Leading Up to the April 2018 CSE Meeting

On appeal, the district argues that the IHO erred in finding that it failed to offer the student a FAPE for the 2018-19 school year. More specifically, the district argues that the IHO erred in finding that the student did not make meaningful progress during the 2018-19 school year.

In countering the IHO's finding that the student did not make progress, the district argues that, during the 2017-18 school year, the student's lexile level increased and she exceeded NWEA growth projections in reading and math that year. Moreover, the district asserts that the IHO ignored testimony from several district witnesses who interpreted the student's test results as demonstrating slow, but steady, progress and, instead, substituted her own interpretation of the student's test scores.

Based on the standard set forth above, in order to address the district's allegation, a review of the information contained in the hearing record regarding the student's progress made during the 2017-18 school year is warranted.

As with the previous school year, the hearing record includes multiple measures of the student's academic performance during the 2017-18 school year including a MAP growth report, progress reports based on the HMH Reading Inventory, test results for ELA and math from the New York State Testing Program, the results of academic achievement testing, the student's report card, an IEP progress report, and testimony from district staff who worked with the student (Parent Ex. E; Dist. Exs. 57; 60; 69; 70; 71).

The MAP growth report reflected the student's performance on the NWEA reading and math assessment during the 2017-18 school year (Dist. Ex. 70). The student's RIT scores for

reading increased from 210 in fall 2017 to 214 in winter 2018, and 222 in spring 2018 (*id.*).²⁸ The corresponding percentile ranks for the student's performance over the course of the school year increased from the 49th, to the 51st, to the 66th percentile (*id.*). The MAP growth report indicated that the student had exceeded her growth projection of five points by increasing her score for the school year by twelve points (*id.*). For mathematics, the growth report reflected that the student's RIT scores increased from 197 in fall 2017 to 210 in spring 2018, with corresponding percentile ranks increasing from the 10th to the 18th percentile (*id.*). The student also exceeded her math growth projection of nine points with her overall growth for the year of thirteen points (*id.*).

The student's performance on the HMH Reading Inventory at five intervals during the school year showed she progressed from a lexile score of 609 on October 4, 2017 to a lexile of 752 on November 30, 2017 and 784 on March 1, 2018 (Dist. Ex. 71 at p. 1). The "Lexile Proficiency and Growth Report" indicated that this increase represented an improvement from the "below basic" range of skills to the "basic" range of skills level (*id.*). The report also reflected the student's performance in percentile ranks, showing an increase over the course of the 2017-18 school year from the 9th percentile in October 2017 to the 21st percentile in November and the 25th in March 2018 (*id.* at pp. 1-2). The student's April 2018 IEP indicated that she had shown a great deal of growth in reading during the 2017-18 school year, noting a 175-point increase in her lexile level (Dist. Ex. 36 at p. 4; *see* Dist. Ex. 71 at p. 1).²⁹ Testimony by the student's sixth grade special education teacher indicated that at the time of the April 2018 CSE meeting, the student's March 1, 2018 lexile score of 784 was at the third to fourth grade level (Tr. pp. 408-09; Dist. Exs. 71 at p. 1; 72 at p. 1).

Turning to the student's performance on New York State Testing Program assessments, the State reports indicated that the student's ELA score at the end of fifth grade was 275, at the upper end of the Level 1 range and 14 points from the Level 2 range (Parent Ex. D at p. 7). At the end of sixth grade the student's score on the 2017-18 ELA State exam was 570, still in the Level 1

²⁸ Testimony by the student's special education teacher during the 2017-18 school year indicated that the student's reading score on the MAP growth report for spring 2018 reflected a second administration of the test, as her initial performance was not an accurate reflection of her "true abilities" (Tr. pp. 401-02). The special education teacher stated that the student had "a really difficult time focusing" during the initial administration of the reading NWEA test and that after consulting with her co-teacher, the principal, and the parent, she re-administered the test in a 1:1 setting in a quiet spot and provided the student with a lot of redirection and encouragement (Tr. pp. 371-72). The sixth grade special education teacher testified that she believed the results of the second test were "a lot more accurate" and that the student really focused and applied herself, where the first time the test was given the student "really quickly clicked through it" (Tr. pp. 372-73).

²⁹ The director of curriculum defined lexile as a way to measure growth in reading that is determined based on sentence complexity and vocabulary that is being used in a particular passage (Tr. p. 648). She indicated that lexiles were widely accepted and "you c[ould] pick up many books and see what the lexile level [wa]s" (Tr. pp. 648, 649). She testified that "[y]ou can take any passage and put it into the lexile determinator on Google and look at that" (Tr. p. 668). The director of curriculum added that a student's ability to read a given passage was tied to their prior knowledge of the content area and that a reading score was strongly influenced by the content of the passage being read (Tr. pp. 648-49). She indicated that when you look at a lexile without knowing the content of the passage and the depth of knowledge that the reader has for that passage it provided a certain amount of information but that it was necessary to look at multiple measures of a student's performance in order to get a true picture of the student (Tr. p. 649).

range and 20 points from Level 2 (Parent Ex. E at p. 1). Similarly, the student's performance at the end of fifth grade on the mathematics State exam was 279 at the upper end of Level 1 and 15 points from Level 2 and at the end of sixth grade her score remained in the Level 1 range, 27 points from Level 2 (Parent Exs. D at p. 9; E at p. 3). The State assessment test results indicated that "[s]tudents performing at this level [level1] are well below proficient in standards for their grade" (Parent Exs. D at p. 1; E at p. 1).

The district conducted standardized testing during the 2017-18 school year that provided additional insight into the student's academic performance. The hearing record contains academic achievement test results from a July 5, 2016 administration of the WIAT-III after the student completed fourth grade, as well as the results from a March 15, 2018 administration using the same measure, when the student was in sixth grade (Dist. Exs. 36 at p. 3; 66 at pp. 1, 13; 69 at p. 1; see Tr. pp. 65-67). Testimony by the director of pupil personnel services indicated that the student's scores on the March 2018 administration of the WIAT-III by the student's sixth grade special education teacher were reviewed at the student's April 2018 CSE meeting (Tr. pp. 65-67).³⁰ A comparison of the student's scores from the March 2018 administration of the WIAT-III with the student's earlier July 2016 scores shows that her academic achievement had largely declined, particularly in mathematics (Dist. Ex. 69 at pp. 1-2). The student's scores on all of the math subtests administered in March 2018 were lower than her scores on the previous testing in math including on measures of problem solving, numerical operations, and in math fluency for addition, subtraction and multiplication (id.). While her scores in numerical operations remained in the average range of functioning (going from a standard score of 105 to 91), her performance on three of the five math subtests declined such that she moved from the average range to lower ranges of functioning (Dist. Exs. 66 at p. 13; 69 at pp. 1-2). Specifically, the student's performance in math problem solving declined from a standard score of 101 in the average range of functioning in July 2016 to a standard score of 76 in the below average range of functioning in March 2018 (id.). The student's score in math fluency for addition also declined from a standard score of 93 in the average range of functioning to a standard score of 73 in the below average range and in math fluency for multiplication, her performance declined from a standard score of 91 to 83, and from the average range of functioning to the below average range (id.).

With regard to reading, the student's oral reading fluency score declined from a standard score of 90 to 87 while her performance on the pseudoword decoding subtest declined from a standard score of 90 in the average range of functioning, to a standard score of 78, in the below average range (Dist. Exs. 66 at p. 13; 69 at p. 1). In contrast, the student's performance on the word reading subtest increased from a standard score of 81 to 89, which was in the average range (Dist. Ex. 69 at p. 1). In addition, the student's performance on the reading comprehension subtest

³⁰ The April 2018 IEP listed the March 2018 educational evaluation but did not include the student's evaluation scores (Dist. Ex. 36 at p. 1). However, the student's scores from the July 5, 2016 administration of the WIAT-III were included in the April 2018 IEP and were also reflected in the March 2018 educational reevaluation report (Dist. Ex. 36 at p. 3; see Dist. Ex. 69 at p. 1).

significantly increased from a standard score of 75 in the below average range on earlier testing to a standard score of 98 in the average range of functioning in the more recent testing (id.).³¹

The student's performance during the 2017-18 school year was also reflected in her IEP progress report (Dist. Ex. 57 at pp. 1-5). At the end of the second marking period in January 2018 the student was reported to be progressing gradually on eight of her eleven IEP goals; progressing satisfactorily on one goal; had achieved one goal; and had not achieved one goal that had not yet been addressed (id. at pp. 2-5). By the end of the third marking period the student was reported to be progressing gradually on three goals; progressing satisfactorily on seven goals; and had achieved one goal (id. at pp. 2-5). Third quarter notes indicated that the student continued to work hard in reading class and at taking the time to stretch out unknown words when reading, was able to explain information that had been quoted from text and "use" inferences, had shown growth in identifying the main idea and locate supporting details, improved her use of transitions when writing, and continued to be challenged by addition (id. at pp. 1-5).

The student's report card for the 2017-18 school year indicated that the student received grades in the 70s and 80s during the first three quarters of the 2017-18 school year (Dist. Ex. 60). The student's lowest third quarter grade, 73, was in math while her highest grades were in ELA (88) and reading (84) (id.).

The student's sixth grade ICT special education teacher indicated that the student had a "great year" and had made "significant progress" during the 2017-18 school year, citing her growth of approximately two grade levels in reading using READ 180, based on the graph and lexiles reflected in the Lexile Proficiency and Growth Report (Tr. pp. 364, 366; Dist. Exs. 71 at p. 1) The special education teacher also noted the student's progress with regard to her growth projection score in reading, which she exceeded, as reflected in the MAP report (Tr. pp. 368-71; Dist. Ex. 70).³² She indicated that during the 2017-18 year, the student worked hard, retook tests when she was not successful initially, redid homework and studied a lot and that the student "aimed to please" (Tr. pp. 394-95).

