



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-149

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

Appearances:

Law Offices of Bonnie Spiro Schinagle, attorneys for petitioner, by Bonnie Spiro Schinagle, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from those portions of the decision of an impartial hearing officer (IHO) which, among other things, ordered respondent (the district) to devise a compensatory education proposal for her son after further evaluation due to a denial of a free appropriate public education (FAPE) for the 2018-19 school year. The parent further appeals from the IHO's denial of her request to be reimbursed for her son's tuition costs at the Ideal School of Manhattan (Ideal) for the 2019-20 school year. The district cross-appeals from that portion of the IHO's determination ordering the district to provide the student with relief in the form of compensatory education. The appeal must be sustained. 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 parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. Briefly, the student exhibits delays in academic skills; receptive, expressive, and pragmatic language skills; social/emotional development; executive functioning including focusing and attending; graphomotor and

sensorimotor skills; and some behavioral skills (Parent Exs. C at pp. 3-8; D at pp. 1-4; E at pp. 1-3; Dist. Exs. 3; 4; 6).¹ He has received the diagnoses of autism spectrum disorder with language impairment and specific learning disorders in reading (dyslexia) and writing (Tr. pp. 185, 203; Parent Ex. C at p. 8).

The student received services through the Early Intervention Program and the CPSE (Parent Ex. C at p. 6; Dist. Ex. 5 at p. 7). He attended an 8:1+1 special class in a district school with related services from kindergarten through fifth grade (Tr. pp. 22, 36-37, 78-79, 219). The student repeated third grade in 2016-17 (Tr. pp. 74, 77-78).²

A CSE convened on April 10, 2018, to formulate the student's IEP for the 2018-19 school year (fifth grade) (see generally Parent Ex. E). Finding the student remained eligible for special education and related services, the April 2018 CSE recommended the student attend an 8:1+1 special class with the related service of speech-language therapy twice per week for 30 minutes in a small group (Parent Ex. E at pp. 8-9).

The following year, a CSE convened on April 15, 2019 to conduct the student's annual review and to formulate an IEP for the 2019-20 school year (sixth grade) (see generally Parent Ex. D). Finding the student remained eligible for special education and related services, the CSE recommended the student attend an 8:1+1 special class in a district school with the related services of speech-language therapy twice per week for 30 minutes in a small group, and counseling once per week individually and once per week in a small group, each for 30 minutes (Parent Ex. D at pp. 8-9).

The parent disagreed with the recommendations contained in the April 2019 IEP, and, as a result, notified the district of her intent to unilaterally place the student at Ideal (see Parent Ex. B). In a due process complaint notice, dated September 25, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 and 2019-20 school years (see Parent Ex. A). For the 2018-19 school year, the parent challenged the IEP as deficient because it was not developed by a fully constituted CSE team, did not include appropriate goals, did not provide an appropriate program, and further alleged that the district restricted the parent's ability to meaningfully participate in the student's educational programming (id. at p. 4). Specifically, the parent alleged that the student's related services for the 2018-19 school year remained unchanged from the previous year and did not reflect the student's current evaluations, and that the district failed to evaluate the student in all areas of suspected disability (id. at p. 2). For the 2019-20 school year, the parent argued that the district developed a program that was substantially similar to prior inappropriate programs under which the student failed to make meaningful progress, failed to include goals that specifically addressed the student's deficits or that were designed to deliver specialized instruction reasonably calculated to produce meaningful progress, and failed to develop a program reasonably calculated to allow the student to make meaningful progress. (id. at pp. 4-5) Specifically, the parent argued that in developing the 2019-

¹There appears to be some duplicative exhibits in the hearing record (compare Parent Exs. D; E with Dist. Exs 2; 11). For the purposes of this decision, parent exhibits will be cited.

² The hearing record showed that the student's then-current teacher testified at the hearing as the assistant principal of the school that the student attended for kindergarten through fifth grade (Tr. pp. 70-78).

20 IEP, the CSE ignored the student's need for instruction to improve his reading comprehension, phonological and decoding skills, did not include goals related to these skills, eliminated OT and speech-therapy, did not include a general education teacher, and despite stating that the student did not have a BIP, an FBA was conducted which identified inattention and distractibility during reading activities and difficulty with writing activities (id. at pp. 2-3). The parent also requested the IHO make determinations that Ideal was an appropriate placement, equities favored the parent, and that the district be required to fund tuition and transportation costs at Ideal (id. at p. 5).

An impartial hearing convened on January 28, 2020 and concluded on May 6, 2020, after three days of proceedings (Tr. pp. 1-236). In a decision dated August 7, 2020, the IHO first determined that the district offered the student a FAPE for the 2019-20 school year, finding that "[o]n the whole, I find that the testimony of the . . . school psychologist and a review of the student[s] April 15, 2019 IEP indicate that the document is procedural[ly] and substantively sufficient and that it offered the student a FAPE for the 2019-2020 school year in that it is reasonabl[y] calculated to provide more than a d[e]]minimum educational benefit to the student" (IHO Decision at pp. 11-15). The IHO also made an alternative finding that Ideal was an appropriate unilateral placement for the 2019-20 school year, indicating that the testimony of an independent psychologist "[c]ombined with the private school's 1st quarter progress report [was] sufficient evidence . . . that the private school can appropriately address the student's needs and provides him with an educational benefit" (id. at pp. 11-14).

Next, the IHO turned back to the 2018-19 school year and determined that the district failed to offer the student a FAPE for the 2018-19 school year, reasoning that while the April 2018 IEP "makes substantive recommendations, the evaluative information supporting those recommendations is scant at best and no one gave testimony on behalf of the [district] indicating that those recommendations are supported by evaluations, or that the recommendations reflect the results of evaluations that identify the student's needs. This is fatal to the DOE's assertion that it offered the student a FAPE for the 2018-2019 school year" (IHO Decision at p. 14, 15). As relief, the IHO further ordered the district to conduct re-evaluations of the student in all areas of suspected disabilities that were not covered by the neuropsychological evaluation conducted by the independent psychologist and had not been conducted in the past two years and then to reconvene the CSE to consider the reevaluation of the student (id. at p. 16). Once the district completed the ordered re-evaluations, the IHO authorized the parent to "seek compensatory education" for the denial of FAPE during the 2018-19 school year either at the reconvened CSE meeting ordered by the IHO, "and/or" by filing a new due process complaint notice (id.).