Notwithstanding the above, the parent testified that she believed the student was not progressing or was progressing slowly based on the fact that she could not write a paragraph or explain what she was reading and could not complete the grade-level math work she was given (Tr. pp. 995-96).

As noted above, the IHO found that, based on the district's erroneous "interpretation of standardized test results" and failure to take into account other objective measures of the student's progress, the CSE incorrectly identified the student's present levels of performance in the IEPs,

³¹ Although the March 15, 2018 educational reevaluation test results indicate that the student's previous testing score for reading comprehension was 75, the actual report that these previous tests scores were taken from does not list a reading comprehension subtest (compare Dist. Ex. 66 at p. 13, with Dist. Ex. 69 at p. 1).

³² Although not in the special education teacher's testimony, the MAP report also reflected that the student exceeded her growth projection score in math during the 2017-18 year (Dist. Ex. 70).

which, in turn, impacted the appropriateness of the annual goals and recommendations in the IEPs, thereby denying the student a FAPE for the 2018-19 school year (IHO Decision at p. 16).

With respect to the district's argument that the IHO gave undue weight to the student's results on the New York State Testing Program assessments and ignored testimony from district witnesses regarding the value of the State assessments in providing useful information about students' needs and abilities, the student's April 2018 IEP, developed at the end of sixth grade, did not include test results for State and district-wide assessments (*see* Dist. Ex. 36 at p. 3). Testimony by the director of pupil personnel services indicated that while the district considered the results of State assessments it did not put the State assessment scores on student IEPs (Tr. pp. 75, 161-62). She indicated that many or most students did not perform well on the tests, and the district liked to look at multiple measures and had other measures that were more meaningful; the district did not use the State assessments to drive or find special education supports (Tr. pp. 75, 160-63). The director of pupil personnel services further testified that State assessment results were usually released in August, after CSE meetings had taken place and as such were not available for consideration by the CSE (Tr. pp. 211-12). Testimony by the director of curriculum for the district indicated that the New York State Testing Program assessments were one of the multiple measures used to test students but not one of the district's most important measures due to the challenges presented by how often the tests had changed (Tr. p. 696). She testified that certain groups were disadvantaged by the assessments, certain grades (third and fourth) did not do well on it, and that removing the time limits so that students had unlimited time to test had altered the normed assessment so that it was no longer a reliable instrument (Tr. pp. 695-96). Testimony by the student's special education teacher for sixth grade indicated that she did not rely on the State assessments as a measure of progress because the test did not provide an item analysis of information and therefore did not provide much information on how to remediate concerns (Tr. p. 358). The chairperson for the May 23, 2017 CSE meeting for the 2017-18 school year testified that that IEP did not reflect any State or district-wide assessments because the district did not list things on the IEP that were not relevant in its decision making with respect to program modifications and the State assessment results were just one piece of information about how the student was performing (Tr. p. 459; *see* Dist. Ex. 29 at p. 5).

Turning to the district's argument that the IHO failed to consider other measures of the student's progress, as detailed above, in addition to the results of the MAP growth report and Reading Inventory lexiles, the hearing record shows that there were additional objective measures of the student's performance during the 2017-18 school year to consider including the student's report card for the 2017-18 school year, her IEP progress report and the results of the March 2018 educational evaluation. The additional measures provided a mixed picture of the student's progress during the 2017-18 school year. While the student's report card showed that she received passing grades throughout the year, and the student's IEP progress report indicated that the student was progressing satisfactorily toward many of her IEP goals and expected to achieve them, administration of the WIAT-III in March 2018 suggested a significant decline in the student's math skills and continued difficulty with decoding (Dist. Exs. 57; 60; 69). In particular, despite the student's reported progress in math, the hearing record shows that the student, at best, performed at the 18th percentile on the NWEA math assessment, that her standard score for math fluency on the WIAT-III was a 77, and she performed at Level 1 on the New York State Testing Program mathematics assessment (Parent Ex. E; Dist. Exs. 69; 70). In addition, the student received a report

card grade of 73 in math and her mother indicated that she could not complete grade-level math work (Tr. p. 995-96; Dist. Ex. 60).

Regarding other factors that may have impacted the student's test scores, the evaluator who conducted the March 15, 2018 educational reevaluation of the student reported that the student was distracted many times during the testing, that any sound coming from the hallway was a distraction to her, and that she required redirections (Dist. Ex. 69 at p. 2). The evaluator also reported that the student "was anxious with the timed assessment pieces" and that "this could have an impact on her scores" (*id.*). In addition, the report reflected that the student worked hard on portions of the test that she felt she was not good at, notably the decoding and mathematics portions, but became frustrated more quickly and easily gave up on these sections (*id.*).

As noted above, testimony by the student's sixth grade special education teacher for the 2017-18 year indicated that she re-administered the reading portion of the spring 2018 NWEA assessment to the student because the student had a "really difficult time focusing," had "just clicked through and not really tried on the assessment," and that it did not reflect her true potential (Tr. pp. 371-72, 402). She further testified that she "re-did" the assessment with the student in a 1:1 setting in a quiet spot in order to get a more accurate assessment and that she provided the student with a lot of redirection and repeatedly stated "come on, . . . come on" to the student (Tr. p. 372). The special education teacher testified that she felt the results of the retest were "a lot" more accurate because the student had really focused and applied herself during the retesting (Tr. pp. 372-73).

Additionally, the special education teacher's testimony indicated that according to the parent, the student was taking medication for ADHD and anxiety, it was very difficult for her to focus and get to work in the morning, she definitely experienced more distractibility in the morning, and that the student was more able to attend to things later in the day (Tr. pp. 374, 382). With regard to the student's scores on the mathematics NWEA assessment, testimony by the special education teacher indicated that the math tests were administered in the morning during her first period math class (Tr. pp. 373-74). Notwithstanding this, the teacher testified that she did believe the math assessment was an accurate assessment of the student's abilities (Tr. p. 375).

Testimony by the special education teacher during the 2017-18 year also indicated that the student did not always accept her testing accommodations and at times began a test without waiting for her teacher to read and explain the directions, that the student inconsistently wore her glasses which affected her ability to focus and attend and resulted in her requiring more support on the days she did not have her glasses, and the student displayed inconsistent effort toward her academic work (Tr. pp. 379-82). The special education teacher testified that there were times the student crumpled up her work in the skills class, times when just focusing on what she was supposed to do was difficult, times when staff moved the student's seat away from certain peers, and other times when the student was wonderful (Tr. p. 382).

Based on the above, a review of the hearing record reflects that although the student made some progress during the 2017-18 school year, the student continued to exhibit significant academic deficits. Thus, the next issue to address is whether, as the district asserts, the educational program offered to the student in the April 2018 IEP—which was very similar to the program

provided in the May 2017 IEP—was reasonably calculated to enable the student to receive educational benefits.

As noted above, the April 2018 CSE recommended that the student continue to receive daily ICT services in ELA, math, science and social studies for 40 minutes per day for a 10-month school year (Dist. Ex. 36 at pp. 7, 9). The April 2018 IEP did not carry over the 15-minute monthly speech-language consultation services for the teacher to address the student's phonemic awareness concerns (compare Dist. Ex. 29 at p. 10, with Dist. Ex. 36 at p. 7). In this instance, as described in detail above, the district did not demonstrate that its educational recommendations for the student for the 2018-19 were reasonably calculated to enable the student to make progress in light of her particular circumstances. Unlike the 2016-17 school year, where the totality of the evidence demonstrated progress sufficient to support a continuation of the district's program recommendations for the 2017-18 year, the student's progress during the 2017-18 year was not sufficiently established for purposes of, once again, recommending largely the same program for the 2018-19 school year. Although there are some indicators of the student's progress from the beginning of the school year to the time of the April 2018 CSE meeting in the hearing record, there is also evidence of overall educational decline as indicated by standardized test scores. Moreover, where a CSE continues to recommend a substantially similar program year after year, the student's progress from year to year must be taken into account as well, as opposed to assessing the student's progress during the course of each school year in isolation from the others. Otherwise, a student could perpetually go back to square one at the beginning of each school year, make some progress under the recommended program during that year and be recommended a similar program for the next year, while, overall, he or she stagnates and falls behind grade level expectations over time. Given the mixture of limited progress, objective evidence of educational decline or regression and the overall lack of evidence of the student's progress as measured on a year-to-year basis, the hearing record shows it was not reasonable for the district to offer a similar program, effectively for the third year in a row, for the 2018-19 school year. Accordingly, I find no reason to disturb the IHO's conclusion that the district failed to offer the student a FAPE for the 2018-19 school year.

D. February 2019

1. Parental Participation (CSE Process)

Turning to the issue of parental participation for the remaining school year at issue, the parent argues that the IHO erred in finding no merit to her claims that the parent was denied meaningful participation during the 2019-20 school year. A review of the hearing record reflects that the CSE convened on February 19, 2019 to develop the student's IEP for the 2019-20 school year (Dist. Exs. 50; 51; 52). The parent testified that at the February 2019 CSE meeting she "brought up the Lindamood-Bell program again" but the supervisor of special education indicated that the district would not be able to add Lindamood-Bell as an additional program to the student's curriculum (Tr. p. 910). The parent recalled that she asked the supervisor of special education if the student would have any specialized program, which the supervisor of special education interpreted as a request for placement in a special class (Tr. pp. 910-11). According to the parent, she indicated that she did not want a special class, to which the supervisor of special education responded that "then" the district would not be offering anything at that time (Tr. p. 910). The

parent indicated that the CSE recommended the continuation of ICT services for eighth grade with READ 180 (*id.*). The parent testified that she was not happy with the CSE's recommendation of the same program because the student's frustrations were growing and the parent felt the student was not being taught the way she needed to be (Tr. p. 912).