IV. Appeal for State-Level Review

Both parties appeal from the IHO's determinations. The parties' familiarity with the particular issues for review on appeal in the parent's amended request for review and the district's answer with cross appeal thereto is also presumed and will not be recited here in detail.

The following issues presented on appeal must be resolved on appeal in order to render a decision in this case:

1. With respect to relief related to the 2018-19 school year, the parties dispute whether the IHO erred in ordering a re-evaluation of the student after which the parent could seek compensatory education due to the denial of FAPE to the student for the 2018-19 school year.
2. With regard to the 2019-20 school year, the parties dispute whether the IHO erred in determining that the 2019-20 IEP afforded the student a FAPE because it did not contain appropriate annual goals or specially designed instruction such as reading interventions to address the student's unique learning needs.

More specifically, the parent asserts that the IHO erred in ordering a reevaluation of the student in order to potentially provide the student with compensatory education relief at some point in the future due to the deprivation of FAPE for the 2018-19 school year. The parent also asserts that the IHO erred in concluding that the April 2019 IEP was appropriate to address the student's needs. In its answer, the district argues that the IHO was correct in his determination that the district offered a FAPE for the 2019-20 school year, the IEP appropriately addressed the student's identified difficulties, especially in reading, and the CSE had created a program uniquely tailored to the student's specific needs. Furthermore, the district agrees with the parent in part, asserting a cross-appeal from the IHO's order to fund an independent neuropsychological evaluation and authorizing the parent to seek compensatory education in a subsequent action related to the 2018-19 school year.

The parent filed a reply to the district's answer, reiterating arguments that were covered in her request for review. As for the district's cross appeal, while the parent agrees that the IHO improperly granted prospective remedies related to the 2018-19 school year, the parent argues she is still entitled to a remedy for the denial of FAPE while the student was attending school in the district during the 2018-19 school year, and that that relief should be tuition reimbursement for the 2019-20 school year at Ideal.

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]).³

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

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

VI. Discussion

A. Preliminary Matters—Scope of Review

Initially, it is necessary to identify which issues have been pursued by the parties and must be resolved in this appeal. State regulations governing practice before the Office of State Review require that the 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]; see 8 NYCRR 279.4[a]).

Neither party has appealed the IHO's determinations that the district failed to offer the student a FAPE for the 2018-19 school year or that the parent's unilateral placement of the student at Ideal for the 2019-20 school year was appropriate (see IHO Decision at pp. 13-16).⁴ Therefore, the IHO's determinations on these issues have become final and binding on both parties and they

³ 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).

⁴ The district "denies" the parent's assertion in her request for review that "[t]he hearing officer correctly determined that [t]he Ideal School of Manhattan ("Ideal") appropriately addresses the child's needs," but does not actually make any allegation of error of fact or law regarding the IHO's adverse findings and, consequently, any challenges to the IHO's determination regarding Ideal has been abandoned by the district.

will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The remaining claims before me are whether the IHO erred in concluding that the district offered the student a FAPE for the 2019-20 school year and whether the IHO erred in ordering a re-evaluation of the student and directing the CSE to reconvene to consider a request from the parent for compensatory education relief for the denial of FAPE for the 2018-19 school year.

B. Relief Related to the 2018-19 School Year

As an initial matter, the parent correctly argues that the IHO improperly delegated his responsibility to determine an appropriate award of compensatory education to the CSE. It has been repeatedly held by appeals courts that such delegations of the IHO's authority to an IEP team that is significantly comprised of school district officials is impermissible because it is at odds with the remedial scheme set forth by the IDEA (see Sch. Comm. of Burlington v. Dep't of Educ. of the Commonwealth of Mass., 471 U.S. 359, 369 [1985] [noting that, while the IDEA "confers broad discretion on . . . court[s]" and administrative agencies to fashion "appropriate" relief, an agency or court may not delegate this responsibility to a school district]; M.S. v. Utah Sch. for Deaf & Blind, 822 F.3d 1128, 1135-36 [10th Cir. 2016]; Bd. of Educ. of Fayette Cty., Ky. v. L.M., 478 F.3d 307, 317-18 [6th Cir. 2007]; Reid v. Dist. of Columbia, 401 F.3d 516, 526-27 [D.C. Cir. 2005]; see also, Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *24 [E.D.N.Y. Oct. 30, 2008]). Here, parties appear to concur that ordering a second neurophysiological evaluation was unnecessary, and I agree, given that one had already been conducted in March 2019 and it does not appear that the student's needs and circumstances were rapidly evolving such that a second one was warranted, especially since the IHO did not provide any reason why the March 2019 neurophysiological was no longer reliable. Instead the IHO seemed to suggest that the student was due some form of remedial relief in light of the fact that he found the services offered by district were lacking during the 2018-19 school year, but he nevertheless appeared to abandon any effort at fashioning an award of remedial services in favor of passing the duty to craft relief to a group including officials of the district that denied the student a FAPE in the first place. This was error and must be reversed.⁵

In one respect I can appreciate the conundrum that the IHO was apparently facing in which two school years and different circumstances were at issue, namely, what relief should be crafted if the district "righted the ship," so to speak, and designed appropriate programming for the student that offered a FAPE for the second school year prior to when the parent removed her son from the public school and placed him in Ideal. Review of the evidence and the parties' arguments before the IHO reveals that the parties were either unaware of this possibly or unwilling to contemplate and address what the IHO should do if the parent prevailed on her 2018-19 school year claims but the district prevailed with respect to the parents 2019-20 school year claims – the very outcome that the IHO reached. This was an entirely foreseeable possibility and the parent's attorney, the

⁵ The parent also argues that the IHO's actions violate the finality requirements of the IDEA by allowing the matter of relief for the denial of a FAPE for the 2018-19 school year to be revisited again by another first tier IHO through enforcement or modification. The parent is correct that creating the specter of a second first tier proceeding on the same claims/school year at some point in the future becomes very problematic as it seems to send the parties backtracking to the beginning of the hearing process all over again while tying the hands of, and shifting the responsibility for addressing the issue to, another IHO.

district's representative, and the IHO all ignored the problem until after the evidentiary phase of the hearing had concluded, which was far too late as the IHO was not in a position at that point to simply conjure it out of the ether without ascertaining the parties respective positions and finding support for the relief that is based in the evidentiary record.