The February 2019 IEP reflected that the parent had concerns with respect to the student's progress in school, especially reading, and was seeking alternative methods of instruction to address the student's dyslexia (Dist. Ex. 50 at p. 4). Minutes from the February 2019 CSE indicate that the parent shared with the committee that the student enjoyed math but struggled to remember foundational skills and commented that the student's struggle to redo work after finishing an assignment was a learned behavior (Dist. Ex. 52 at p. 1).

Based on the information in the hearing record, there is sufficient evidence to demonstrate that the parent participated during the February 2019 CSE meeting. Although the CSE may not have incorporated some of the parent's suggestions into the February 2019 IEP, the record sufficiently demonstrates that the parent had an opportunity to express her concerns and have input in the development of the IEP. Therefore, the hearing record does not support the parent's contention that the district significantly impeded her opportunity to participate in the drafting of the student's February 2019 IEP and the IHO's finding that the parent's claims with respect to parent participation are without merit must not be disturbed (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]).

2. Progress Leading Up to the February 2019 CSE Meeting

On appeal, the district argues that the IHO erred in finding that it failed to offer the student a FAPE for the 2019-20 school year. The district further argues that the IHO erred in finding that the student did not make meaningful progress during the 2019-20 school year.

With respect to the student's progress, the district asserts that the student made steady progress in reading during the 2018-19 school year and notes the growth in the student's lexile level. Moreover, the district asserts that the IHO ignored testimony from several district witnesses who interpreted the student's test results as demonstrating slow, but steady, progress and, instead, substituted her own interpretation of the test scores. The district also argues that the IHO erred in relying on the student's spring 2019 NWEA results, since they had not yet been administered when the February 2019 CSE convened.

Based on the standard set forth above, in order to address the parent's allegation, a review of the information contained in the hearing record regarding the student's progress made during the 2018-19 school year is warranted.

As with the previous school years the hearing record contains multiple measures of the student's academic performance during the 2018-19 school year including a MAP growth report, lexile levels from the HMH Reading Inventory, the results of a READ 180 assessment, an IEP progress report, and testimony by district staff who were familiar with the student (Dist. Exs. 58; 70; 72; 75).

The student's performance on the math NWEA assessment, as reflected in the MAP growth report, dropped from 210 in spring 2018 (6th grade) to 201 in fall 2018 (7th grade) (Dist. Ex. 70).

With regard to the student's performance on the reading NWEA assessment reflected in the MAP growth report, as noted above, the student's RIT scores for the 2017-18 school year (sixth grade) had increased from 210 in fall 2017 to 214 in winter 2018 (Dist. Ex. 70). However, the MAP growth report indicated that the student's RIT score dropped to 205 in fall 2018 (id.).

The student's performance on the HMH Reading Inventory during the 2018-19 school year as reflected in the "Progress to College and Career Report," indicated that she regressed 113 points over the summer after sixth grade and that at the start of the 2018-19 school year in September 2018 her lexile score was down to 767 (compare Dist. Ex. 71 at p. 1, with Dist. Ex. 72 at p. 1). The student's performance on the Reading Inventory for the four subsequent intervals during the 2018-19 school year showed she progressed to a lexile of 790 on November 7, 2018 and to a lexile of 842 on January 25, 2019 (compare Dist. Exs. 71 at p. 1, with Dist. Ex. 72 at p. 1).

A READ 180 Diagnostic Skills Report from the 2018-19 school year indicated that student received a "correct" score of 70 percent for literary elements, 17 percent for point of view, and 43 percent for text structure (Dist. Ex. 75). The report quantified the student's overall comprehension as 44 percent and indicated that 11 of the skills tested were below a 70 percent proficiency level (Dist. Ex. 75; see Tr. pp. 669-70).

A review of the student's 2018-19 IEP progress report indicated that in November 2018 and January 2019 the student was progressing inconsistently on all of the annual goals that she was working on at the time (Dist. Ex. 58 at pp. 1-4).

The parent opined that the scores from the two years of the HMH Reading Inventory looked "basically the same" and did not look like progress to her (Tr. p. 1003).

With respect to the district's claim that the IHO failed to consider other measures of the student's progress, such as report cards, IEP progress reports, READ 180 data, information shared with the CSE, and testimony of the student's teachers, testimony by the director of curriculum indicated that the READ 180 Diagnostic Skills Student Report provided information regarding the particular skills a student was proficient in, as well as those they struggled with (Tr. p. 669; Dist. Ex. 75). She indicated that anything over 70 percent indicated some level of proficiency, which for this student included identifying central ideas and details (70 percent); inferences (80 percent); plot (100 percent); theme (100 percent); literary elements (70 percent); and author's purpose (100 percent) (Tr. pp. 669-70; Dist. Ex. 75 at pp. 1, 2). The director of curriculum testified that the student's areas of proficiency suggested that her decoding ability was such that she was able to decode and "get the basic gist . . . of the story" as well as make inferences and that the student's biggest areas of weakness were in the combined-text structure section of the assessment that included skills such as sequence/process where the student attained a score of 50 percent correct; cause and effect (56 percent); and compare and contrast (67 percent) (Tr. pp. 670-71; see Dist. Ex. 75 at p. 3). The director of curriculum opined that these areas of weakness would "probably be driving the small group instruction" (Tr. p. 671). She indicated that the READ 180 report showed that the student had lesser challenges on point of view tasks despite that the student had 0 percent correct responses for author point of view and 17 percent for inferences (Dist. Ex. 75 at p. 2). The

report also reflected the student's percentage of correct responses in the areas of description (50 percent); problem and solution (0 percent); inferences (41 percent); and all text structure (43 percent), which were also less than the 70 percent proficiency level that the director of curriculum spoke of (id. at p. 3).

Testimony by the student's seventh grade special education teacher indicated that during the 2018-19 school year, the teacher taught the student math, science, social studies, English, Skills class, and reading using READ 180 (Tr. p. 502). The special education teacher indicated that during the 2018-19 school year the student's ICT English class had three teachers: the general education classroom teacher, an ESL teacher, and herself (Tr. pp. 538-39). The special education teacher also testified that she provided all of the information in the academic achievement, functional performance and learning characteristics section of the student's February 2019 IEP, which included the statement that the student's rate of progress at that time was "slow but steady" (Tr. pp. 533-34; Dist. Ex. 50 at p. 3). She further testified at the hearing that the student made "steady and gradual progress" in the inclusion classroom during the 2018-19 school year (Tr. pp. 537, 539).

The district also argues that the IHO ignored other material facts in the hearing record that may have impacted the student's test scores, including the fact that the student had difficulty with test-taking and that, during the 2018-19 school year, the student struggled in the morning when the math NWEA assessments were administered. The district also emphasized that, during the 2018-19 school year, other factors also contributed to the student's performance, including that the student stopped taking medication for ADHD for a time and often went to class without her prescription reading glasses.

Additionally, testimony by the director of pupil personnel indicated that with regard to test taking, there were a lot of contributing variables that could inflate or deflate the scores when it came to the student (Tr. pp. 151-52). Her testimony indicated that factors such as the student's level of effort, work avoidance behaviors, whether the student was on new medication or experiencing anxiety could all change the student's performance on a test at the time it was administered (id.). She confirmed that the CSE was concerned about the student finishing the 2017-18 and 2018-19 school years with the same lexile scores in reading and testified that it prompted the CSE to do a "deeper dive" and look at datapoints and student progress from other measures such as the WIAT-III and READ 180 (Tr. pp. 152-53).

The hearing record shows that there were other factors, identified by the student's special education teacher, that may have impacted the student's performance during the 2018-19 school year. In an email dated December 12, 2018, the parent asked the student's special education teacher to meet with her regarding concerns she had related to her daughter (Dist. Ex. 82 at p. 2). The special education teacher responded via email on December 18, 2018, indicating that she also had concerns and had planned to share them at the student's upcoming December 20, 2018 academic meeting (id. at pp. 1-2). However, the teacher took the opportunity to share her concerns via email with the parent including that the student struggled to come to class prepared and ready to work with folders, a pencil, and her glasses; when the student left class to go to the bathroom she was gone for a long time and therefore was currently provided with an escort; and that the student exhibited increased difficulty staying focused and not talking during class, to the extent that the

teacher moved her seat to deter her from talking and laying across her desk (*id.* at p. 2). The special education teacher indicated that the student laid across her desk as if she had "had enough already by first period" and that she (the teacher) was usually able to slowly get the student to do what she needed to do by providing a lot of encouragement (Tr. pp. 565-66). The teacher indicated that at times the student did not seem to recognize what was going on around her and that when she did not get what she wanted, the student shut down (Dist. Ex. 82 at p. 2).

The hearing record shows that the student's seventh grade teachers subsequently met with the parent and discussed their concerns on December 20, 2018 (Tr. pp. 526-27; Parent Ex. F). Specifically, the student's ELA teacher indicated that the student was not taking advantage of opportunities to make up test corrections or review for quizzes or tests, that she was not putting forth effort when completing her work and had an average at that time of 68 (Parent Ex. F). Her science teacher indicated the student needed to resubmit assignments to raise her grade, which at that time was 64, that she needed to focus in class, and wear her glasses to help her read handouts (*id.*). The social studies teacher indicated that her current grade was 66, that she was missing one assignment, did poorly on quizzes, and was very distracted (*id.*). A parent connection form, used to summarize the December 2018 "conference content," included recommendations that the student make up missing assignments for ELA and science and that her special education teacher check the student's assignment book and the parent sign it and go over assignments with the student (*id.*). Testimony by her special education teacher indicated that although the team discussed encouraging the student to come down at lunch time for extra help and to make corrections the student took advantage of extra help only sporadically (Tr. pp. 522, 528).

In a follow-up email dated January 23, 2019, the special education teacher informed the parent that the student had put little effort into the social studies corrections that she had completed and would have to redo them (Dist. Ex. 83 at p. 1). The teacher identified the opportunities available to the student to get help in science and noted that the student had been made aware of these opportunities but was either choosing not to sign up or did not show up after signing up for extra help (*id.*). At the time, the student's grade in science was "66%" (*id.*).

Additional emails in February 2019, between the parent and the student's seventh grade special education teacher, indicated the student was becoming less cooperative in school. For example, the parent and special education teacher exchanged emails regarding the student's reluctance to wear her reading glasses when necessary and to have them with her at school (Dist. Ex. 84 at pp. 1, 3). The teacher reported that the student had pushed back on her reminders to wear the glasses to the extent that she told the teacher the glasses were only for when she was reading a book, although the parent had indicated that the student should be wearing the glasses for "seeing near" including reading, working on the computer, or when the student sat up close to the board (*id.* at pp. 1-2, 3). The teacher reported to the parent that she had asked the student to get her glasses on to do her seat work and the student did not follow through (*id.* at p. 1). Contrary to testimony by the student's sixth grade special education teacher, who testified that the student went willingly to get her glasses from her backpack when asked, the student's seventh grade teacher indicated that she had asked the student several times in ELA class to put her glasses on for the end of the unit exam but the student refused to do so (Tr. p. 380; Dist. Ex. 84 at p. 1).³³ The email

³³ Although the hearing record reflects the student needed to wear her glasses at school the parent testified that

also reflected that during reading the prior day the student completed very little and further indicated that she had a bag of candy in her sweatshirt and when asked to stop eating the candy she ate another piece (id. at p. 3).

This email chain documented other instances where the student was uncooperative and off task in class. Specifically, the student argued with the teacher about carrying a jean bag that was against the code of conduct and later, after the teacher told her she should write a letter to the board of education and explain why she wanted to change the code of conduct, the student attempted to write that letter during social studies class, while the class was reading a play (Dist. Ex. 84 at p. 3). In an email to the parent the following day, the teacher indicated that the student "tried to sneak to do her math homework" when the class was using Edmentum to review the distributive properties in math class (id. at p. 2). This email also informed the parent that the student had taken an excessive amount of time during a trip to the bathroom and the teacher had not been able to find her, leading school security to help look for the student (id. at p. 1).

In addition, the student's general education teacher also noted work avoidance behaviors (Dist. Ex. 45 at p. 1). Testimony by the director of pupil personnel also indicated that the student exhibited some work avoidance behaviors (Tr. p. 186). Her testimony further indicated that the student's performance was affected by her anxiety, noting that evaluators had indicated the student's anxiety influenced her fluency and that teachers reported they sometimes saw the anxiety exhibited in the classroom (id.). Testimony by the student's seventh grade special education teacher indicated that she believed the student's anxiety caused her to be task avoidant and the student did not want to be singled out, while the student's ADHD played a role in her lack of focus (Tr. pp. 564-65).³⁴

Testimony by the student's seventh grade special education teacher also indicated that rushing on tests as well as in the classroom was an issue for the student (Tr. pp. 548-49). The teacher stated that the student always liked to be the first one done and opined that the student was proud of herself and liked to show that she was done when she accomplished what she was asked to do (Tr. p. 549). She further testified that the student's rushing could have been related to her anxiety or her ADHD (id.). In an email dated October 1, 2018 the special education teacher described that the student worked ahead of her teacher on a quiz, answering questions before the teacher had read them to her, as per her reading accommodations (Dist. Ex. 80 at p. 2). The parent posited that the student might have rushed through the test because she was uncomfortable with her accommodation being provided in front of other students who did not have an IEP (Dist. Ex.

there came a time when she told the student's special education teacher to stop asking the student if she had her glasses because she was concerned about the anxiety that resulted from the teacher repeatedly asking about the glasses instead of focusing on instruction (Tr. pp. 454, 523, 990-91, 1001, 1005; Dist. Exs. 29 at p. 7; 32 at p. 2; see Tr. pp. 519-20). Testimony by the student's seventh grade special education teacher indicated that the student was not wearing her prescribed glasses for the majority of the school year while reading on the computer, on READ 180, or in a book (Tr. p. 520).

³⁴ In an email dated September 30, 2018 the parent informed the student's seventh grade special education teacher that the student had started taking medication to address her anxiety again (Dist. Ex. 80 at pp. 2, 3).

80 at pp. 1-2). However, the teacher testified that this was not an isolated incident and that she often had difficulty keeping the student reading along with her (Tr. p. 518).

A review of the student's 2018-19 progress report for IEP goals shows that it included several teacher comments that described the student's tendency to rush through her work (Dist. Ex. 58 at pp. 2, 4). Comments from the second (January 2019) marking period indicated that the student needed to take her time while reading and answering questions and also needed to take her time to line up her numbers when adding and subtracting (Dist. Ex. 58 at pp. 2, 4).

Overall, the evidence in the hearing record supports a finding that although the student made some inconsistent and minimal progress from the beginning of the 2018-19 school year to the February 2019 CSE meeting, there is insufficient evidence that she made demonstrable educational progress overall when comparing multiple test and assessment scores from 2017-18 and 2018-19. As previously discussed, little can be gleaned with respect to whether a student's program is reasonably calculated to allow her to make progress in light of her individual circumstances where the same program is recommended to the student for several years, and the student's progress in terms of her educational functioning and academic achievement is considered primarily in the context of how the student performed at the beginning of each school year and where she ended up at the end of each school year, rather than tracking progress from year to year in order to capture evidence of stagnation or regression. Therefore, , given that the district did not demonstrate that the student progressed under its recommendations for the 2018-19 school year, the next issue to address is whether, as the district asserts, the educational program offered to the student in the February 2019 IEP—which was very similar to the program provided in the April 2018 IEP—was reasonably calculated to enable the student to receive educational benefits.

As noted above, the February 2019 CSE recommended that the student continue receiving daily ICT services in English/language arts, mathematics, science and social studies, for 40 minutes per day in each class, during the 10-month school year (Dist. Ex. 50 at pp. 7, 8). However, the hearing record shows that the student demonstrated very little academic progress during the 2018-19 school year and in addition she began to demonstrate avoidance behaviors and a growing lack of cooperation with teacher requests. Despite the student's general deterioration in academic skills, performance and behavior as expressed by her diminished functioning in the classroom, her limited and inconsistent academic progress from the beginning of the school year until the February 2019 CSE meeting, and a dearth of evidence that any progress the student achieved during the 2018-19 school year represented overall educational progress when compared to testing and assessment results from her 2017-18 school year, the CSE recommended the same program and placement for the student for the 2019-20 school year as she had received during the 2018-19 school year. Accordingly, there is sufficient information in the hearing record to support a finding that the February 2019 IEP was not reasonably calculated to provide the student with meaningful educational benefit in light of her circumstances and the IHO's determination that the district failed to offer the student a FAPE for the 2019-20 school year should not be disturbed.

E. Compensatory Education

Having found that the evidence in the hearing record supports the IHO's determination that the district denied the student a FAPE for the 2018-19 and 2019-20 school years, I turn to the appropriateness of the remedy crafted by the IHO.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

1. Math and Reading Services

In their respective appeals, both parties take issue with the IHO's determination to award 280 hours of compensatory services for math and reading "to be provided by the school district by a provider who is certified and/or licensed in their respective fields" (see IHO Decision at p. 25).

During the impartial hearing, the parent presented evidence to support her request for compensatory education in the form of a program at Lindamood-Bell. According to the hearing record, Lindamood-Bell is a learning process that has specific programs to address reading, comprehension, and math (Tr. p. 794). In the instant case, the student participated in a learning ability evaluation conducted by a Lindamood-Bell center on March 12, 2019 (Parent Ex. G). The executive center director from Lindamood-Bell (executive director) who met with the student and reviewed the results of the evaluation with the parent, testified that, based on the student's test

results, she recommended three programs for the student, including the "Seeing Stars," the "Visualizing and Verbalizing," and the "On Cloud Nine" programs (Tr. pp. 793, 810). The executive director explained that the "Seeing Stars" program would specifically address the student's mechanics and reading fluency (Tr. p. 810). The executive director further explained that the "Seeing Stars" program would specifically develop the student's phonemic awareness and recognition of sight words (Tr. p. 815). With respect to the "Visualizing and Verbalizing" program, the executive director explained that this program would develop concept imagery and assist with the student's expressive language (Tr. pp. 817-22). Next, the executive director explained that the "On Cloud Nine" is a math program specifically designed to be utilized after the "Seeing Stars" and "Visualizing and Verbalizing" programs so that the student could use those skills that were developed with the first two programs and apply them to math (Tr. pp. 822, 829). Based on the student's evaluation, the executive director recommended Lindamood-Bell instruction—four to six hours per day for five days per week—for a total of 280 to 320 hours (Tr. p. 832). The executive director explained that the research was based on a model of instruction that consisted of an "intensive five days a week" and that the number of hours in the day could be flexible but that four hours a day was "ideal" (*id.*). When asked whether the number of weeks could lengthen out from 14 to 16 weeks if the student had Lindamood-Bell instruction just two or three hours a day, the executive director responded that the "target [wa]s the number of hours rather than the number of weeks" (Tr. p. 833).