On appeal, the parent at least considers the problem and asserts for the first time in the answer to the district's cross appeal that "the only" proper compensatory education that can be provided with respect to the 2018-19 school year would be in the form of tuition reimbursement for the 2019-20 school year,⁶ but the parent otherwise side steps the IHO's concerns, and it would seem to be an unduly harsh result to force the district to grant tuition reimbursement if the district had properly adjusted course and truly offered free public special education programming in the public school that was reasonably calculated to provide the student with educational benefits in light of his circumstances as that aim is one hallmark statutory purpose of the IDEA. On appeal the district likewise rejects the IHO's attempt to craft compensatory relief, but simply rests on the fact that the parent did not request compensatory education services from the district, which is an equally anemic response, as the most appropriate response would be to identify a quantity of services that would meaningfully address some of the most significant areas of continuing need, such as the student's deficits in decoding, phonological processing, reading comprehension and fluency and require the district to make such services available.

The point here is that the parties and IHO all neglected this case by failing to make their views known and to develop the record with respect to crafting appropriate compensatory relief with respect to the 2018-19 school year. However, there is no need to belabor the issue further because, as described in detail below, the parent achieves the outcome she seeks in any event by prevailing on her main argument, namely that the IHO erred in determining that the district offered the student a FAPE for the 2019-20 school year.⁷

C. 2019-20 School Year

1. Evaluative Information and Present Levels of Performance

The parent did not raise any significant claims concerning the evaluation of the student following the March 2019 neuropsychological evaluation of the student. Although not in dispute in this appeal, I will discuss the evidence describing the evaluative information that was available to the April 2019 CSE and the student's present levels of performance described in the April 2019 IEP because it informs the special education programming choices that the CSE needed to address.⁸

⁶ This seems to cement the fact that the parent would be unwilling at this juncture to seriously consider any kind of relief for the 2018-19 school year other than tuition reimbursement at Ideal, especially since the parent appears unwilling to argue any alternative remedy.

⁷ Accordingly, I am not awarding reimbursement at Ideal as compensatory education.

⁸ Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the

The hearing record shows that the April 2019 CSE had or considered, "ATS records," a December 2018 teacher report, a December 2018 OT report, a January 2019 speech and language assessment report, the March 2019 private neuropsychological evaluation, a March 2019 functional behavioral analysis (FBA) and a corresponding behavior intervention plan (BIP) (Tr. pp. 28, 31-32, 40-43; Parent Ex. C; Dist. Exs. 3; 4; 5; 6; 7; 10 at p. 2).⁹

The April 2019 IEP reflected the assessment results and evaluative findings of the March 2019 private neuropsychological evaluation (compare Parent Ex. C at pp. 3-8 with Parent Ex. D at pp. 1, 3). Notably, the IEP included the results from the March 2019 administration of the Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V) which indicated that the student's cognitive abilities were in the borderline range (full scale IQ = 78) (Parent Ex. D at p. 1). The IEP reflected the neuropsychologist's assertion that due to significant variability among the student's individual WISC-V scores, the General Ability Index (GAI) was a better indicator of the student's actual cognitive potential and noted that the student's GAI standard score (SS) of 86 fell within the low average range of cognitive ability (id.). Additionally, the IEP recounted that the student performed in the high end of average range on the visual spatial abilities (SS-108); within the average range on fluid responding (SS-94); within the borderline range on verbal comprehension (SS-78) and working memory (SS-79); and he demonstrated profoundly delayed processing speed skills (SS-66), which represented a significant relative weakness within his cognitive profile (Parent Ex. D at p. 1).

The April 2019 IEP present levels of academic performance indicated that the student presented with significant delays, especially in reading and writing; specifically noting deficits in decoding and reading comprehension (Parent D at p. 1). Furthermore, the IEP noted that the student presented with significantly impaired phonological processing skills that limited his ability to sound out unfamiliar words (id.). With regard to writing, the April 2019 IEP stated that the student had underdeveloped spelling and sentence composition and combining skills, his writing often lacked proper punctuation and capitalization, and he often wrote in incomplete sentences (id.). The IEP indicated that the student's math skills presented as a relative strength, specifically noting his ability to complete written math problems was his strongest performance; however, his ability to complete math word problems was not as strong (id.).

The March 2019 private neuropsychological evaluation provided additional information regarding the student's educational needs. The neuropsychologist found that the student met the criteria for diagnoses of autism spectrum disorder with accompanying language impairment and specific learning disorders in the area of reading (dyslexia) and in writing (Tr. pp. 185, 207-12; Parent Ex. C at p. 8). In terms of the specific learning disorders in reading and writing, the neuropsychologist explained that the student presented with deficits in phonological processing that affected his ability to decode and to spell unfamiliar words, and noted that his phonological deficits were especially evident when reading and spelling words in isolation (Parent Ex. C at p.

education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

⁹ The district school psychologist who chaired the April 2019 CSE meeting testified that "ATS records" were considered by the CSE; however, she did not explain what ATS records contain (see Tr. p. 28).

8). The neuropsychologist further explained that the student had difficulty constructing sentences that were grammatically correct and demonstrated deficient knowledge of English grammatical and mechanical conventions (id.). With regard to the student's academic profile, the neuropsychologist reported that the student had a strong dyslexia profile, and noted that his decoding was impaired, he was unable to sound out both real and unfamiliar words or to read information independently, and his writing was affected as well (Tr. p. 185).

The neuropsychologist confirmed his findings during the impartial hearing. He testified that the student continued to meet the criteria for autism and that he had some significant intellectual strengths with scores in the average to high average range in his intellectual profile (Tr. p. 185). He opined that the student had a "high-functioning autism profile" with restricted interests (id.). With regard to the diagnoses of specific learning disorders in reading and writing, the neuropsychologist testified that the student was word reading at a second-grade level, and pseudoword reading below the first-grade level, and that those scores indicated that the student lacked the phonological skills required to read, or to sound out both real and pseudowords, which resulted in impaired reading comprehension (Tr. p. 204). He explained that the student's oral discourse comprehension was in the low-average range and was significantly stronger than his reading comprehension which all fit the dyslexia profile (id.). With regard to writing, the neuropsychologist testified that the student presented with difficulties in both spelling and sentence writing, which was not uncommon for children presenting with significant phonological deficits (Tr. pp. 204-05). He further noted that the student's spelling was approximately at a second-grade level, and his ability to write grammatically and mechanically correct sentences was impaired (id.).