Although the IHO did not award the Lindamood-Bell program, the IHO did base her award on the executive director's recommendation of 280 to 320 hours of 1:1 tutoring (*see* IHO Decision at p. 22). The district objects to the amount of compensatory services ordered by the IHO on the grounds that the award lacked a nexus to the underlying denial of a FAPE; however, during the impartial hearing, the district failed to alternatively assert any arguments or provide evidentiary support on the issue of what, if any, compensatory remedy would be appropriate if it were found to have denied the student a FAPE (*see, e.g., Application of a Student with a Disability*, Appeal No. 16-050). On the other hand, the evidence in the hearing record generally supports the IHO's award. In addition to the evidence summarized above regarding the recommendations of the executive director of Lindamood-Bell, the private neuropsychologist also opined about an appropriate award for the student. In offering recommendations, the neuropsychologist cited the student's lack of progress while attending the district, which, as discussed above, underlies the determination that the district failed to provide the student with a FAPE (*see* Parent Ex. H at p. 7). The neuropsychologist indicated that the student would benefit from "intensive remediation" and cited the Lindamood-Bell program as an example of a multisensory-language-based approach which would address the student's need for a highly structured curriculum (*id.* at p. 9). Moreover, the total number of hours is appropriately modest for a denial of a FAPE for two school years given that the student did attend the district program and receive some educational benefit during the 2018-19 and 2019-20 school years.

Next, the parent argues that the IHO erred in declining to award the Lindamood-Bell program. While the hearing record reflects that the Lindamood-Bell program could address the student's significant deficits in reading and math, I have a concern regarding the intensity of the

program if delivered over a limited 14 to 16 week time period.³⁵ For example, if the student received Lindamood-Bell instruction for four hours per day as the executive director suggests as "ideal," this would limit the student's ability to participate in her regular academic program and other services or aggregate with such program and services to result in a lengthy extended-day schedule. Therefore, while it is understandable that the parent desires the Lindamood-Bell program for the student, it is necessary to take into consideration the student's entire academic program, as well as the student's tolerance for services and instruction before calculating an award (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). As such, I agree with the IHO's decision to order a total amount of compensatory services in a manner that provides flexibility with regard to the timeframe and medium for delivery.

However, given the evidence in the hearing record tending to support the parent's requested relief and the lack of evidence from the district identifying a form or amount of compensatory educational services that it could deliver to the student that was qualitatively different than the building-level services that it implemented during the school years for which it denied the student a FAPE, I agree with the parent's assertion that the IHO erred in limiting the delivery of the services to "to be provided by the school district by a provider who is certified and/or licensed in their respective fields" (see IHO Decision at pp. 22, 25). Thus, I will modify the IHO's order so that the parent can choose the provider to deliver the tutoring services to the student, which may be a provider trained in Lindamood-Bell or any other methodology the parent finds appropriate, provided that in no event shall the cost of the services exceed the cost of the services available at Lindamood-Bell. Consistent with this, the district should reimburse the parent for the costs of the Lindamood-Bell intake and assessment of the student.³⁶

In summary, the IHO's award represents an appropriate balance between the purpose of an award of compensatory educational services with a fact-specific inquiry into the student's areas of need in order to accomplish the IDEA's purpose of providing the student with the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place (see Reid, 401 F.3d at 524). Accordingly, the IHO properly awarded a total of 280 hours of compensatory educational services to make up for the district's failure to provide an appropriate special education program during the 2018-19 and 2019-20 school years to address the student's needs, except that the IHO's order shall be modified to permit the parent to obtain the services from a private provider of her choosing as described above.

³⁵ Similarly, I share the IHO's concern regarding the Lindamood-Bell program being implemented remotely (IHO Decision at p. 21).

³⁶ While the IHO did not order the Lindamood-Bell evaluation as an IEE to inform the hearing record (see 8 NYCRR 200.5[j][3][viii]; see also 8 NYCRR 200.5[g][2]), she did rely upon it for the purposes of crafting relief, and, therefore, reimbursement of the costs of this evaluation is an appropriate equitable remedy under the circumstances.

2. Nonpublic School Tuition

Turning to the parent's assertion in her cross-appeal that the IHO erred in denying the parent's compensatory education services in the form of tuition at Gow, assuming that the IHO erred in failing to grant the relief based on the parent's purported failure to request the same in her amended due process complaint notice, the hearing record supports the IHO's denial of this form of relief.³⁷

Initially, as to the IHO's comment that she might have reached a different result with regard to ordering funding for Gow under the Burlington/Carter analysis, the observation as to the category of remedy the parent sought is a matter treated with some disparity in the courts. For example, one district court recently described a situation similar to the one in this matter insofar as: "[the parents] ha[d] not expended any money on tuition thus far and [we]re not, at th[at] time, requesting any tuition reimbursement for past-made payments"; the court characterized the parents' request in that matter as "a request for prospective placement reasonably intended as compensatory education" (Smith v. Cheyenne Mountain Sch. Dist. 12, 2018 WL 3744134, at *7-*8 [D. Colo. Aug. 7, 2018] [concluding that the administrative law judge's decision not to award compensatory education services was supported by the record and not erroneous and that an award of prospective nonpublic school placement as compensatory relief was likewise unwarranted, particularly in light of the IDEA's preference for avoiding "separate schooling or other removal . . . from the regular educational environment"], quoting 20 U.S.C. 1412[5][A]; see also Eley v. District of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges that IEP]).³⁸ In contrast, another district court seemed less concerned with the need to avoid an unnecessary removal from public schooling and instead appeared to employ an analysis closer to, but not identical to a parental unilateral placement/reimbursement case, relying on the Supreme Court's decision in Carter to determine whether the parent's proposed private school placement was "proper under the Act" (S.C. v. Chariho Reg'l Sch. Dist., 298 F. Supp. 3d 370, 381 [D.R.I. 2018], quoting Carter, 510 U.S. at 15; see also D.C. v. Oliver, 2014 WL 686860, at *5 [D.D.C. Feb. 21, 2014] [discussing both Reid compensatory education relief, Carter, and Forest

³⁷ Notably, courts have repeatedly recognized the "broad discretion" that hearing officers and reviewing courts must employ under the IDEA when fashioning equitable relief, and have also "repeatedly rejected invitations to restrict the scope of remedial authority provided in Section 1415(i)(2)(C)(iii)" (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]).

³⁸ Consistent with the court's rationale in Smith, the IHO's comment that she was not inclined to order a residential placement for the student was appropriate to the extent that a prospective placement implies that the district is effectuating the placement of the student (as opposed to a unilateral placement, where the parent effectuates the placement), and the district is obligated to place a student in the LRE (see 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]; Smith, 2018 WL 3744134, at *7-*8; see also C.L., 744 F.3d at 830, 836-37 [noting in the unilateral placement context that, "while the restrictiveness of a private placement is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"])).

Grove reimbursement, and finding that, when a school district has failed to develop an IEP, propose a location of services, and otherwise offer an eligible child a FAPE, parents may seek placement at a nonpublic school on a prospective basis and are not required to wait and see a proposed IEP in action before concluding that it is inadequate and choosing to enroll their child in an appropriate nonpublic school]; J. v. Portland Pub. Sch., 2016 WL 5940890, at *23 [D. Me. Oct. 12, 2016] [suggesting that LRE considerations, although required by the Act, may be of lesser importance when an administrative hearing officer is fashioning relief in the form of a compensatory educational placement in a nonpublic school setting], adopted at, 2016 WL 7076995 [D. Me. Dec. 5, 2016]). There are various practical differences that come into play depending on how this sort of relief is characterized, not the least of which is application of the burden of proof (compare Educ. Law § 4404[1][c] [providing that a "parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement"], with M.M., 2017 WL 1194685, at *4 [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]; Application of a Student with a Disability, Appeal No. 19-016; Application of the Dep't of Educ., Appeal No. 17-105).

Another area of concern in effectuating a prospective placement is the effect on the district's obligations and the procedural protections of the IDEA. That is, an award of prospective placement in a nonpublic school tends to circumvent the statutory process, under which the CSE is the entity tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).³⁹

Here, the evidence in the hearing record does not present one of those few cases where a prospective placement might be appropriate (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]). At this point, if it has not already done so, the CSE should be meeting in the upcoming months to develop a new IEP for the student for the 2020-21 school year (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). As such, the more appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record, which as discussed above, warrants an award of compensatory educational services to remedy the district's failure to provide the student a FAPE during the 2018-19 and 2019-20 school years. If the parent remains displeased with the CSE's

³⁹ These concerns simply do not arise in the same way in retrospective, unilateral placement cases in which the public school district's responsibility to assess the student and continue to propose an appropriate public school placement typically continues uninterrupted and there is only a deviation in the delivery of services that changes while the student is unilaterally placed at the parent's own risk.

recommendation for the student's program for the 2020-21 school year, she may obtain appropriate relief by challenging the district's determinations regarding that school year in a separate proceeding (see Eley, 2012 WL 3656471, at *11 [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

Accordingly, the IHO's order denying the parent's request for prospective placement at Gow is appropriate and will not be disturbed.

F. CSE Reconvene and IEP Amendment

The parent appeals the IHO's order that the CSE reconvene and add reading and math services from a teacher or certified/licensed provider to the student's IEP (see IHO Decision at p. 25). The parent argues that the award is "arbitrary, unconnected to the evidence, and patently inappropriate given that such nonspecific, nonspecialized 'reading and math services' have failed [the student] for the past three years" (Answer & Cross-Appeal ¶ 35).

First, neither party has appealed the IHO's determination that the CSEs' failure to list "building level services" in the student's IEPs for the 2017-18 through 2019-20 school years, did not rise to a denial of a FAPE (IHO Decision at pp. 10-11). Therefore, the IHO's determination on this issue has become final and binding on both parties and it will not be reviewed on appeal (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). However, it appears that the IHO's order that the CSE reconvene and list reading and math services was generally targeted at the CSEs' failures to include building level services on the student's IEP. Accordingly, the underlying determination shall be briefly addressed.