The neuropsychologist testified that the student's math profile also supported the student's dyslexia profile specifically noting that his ability to perform numerical operations was in the average range at the 47th percentile (5.7 grade equivalent), which contrasted with his ability to solve word problems, which was in the low-average range (Tr. p. 205). He opined as further evidence of the student's reading disability, that when the student had to read to solve math problems, he did not do as well as when just working with numbers (id.).

Returning to the April 2019 IEP, the district school psychologist testified that the present levels of performance were further developed from information provided by the student's then-current providers (Tr. pp. 30-31). Based on the report of the student's then-current teacher, the April 2019 IEP described the student as a kinesthetic and visual learner, and noted that his engagement in lessons would increase when he was presented with manipulatives and visuals (Parent Ex. D at p. 1).¹⁰ The IEP indicated that the student had difficulty visually focusing on text from a projector or SMART Board and further noted that he was easily distracted and often needed repetition of directions and instructions (id.). With regard to reading, the April 2019 IEP noted that the student's comprehension and decoding skills were significantly below grade level and he was reading at a Fountas and Pinnell level J (middle second grade) (id.). In addition, the IEP indicated that when reading aloud the student would omit words, skip sentences, make substitutions or decode the first part of a word but not follow through the rest of the word (predominantly 3 or more syllable words) (id. at p. 2). The IEP stated that the student would

¹⁰ Comparison of the April 2019 IEP present level of academic performance with the December 2018 teacher report showed that some of the information provided in the report appears in the IEP (compare Parent Ex. D at pp. 1-2 with Dist. Ex. 4).

decode word for word which impacted his comprehension, and he would replace words with similar looking words or words that made sense in his reading (id.). In writing, the IEP indicated that the student's writing mainly consisted of short, simple sentences and he required reminders to check his work for grammar, sequence and syntax (Parent id.). The April 2019 IEP noted that when the student was given a checklist he needed reminders to use it (id.). Additionally, the IEP indicated that the student could write independently for extended periods of time with multiple teacher check-ins and graphic organizers to help him stay on task (id.).

With regard to math, the April 2019 IEP stated that the student struggled with "dissecting grade level word problems, specifically determining what operation(s) to use," answering questions asked, and solving multi-step problems (Parent Ex. D at p. 2). The IEP described the student as struggling with decimal place value, multi-digit divisor division problems, and multi-digit multiplication problems with decimals (id.). The IEP noted that the student benefitted from using a preferred strategy to solve word problems, and for multiplication and division (id.).

Additionally, the December 2018 teacher report indicated that in December 2018, the student was reading at a Fountas and Pinnell level I (end of first grade) (Dist. Ex. 4 at p. 1). The teacher reported that the student responded well to all classroom and school rules with little to no infractions; however, he often arrived late to school (id. at p. 2). She also indicated that as a goal for the end of the school year, she would like the student to see an eye specialist to rule out vision issues, and recommended the student receive additional (academic intervention services) AIS and a vision screening (id. at pp. 2-3).¹¹

The speech-language portion of the April 2019 IEP present levels of performance, written by the student's then-current speech-language pathologist, referred the reader to the January 2019 speech and language assessment report; however, also noted that the student had made progress towards his speech and language goals since that time (Parent Ex. D at p. 2). According to the IEP, the student had improved his social pragmatic language skills by engaging in conversations of five to six verbal exchanges with peers and adults by attending to the speaker and asking relevant questions when provided with decreasing moderate verbal and visual cues (id.). In addition, the student had improved his expressive language skills by formulating grade appropriate sentences using correct sentence structure and verb tense when provided with minimal cues (id.). The IEP indicated that the student improved his expressive language skills by responding to higher level thinking questions by using sentences that reflect a complete thought when provided with decreasing moderate to minimal verbal and visual cues (id.). It noted that the student had also improved his narrative language skills by retelling a narrative including background information, key details in sequential order, and a conclusion when provided with decreasing moderate to minimal verbal and visual cues (id.). Lastly, the April 2019 IEP stated that the student's performance in speech therapy was inconsistent and dependent on the student's level of attention and engagement, and noted that the student benefitted from decreasing moderate to minimal verbal and visual cues (id.).

¹¹ The student's special education teacher also indicated that she would like to see the student increase his reading volume outside of school to a second grade reading level, increase his phonetic awareness to promote fluency, increase his fluency, increase sentence length and complexity and increase in grade-level vocabulary usage (Dist. Ex. 4 at pp. 1-2).

The January 2019 speech-language assessment report, referenced in the April 2019 IEP, contained the results of an administration of the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-V) (Dist. Ex. 3). The results indicated that the student's core language score was in the average range with only the recalling sentences subtest falling within the below average range (id. at pp. 1-3). An informal language sample, taken after the student listened to a story, showed that when he retold the story he was able provide an introduction, the main character's name, the setting, characters' feelings, and a conclusion, and he sequenced the events in the story (id. at p. 3). The student's retelling also included dialogue from the story; however, he included some dialogue that was not presented in the first retelling of the story (id.). For the second informal language sample, the student was asked to retell a personal story in which he included an introduction and series of events, key details, and a conclusion (id.). With regard to the student's articulation skills, the evaluator noted that the student's intelligibility decreased when he spoke very fast or was unsure of an answer; however with verbal cues, he could slow down his rate of speech and improve his intelligibility (id.).

With respect to the student's social development, the April 2019 IEP present level of performance indicated that the student presented as kind, engaging, and cooperative; however, he exhibited significant language, attention, executive/functioning, academic, sensorimotor, behavioral and social/motional challenges (Parent Ex. D at p. 3).¹² The IEP described the student as generally polite and considerate of other students and noted that he would work with any student with whom he was paired (id.). Finally, the April 2019 IEP noted that the student responded well to any behavioral correction and/or redirection and would "correct his behavior with little or no push back" (id.).

The April 2019 IEP present level of physical development indicated that the student was willing and able to participate in most physical activities, but only for a limited amount of time due to fatigue (Parent Ex. D at p. 3). The IEP further indicated that the student was able to grip and use scissors, pens, pencils, etc., and could navigate the classroom with little support (id.). The IEP reported that the student had difficulty focusing on text on the SMART Board and would squint and lean toward the SMART Board or physically move closer in an effort to see it better (id.).

The student's management needs, as identified in the April 2019 IEP included: task analysis; visual prompts; modeling; small group instruction; computer with large text for reading; and "technology that will read to him while he reads" such as "Reading A-Z" or "Zearn" (Parent Ex. D at p. 3).

The hearing record indicates that a December 2018 occupational therapy (OT) evaluation of function and participation (OT evaluation) was reviewed at the April 2019 CSE meeting (Tr. pp. 43-44; see Dist. Ex. 5). The OT evaluation identified the following primary concerns: the student's reading level was significantly below that of his peers; he had difficulty following multi-step directions; and he had difficulty seeing the SMART Board and other text (Dist. Ex. 5 at p. 2). The occupational therapist noted that the student had begun receiving OT beginning in preschool

¹² This appears to be a description taken from the March 2019 neuropsychological evaluation (compare Parent Ex. C at p. 8 with Parent Ex. D at p. 3).

and continued to receive OT until April 2018, when he "graduated from the program" (*id.* at p. 7). The occupational therapist reported that the student displayed "functional skills for completion of school related activities of daily living" and that he had "adequate fine motor skills for manipulation of classroom tools and materials" (*id.*). Additionally, the occupational therapist noted that the student demonstrated functional visual perceptual and visual motor coordination skills for school related tasks, including drawing, writing and keyboarding (*id.*). The December 2018 OT evaluation indicated that the student had adequate sensory processing and self-regulation skill to engage in multi-sensory experiences within the school environment, and noted that the student was able to access and negotiate his educational environment and community in a safe and efficient manner (*id.*). The occupational therapist opined that the student's reading level and difficulty following multi-step directions were best addressed via classroom strategies and suggested a consultation with the speech therapist (*id.*). She further recommended that the student be seen by an optometrist to "assess issues with visual acuity and/or visual perception that impact[ed] his ability to read text from afar" (*id.*). According to the district school psychologist who chaired the April 2019 CSE meeting, the December 2018 OT evaluation was done as a result of a previous impartial hearing, and noted that it stated the student did not qualify for OT services at that time (Tr. p. 42-44).

D. 2019-20 IEP Programming

Before turning to the parent's particular challenges to the April 2019 IEP in her due process complaint notice as continued on appeal, I note that with regard to whether the April 2019 IEP was appropriate, the IHO conducted very little meaningful analysis of that IEP and merely indicated that "[o]n the whole, I find that the testimony of the DOE school psychologist and a review of the student[s] April 15, 2019 IEP indicate that the document is procedural[ly] and substantively sufficient and that it offered the student a FAPE for the 2019-2020 school year in that it is reasonabl[y] calculated to provide more than a diminimus [sic] educational benefit to the student" (IHO Decision at p. 13-14). The IHO did not otherwise explain why he reached this conclusion.

Furthermore, the legal standard articulated by the IHO in his analysis has been explicitly rejected by the United States Supreme Court. In Endrew F., the Court clarified the Rowley standard to determine whether a school district has offered a FAPE and stated that the standard "is markedly more demanding than the 'merely more than de minimis' test applied by the Tenth Circuit" (Endrew F., 137 S. Ct. 988, 1000 [2017]). The IHO's deficient fact analysis based on an erroneous legal standard is reversible error.

1. Annual Goals

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

by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Here, a review of the April 2019 IEP shows that it contained approximately nine annual goals that were designed to address the student's needs in speech, reading, writing, math and social skills, communication, and pragmatic language (Parent Ex. D at pp. 5-8). Specifically, with regard to academics, the IEP contained one reading comprehension goal that was designed to improve the student's ability to refer to details and examples within a text when explicitly explaining what the text says and when drawing inferences from the text (*id.* at p. 6). However, the student's other identified deficit areas in reading, related to decoding, phonological processing, and fluency, were not addressed by this goal (*id.*). With regard to writing, the April 2019 IEP contained one goal designed to improve the student's ability to produce clear, coherent writing in which the development and organization were appropriate to task, purpose and audience (*id.*). As discussed in more detail above, the student had significant difficulty composing basic sentences, using capitalization and punctuation appropriately and had underdeveloped spelling skills; none of which were addressed in the writing goal (*id.* at pp. 1-2, 6). I note that there was a speech goal that addressed reading comprehension and writing skills by improving the student's ability to identify the main idea and summarize what happened using three supporting details both verbally and in writing after reading or listening to a story; however, this goal did not go far enough to address the student's significant reading or writing deficits (*id.* at p. 5). Although the IHO referenced the district school psychologist's (psychologist) testimony in his written decision as convincing, I find that she did not explain how the IEP was designed to address the student's decoding, phonological processing, and fluency and, moreover, she testified that the IEP was supposed to have an additional reading goal and was left searching for an explanation such as lacking a missing page from her copy of the evidence (Tr. pp. 34-36). These points render her testimony unpersuasive in the determination of whether the IEP was appropriate.

With regard to math, the IEP contained a math goal indicating that within one year the student would solve grade level word problems involving multiplication and division (whole numbers, decimals, fractions, etc.) using a preferred strategy (CUBES, draw it out, etc.); however, the student's reading ability was significantly below grade level and according to his then-current teacher, he struggled with multiplication and division especially with multi-digit numbers and decimals (Parent Ex. D at pp. 2, 7; Dist. Ex. 4 at p. 2). While Andrew F. explained that IEPs should contain ambitious goals—especially for those students who do not attend class in a general education environment—the goals for such students should be appropriately ambitious (Andrew F., 137 S. Ct. at 1000 [emphasis added]). In this case, the emphasis on grade level (i.e. sixth grade) word problems in math was unrealistically ambitious, given that the student would have to progress nearly three to four years in his reading skills to work meaningfully and make progress on such a goal. While it may be appropriate to target the student's math skills through word problems in multiplication and division, working with a grade level reading expectation makes this goal inappropriate, considering the student was reading at a level significantly below his current grade.