The hearing record reflects that the student received building level services in reading and math although they were not reflected in the student's IEPs. Beginning in Fall 2016 the student received the Reading Horizons program, AIS, MobyMax, Do the Math, Orton-Gillingham, the Lexia program, and Read Theory (Dist. Ex. 4 at p. 2; 11 at p. 2; 12 at p. 1; 17 at p. 1; 29 at p. 6; 31 at p. 1; see Tr. pp. 132-33, 251-52). The hearing record shows that the CSE added a daily 30-minute push-in reading group to the student's program in April 2017 (Dist. Exs. 15 at p. 9; 17 at p. 1; 18), however, the IEP for the 2017-18 school year did not continue this service (see Dist. Ex. 29 at p. 9). Notwithstanding this, the hearing record shows that the student was targeted to and did receive the Read 180 program during the 2017-18 school year (Tr. pp. 80, 967-968; Dist. Ex. 31 at p. 1; 36 at pp. 3-4; see Dist. Exs. 71 at p. 1), as well as during the 2018-19 school year (see Tr. pp. 912; see Dist. Exs. 52 at p. 1; 72; 73; 94; 95). She was also given access during the 2018-19 school year to math supports including Edmentum, Khan Academy, and Symbolab (Tr. pp. 289, 291-93; Dist. Ex. 52 at p. 1).

Certain additional instructional or supportive services may be available to special education students and non-disabled students alike (e.g., AIS or "building level services"); however, according to the State Education Department, such services should not be listed on a student's IEP (see "Academic Intervention Services: Questions and Answers," at pp. 5, 20, Office of P-12 Mem. [Jan. 2000], available at <http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf>). On the other hand, services that clearly fall into the realm of special education services are required to be listed on an IEP, at least according to United States Department of Education guidance, which states that

"[t]he IEP Team is responsible for determining what special education and related services are needed to address the unique needs of the individual child with a disability. The fact that some of those services may also be considered 'best teaching practices' or 'part of the district's regular education program' does not preclude those services from meeting the definition of 'special education' or 'related services' and being included in the child's IEP" (Letter to Chambers, 59 IDELR 170 [OSEP 2012]).

In this instance, for better or worse, the district seemed to rely heavily on the delivery of "building-level" services to address the student's reading and math needs. Going forward, the CSEs should consider whether or not any reading or math services that the student requires meet the definition of "specially designed instruction" and are necessary in order for the student to receive a FAPE (see 34 CFR 300.39[b][3]). If so, the CSE should include such services on the student's IEP. However, as noted above, I will not usurp the CSE's authority to consider these services and, therefore, will modify the IHO's order that the CSE include reading and math series on the student's IEP, particularly given the parent's request that such relief be vacated.

G. District and Independent Educational Evaluations

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Pursuant to the IDEA, federal and State regulations, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree, and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). Pursuant to State regulation, a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability (see 8 NYCRR 200.4[b][4]). The reevaluation "shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][iii]; 8 NYCRR 200.4[b]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

A relevant area of factual inquiry regarding the appropriateness of the district's evaluations in this case are the comprehensiveness of the assessments conducted and whether the student's areas of need were adequately identified and assessed. Pursuant to the IDEA, federal and State regulations, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree, and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). Pursuant to State regulation, a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability (see 8 NYCRR 200.4[b][4]). The reevaluation "shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student

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Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

1. Neuropsychological Evaluation

The parent requested a neuropsychological IEE in her due process complaint notice and alleged that the district failed to "re-administer" a neuropsychological evaluation per the recommendation of the private neuropsychologist who conducted an evaluation of the student in July 2016 (Parent Ex. B at pp. 7, 11). The IHO denied the parent's request that the district fund the May 2019 private neuropsychological evaluation based on her finding that the district conducted a psychological evaluation of the student and that it was unclear why the May 2019 neuropsychological evaluation was needed (IHO Decision at p. 22). In the cross-appeal, the parent asserts that the IHO erred in declining to reimburse her the cost of the 2019 neuropsychological IEE on the basis that it was duplicative and irrelevant. Further, both the district and the parent challenge the IHO's order for the district to fund a new IEE to be conducted by Center for Discovery.

The parent obtained a private neuropsychological evaluation of the student in July 2016 that recommended repeat testing "in one to two years to monitor any changes in neurocognitive status" (see Dist. Ex. 66 at pp. 1, 10; see also Tr. p. 1033). According to the parent's memorandum of law, since the district did not conduct such repeat testing, she obtained the May 2019 private neuropsychological evaluation of the student (see Parent Mem. of Law at p. 19). The parent further asserts that she obtained the May 2019 neuropsychological evaluation due to her disagreement with the district's assertions that the student was making progress (see id.). There is nothing in the hearing record indicating that the parent requested that the district conduct a neuropsychological evaluation of the student (see Tr. pp. 306, 476).

While the district did not conduct a neuropsychological evaluation of the student within two years of the July 2016 private evaluation,⁴⁰ it did conduct cognitive and academic testing in November 2017 and March 2018 (see Dist. Ex. 68; 69). The school psychologist who completed the November 2017 psychoeducational evaluation of the student administered the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) to measure the student's cognitive functions and the Conners 3rd Edition Self-Report Short Form (Conners 3-SR) to assess the student's "current symptoms of ADHD" (Dist. Ex. 68 at pp. 1-4). According to the school psychologist, the results of administration of the standardized tests were "thought to be a valid reflection of [the student's] potential" (*id.* at p. 1). Administration of the WISC-V yielded a full-scale IQ of 100, which fell in the average range (*id.* at pp. 2-3). The school psychologist opined that, "[w]hen compared to the previous administration [of the WISC-V], [the student] ha[d] demonstrated some impressive growth in several areas of her thinking and reasoning skills" (*id.* at p. 3).⁴¹

According to the school psychologist, the student demonstrated a relative strength in verbal comprehension, particularly "when compared to her performance on tasks that involved using logic to solve problems," which "implied a strength in crystallized abilities relative to fluid reasoning abilities" (Dist. Ex. 68 at p. 3). The psychologist also observed that the student performed very low on subtests that contribute to the verbal comprehension index, "suggesting weak ability to acquire, remember, and retrieve knowledge about the world around her" (*id.*). According to the school psychologist, the student exhibits a strength in visual spatial processing (high average range), indicating that the student possessed "a well-developed capacity to apply spatial reasoning and analyze visual details" (*id.*). The student exhibited a relative weakness on the fluid reasoning index (low average range), which the school psychologist opined could manifest in a "difficulty solving complex problems that require her to identify and apply rules" (*id.*). The student performed in the average range on the working memory index and in the above average range on the processing speed index (*id.* at p. 4). As for the latter, the school psychologist noted that the student's "speed and accuracy when processing visual information were strengths compared to her performance on tasks that involved language-based reasoning," which suggested a relative strength in the ability to quickly evaluate visual information and make simple decisions compared to the ability to engage in complex problem solving (*id.*). As for the student's completion of the Conners Self Report, the school psychologist described the student as "candid about her difficulties" and indicated that her profile reflected elevated scores in inattention and statistically significant scores in the areas of hyperactivity/impulsivity and learning problems (*id.*).

⁴⁰ While the July 2016 private neuropsychological evaluation recommended repeat testing, in order to satisfy its obligation to consider the private evaluation, the CSE was not required to adopt that recommendation (see 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]).

⁴¹ The school psychologist referenced the student's scores on an administration of the WISC-IV in March 2015 (Dist. Ex. 68 at p. 1; see Dist. Ex. 63).

In addition to the testing described in the November 2017 psychoeducational evaluation report, a special education teacher completed a March 2018 educational evaluation of the student, which consisted of administration of the Weschler Individual Achievement Test-Third Edition (WIAT-III) to assess the student's academic skills (Dist. Ex. 69 at pp. 1-2). The special education teacher reported that the student "was anxious with the timed assessment pieces" and that this could have impacted her scores (id. at p. 2). She also noted that the student was distracted during the testing and required redirection (id.).

The special education teacher reported that the student scored in the average range in the area of reading comprehension, which represented improvement relative to prior testing but noted that the student's basic reading composite score fell below average (Dist. Ex. 69 at p. 1). According to the special education teacher, the student "continue[d] to have a difficult time with pseudoword decoding" but she scored in the average range on the word reading subtest, which indicated the student's "strong foundation of sight words that assist[ed] her in her reading comprehension" (id. at pp. 1-2). In the area of numerical operations, the special education teacher reported that the student "remained in the average range"—exhibiting ability to add multiple digits together and simplify fractions but difficulty with borrowing when subtracting and completing long division—but struggled in math problem solving (below average range) (id. at p. 2). As for oral reading fluency, the student scored in the average range but struggled with math fluency facts in addition, subtraction, and multiplication (id.).

There is no indication in the hearing record that the parent ever expressed disagreement with the November 2017 psychoeducational or the March 2018 educational evaluation of the student. In her memorandum of law in support of her cross-appeal, the parent points to standardized tests administered by the neuropsychologist in May 2019 that were lacking from the district evaluations (see Parent Mem. of Law at pp. 19-20). For the May 2019 evaluation, the neuropsychologist also administered the WISC-V; in addition, the neuropsychologist administered the NEPSY II Developmental Neuropsychological Assessment (NEPSY-2) to assess the student's cognitive abilities in the areas of language, comprehension, and attention; the Wide Range Assessment of Memory and Learning, Second Edition (WRAML2) to measure the student's performance on tests of learning and memory; the Conners Continuous Performance Test 2nd Edition (CPT-2), the Trail Making Test, the Stroop Color and Word Test, and the Behavior Rating Inventory of Executive Function (BRIEF) to measure the student's attention and executive function; the Beery-Buktenica Development Test of Visual Motor Integration, 6th Edition (Beery VMI) to assess the student's visual spatial and motor skills; and the Reynolds Children's Manifest Anxiety Scale, Second Edition (RCMAS-2) and the Sentence Completion Test to measure the student's anxiety symptoms (Parent Ex. H at pp. 1, 4-7, 12-14). The neuropsychologist testified that she repeated many of the tests that she had administered in 2016 except that she decided not to re-administer the WIAT since the student had just undergone an academic evaluation by Lindamood-Bell and that she added the Stroop Color and Word Test, as well as "some self-report measures" for the student to complete—i.e., the Reynolds Children's Manifest Anxiety Scale, Second Edition (RCMAS-2) and the Sentence Completion Test—"since she was older" (Tr. p. 1016; compare Dist. Ex. 66 at p. 1, with Parent Ex. H at p. 1). The May 2019 private neuropsychological evaluation reflected that, in comparison to the testing conducted in July 2016, the student's verbal, fluid reasoning, and working memory scores were somewhat lower in May 2019 (Parent Ex. H at p. 7; compare Parent Ex. H at p. 12, with Dist. Ex. 66 at p. 12). With regard

to the student's lack of progress, the neuropsychologist opined that the decline in the student's scores likely reflected a lack of progression in skills as opposed to a loss of skills (Parent Ex. H at p. 7). She further explained that as the student got older she "ha[d] not been able to keep up with her age matched peers in the number of questions she [wa]s able to answer; as the test items bec[a]me more difficult, the information bec[a]me[] more abstract in nature, which [wa]s harder for [the student]" (*id.*).