While a CSE does not need to develop a goal for every last one of a student's identified needs to pass the FAPE threshold and lead to the conclusion that the student is likely to make educational progress, annual IEP goals should be developed that meaningfully address the areas that impede the student's learning and have the greatest impact on his ability to access the curriculum. In this case, the April 2019 CSE did not develop adequate annual goals to address the

student's reading and writing deficits described above which the hearing record shows are core areas of significant struggle for the student, impacting his ability to access the curriculum and to make meaningful progress.

2. Recommended Special Education Programs and Services

Turning next to the recommended special education programs and services portion of the April 2019 IEP, the CSE recommended that the student attend an 8:1+1 special class in a district school with the related services of counseling and speech-language therapy (Parent Ex. D at p. 8-10).¹³ Additionally, the CSE recommended the student receive the following testing accommodations: extended time (time and a half), breaks every two minutes out of 20 minutes and revised test format – large print (*id.* at p. 10). Finally, the April 2019 CSE recommended the following supplementary aids and services, program modifications or accommodations: highlighted work and larger text size (*id.* at p. 9). Comparison of the April 2019 IEP with the April 2017¹⁴ and April 2018 IEPs showed that the April 2019 CSE recommended a similar program with the addition of counseling services one per week individually and once per week in a small group in the April 2019 IEP (compare Parent Ex. D at pp. 8-9, with Parent Ex. E at p. 8-9, and SRO Ex. I at pp. 8-9).¹⁵

The school psychologist who chaired the April 2019 CSE meeting testified that the student had attended the district school's ASD Horizon program since kindergarten (Tr. pp. 22, 36-37). She described ASD Horizon as a specialized program for children diagnosed with autism spectrum disorder (ASD) consisting of an 8:1+1 special class in a district school in which the students receive small group instruction and social skills training (Tr. p. 22-23). The psychologist further explained that the students were expected to participate in standard academic instruction and be able to participate in the regular academic curriculum (Tr. p. 23). The psychologist testified that students in the ASD Horizon program move to "the Dock Street program," which is a continuation of the 8:1+1 program into the middle school (Tr. p. 38). She explained that students in the Horizon program who continue to require such a program "have a guaranteed seat" for sixth grade (Tr. p. 39).

¹³ The April 2019 IEP recommended the student receive speech-language therapy once per week in a small group during the summer (Parent Ex. D at p. 10).

¹⁴ After a preliminary review of the record in this matter, it was determined that additional evidence was potentially relevant and necessary for a full review of the parties' claims. Thus, in a letter dated September 28, 2020, the Office of State Review, pursuant to 8 NYCRR 279.10(b), directed that the district submit a copy of the student's IEP for the 2017-18 school year, as the hearing record indicated that the 2017-18 IEP was offered as evidence by the parent (Parent Ex. F), but was captioned as "Withdrawn/Not Received" in the IHO Decision (IHO Decision p. 2) and, further, was not included in the hearing record (see Tr. pp. 13-15, 194, 200-01). The parties were offered an opportunity to state their positions or objections in their answer and/or reply. Neither party opposed the consideration of the additional documentary evidence. For purposes of this decision, the additional evidence shall be cited as SRO Exhibit "I" and paginated with assigned page numbers 1-13.

¹⁵ The April 2017 IEP recommended the student receive speech- language therapy once individually for 30 minutes per week and twice in a small group for 30 minutes per week (SRO Ex. I at p. 8). This frequency was reduced in the April 2018 IEP with the removal of the individual therapy recommendation; however, there is no explanation for this reduction in the hearing record (Parent Ex. E at p. 9).

The psychologist testified that the April 2019 CSE considered and ruled out an "integrated class" (ICT) as a placement option for the student due to his performance in the classroom and the amount of supports he required (Tr. p. 46). She further explained that because the student had difficulty focusing in the small 8:1+1 class, a larger class would "be too much for him" (Tr. p. 46). Consequently, the April 2019 IEP indicated that the CSE ruled out an ICT classroom because the student benefitted from a small, well-structured classroom with a low student to teacher ratio (Parent Ex. D at p. 14). The April 2019 CSE also considered a small class in a specialized school (6:1+1) as a possible placement for the student but determined it was "too restrictive" at that time (*id.*). The psychologist testified that the 6:1+1 special class would have been too restrictive because the students are typically much more cognitively and socially impaired (Tr. p. 46-47).¹⁶

The parent contends that the April 2019 CSE recommended a program for the student that was similar to the program he had received during the 2018-19 school year, which the IHO determined did not provide a FAPE. The hearing record provides limited information regarding the student's progress over the course of the 2018-19 school year. However, the hearing record shows that the student's performance during the 2015-16 school year was such that he repeated third grade the following year (Tr. pp. 77-78, 91-92; Parent Exs. D at pp. 1-2; E at p. 1; SRO Ex. I at p. 1; Dist. Ex. 4 at p. 1). The assistant principal testified that during the 2015-16 school year, the student's instructional levels were approximately first grade in reading and second grade in writing and that as the year progressed, he moved into a second-grade level (Tr. pp. 91-92).¹⁷ The assistant principal explained that data showed the student was making progress toward the first and second grade standards; however, he was still significantly behind the rest of the class, so it was decided to retain him for the 2016-17 school year (Tr. p. 78). Moving forward, the student's reading level at the April 2017 CSE meeting was at a Fountas and Pinnell level I (considered the end of first grade) and it remained at level I through December 2018 (Parent Exs. D at p. 1; E at p. 1; SRO Ex. I at p. 1; Dist. Exs. 4 at p. 1). Moreover, the student's reading skills were described in a significantly similar manner in the April 2017, April 2018 and April 2019 IEPs, all noting that the student omitted words, skipped sentences, made substitutions, easily lost his place, and decoded word for word which made comprehension difficult (compare Parent Ex. D at pp. 1-2, and Parent Ex. E at p. 1, with SRO Ex. I at pp. 1-2). In writing, the April 2017 and April 2018 IEPs indicated that the student wrote simple sentences, while the April 2019 IEP also indicated

¹⁶ Although not particularly significant to the disputed issues in this case, if the school psychologist was referring to the IDEA's LRE requirement, she had a fundamental misunderstanding of the term "restrictive" which has nothing to do with the ratio of disabled students to their teachers. In circumstances such as those in the present case, LRE is not defined by the particular student-to-adult staff ratio present in a placement because the ratio distinctions present no difference in the degree of the student's access to nondisabled peers (see 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2]; 300.116[b], [c]; 300.117; 8 NYCRR 200.1[cc]; 200.6[a][1]). Instead, as described by the Second Circuit, the LRE determinations are made by considering the extent to which the student has been placed with nondisabled peers; that is, "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child,' and, if not, then 'whether the school has mainstreamed the child to the maximum extent appropriate" Newington, 546 F.3d at 120, quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 [5th Cir. 1989]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 639 [S.D.N.Y. 2011]).

¹⁷ The assistant principal was the student's teacher during the student's first year in third grade (2015-16) and beginning in February 2017, he taught math in the ASD Horizon program for student's second year in third grade (2016-17) (Tr. pp. 77-78).

that the student often wrote incomplete sentences (compare Parent Ex. D at pp. 1, 2, and Parent Ex. E at p. 2, with SRO Ex. I at p. 1).

After careful review of the evidence in this case, I find that program recommendations contained in the April 2019 IEP were inadequate and did not appropriately address all of the student's identified needs, most notably the student's reading and writing deficits. There is ample evidence in the hearing record that the student required more support in reading, especially in decoding and phonological processing. I note that the December 2018 teacher report contained a recommendation for additional AIS support in reading (Dist. Ex. 4 at p. 3). While AIS is not a special education service, this recommendation was in a report that was before the April 2019 CSE and the teacher who wrote it participated in the CSE meeting, therefore, the CSE should have been on notice that the supports the student had been receiving under the 2018-19 IEP were insufficient (see Tr. pp. 28, 30-31; Dist. Exs. 2 at p. 15; 4 at p. 3). In his evaluation report before the CSE, first among the neuropsychologist's recommendations was that "[g]iven [the student's] academic deficits in reading that rise to the level of a reading disability (i.e. dyslexia), he requires 1-on-1 academic support using an empirically supported method for remediating reading disabilities (i.e. Wilson, Orton-Gillingham, Lindamood-Bell)" (Parent Ex. C at p. 8).¹⁸ Additionally, the neuropsychologist testified during the impartial hearing that the ASD Horizon program was not addressing the student's reading disability because the student was not receiving any specialized reading instruction (Tr. p. 188).¹⁹ Furthermore, there is no evidence in the hearing record that additional support, such as direct reading instruction, was considered by the April 2019 CSE even though there was an uncontradicted, compelling basis in the evaluative information for the CSE to adopt that aspect of the neuropsychologist's recommendation. Finally, the hearing record shows that the student was expected to access grade level content; however, the IEP was unclear as to how he was to access such academic content with the supports currently in place.

It cannot be gainsaid that one of the essential functions of a CSE when conducting an annual review is to review the IEP currently in place to determine if the student is making progress as expected, and if not to attempt to ascertain why if possible. A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress

¹⁸ The neuropsychologist also indicated that it was important for the reading instruction to occur outside of school hours, and while I agree with his opinion to the extent that direct reading instruction was lacking in the district's IEP, I do not necessarily agree with his view regarding afterschool 1:1 instruction, which tended toward a best possible approach with an eye toward maximization of all possible instructional time that the student could tolerate, which is not required by IDEA. Had the parent pursued additional services as compensatory education rather than reimbursement for Ideal, the practical need to accomplish such compensatory educational services outside of the school day may have featured more prominently, but as described above, the parent has made it clear that she is not seeking such relief.

¹⁹ The neuropsychologist further opined that the student's reading disability was not being addressed because the student did not receive any assistive technology that would have allowed him to access reading, by reading stories aloud, and also writing, by facilitating his ability to type (Tr. p. 188). Although the student's April 2019 IEP indicated under special factors that he did not require an assistive technology device or services and no assistive technology device or services were listed under the recommended special education program and services, the IEP indicated that the student required "technology that will read to him as he reads" (Reading A-Z, Zearn) under management needs (Parent Ex. D at pp. 3, 4, 9).

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

Here, the evidence shows that the April 2019 CSE recommended a program quite similar to that which the student had been attending since at least the 2017-18 school year, with limited evidence regarding any progress the student may have made. Prior to the April 2019 CSE meeting, the parent repeatedly expressed concerns about the student's reading levels (Parent Ex. E at p. 2; SRO Ex. I at p. 2). The student's reading levels as reported by the district personnel show that the student made limited progress in his reading skills, moving from an end of first grade reading level to middle of second grade level over the course of two school years (compare SRO Ex. I at p. 1, with Parent Ex. D at pp. 1-2). Given the mixture of limited progress and the overall lack of evidence of the student's progress as measured on a year-to-year basis, the hearing record shows that this was the type of case in which it was not reasonable for the district to continue to offer a very similar program for the 2019-20 school year that the student had received under previous IEPs with very little achievement.

Related to the issue of providing appropriate instruction to the student to address his deficits, the hearing record contains a March 2019 FBA and resulting BIP designed to address what was described as the student's interfering behaviors; however, I note that the FBA and BIP show that the interfering behaviors do not appear to be a predominant factor that affects the student's learning or that of others (Dist. Exs. 6 at pp. 5-6; 7 at pp. 2-3). The FBA identified the student's difficulty with inattention and distractibility as the behaviors interfering with his ability to access the curriculum; however, the FBA further indicated that these behaviors occurred when the student was engaged in a difficult task or during group work or whole group lessons when he was required to be attending and participating with peers (Dist. Ex. 6 at pp. 2-3). The description of antecedents in the March 2019 FBA included "during reading activities where [the student] experiences difficulty sounding out words, activities that involve comprehension questions, writing activities where he experiences difficulty responding to questions and spelling words in his responses" (id. at p. 3). The FBA also indicated that the student's "inattention and distractibility behaviors appear[ed] to be a combination of skills and performance deficits" (id. at p. 4).