During the impartial hearing, the neuropsychologist testified that the benefit of a neuropsychological evaluation, as compared to a psychoeducational evaluation, was to "look[] at additional factors with the memory and attention," as well as "other areas" rather than just "the educational part" (Tr. p. 1034). However, the district was only obligated to conduct evaluations sufficient to "determine the student's individual needs, educational progress and achievement" and ability to participate in instructional programs (8 NYCRR 200.4[b][4]). The district relied on technically sound instruments and assessed the student's cognitive and academic skills sufficiently to identify all of the student's special education and related services needs (see 34 CFR 300.304[b][3]; [c][6]; 8 NYCRR 200.4[b][6][ix], [x]). While the parent may have preferred that the student's needs be measured by the particular standardized tests used by the neuropsychologist, "[t]here is no provision in the IDEA that gives a parent the right to dictate the specific areas that the public agency must assess as part of the comprehensive evaluation; the public agency is only required to assess the child in particular areas related to the child's suspected disability, as it determines appropriate" (Letter to Unnerstall, 68 IDELR 22 [OSEP 2016]).

Based on the foregoing the evidence in the hearing record supports the IHO's determination that the district sufficiently evaluated the student (see IHO Decision at p. 22) and that the district did not need to conduct a neuropsychological assessment of the student or administer the particular standardized measures utilized by the private neuropsychologist. However, the IHO then erred in ordering the district to fund an evaluation by the Center for Discovery based on evidence of "varying reports" of the student's achievement (IHO Decision at pp. 22, 24). Absent evidence that the parent disagreed with an evaluation conducted by the district or evidence that the district failed to assess the student in a particular area, the parent was not entitled to public funding of an IEE.

2. Occupational Therapy and Assistive Technology Evaluations

The district argues that the student did not need to be evaluated in the areas of OT and assistive technology and that, therefore, the IHO erred in ordering the district to conduct such evaluations.

With respect to the area of OT, the hearing record reflects that the July 2016 private neuropsychological assessment was requested by the student's developmental pediatrician due to the student's academic and attentional difficulties and that, as part of this assessment, the neuropsychologist administered the Beery VMI to the student (Dist. Ex. 66 at pp. 1-2, 6, 14). Test results reflected that the student's ability to copy simple designs was in the high average range of functioning and at a percentile rank of 84 (*id.* at p. 66).⁴²

⁴² The neuropsychological evaluation report does not specify whether any VMI subtests other than simple designs

Testimony from district staff (specifically the director of pupil personnel services, the supervisor of special education, and the May 2017 CSE chairperson) reflected that neither the parent nor any of the student's teachers ever raised concerns at any of the CSE meetings at issue in the present matter that would have warranted an OT evaluation or input from an occupational therapist and that the parent did not request that an occupational therapist be present at a meeting or that an OT evaluation be conducted (Tr. pp. 110-11, 302-03, 337-38, 475). The director of pupil personnel services indicated that OT is designed to address concerns in the areas of fine motor skills, handwriting, strength, gross motor skills, conduct, being able to copy, and visual-spatial tracking and that there were no needs found during meetings she chaired that indicated the student needed an OT evaluation; she further testified that if there were needs found, the CSE would have recommended an OT evaluation (Tr. pp. 188-89). The supervisor of special education testified that teachers met as a team to discuss a deficit or struggle a student may be experiencing and that the team would decide if it was an OT, speech, or physical therapy concern and, if so, make contact with the parent to request a possible evaluation (Tr. pp. 336). The supervisor of special education indicated that she was able to determine whether a student needed an OT evaluation when presented with the right criteria and would use her best judgement, her experience, and the resources within the district to determine whether a student needed a more specific evaluation (Tr. p. 337). She stated that, in the meetings she attended, she did not see hear about any needs of the student that could be addressed by OT (Tr. pp. 337-38).

With respect to the student's need for assistive technology, an April 2017 speech-language evaluation indicated that, for longer writing assignments, speech-to-text options on a tablet should be considered to allow the student to "express the content of her ideas quickly and then later rewrite and make any spelling corrections to her narratives" (see Dist. Ex. 67 at p. 6). The IHO cited this recommendation when expressing his concern that the evidence did not show that the district provided such a speech-to-text option or conducted an assistive technology evaluation (IHO Decision at p. 23). However, the speech-language pathologist did not specifically recommend further evaluation in the area of assistive technology and, moreover, the student's April 2018 and October 2018 IEPs included recommendations that the student be provided access to a word processor/computer for extended writing periods, and the February 2019 CSE added a testing accommodation of access to speech-to-text software to the student's IEP (Dist. Exs. 36 at p. 8; 43 at p. 8; 50 at p. 9; 67 at p. 6).

Testimony by the director of pupil personnel services indicated that the need for an assistive technology evaluation was never discussed by those who knew the student including her teachers, psychologists and doctors, as well as the parent (Tr. pp. 191-92; see Tr. p. 476). She testified that she was surprised that it was a topic of discussion and a request at the time of the impartial hearing as she had never heard about it before (Tr. p. 192). She further testified that the professionals that worked with the student felt the student could use the support of some assistive technology but that an evaluation was not necessary to make that determination (Tr. p. 193). The director of pupil personnel services further indicated that they had recommended the use of a word processor noting that all students had access to an iPad, which was considered to be a piece of assistive technology, and that both speech-to-text and text-to-speech software were included in the student's testing accommodations (Tr. pp. 191, 217-18; see Tr. p. 416). She stated that the

were completed (see Dist. Ex. 66 at pp. 6, 14).

committee as a whole thought the student was making progress with the modifications and supports that she received (Tr. pp. 190). Furthermore, testimony by the supervisor of special education indicated that she did not believe an assistive technology evaluation was brought up by the parent because the student had access to the iPad and all the programs including the text-to-speech and speech-to-text software (Tr. pp. 303, 304). She indicated that the committee felt that an assistive technology evaluation was not required in order to provide these to the student (Tr. pp. 304-05). In addition, the student's sixth grade special education teacher indicated that the READ 180 program that the student used each day was accessed via the student's iPad and that she felt that the student was seeing success and doing well with the tools that she was using (Tr. pp. 416-17, 420-21). Moreover, testimony by the district speech-language pathologist indicated that she did not recommend an assistive technology evaluation be conducted because the student did not need an assistive technology device to help her with her language ability and that, when she spoke to the parent about it on the phone, the parent did not disagree with her (Tr. p. 602).

Overall, given the lack of explanation from the parent regarding the student's need for OT and assistive technology evaluations and the lack of evidence in the hearing record suggesting that the student required evaluations in these areas, there exists sufficient basis to reverse the IHO's order for the district to conduct such evaluations. However, if the parent still desires that the student undergo evaluations in these areas, she should request that the district conduct them. Upon receipt of such request, the district must consider whether or not it would be appropriate to conduct the evaluations to assess the student's special education needs and, after due consideration, provide the parent with prior written notice describing, if applicable, its reasons for concluding that additional evaluative data of the student was unnecessary (8 NYCRR 200.5[a]; see 34 CFR 300.503, 300.305[d]).

3. Central Auditory Processing Evaluation

The parent cross-appeals the IHO's finding that the parent's request for a central auditory processing IEE was unsupported by the hearing record. More specifically, the parent argues that the IHO erred in acknowledging the recommendation for an auditory processing evaluation in the May 2015 private speech-language evaluation but finding that the recommendation was based on the student's score on one subtest and that the district conducted other relevant testing and provided supports to address the underlying weaknesses (see IHO Decision at p. 23).

A review of the hearing record reveals that the student's developmental pediatrician referred the student for her initial speech-language evaluation, which was conducted by a private speech-language pathologist on March 24, 2015 (Dist. Ex. 65 at p. 1; see Dist. Ex. 64).⁴³ The private speech-language pathologist's impressions reflected that the student demonstrated speech and language skills within the normal limits but noted that deficits were observed on the Recalling Sentences subtest of the Clinical Evaluation of Language Fundamental-Fifth Edition (CELF-5)

⁴³ This document reflected on page one that one speech-language pathologist conducted the evaluation, however, an additional speech-language pathologist signed the evaluation on page 2 of the evaluation report (Dist. Ex. 64 at pp. 1, 2). The district's speech-language pathologist notes in her May 2015 speech-language evaluation report that both of the speech-language pathologists who evaluated the student recommended a central auditory processing evaluation (Dist. Ex. 65 at p. 1).

(Dist. Ex. 64 at pp. 1, 2). The private speech-language pathologist indicated that the student's scaled score of 6 on the recalling sentences subtest was one standard deviation below the mean and indicated a mild deficit, noting that the student may have been affected by fatigue (*id.* at p. 4).⁴⁴ The private speech-language pathologist opined that this score, along with the student's increasing difficulty in school, could be signs of an auditory processing deficit (*id.* at p. 2). Shortly thereafter, on May 7, 2015 the district completed a speech-language evaluation of the student (Dist. Ex. 65 at p. 1). The subsequent May 13, 2015 evaluation report noted that the recent private speech-language evaluation recommended that a central auditory processing evaluation be conducted and indicated that the present evaluation would address "listening concerns" and "would provide strategies to assist [the student] in her classroom environment" (*id.*).

The district speech-language pathologist administered several informal and formal (standardized) tests to assess the student's articulation, voice abnormalities, vocabulary, language processing, and auditory processing skills and a listening test to assess the student's abilities related to classroom listening situations (Dist. Ex. 65 at pp. 1-3). The student's informal articulation and voice assessments reflected normal functioning and her performance on measures of receptive vocabulary, expressive vocabulary, and language processing reflected percentile ranks within the average range of functioning (*id.* at pp. 1-2). However, the student's performance on the Listening Test revealed weaknesses in her ability to listen for specific elements such as concepts, main idea, and reasoning with percentile ranks (PR) of 6, 9, and 13 respectively and revealed strengths in the student's ability to listen for details (PR of 42) and story comprehension (PR of 30) (Dist. Ex. 65 at p. 3). In addition, results of the administration of the Test of Auditory Processing Skills-Third Edition (TAPS-3), which was described as measuring auditory skills necessary for the development, use, and understanding of language commonly utilized in academic and everyday activities, also reflected varied performance among subtests (*id.* at pp. 3, 4). Specifically, the student demonstrated strengths and average abilities in auditory comprehension (PR 50), auditory reasoning (PR 37), word discrimination (PR 37), and phonological blending (PR 25), but demonstrated significantly lower scores in sentence memory (PR 16), word memory (PR 9), phonological segmentation (PR 1), and number memory forward and number memory backward, both with percentile ranks of less than 1 (*id.* at p. 3). The district speech-language pathologist indicated in her report that subtests on the TAPS-3 are grouped together based on the skills they assess and that a standard score is given to the phonological, memory, and cohesion categories (*id.* at p. 4). She noted that the student presented with needs in the phonologic abilities (standard score of 83) and memory (standard score of 70) categories and a strength in the cohesion category (standard score of 98) and that the student's overall score was "indicative of having some concerns in her ability to process auditory information" (*id.* at pp. 3, 4). Despite this statement/conclusion, the speech-language pathologist did not recommend further investigation of the student's auditory processing.

Nevertheless, the hearing record reflects that there appears to be some disparity with regard to the district speech-language pathologist's testimony and the reported findings in the two speech-language evaluation reports. The district speech-language pathologist testified that, with regard to

⁴⁴ Based on the description of the subtests included in the evaluation, it appears that the student's scores on two of the subtests, recalling sentences and understanding spoken paragraphs, were interchanged (*see* Dist. Ex. 64 at p. 4).

the private speech-language evaluation, the student achieved a "standard" score of six on the recalling sentences subtest of the CELF-5, which she testified was "just below the average norm of seven" (Tr. p. 595). However, as noted above, the private speech-language evaluation report did not report the results in standard scores but rather reflected that the student scored with a "scaled score" of six and "one standard deviation below the mean," where a scaled score of 7-13 was within the first standard deviation (Dist. Ex. 64 at p. 4). The district speech-language pathologist testified with regard to her own TAPS-3 test results that the student's memory score was "below average" while her report reflected that the student scored with a standard score of 70, which falls at the lower end of the borderline range of functioning (Tr. p. 597; Dist. Ex. 65 at p. 3).

In addition, testimony by the district speech-language pathologist indicated that a central auditory processing evaluation is testing that is completed to determine if the signal picked up by the ear is transmitted correctly to the brain such that the student is hearing but not processing (see Tr. p. 619). In contrast to the one test of auditory processing that the district speech-language pathologist administered, she testified that there is testing that is done to figure out why the apparent a processing deficit occurs that is conducted by an audiologist, which includes a "series of batteries of tests [conducted] in an audiological soundproof booth" that attempts to determine what is happening along the neural pathway between the ear and the brain (Tr. p. 619). When asked why the student's lowest scores on her administration of the TAPS-3, including three scores at or below the first percentile, did not compel her to recommend a central auditory processing evaluation, the district speech-language pathologist's testimony indicated that, knowing the student had diagnoses of ADHD and anxiety which she opined impact a student's learning ability, it was "hard for [her] to say on a snapshot, one test, that that would be [due to] central auditory processing or [if] it would be [due to]attention" (Tr. pp. 620-21). She further testified with regard to the private speech-language pathologist's determination—i.e., that the student's deficits in the recalling sentences subtest could be a sign of an auditory processing deficit—that this subtest involved working memory, which she opined could be impacted by an attention deficit disorder (Tr. p. 621). She testified that the student's deficits related to memory tasks could be attention related because, when you are not sustaining your attention, it impacts your memory (Tr. pp. 621-22).

Furthermore, testimony by the district speech-language pathologist indicated that another reason that she did not recommend a central auditory processing evaluation was she wanted to try the recommendations she included in her report related to supporting the student's learning needs as identified in her evaluation (Tr. p. 622; see Dist. Ex. 65 at pp. 5-10). These included, among other things, helping the student build awareness of her listening behaviors; creating a list of listening skills that the student needed to develop; practice listening for the main idea using several strategies; improving her knowledge of select concepts that she struggled with using drawing and whole-body activities that feature location, direction, quantity, or time concepts; improving her working memory by presenting and discussing interesting picture scenes in the morning and questioning her throughout the day to see what she remembers, as well as utilizing memory games such as Simon and Bop It; and participating in daily sound play to improve phonological awareness skills (Dist. Ex. 65 at pp. 5-10). She testified that she gave the strategies to the student's teacher and parent and that, when she followed up with them, they reported that the strategies were helping (Tr. p. 622).

Although the district's May 2015 speech-language evaluation was reflected in the list of evaluations/reports in the September 2016 and the November 2016 IEPs, the private speech-language evaluation was not (see Dist. Exs. 2 at p. 1; 9 at p. 1). Testimony by the district's supervisor of special education who attended the November 2016 CSE meeting indicated that, while the private speech-language evaluation was not listed among the reports that the CSE reviewed, it was "absolutely possible" that the parent gave the document to the district but the CSE did not review it; however, she also indicated that it did not mean it was not reviewed either (Tr. pp. 340-41). She further testified that the private speech-language evaluation was not reviewed by her at the November 2016 CSE meeting (Tr. pp. 341-42).

However, testimony by the CSE chairperson for the May 2017 CSE meeting, the supervisor of special education, and the director of pupil personnel services indicated that the parent did not request that the district conduct a central auditory processing evaluation (Tr. pp. 111, 305-06, 476).

Based on the above, the district was aware of and provided some management strategies and accommodations to address the student's known auditory processing difficulties. However, based on the results of the above-referenced evaluations, it was incumbent on the district to conduct a central auditory processing evaluation in order to determine whether the student demonstrated a central auditory processing disorder and how it should be addressed. Therefore, the parent's request for an independent central auditory processing evaluation at public expense is granted.

Thus, consistent with State regulation, the district shall—if requested—provide the parent with a list of independent evaluators from which the parent can obtain the IEE for the student at district expense (8 NYCRR 200.5[g][1][i]). If, however, the parent wishes to obtain the evaluation from an evaluator whose fee does not fall within the district's cost criteria, the district must provide the parent with an opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's cost criteria (see 8 NYCRR 200.5[g][1][ii]).

VII. Conclusion

In summary, the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the student's 2017-18 school year but failed to offer student a FAPE for the 2018-19 and 2019-20 school years. As for relief, the evidence in the hearing record supports the IHO's award of 280 hours compensatory educational services in math and reading, except that the award is modified to allow the parent to obtain the series from a provider of her choosing consistent with the body of this decision. The hearing record also supports the IHO's decision to deny the parent's request that the district prospectively place the student at Gow, albeit on different grounds. As for evaluations, the IHO's orders are modified as the evidence in the hearing record does not support an order requiring the district to fund a neuropsychological IEE or conduct assistive technology and OT evaluations of the student. However, the parent is entitled to district funding of an IEE to assess the student's central auditory processing needs.

I have reviewed the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated January 12, 2020 is modified by reversing that portion requiring the district to conduct assistive technology and OT evaluations of the student; and

IT IS ORDERED that the IHO's decision dated January 12, 2020 is modified by reversing that portion which required the compensatory award to be provided by the school district; and

IT IS FURTHER ORDERED that, unless the parties shall otherwise agree, the district shall fund as compensatory educational services 280 hours of tutoring or instruction in the areas of math and reading delivered by a provider or agency of the parent's choosing, provided that the services must be delivered within two years from the date the parent identifies a provider and the costs of such services shall not exceed the costs of the services at Lindamood-Bell, and provided further that, if the parent chooses, the district shall be responsible to deliver the services; and

IT IS FURTHER ORDERED that the district shall reimburse the parent for the costs of the evaluation and consultation with Lindamood-Bell; and

IT IS FURTHER ORDERED that the IHO's decision dated January 12, 2020 is modified by reversing that portion requiring the CSE to reconvene and add reading and math services to the student's IEP; and

IT IS FURTHER ORDERED that the IHO's decision dated January 12, 2020 is modified by reversing those portions which ordered the district to fund an IEE by Center for Discovery, required the district to conduct assistive technology and OT evaluations of the student, and denied the parent's request for a central auditory processing IEE; and

IT IS FURTHER ORDERED that the district shall fund a central auditory processing IEE consistent with the body of this decision.

Dated: **Albany, New York**
 May 29, 2020

CAROL H. HAUGE
STATE REVIEW OFFICER