I find it was appropriate for the CSE to conduct the March 2019 FBA in this instance in order to gain additional insight into the student's needs.²⁰ First among the consequences of the "problem behavior" that district staff reported, was that the student "typically [received] attention from adults in the form of redirection and adults providing help in work to check for understanding and reattend to task" (Dist. Ex 6 at pp. 3-5). In other words, the student is trying to get adult attention to help him with the work he struggles most with. While I understand that as a replacement behavior the district staff would prefer that the student request assistance from them without becoming distracted or going off task during the academic activities in which he struggles (Dist. Ex. 6 at p. 8), I also suspect that providing the student with appropriate instruction to address his skill deficits related to the tasks with which he struggled most and was delayed by several years in terms of grade-level skills would also have served to decrease his inattentiveness.

While the FBA provided good insight for the CSE to consider, the March 2019 BIP that was developed based upon the FBA identified intervention strategies such as tasks broken down into step-by-step formats, checklists, break cards, social stories, visuals, role playing, demonstration, redirection, and modeling; however, as with the FBA, the interventions that targeted the student's ability to attend in the BIP are not realistically designed to improve the student's deficits in academic areas in which he continues to struggle (see Dist. Ex. 7 at p. 5).

Underscoring this point, even the district's psychologist testified that the "only difficulty that [the student] exhibited was focusing and sustaining attention" (Tr. p. 47). She further testified that the CSE did not feel the student needed a BIP and noted that the recommended supports were already being provided by the classroom teacher as part of his daily instruction and he did not require additional behavioral support (Tr. pp. 47-48). Thus, while I do not find any fault with the efforts in developing an FBA and a BIP for the student,²¹ they were not a suitable substitute for the deficits in the April 2019 IEP that were related to and driven by the failure to sufficiently address the student's academic needs. Based upon the foregoing evidence, I am not persuaded that the district established that the programming and services recommended by the CSE in the April 2019 IEP were reasonably calculated to enable the student to receive educational benefits in light of his circumstances. Accordingly, the parent prevails with respect to her FAPE claim for the 2019-20 school year and the IHO's determination in this regard must be reversed.

E. The Student's Vision

Although not a matter disputed by the parties in this appeal, one final matter warrants further mention due to its potential importance to the student's learning and the challenges he is facing. The hearing record is replete with comments, concerns and recommendations regarding the student's vision (see Parent Ex's. D at pp. 3, 9; E at pp. 1-3; SRO Ex. I at p 2; Dist. Exs. 4 at pp. 1-2; 5 at p. 7). Specifically, the April 2017 IEP states "It was recommended that [the parent]

²⁰ I have presided in many State-level review proceedings involving this district in which FBA and BIP issues were disputed between the parties. From a procedural standpoint, the effort and comprehensiveness in the procedural approach taken to conducting an FBA and laying out a BIP is more robust that I have seen previously and represents a substantial improvement over other lackluster examples that I have seen in cases in the past.

²¹ Even if I found the FBA or BIP deficient, I would be reluctant to use that as a basis for a finding a denial of a FAPE, as that is not one of the issues that has been advanced in this State-level review proceeding. I offer this perspective if it is of use to the parties going forward.

take [the student] to see a [d]evelopmental [o]ptommetrist because he consistently skips lines, and does not realize he skipped lines or a page. The concern is that visually he is not reading what is actually there. There is concern in that [there] might be a challenge in how his eyes [are] working to receive the information. Only an assessment from a [d]evelopmental [o]ptommetrist can tell for sure whether there will be a need for vision therapy." (SRO Ex. I at p. 2). In addition, the April 2018 IEP present levels of performance state "[w]e strongly believe [the student] needs to see a development[al optometrist] to support [the student's] eyesight which would therefore support his reading comprehension and overall learning"; "Only an assessment from a [d]evelopmental [o]ptommetrist can tell for sure whether there will be a need for vision therapy"; and "[i]t [was] recommended for [the student] to have his eyesight checked as well as discuss [the student's] difficulty with reading with his pediatrician to determine if further evaluation by a developmental optometrist would be beneficial" (Parent Ex. E at pp. 1-3). The December 2018 teacher report recommended the student see an eye specialist to rule out vision issues and noted that he would squint and lean toward the SMART Board and/or physically move himself closer in an attempt to see better (Dist. Ex. 4 at pp. 1-2). The January 2019 OT evaluation recommended that the student be seen by an optometrist to "assess issues with visual acuity and/or visual perception that impact his ability to read text from afar" (Dist. Ex. 5 at p. 7). The district psychologist testified that during the April 2019 CSE meeting there were conversations regarding the student's need for glasses due to his squinting and inability to see the board, and noted that the providers advocated for an ophthalmological evaluation by an optometrist and possibly vision therapy (Tr. pp. 32-33). Furthermore, both the April 2018 and the April 2019 IEPs recommended larger text and technology that could read to the student (Parent Exs. D at pp. 3, 9; E at pp. 3, 9). A CSE is required to conduct "other appropriate assessments or evaluations . . . as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities" (8 NYCRR 200.4 [b][1][iv]), and a vision assessment is not excluded from that requirement if difficulties with the student's vision affect his learning. It is unclear in the hearing record why the district continues to remind the parent from year to year of the need for such an evaluation. Accordingly, if the parties have not already come to some understanding and seen to the completion of the vision evaluation recommended by the CSE, I strongly encourage the district to seek consent from the parent to conduct the needed vision assessment which can be further discussed in more detail at a meeting of the CSE.

VII. Conclusion

Having determined that the evidence in the hearing record does not establish that the April 2019 IEP offered the student a FAPE, and because there is no appeal of the IHO's determination favorable to the parent with respect to the appropriateness of Ideal, the necessary inquiry is at an end (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).²²

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

²² The hearing record does not contain evidence that would support a reduction or a denial of tuition reimbursement on equitable grounds. The IHO did not make findings on the matter, the parent only briefly states as much in her request for review, and the district did not respond on this issue.

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 August 7, 2020, is modified by reversing those portions which concluded that the district offered the student a FAPE for the 2019-20 school year, directed a neuropsychological evaluation of the student, and delegated to the CSE the responsibility to devise a compensatory education plan for the student; and

IT IS FURTHER ORDERED that the district shall reimburse the parent for the student's tuition costs at Ideal for the 2019-20 school year.

Dated: **Albany, New York**
 November 6, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER