



# **The University of the State of New York**

## **The State Education Department**

**State Review Officer**

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**No. 21-192**

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

#### **Appearances:**

Ingerman Smith, LLP, attorneys for petitioner, Christopher Venator, Esq.

Littman Krooks, LLP, attorneys for respondents, by Marion Walsh, Esq.

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Fusion Academy (Fusion) for the 2018-19, 2019-20, and 2020-21 school years. The parents cross-appeal from the IHO's determination of their claims regarding parent participation, section 504 of the Rehabilitation Act of 1973 (section 504), award of private tutoring and related services, and CSE composition for the 2020-21 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

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

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

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

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

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

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

As the parties are familiar with the detailed facts, the student's educational history and the extensive procedural history, such details regarding this case will not be recited here in full. The student's disability classification of autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]). The proceeding involves multiple school years, and the CSE convened on April 20,

2016, March 31, 2017, March 28, 2018,<sup>1</sup> June 10, 2019, and June 15, 2020 to formulate the student's IEPs for the respective school years, specifically 2016-17, 2017-18, 2018-19, 2019-20 and 2020-21 (see generally Dist. Exs. 14, 16, 18, 52, 58).<sup>2</sup> In sum, the parents' dispute with the district originated when the CSE changed its placement recommendation for the student from a 12:1+1 special class, where he had been placed previously for the 2013-14 and 2014-15 school years, to an 8:1+2 special class for the 2016-17 school year. The gravamen of the parents' claims for the 2016-17 school year, and the ensuing school years at issue, has consistently been that the 8:1+2 special class recommended by the CSE was not an appropriate placement for the student because the recommended special class and related educational programming for the student was not appropriately ambitious for the student given his abilities, did not provide the student with sufficient support for his speech-language needs and, because the CSE failed to consider appropriate mainstreaming opportunities for the student, was not the student's least restrictive environment. Relatedly, the parents have also contended that the CSE's placement and programming recommendations for the student for the school years at issue were based on an incomplete and incorrect picture of the student's cognitive functioning, and that he should not have been designated as an "alternate assessment" student by the district (see Parent Ex. Z at p. 1). Ultimately, on January 22, 2019,<sup>3</sup> the parents, through their attorney, notified the district that they intended to remove the student from the public school and unilaterally place the student at Fusion as they disagreed with the December 2018 IEP developed by the CSE (id.). In their 10-day notice, the parents expressed specific disagreement with the student's placement as they believed it did not meet the student's needs, was not appropriately ambitious considering the student's unique circumstances, was not in the least restrictive environment and because the CSE did not remove the alternate assessment designation from the student's IEP (id. at pp. 1-2).

#### **A. Due Process Complaint Notices**

The parents initiated the underlying due process proceeding by way of a December 14, 2018 due process complaint notice,<sup>4</sup> which was modified by a first amended due process complaint notice dated February 26, 2019 (see generally IHO Exs. 1; 4). In an interim decision dated June 7, 2019 the IHO held that the latter due process complaint notice survived a motion to dismiss made by the district alleging, among other items, that the statute of limitations barred the parents' claims regarding the 2016-17 school year (see generally IHO Ex. 8).

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<sup>1</sup> For the 2018-19 school year, the CSE reconvened on October 24, 2018 and on December 12, 2018 (Dist. Exs. 10; 12).

<sup>2</sup> For the 2020-21 school year, the CSE reconvened on June 22, 2020 and June 30, 2020 (Dist. Ex. 58 at pp. 3-5).

<sup>3</sup> The letter submitted to the district is dated January 22, 2018, which appears to be a typographical error as the letter references meetings that occurred later in 2018 and 2019 (see Parent Ex. Z at p. 1). The parents' due process request, dated August 3, 2020, also refers to such letter as being dated January 22, 2019 (IHO Ex. 11 at p. 17).

<sup>4</sup> In the original due process complaint notice, the parents' claims were limited to three school years, the 2016-17, 2017-18 and the first half of the 2018-19 school year (IHO Ex. 1). That complaint predated the unilateral placement of the student at Fusion and sought, among other things, to return the student to the district's 12:1+1 special class, provide a 1:1 teaching assistant, designate the student as regularly assessed, provide compensatory education relief, and to allow the student to repeat sixth grade (id.).

After his unilateral placement at Fusion, the parents filed a second amended due process complaint notice, dated July 15, 2019, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17, 2017-18, 2018-19, and 2019-20 school years (see generally IHO Ex. 9). Specifically, the parents argued that the IEPs and annual goals were inappropriate, the student was not in the least restrictive environment because the district failed to place the student with nondisabled peers, and the student was improperly designated as being a student who was to be alternatively assessed (see generally IHO Ex. 9). The parents further argued that the district violated section 504 by engaging in discrimination and acting with bad faith and gross misjudgment toward the student because the CSE made its recommendations for services on the basis of the student's classification as a student with autism (id. at p. 21). In order to facilitate the student's return to the district and as a proposed resolution, the parents sought for the child to be placed in a 12:1+1 special class in a neighborhood school, to be assessed using general State assessments rather than alternate assessments, the provision of an inclusion consultant to be retained for at least 200 hours, and for a neuropsychological evaluation to be conducted by a professional with expertise in inclusion (id. at pp. 23-24). As relief, the parents also requested an order with findings that the parents' unilateral placement of the student at Fusion was appropriate, Fusion provided individually tailored services for the student, and that equitable considerations favored the parents, as well as an order directing the district to reimburse the parents for all tuition and expenses at Fusion including fees, books, tuition insurance and finance charges (id.). Additionally, the parents requested that 500 hours of compensatory tutoring be provided and that they be reimbursed for private tutoring, evaluations, speech-language services, and attorney fees (id. at p. 24).

While the matter remained pending, the parents filed another due process request dated August 3, 2020, in which the parents continued to set forth the previously stated grounds to argue that the district failed to offer the student a FAPE for the 2016-17, 2017-18, 2018-19, and 2019-20 school years (see generally IHO Ex. 11). However, the parents added allegations that the district did not provide the student a FAPE for the 2020-21 school year (id.). As relief, the parents requested an order for the relief previously requested, and additional relief in the form of tuition reimbursement for the 2020-21 school year (id. at pp. 36-37). The parents previous request for 500 hours of compensatory tutoring was omitted from this due process request (see generally id.).

The parents requested consolidation of the August 2020 proceeding with the July 15, 2019 second amended due process complaint notice (IHO Ex. 12 at pp. 1-4). The district opposed the request for consolidation on the grounds that it would cause delay and have a negative impact on the student (IHO Ex. 13 at pp. 1-4). However, the IHO issued an interim decision on August 24, 2020 granting the parents' request to consolidate the two proceedings (IHO Ex. 14). Pursuant to that interim decision, the IHO discussed the consolidation factors in State regulation and ultimately determined that "for the convenience of the parties (and, specifically, [s]tudent) and in the interest of judicial efficiency, this Hearing Officer will consolidate Complaint 1 and Complaint 2" (id. at p. 4).

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

After three pre-hearing conferences were conducted between January 30, 2019 and May 22, 2019, an impartial hearing convened on October 15, 2019 and concluded on May 28, 2021 after 41 additional days of proceedings (Tr. pp. 1-6847). Over two thousand pages of documentary

evidence, exhibits, motions and briefs were also entered into the administrative record (Dist Exs. 3-62; Parent Exs. A-EEEEEE; IHO Exs. 1-21).

In a decision dated August 12, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2016-17, 2017-18, 2018-19, 2019-20, and 2020-21 school years (see generally IHO Decision). With regard to the 2016-17 school year, the IHO stated the following:

I find a denial of FAPE for 2016-2017 based upon the criteria of how the IEP must be "reasonably calculated to provide some 'meaningful' benefit" and failed to address his pronounced language disorder and provided OT instead;; failed to provide ESY (even when the District made the AA determination);, failed to conduct an FBA/BIP. The District did not meet its burden for FAPE this school year

(IHO decision at p. 20). With respect to the 2017-18 school year, the IHO concluded, among other things, that

From district's 5-year elementary experience, that although he wanted to interact with peers, he was not able to extract information from the environment, from the language of his peers. The District witnesses opined that the District provided a FAPE. No one questioned - even though the Student was exhibiting mastery outside of school and showed he was making de minimis progress. District witness further testified that if the Student was in a 12:1:1 with a 1:1, Student would not be interacting with peers. Tr. 2129. However, the record indicates that he was not interacting in the 8:1:2; needed to be prompted to be engaged.

\* \* \*

However, there were no vocabulary goals for the 5th grade (and so on in the following school years). I do not find that the CSE fully considered the significant communication needs of the Student, opportunities for direct communications with peers and professional personnel to support the Student's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction for the Student.

\* \* \*

Underneath all the testimony, I did not find that the District's decisions were based upon any timely and evidenced based, more so on the availability of the special education programs available at the time.

\* \* \*

For the 2017-2018 school year, I find that the District failed to provide the appropriate special education, failed to evaluate, provide measurable and

challenging goals, conduct an FBA/BIP, and failed to address his pronounced language disorder in order for this Student to progress.

(IHO Decision at pp. 27-29). For the 2019-19 school year, the first year of middle school, the IHO found, among other things that:

the APE 1 x daily 40min and the continued use of programmatic OT inappropriate use of special education services and resources for this Student, who did not receive an OT evaluation; OT was considered a relative strength for the Student, and obviously, no goals were recommended, so the dedication of these resources does not meet the Student's needs.

(IHO Decision at p. 32-33). The IHO found many of the earlier IEP goals "compound and difficult to measure" (IHO Decision at pp. 33-34), and the IHO then discussed additional assessments and revised IEP goal findings (IHO Decision at pp. 33-34). The IHO went on to hold that

[n]otwithstanding, not having a clear picture of the Student's present level and considering his limited progress in language (P YY), the CSE reviewed a number of placement options; the MS Special Education Department Head, and the other Special Education familiar with other District special education placements, reviewed that the Student is not appropriate for the 12:1 :1; acknowledged that even with the difference in skills reported by the tutor and Parent, the District continued with their recommended the same placement with the same related services (infra); however, for Math, the District agreed to another 8: 1 :2 placement for higher level students, to which the Parent disagreed. Likewise, the CSE recommended ESD and AA determination.

Considering the 3 CSEs, D 14, D 12, and D 10, and the analysis of the goals and progress, the District did not offer FAPE to the Student for the 2018-2019 school year. CSE failed to evaluate and to assess the Student's present levels, considering additional information provided, such as his private tutor, mastery in music showing his learning abilities, along with the October 2018 psychological evaluation showing that he does not have a severe cognitive disability, in the development of the Student's IEP for the 2018- 2019 school year, and therefore failed to consider any alternatives, including the least restrictive program (LRE infra) for the Student. It was during this school year the Parent submitted their initial due process complaint requesting, amongst other things, a least restrictive environment ("LRE") and access to the general curriculum (See H 1) and thereafter placed the Student privately at the Private School (see H 4 and H 9).

(IHO Decision at pp. 43-45). As for the IHO's findings related to the 2019-20 school year, the IHO found that

The 2 witnesses reveal a Student who was not engaged, not paying attention, not responding, unless prompted in the District's MS program. Student, who is known to be very polite and compliant, appears not to be motivated at the District MS program. The testimony of the Private Tutor, along with his obvious accomplishments in music, shows a totally different type of learner: focused, hardworking, able to remember and apply. Despite this anomaly continuing each school year, the District did not conduct a FBA/BIP and or evaluate further (infra).

The same 8:1 :2 placement was offered with APE daily with the same level of S&L as before, with ESD and AA determination. Again, the IEP provided the programmatic S&L (1 x 30min daily and 1x 30min on alt days) and indicated that the Student needed strategies (visual materials, linguistic scaffolding, re-teaching, and pre-teaching), ESD and ESY with S&L 1x 30min weekly. No extra time for instruction (does not move on until mastery), testing, and/or assignments, no vocabulary study boxes and/or tables, no FBA/BIP and/or AT were noted and/or required, but the Student required special door-to-door transportation. D 52. Again, the Parent disagreed with this IEP.

For the reasons above and for previous IEPs, I find that the District denied FAPE to the Student for 2019-2020 school year as the IEP did not address all of his needs relating to his language; the goals were arbitrary in its levels, did not address his vocabulary deficits and lack foundational concepts, and the absence of a FBA/BIP continues. The CSE had examples where Student was thriving - acceptance at the Julliard Pre-college and his engagement at the Private School. The CSE failed to evaluate in areas that could be used to draw the Student's attention, engage the Student in instruction in order for him to access learning, failed to address his pronounced language disorder, and to consider additional supplementary aides and services in the development of the student's IEP for the 2019-2020 school year and therefore failed to adjust and or consider any alternatives, including a LRE (infra) for the Student.

(IHO Decision at pp. 50-51). As to the IHO' conclusions regarding the 2020-21 school year, the IHO stated that

I do not find that this IEP is effective and logically developed to illicit the educationally intended behavior from this Student.

The same 8:1:2 placement was offered with APE daily with the same level of S&L as before, with ESD and AA determination. Again, the IEP provided the programmatic S&L (1 x 30min daily and 1x 30min on alt days) and indicated that the Student needed strategies (visual materials, linguistic scaffolding, re-teaching, and pre-teaching), ESD and ESY with S&L 1 x 30min weekly. No additional and or intensive S&L was recommended. A communication disorder can have a direct impact on cognitive performance,

and it can have a big impact on our understanding and appreciation of an individual's cognitive development. Tr. 6826/6-10. The IEP did not provide extra time for instruction (does not move on to next topic until mastery), no extra time for testing and or assignments, no vocabulary study and/or tables; no FBA/BIP and/or AT were required, but the Student required special door-to-door transportation. D 58. Again, the Parent disagreed with this IEP. The Private Psychologist opined that the student had been inappropriately placed throughout his educational experience and that his language disabilities had not been properly addressed. According to the Private Psychologist, the Student's learning abilities have not been fully understood, and he required an integrated setting that is well planned with supports and services and intellectually stimulating.

(IHO Decision at pp. 55-56). After making her FAPE findings concerning the student's elementary school year and middle school years separately, the IHO addressed several issues which she determined globally contributed to a denial of FAPE to the student for all of the five school years at issue.

Concerning the evaluations conducted and considered by the CSEs, the IHO found that the record was "replete with the [s]tudent having 'behaviors,' such as a learning, distracted, not engaged, inattentive, 'needing' prompting, . . . perseverating [and] seeking praise" (IHO Decision at p. 56). She noted that although the district could have administered a functional behavioral assessment (FBA) to the student to ascertain more information about how the student's behaviors impeded his ability to access learning and to develop a behavioral intervention plan (BIP), it failed to do so (*id.*). The IHO further found that the district failed to "tease out language and or cultural concerns" raised by the privately obtained psychological examination of the student (*id.*). Finding that the district had failed to further evaluate the student in order to determine how he was able to master learning and playing music independently and in a group setting given his alleged cognitive deficits, the IHO determined that the district failed to provide a FAPE to the student due to its refusal to further evaluate the student in all areas of his disability (*id.* at p. 57).

With respect to the related services recommended by the CSEs for the student, the IHO faulted the district for offering "only the programmatic services," including OT, "without any indication" that the student needed OT as a related service (IHO Decision at p. 59). The IHO also found that despite "reports showing areas of need in language and the need for intensive/remediation called for early on in his educational career" the district "showed a pattern of decreasing" speech-languages services that, similar to the unnecessary OT, were also delivered primarily as a programmatic service, as opposed to providing the student with individual speech-language services and supports (*id.* at pp. 59-60).<sup>5</sup>

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<sup>5</sup> Historically, the term "programmatic" has been used differently in different school districts in this State, most often to describe services that are automatically provided when a student attends a particular classroom or school building, but without such services being listed on the student's IEP. However, that approach very often has run afoul of the principle described by the Second Circuit in *R.E.* that a school district cannot defend its offer of a FAPE by arguing through retrospective evidence that a student would have receive services that are not listed on an IEP. It is unclear why the school district chooses to rely on a descriptor that has historically proven to be



The IHO also found that while the student demonstrated a "significant verbal communication language disorder," non-verbal subtests within the cognitive testing of the student indicated that he was not cognitively impaired (IHO Decision at p. 61). Based on this finding the IHO determined that the district applied a "wide global approach to his communication deficits" as opposed to the specialized supports and services he needed and incorrectly deemed him cognitively impaired (id. at p. 62). As a result, the IHO determined that the district "refused to provide the needed additional, modifications, supplementary aids, and services to address the student's strengths and weaknesses outlined in the various evaluations and its subtests" (id.).

Addressing the district's decision to alternately assess the student, the IHO determined that the student did not have a severe disability within the meaning of the relevant State regulations and showed strengths in areas such as math and music (IHO Decision at p. 66). The IHO further found that the district deemed him an alternate assessment student due to his significant deficits in communication and language, the student never received individualized speech and language services during the years at issue and none of the his IEPs "required that he be provided with a particular device or a service" (id. at p. 67). Based on her findings in this regard, the IHO opined that "[i]t appears that if you were placed in the 8:1+2 [special class] at the [d]istrict, you were designated [alternate assessment]" (id.). As a result, the IHO found that the student "was improperly designated as an alternately assessed student" and that "the alternate assessment, amongst other things, prevents the student from taking [R]egents examinations, retaining his high school diploma, pursuing a career development and occupational studies ("CDOS"), which would allow him to develop a career plan, employability profile and document his preparation for entry-level employment after high school and inhibits his outcome and ability to attend a music conservancy" (id.).

With respect to the student's LRE, the IHO noted at the outset that "[t]he analysis for the LRE is not the difference in ratios from the 12.1.1 versus the [d]istrict's 8.1.2 setting" but instead focuses on the student's access to peers without disabilities (IHO Decision at pp. 72-73). The IHO further noted that for purposes of LRE there was no difference between the 12:1+1 and the 8:1+1 classrooms available at the district because they were both self-contained special classes. However, the IHO further determined that the student's IEPs "did not offer any mainstreaming opportunities for the student (other than [m]usic) which is critical for his social, emotional, transitional and behavioral development" (id. at p. 76). The IHO also stated that while the district's IEPs created a "baseline" of self-contained classrooms with programmatic related services and alternate assessment for the student, the student's LRE should have been one which allowed him to achieve a high school diploma (id. at pp. 76, 77).<sup>6</sup>

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problematic and confusing in a number of local jurisdictions but suffice it to say the "programmatic" services in this case are in fact all listed on the student's IEPs and thus satisfy that aspect of R.E. and it was not a problem for the parties in this particular case.

<sup>6</sup> The IHO also addressed the parents' predetermination and parental participation claims and found that with the exception of the December 2016 CSE meeting, the district did not impede the parents' participation at the CSE meetings or their decision making concerning the student's education (IHO Decision at p. 71). In elaborating on that finding, the IHO noted that although the district "appeared to be entrenched with their theory that the severe language disorder impaired the [s]tudent's cognitive ability to such an extent" that it repeatedly recommended the

With respect to the contested unilateral placement, the IHO found that Fusion was appropriate (IHO Decision at p. 85). Specifically, the IHO found that the record indicated Fusion provided a 1:1 environment and instruction based upon the student's individual needs (id. at p. 83). The student's curriculum was determined based upon performance on several teacher assessments and classes were graded according to the student's effort (id.). The IHO found that Fusion addressed the student's lack of word knowledge and vocabulary needs (id.). The IHO also held that the student made progress while attending Fusion (id. at p. 85). Further, the IHO determined that the placement at Fusion was reasonably calculated to enable a student with autism spectrum disorder to make educational progress (id.). Lastly, the IHO found that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement, as the parents were cooperative and did not obstruct the district (id. at pp. 86-87). Therefore, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Fusion from January 2019 through June 2019 and for the 2019-20 and 2020-21 school years (id.).

As further relief, the IHO ordered that the district reimburse the parents for private speech-language related services that comport with New York State Education Department professional licensing requirements rendered from January 2019 through June 2019 and for the 2019-20 and 2020-21 school years (id.). The IHO also ordered that the cost of private evaluations by the parents' private psychologist and private inclusion psychologist be reimbursed upon proof of payment (id.). Additionally, the IHO granted the parents' request for costs and attorneys' fees (id. at p. 86).

However, the IHO did not grant all relief that had been requested by the parents as it was found that their request for prospective payment of tuition at Fusion could not be awarded (id. at p. 87). The IHO determined that because the parents have remedies and rights under IDEA, an order could not be made requiring the district to convene a CSE, to reimburse the parents for a neuropsychological evaluation, or to amend the student's IEP to reflect a particular placement and services (id.). Further, the IHO determined that the parents' request for the district to retain an inclusion consultant if the student returned to the district, for the student to not be designated as alternately assessed, and for the student to take general State exams could not be granted as such relief was speculative due to the student not being enrolled in the district (id.).

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

The district appeals, arguing that the IHO erred on the law and facts when holding that the district failed to provide the student a FAPE during the 2016-17, 2017-18, 2018-19, 2019-20, and 2020-21 school years, making the relief granted improper. The district argues that based on the information known to the CSE, the decision to recommend a "more restrictive" program beginning with the 2016-17 school year, namely a transition from a 12:1+1 program to an 8:1+2 special class program, was appropriate. Moreover, the district alleges that the student was appropriately evaluated, and the parents had an adequate opportunity to participate in the development of the student's IEP. The district also concludes that the respective IEPs and recommendations for the

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same placement "with its programmatic related services (including the unneeded OT) and [alternate assessment] determination," she nonetheless could not find that the district's "entrenchment" indicated a lack of parental participation because "[c]ommittees can be set in their resolve" and the CSEs were not "required to adopt the recommendations of the private evaluators and the [p]arents'[] desires" (id.).

time period at issue were reasonably calculated to provide the student with educational benefits. Specifically, due to the student's severe cognitive disability and language deficit, the district argues it was appropriate for the student to be alternately assessed. Additionally, the district alleges that the services provided were suitable to address the student's speech and language needs. It is alleged that the IHO undertook a "hypertechnical" analysis to reach her conclusion and had a predisposition to rule in favor of the parents, was overly judgmental and was biased. Thus, among the issues that the district alleges is whether 1) the IHO erred in determining that the district failed to appropriately evaluate the student; 2) the IHO conducted a hyper technical analysis of the district's recommended goals causing an erroneous determination that such goals were often arbitrary or not appropriately ambitious for the student; 3) the IHO erred in determining that the student should not have been alternately assessed; 4) the IHO erred in determining that the district failed to recommend appropriate speech services to the student; 5) the IHO erred in determining that the CSE decided improperly to not include a program for the student to receive specially designated reading instruction for the 2018-19 school year; and 6) the IHO erred in determining that the student was not placed in the least restrictive environment.

Further, the district contends that the parents' unilateral placement of the student at Fusion during part of the 2018-19 school year, and for the 2019-20, and 2020-21 school years was inappropriate as Fusion is not the least restrictive environment for the student and Fusion does not provide the related services that the student needs, as the student receives no speech and language service. The district alleges that purported progress made by the student is illusory and contrived and that the teachers at Fusion are not reasonably qualified to provide instruction to the student. The district also argues that the IHO erred in ordering the district reimburse the student's parents for certain costs sustained in securing private speech and language services from January 2019 through June 2019 and the 2019-20 and 2020-21 school years.

In an answer and cross-appeal, the parents argue that the district's request for review should be dismissed and that the IHO's decision be upheld to the extent that it found the district failed to provide the student with a FAPE for the 2016-17, 2017-18, 2018-19, 2019-20, and 2020-21 school years and that the unilateral placement of the student at Fusion was appropriate. The parents seek affirmance of the IHO's award of relief. However, the parents also argue that the IHO erred in not finding that the district engaged in bad faith and gross misjudgment and that the IHO lacked jurisdiction to hear claims involving section 504.<sup>7</sup> The parents clarified that the IHO should have found that the district precluded parental input for each school year and should have addressed the lack of a general education teacher being present for the 2020-21 CSE meetings. Additionally, the

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<sup>7</sup> An SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. May 12, 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at \*11 [S.D.N.Y. Aug. 5, 2016]). Therefore, I do not have jurisdiction to review any portion of the parent's claims regarding violations of section 504 and they will not be further discussed.

parents argue that the IHO erred in not clarifying that "private tutoring and related services" were being awarded.

In an answer to the cross appeal, the district takes issue with the parents raising 504 claims in this forum and otherwise asserts its arguments against the parental input, CSE composition and relief contentions raised by the parents.

## **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]).<sup>8</sup>

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

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<sup>8</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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**

#### **1. Conduct of the Impartial Hearing - IHO Bias/Impartiality**

As a threshold issue, the district contends that the results of the impartial hearing are essentially tainted because the IHO was biased and failed to conduct herself in an impartial manner. The district argues that the IHO expressed bias and disregard for impartiality by being predisposed to rule in the parents' favor, making rulings that were arbitrary, and reaching conclusions that were inconsistent with the record and applicable law.

More specifically, the district argues that the IHO undertook a "hypertechnical analysis" of the annual goals on the IEP for the 2017-18 school year by, "inexplicably" concluding that the goals were not appropriately ambitious, and again conducted a "hypertechnical analysis" of the recommended annual goals for the 2018-19 school year which was "reflective of the inescapable conclusion that the IHO had a predisposition to rule in favor of the [p]arents on almost every issue" (Req. for Rev at pp. 3-4). The district further argues that the IHO's determination that the district's evaluation of the student was insufficient because it failed to "tease out language and/or cultural concerns" was also "hypertechnical and overly judgmental," and that the IHO's determination that the parents did not have an adequate opportunity to participate in the development of the student's IEP was "so absurd" that it provides further evidence that the IHO had an "inherent bias against the [d]istrict" (id. at pp. 6-7).

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-064).

An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

To the extent that the district disagrees with the IHO's credibility findings or conclusion reached by the IHO based on statements in the hearing record, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083).

Although the district may have reason to disagree with the IHO's conclusions, upon a careful review of the record, there is no basis to support the district's general and conclusory allegations that the IHO displayed bias or prejudice against the district through her conduct, statements, admonitions, or rulings. As evidence of bias, the district argued in general that the IHO made determinations and ruled in favor of the parents with respect to their due process complaint notices. The district made such arguments without specificity or a citation to any supporting legal authority. The district also alluded that when conclusions favor one party, that alone can be sufficient grounds for finding actual or apparent bias. Without addressing such argument, the IHO did not rule unanimously in the parents' favor as not all requested relief had been granted (IHO Decision at pp. 86-87). Notably, the district also does not specify or assert with any particularity that the IHO's alleged bias with respect to rulings, statements, admonishments, or conduct affected either the district's opportunity to present evidence or the district's opportunity to otherwise exercise its rights under due process (see 8 NYCRR 200.5[j], [k]).

In fact, a review of the hearing transcript reveals that both parties were treated fairly, with courtesy, and with respect by the IHO during the impartial hearing. The hearing record demonstrates that during the course of the 41 hearing appearances a multitude of objections were made by the attorney for the district and the attorney for the parents, which resulted in the IHO making rulings both in favor of and against both parties (see, e.g., Tr. pp. 76, 235, 348, 663-664, 781, 983, 1083-1084, 1234-1237, 1339-1340, 1488-1489, 1520-1521, 1695-1697, 1811, 1846, 1861, 1921, 1945-1948, 1958-1960, 2064-2066, 2216, 2263, 2663, 3024-3025, 3340, 3454, 4215, 4444, 4482-4483, 4642, 4856, 4954, 5007, 5248, 5713, 5797, 5952, 6215-6216, 6543, 6547, 6559, 6633, 6779, 6809-6810). According to the hearing record, the IHO, at times, requested and offered clarification of issues in dispute, questioned witnesses, and made efforts to maintain the

decorum of the proceedings while ensuring that each party had the right to be heard in an orderly manner (see, e.g., Tr. pp. 78, 82-83, 100-104, 235, 329-330, 1737-1739, 2404-2407, 2655-2656, 2667, 2694-2695, 2861-2862, 2976, 3031, 3090, 3307, 4095-4096, 4191-4194, 4234-4235, 4493-4494, 5360, 5561, 5567-5568, 5594-5595, 6661-6663). Under sometimes challenging conditions, the IHO remained courteous and did not manifest bias or prejudice in either her words or her conduct, including when ruling on objections made by counsel (see generally Tr. pp. 1479-1480, 1522-1523, 1737-1739, 2352-2354, 2742-2743, 2944-2945, 3025-3026, 3092, 3137-3138, 3798-3801, 3879-3880, 3983-3985, 4420-4421, 4424-4426, 4439-4443). Therefore, I find that the district's contentions regarding the IHO's alleged bias are without merit.

## **B. FAPE**

Before turning to the remainder of this decision, I will briefly touch on why I have selected the remainder of the issues discussed in this decision. This appeal record was developed regarding five school years at issue and the issues set forth repeatedly in four due process complaint notices. Although already involving three school years, the IHO nevertheless allowed amendments to proceed and then ordered consolidation of two due process proceedings. While it may have seemed like a good idea at the time, I do not view delaying the proceedings and amassing a record approaching 9000 pages involving five school years on repeating issues as being in the interests of the student or in the interests of judicial economy.

Congress and the U.S. Department of Education envisioned administrative due process hearings that are typically resolved within approximately 75 days in the first tier and 30 days in the second because that is in the interests of encouraging parties to resolve their disputes quickly and then return to the collaborative process for helping students with disabilities to access learning. Even allowing for flexibility in these timelines, the essence of the current dispute (the differing viewpoints and philosophy regarding the student's education) was exceedingly clear as early as November 2018 (Dist. Ex. 12 at p.2). The parties were heard on the same issues repeatedly and then heard yet again and three years later the case still has not left the hearing system. Administrative hearing officers in this State are strongly cautioned against soliciting extensions of the timelines and I have not done so because it would be highly inappropriate. Although the proceeding took three years, the IHO's decision, quoted at length above, evidences rushed drafting and is at points unclear and difficult to read, which is hardly surprising given the size of the record and number of years that had to be addressed in one sitting.

Thus, the process provides me with 30 calendar days to examine the entire 41-day hearing record and then attempt to provide the thorough and careful analysis expected by the courts of this circuit. I would like to address more of the issues presented by the parties, but I face the Hobson's choice of either addressing all of the disputed issues that require a resolution and violating the IDEA timelines, or addressing what I view as most critical and dispositive points with the most thoughtful analysis I can provide within the timeline, an analysis that should have been completed years ago. Accordingly, the decision below is confined to what I view as the core dispositive issues in the analysis of whether the student was offered a FAPE essentially boils down to an analysis of two critical points in time: the district's special education programming for the student during elementary school and during middle school. There are numerous findings and issues such as the IHO's goal analysis that should have been addressed and with which I do not fully agree, but it is not possible to provide that feedback with sufficient detail to the IHO or the parties in this



matter within the prescribed time. While some may view the consolidations and prolific evidence gathering in this proceeding as comprehensive or efficient, even if technically permissible, I view the result as destructive the procedural safeguards designed by Congress to protect the rights of disabled children in a fair and reasonable manner.

### **1. Elementary School: 2016-17 and 2017-18 School Years**

Turning to the first issue, on April 20, 2016, the CSE convened for the student's annual review and to develop the IEP for the 2016-17 school year (fourth grade) (Dist. Ex. 18). According to the meeting information summary attached to the IEP, the CSE reviewed the student's classroom progress, programmatic and individual speech and language sessions, behavioral needs, and the parent's report (id. at pp. 1-2). Comparison of the April 2016 annual review report with the April 2016 IEP present levels of performance showed that the CSE reviewed that report and incorporated it into the IEP (compare Parent Ex. II with Dist. Ex. 18 at pp. 5-6). Furthermore, the school psychologist testified that the April 2016 CSE considered the April 2016 annual review report (Tr. p. 937).

Review of the April 2016 IEP shows that it reflected the results from the December 2014 administrations of the Vineland Behavior Scales, the Differential Ability Scales, the Clinical Evaluation of Language Fundamentals - Fifth Edition (CELF-5), the Expressive One Word Picture Vocabulary Test - Fourth Edition (EOWPVT-4), the Receptive One Word Picture Vocabulary Test (ROWPVT-4), and the Woodcock-Johnson - III ACH Test (Dist. Ex. 18 at pp. 3-4). While the hearing record is unclear as to whether the April 2016 CSE had these underlying 2014 evaluation reports available to them during this particular meeting, it appears that the scores were considered during the meeting (see Tr. pp. 414-16; 904-05).

According to the supervisor of elementary education and pupil personnel services for special education (supervisor), who served as the chairperson of the April 2016 CSE meeting, the CSE considered the scores contained in the December 2014 educational reevaluation report (Tr. pp. 414-16). The district school psychologist testified that the April 2016 CSE considered the reevaluations that had been conducted during the 2014-15 school year, when discussing the student's alternate assessment designation (Tr. pp. 904-05).

The educational reevaluation reported from a December 2014 administration of the Woodcock Johnson III - Test of Achievement Form B (Parent Ex. E at p. 2). The broad reading cluster was used to provide a measure of achievement in reading, decoding and speed, the results of which placed the student within the low average range in the 23rd percentile (id.). The student's score in the 39th percentile on letter-word identification, placed him within the proficient range (id.). The reading fluency subtest placed the student in the 27th percentile which was considered within normal limits, and the passage comprehension subtest placed the student within the low average range in the 13th percentile (id.). The evaluator noted that the student was able to comprehend and answer questions that included pictures; however, as the sentences became more complex and when a picture was not included, the student had difficulty providing a word that made sense within the sentence (id.).

With regard to the broad math cluster, the student scored within the 29th percentile, which was considered within the proficient range (Parent Ex. E at p. 3). On the math fluency subtest, the student's performance placed him in the 92nd percentile, which was in the superior range (id.). The applied problems subtest was considered below age expectations with the student's performance within the 2nd percentile, and the evaluator noted that he demonstrated difficulty identifying and/or adding money to the dollar and with problems with extraneous information (id.). Finally, the student scored within the very proficient range in the 90th percentile on the calculation subtest (id.).

On the broad written language cluster, the student scores placed him within the 58th percentile, which was considered in average range (Parent Ex. E at p. 3). The student scored in the 76th percentile on the spelling subtest, considered in the very proficient range, and in the 25th percentile on the writing fluency subtest, which was considered within normal limits (id.). The student scored within the 63rd percentile, considered within normal limits, on the writing sample subtest (id.). Finally, the evaluator reported that the student's overall levels of academic achievement were within normal limits, with strengths in math calculation skills and spelling, and difficulties with passage comprehension and math fluency (id. at p. 4).

A speech-language reevaluation was conducted in December 2014 and the report reflected the results of an administration of the Clinical Evaluation of Language Fundamentals - Fourth Edition (CELF-5), which indicated that the student attained a core language score of 55 (0.1 or one tenth percentile), a standard score of 59 (.3 or three tenths percentile) on the language content score and a standard score of 57 (.2 or two tenths percentile) on the language structure score (Parent Ex. A at p. 4).<sup>9</sup> With regard to the student's receptive language development, the evaluator reported that the student attained a standard score of 59 (.3 or three tenths percentile) on the receptive language index, which indicated severe receptive language deficits (id. at pp. 1-2). She explained that the student exhibited weaknesses in his ability to: interpret, recall and execute oral commands of increasing length and complexity; understand relationships between words based on semantic class features, function, place or time of occurrence; and that he exhibited significant difficulty understanding spoken paragraphs and interpreting spoken sentences of increasing length and complexity (id. at p. 2). Additionally, the student attained a standard score of 60 (.4 or four tenths percentile) on the expressive language index, which also indicated severe expressive language deficits (id.). The evaluator reported that the student demonstrated weaknesses in his ability to formulate grammatically correct sentences, recall sentences, apply word structure rules to mark inflections derivations and comparisons, and with irregular plurals, third person singular, possessive nouns, and regular past tense verbs (id.). The December 2014 speech-language reevaluation report reflected that the student attained a standard score of 60 on the pragmatics

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<sup>9</sup> The December 2014 speech-language reevaluation report identified the assessment used with the student both as the Clinical Evaluation of Language Fundamentals - Fourth Edition, and as the CELF-5 (see Parent Ex. A). It is unclear from the report which version was administered during this evaluation, but the acronym CELF-5 is used throughout the report (see id.).

language profile of the CELF-5 placing him in the .4 or four tenths percentile, which indicated severe pragmatic language deficits (id.).

The December 2014 speech-language reevaluation report reflected that the student attained a standard score of 75 (5th percentile) on the ROWPVT, which placed his receptive vocabulary skills below the average range (Parent Ex. A at p. 3). Additionally, the student attained a standard score of 71 (3rd percentile) on the EOWPVT placing his expressive vocabulary skills below the average range (id.). The evaluator summarized that the evaluation results indicated that the student had severe receptive and expressive language deficits along with pragmatic and vocabulary skills that were significantly below the average range (id. at p. 4).

According to the January 2015 psychological reevaluation report, the school psychologist and a school psychology doctoral intern administered the Differential Ability Scales, Second Edition (DAS-II), the Vineland Adaptive Behavioral Scale - Second Edition (Vineland-II), interviewed the student, and observed him in the classroom (Parent Ex. B at pp. 1, 3). During the evaluation, the student easily accompanied the evaluator, completed all tasks asked of him with minimal redirection, and followed the evaluator's instructions (id. at pp. 3-4). The evaluators observed that the student engaged in some perseverations and inappropriate coping skills in between subtests while playing a game (id. at p. 3). According to the evaluators, results of the DAS-II indicated that the student had several average cognitive abilities; however, he demonstrated cognitive deficits in the areas of verbal ability and language skills, and they noted that this was consistent with a previous assessment (id. at p. 4). Specifically, the student demonstrated average spatial ability, and performed in the low average range on nonverbal reasoning (id.). The evaluators noted that when the pictures or patterns became increasingly complex, the student had difficulty finding the correct match to complete the design (id.). Additionally, the student performed "significantly below normal limits" on tasks that measured verbal skills and "struggled greatly" on a task that required him to define words, whereby he only defined two out of 12 words (id.). The evaluators noted that even though the student performed below normal limits, he performed better on a task that asked him to explain how two objects or concepts were alike (id. at p. 5). Overall, the student's performance indicated that he "struggle[d] significantly" when required to demonstrate verbal ability and that it was easier to categorize using similarities rather than generate definitions (id.).

Review of the meeting information summary attached to the April 2016 IEP indicated that the student was "a happy student" who struggled with daily routines and was most successful with physical prompts; however, visual and verbal prompts had limited effect (Dist. Ex. 18 at p. 1). The meeting summary further described that the student struggled with task initiation and transitions, as well as his socialization in the classroom (id.). With regard to academics, the meeting information summary indicated that the student made limited progress (id.). Answering questions and understanding language was indicated to be the student's greatest challenge in reading (id.). Decoding was a strength, but he lacked fluency and expression, and struggled with "who and "what" questions and required language scaffolding to answer those questions (id.). Reading comprehension improved when the student read to himself instead of listening; however, retelling a story in sequence was challenging (id.). With regard to writing, the student's handwriting was

described as neat, his spelling was accurate, and he used capital letters and periods (id.). However, the student struggled to generate ideas and needed assistance to use a graphic organizer (id.). Math was noted to be an area of relative strength for the student, especially computation, and he had memorized all multiplication facts (id.). Word problems and complex understanding of tasks was noted to be more challenging (id.). It was noted that the committee discussed that the student struggled with any task that was language laden (id. at pp. 1-2).

The meeting information summary indicated that the student's language skills and concepts had not grown significantly and that this had become a "big obstacle to his learning" (Dist. Ex. 18 at p. 2). Additionally, the committee expressed concern regarding the student's continued difficulty with routines and hypothesized that he "may be becoming more uncomfortable with the demands" (id.). Socially, the meeting information indicated that the student tended to play on his own and did not initiate interactions with his peers; however, he would watch and copy his peers for limited periods of time (id.).

With regard to speech-language skills, the meeting summary indicated that the student continued to work on language comprehension and noted that reading and writing things down were strategies that assisted him (Dist. Ex. 18 at p. 2). Additionally, the student struggled with explaining and expressing his ideas, and that visuals and word banks assisted with answering questions and expression (id.). The committee discussed that the student had not made many tasks automatic and that he was not using language at appropriate times as it appeared to be random (id.).

Next, the meeting summary indicated that the student was receiving building level reading services, where the focus was on comprehension (Dist. Ex. 18 at p. 2). Furthermore, the committee engaged in a conversation about alternate assessment, and after reviewing the adaptive and speech-language evaluation reports, recommended that the student participate in alternate assessment due to his significant language deficits (id.).

The meeting summary indicated that the CSE reviewed the student's eligibility and classification as well as annual goals and program modifications, discussed programming options and determined that the student required a smaller teacher-student ratio because of his struggles with academic and language demands of the current placement (Dist. Ex. 18 at p. 2). Additionally, according to the CSE, the student was "not able to interact with his peers because his language [was] not as developed" as theirs (id.). The parent expressed concerns about transition to a new building and the CSE indicated that provisions would be made if the program was not going to be in his current building (id.).

Comparison of the April 2016 annual review report that was completed by the student's special education teacher and speech-language pathologist with the April 2016 IEP shows that the information was consistent with and at times verbatim throughout the present levels of performance (compare Parent Ex. II with Dist. Ex. 18 at pp. 5-7). The April 2016 IEP present levels of performance indicated that the student had made "slow but steady progress" in speech and language (Dist. Ex. 18 at p. 5). The student continued to struggle with following two-step directions; however, he showed progress when steps were broken down, his skills increased as he

became more familiar with an activity, and repetition of directions and verbal rehearsal supported him in this area (id.). Recalling and comprehending a sequence of two events presented orally from a short story continued to be difficult for the student and such information needed to be broken down, restated and re-explained when linguistic complexity increased (id.). Some progress was noted in his ability to identify and use content area vocabulary through classification, categorization, and association of skills (id.). Strategies to improve vocabulary included using picture or visual aids, flashcards, teaching new vocabulary within the context of known information, and using a multisensory approach to enhance retention (id.). The IEP further indicated that the student's ability to maintain a conversation for at least three exchanges given visuals had improved and noted that orthographic cues, modeling, cue cards, and scripts have been helpful (id.). Additionally, the IEP described scripting as a "type of role-playing activity that ha[d] helped [the student] learn about and practice various social skills," and specified that the organization and structure of scripting helped him learn appropriate and inappropriate social behaviors for everyday situations (id.).

In study skills, the April 2016 IEP indicated that the student wanted to please and be a part of the class and noted that he tried to follow directions and routines; however, his inattention and language deficits interfered with his success (Dist. Ex. 18 at p. 5). Additionally, even when visual and non-verbal prompts were presented, he only followed the daily routines with physical prompting from an adult in the room (id.). Finally, the IEP reported that modifications for volume of work and language in an assignment were essential to the student's follow through with tasks (id.).

With regard to reading, the April 2016 IEP present levels of performance indicated that the student had made some progress and had moved from a level G to a level I as of March 2016, with level I considered to be "the end of first grade benchmark" (Dist. Ex. 18 at p. 5). Decoding was indicated as a strength for the student as he was able to decode words (multi-syllabic words that contain diagraphs, blends and glued sounds) above his independent reading level (id.). Additionally, comprehension was very difficult for the student due to his expressive and receptive language deficits, and he required visual prompts, models and repetition in order to answer "wh" questions correctly (id.). With modifications, the student was able to answer literal comprehension questions about the setting and the characters; however, he was inconsistent (id.). Finally, the IEP noted that retelling a story in sequence and answering inferential questions was very difficult for the student and he required scaffolding and visuals "to even try" (id.).

In writing, the IEP indicated that the student's handwriting was neat, his spelling was accurate, and that he utilized proper capitalization and end punctuation when writing sentences (Dist. Ex. 18 at p. 5). However, even though the student could write sentences, he had difficulty transitioning into paragraphs, and he required choices of topics to assist in generating ideas for writing (id.). The student struggled with using a graphic organizer and needed scaffolding to use one and adult assistance to remain on task (id.). The IEP noted that the student required 1:1 attention, visuals, and choices in order to organize and expand his ideas and to add meaningful details to his writing (id.).

Math was considered an area of strength for the student, particularly computation, and he was very successful when presented with a new multi-step concept involving calculations (Dist. Ex. 18 at p. 5). The student demonstrated an ability to understand place value, add, subtract, and multiply with regrouping and fraction concepts, and he had mastered multiplication facts to 12 (id.). However, the student struggled with word problems and showing conceptual understanding (id.). He required teacher assistance when asked to identify the correct operation to solve a one-step word problem, as he would often guess the operation (id.). The IEP noted that the student had difficulty reading the word problem independently, as language demands were difficult for him (id.).

The April 2016 CSE identified the academic, developmental and functional needs of the student which included: in the area of study skills the student needed to successfully transition from one activity to another with one verbal and one non-verbal prompt; in reading when provided with visuals he needed to sequence a story with a beginning, middle, and end; to read a nonfiction text and determine two facts about what he read given a written prompt; after reading a story on independent level K, to answer "who", "what" and "where" questions; in writing, to complete a three-part graphic organizer about a nonfiction topic and write a three sentence paragraph from that organizer; after given a completed organizer he needed to utilize the given topic and concluding sentences and add three supporting details from the organizer; in math, the student needed to identify the concepts more, less, same, and different in a variety of contexts; and in speech-language, he needed to work on conversation maintenance (initiate and respond) for at least three exchanges; compare and contrast items by describing at least two similarities and two differences using a graphic organizer; identify and use vocabulary at the third grade level through classification, categorization and association; and given five pictures, after hearing a short paragraph, choose the pictures that represented a sequence of three events (Dist. Ex. 18 at p. 6).

Socially, the student was described as coming into school "every morning very happy with a big smile on his face" and indicated that he greeted his teachers and peers who were in close proximity (Dist. Ex. 18 at p. 6). However, the IEP further indicated that the student did not initiate conversations with his peers, would sit at his desk looking around the room, and did not engage in discussions during morning meeting (id.). The student had made progress in following through with the "greeting" although this was intermittent (id.). When the class was engaged in a game, the student often did not understand the directions and would not play properly, and he could not work with a peer without adult intervention due to the language demands of the tasks (id.). Finally, the IEP indicated that the student often played by himself during recess (id.).

There were no physical or motor needs of the student identified in the April 2016 IEP, as those skills were determined to be within normal limits (Dist. Ex. 18 at p. 6). The April 2016 CSE identified the following management needs: the student required visual materials and strategies during instructional time, and due to his severe language deficits, he required linguistic scaffolding, breaking down of directions and tasks as well as some classroom materials pre-taught and re-taught in order for him to succeed (id.).

For the 2016-17 school year the April 2016 CSE recommended 10-month programming consisting of an 8:1+2 special class placement, four times daily for 40-minute sessions; one 40-

minute session per day in a 12:1+1 special class for "mainstreaming" in specials and math if possible; one daily, 60-minute session of "programmatic" speech-language therapy provided in the special classroom; one 30-minute session of speech-language therapy twice during the six day cycle in the provider's office; two three-hour sessions per six day cycle of "programmatic" OT provided in the special classroom; one 60-minute session per month of parent counseling and training (Dist. Ex. 18 at pp. 2, 11).<sup>10</sup> Additionally, the CSE recommended the following supplemental aids and services, program modifications and accommodations: visual materials and strategies, linguistic scaffolding, scaffolding, pre-teaching, reteaching of materials, and an extended school day three times weekly for two hours per day (*id.* at p. 11). The CSE determined that the student would participate in the alternate assessment, as his "severe disabilities require[d] the use of alternate performance indicators to appropriately assess abilities and needs" (*id.* at p. 12). Regarding the extent that the student would not participate in regular class, extracurricular and other nonacademic activities, the IEP identified that "in the areas of non-participation, special class and speech" the student "require[d] special instruction in an environment with a smaller student-to-teacher ratio and minimal distractions in order to progress in achieving the learning standards" (*id.* at p. 13). Finally, the April 2016 IEP indicated that the student would attend the extended school day at another district school and would require transportation to the other site (*id.*).

The hearing record contains a December 2016 IEP, which indicated that it was an amendment without a CSE meeting (Parent Ex. H at p. 1). Comparison with the April 2016 IEP indicated that there were very few changes made to the December 2016 IEP, which consisted of adding the date of a psychological addendum completed on November 28, 2016 (compare Parent Ex. H at pp. 1, 3, with Dist. Ex. 18). The November 2016 psychological addendum was completed at the request of the parent in order to supplement the December 2014 psychological evaluation (Dist. Ex. 8 at p. 1). The evaluator administered the Childhood Autism Rating Scale - Second Edition, standard version and the questionnaire for parents, and the Vineland Adaptive Behavior Scales - Third Edition parent form and teacher form (*id.*). The evaluator concluded that the student demonstrated deficits in his receptive understanding and expressive communication skills; he needed assistance to follow multi-step directions in novel situations outside of his normal routine; he had a limited interest in social interactions and a limited repertoire of play skills; he had difficulty with back and forth exchanges during social interactions; and he was in need of adult facilitation to engage in cooperative play and learning activities (*id.* at p. 4). Additionally, the evaluator described that the student presented with flat affect, had limitations in his range of emotions and generally, presented a calm demeanor (*id.*). She opined that the "culmination of these deficits hinder[ed] his learning as well as independent functioning and ability to negotiate the demands within the classroom, school and home environments" (*id.*). Furthermore, the evaluator explained that the descriptions of the student's current functioning reflected the impact of his skill deficits on his ability to independently negotiate the demands during his day to day

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<sup>10</sup> The April 2016 IEP contained the recommendation of three hours of OT to be provided twice within a six day cycle is in contrast to the written information summary attached to the IEP which indicated 30 minutes of OT twice within a six day cycle (compare Dist. Ex. 18 at p. 1 with Dist. Ex. 18 at p. 11).

interactions within his environment (id.). She explained that the results of the behavior rating scales completed by the parent and the student's then-current teacher identified his communication, daily living and socialization skills as low to moderately low and significantly below age expectations (id. at pp. 4-5). Additionally, the evaluator reported that consistent with previous evaluations, the present assessment of the student's behavior suggested that he continued to demonstrate several characteristics that were mildly consistent with the criteria in the Diagnostic and Statistical Manual Fifth Edition for the diagnosis of autism spectrum disorder, and suggested that the student continued to require support to acquire the skills needed to compensate for his identified deficits (id.).

Turning to the 2017-18 school year, the CSE convened on March 31, 2017 for the student's annual review and to develop the IEP for fifth grade (Dist. Ex. 16 at p. 1). According to the meeting information summary attached to the IEP, the student's classroom teacher reviewed his progress, and reported that the student had good math calculation skills, was working to improve his math reasoning and needed repetition to allow him to dissect a problem in order to understand what was being asked; he had difficulty retaining strategies taught; in reading he was a good decoder and read fluently, but did not read for meaning; he was reading at level K (beginning of second grade); errorless teaching was used to help him identify "wh" questions based on stories; inferential questions were difficult for him; he had neat handwriting and used capitalization and punctuation; he needed choices to help him generate ideas even when given a picture; he used sentence starters to organize his ideas; he followed classroom routines with visual schedules; routines were sabotaged in order to create opportunities for him to initiate requests and questions; he responded well to positive reinforcement; he required an individual schedule and was building up his ability to follow the schedule and to build his repertoire of appropriate independent activities; and socially he had built up his pragmatic language skills and was learning to apply them to his interactions with same aged peers (Dist. Ex. 16 at pp. 1-2).

The speech-language pathologist reported that the programmatic and individual speech sessions focused on improving the student's ability to sequence ideas and noted that he had significant weaknesses in his verbal comprehension and needed information broken down to help him understand (Dist. Ex. 16 at p. 2). The summary indicated that the student would offer and change his responses to questions because he was not attending to the questions, rather he was responding based on the inflection of the speaker's voice instead of his own knowledge, and that prompts were being used to improve his confidence in his responses (id.). During classroom lessons, the student would often repeat the answer previously given and was prompted to develop his own responses and to "think for himself" (id.). The speech-language pathologist reported that the student required repetition to help him acquire vocabulary, and he was working on discriminating between "wh" questions (id.). Additionally, the student was being prompted to initiate and maintain social conversations, and the prompts were being faded (id.). Finally, the student knew all of the rules during social interactions, was learning to apply them to verbal exchanges, and that he had started to advocate for himself to express wants and needs (id.).

The meeting summary included the parent's report which indicated that the student could follow directions at home, and that he did not readily talk about school and would become upset



when questioned (Dist. Ex. 16 at p. 2). The CSE chairperson explained that the student's class placement had increased the demands on his class participation and verbal expression, and that he was being held accountable for his learning, which may be upsetting for him because he wanted to please but his answers were being challenged for accuracy and he was being prompted to think about his answers before he verbalized them (id.).

In science, the meeting summary reported that the student enjoyed manipulative activities and noted that he was more willing to volunteer and to take the lead (Dist. Ex. 16 at p. 2). He enjoyed working in cooperative groups and was advocating for himself (id.). The summary indicated that the student needed time to process one-step directions and was asked to repeat the directions back to confirm that he understood what he was being asked to do (id.). Content was broken down to help retention, and the student was responding well to visuals as it helped his memory and comprehension of information (id.). The meeting summary indicated that due to his distractibility, the student was seated close to the teacher, that he was a literal thinker, and he had more difficulty with higher level concepts (id.).

The meeting summary indicated that the "[e]ffect of student needs" was completed and indicated that while the student needed behavioral strategies, at that time he did not require a behavioral intervention plan (BIP) (Dist. Ex. 16 at p. 2). Additionally, the CSE determined that due to the student's significant language reasoning, reading comprehension, and communication skill deficits he continued to meet the eligibility criteria for alternate assessment (id.). The CSE further determined that the student's delays in social skills, language skills, attention, reading comprehension, math language-based concepts and word problem solving skills inhibited his progress in the general education curriculum and annual goals were created in the areas of study skills, reading, writing, math, speech, motor, social and behavioral skills (id.).

The meeting information summary indicated that the parent asked about the availability for the student to receive reading comprehension support through a general education support service (SIR) and the CSE discussed the availability for the special education teacher to consult with the reading department to incorporate and modify reading comprehension strategies into the student's work throughout the day (Dist. Ex. 16 at p. 2). The parent responded that there was value in having the reading specialist work directly with the student in addition to him working with the special education teacher as a direct service rather than a consult (id.). The CSE noted that the "[t]eam has been made aware of parental concerns and will share with the [r]eading [d]epartment in the fall" (id.).

The meeting information summary indicated that the March 2017 CSE determined that the student had significant delays in all areas including academic, social and management needs which would result in significant regression without an extended school year program, and that he required a special education program to be provided for an extended school year during July and August to prevent substantial regression (Dist. Ex. 16 at p. 2).

Comparison of the present levels of performance contained in the April 2016 IEP with those contained in the March 2017 IEP showed that while some information had been updated, other information remained the same from the previous IEP (compare Dist. Ex. 16 at pp. 5-7, with

Dist. Ex. 18 at pp. 5-7). In speech-language, the present level of performance indicated that the choosing of pictures to represent a sequence of three events after hearing a short paragraph continued to be difficult for the student (Dist. Ex. 16 at p. 5). Additionally, information needed to be broken down, restated and re-explained as linguistic complexity increased, and the student required repetition to successfully retain the information (id.). According to the March 2017 IEP, the student had made limited progress with his ability to identify and use content area vocabulary through classification, categorization and association skills, and the IEP noted that repetition, using graphic organizers, flashcards, pictures, visual aids, and having the student apply these to personal experiences had been helpful in enhancing retention (id.). The student continued to need scripts and orthographic cues to initiate and maintain a conversation for three exchanges, and strategies to improve his social skills included the use of social stories, scripts, role-play, visual cues (cards) and modeling (id.). The IEP indicated that during programmatic speech in the classroom, the student required prompting to use conversational rules (e.g., turn body to speaker, look at speaker/listener, maintain eye contact) (id.). Additionally, the student would often repeat a classmate's response to a novel question rather than providing his own, and he required repetition of vocabulary over several days in order to maintain and use it (id.). The student also required verbal and visual prompts in order to retell a short paragraph-length story, and he had difficulty recalling sentences consisting of more than six words (id.). Finally, the student required peer modeling and tasks broken down in order to follow more than one-step directions (id.).

In the area of study skills, the March 2017 IEP described the student as "a pleasure and a happy student in the class" and indicated that he tried to follow directions and routines; however, inattention and language difficulties interfered with his success (Dist. Ex. 16 at p. 5). The student could follow the morning routine, but he became easily distracted when there was an interruption in the classroom, and he required visual and non-verbal prompts (id.). The IEP indicated that the student looked forward to positive reinforcement and choice time as a reward for completing his tasks; however, he did not utilize the checklist provided for him on the Smart Board, and he required modifications for volume of work and language on assignments in order to follow through with tasks (id.). Additionally, all tasks needed to be broken down and a checklist was required in order for him to complete multiple activities independently (id.).

Regarding reading, the March 2017 IEP indicated that the student had made progress and had moved from a level F to a level K (beginning of second grade) as of January 2017 (Dist. Ex. 16 at p. 6). The student struggled with answering comprehension questions on this level, however he was able to decode and read fluently (id.). The IEP reflected that decoding was a relative strength, and that although he lacked fluency and expression as he read, the student could decode words above his independent level (id.). Specifically, the IEP noted that the student could read multi-syllabic words that contain digraphs, blends, and glued sounds (id.). Comprehension was very difficult for the student due to his expressive and receptive language deficits, and he required visual prompts, models and repetition in order to answer "wh" questions correctly (id.). The March 2017 IEP indicated that with these modifications in place and using errorless teaching, the student could answer literal comprehension questions about the setting and the characters in the story (id.). However, retelling a story with a "beginning, middle and end" and answering inferential questions

was very difficult for the student and he required scaffolding and visuals in order to give an appropriate answer (id.).

In writing, the March 2017 IEP indicated that the student's handwriting was neat, his spelling was accurate, and that he utilized proper capitalization and end punctuation when writing sentences (Dist. Ex. 16 at p. 6). However, even though the student could write sentences, he had difficulty transitioning into paragraphs, and he required choices of topics to assist in generating ideas for writing as well as verbal prompting to continue with an idea (id.). The student struggled with using a graphic organizer and needed scaffolding to use one and adult assistance to remain on task (id.). The IEP noted that the student required 1:1 attention, visuals, and choices in order to organize and expand his ideas and to add meaningful details to his writing (id.).

The March 2017 IEP indicated that math was considered an area of strength for the student, particularly rote skills that included addition, subtraction and multiplication facts, and when presented with a new multi-step concept involving calculations, he was very successful over time (id.). The student demonstrated an ability to understand place value, add, subtract and multiply with regrouping, and fraction concepts, and he had mastered multiplication facts (id.). However, the student struggled with word problems, as he did not retain the strategies taught or show conceptual understanding (id.). He required teacher assistance when asked to identify the correct operation to solve a one-two step word problem, as he would often guess the operation (id.). The IEP noted that the student had difficulty reading the word problem independently, as the language demands were difficult for him (id.).

The March 2017 CSE identified the academic, developmental and functional needs of the student which included: in the area of study skills the student needed to successfully transition from one activity to another with one verbal and one non-verbal prompt; in reading, when provided with visuals he needed to sequence a story with a beginning, middle, and end, to read a nonfiction text and determine three facts about what he read given a written prompt, after reading a story on his independent level, he needed to answer "who," "what" and "where" questions regarding story elements; in writing, he needed to complete a three part graphic organizer about a nonfiction topic and write three sentences paragraph from that organizer, and after given a completed organizer he needed to utilize the given topic and concluding sentences and add three supporting details from the organizer; in math, the student needed to identify the concepts more, less, same and different in a variety of contexts and complete basic word problems that included addition and subtraction; and in speech and language, he needed to work on maintaining (initiate and respond) a conversation for at least three exchanges, compare and contrast items by describing at least two similarities and two differences using a graphic organizer (Venn diagram), identify and use vocabulary at the third grade level through classification, categorization and association, and given five pictures, after hearing a short paragraph, choose the pictures that represent a sequence of three events (Dist. Ex. 16 at p. 6).<sup>11</sup>

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<sup>11</sup> Review of the academic, developmental and functional needs of the student identified in the March 2017 IEP are quite similar, and in some instances identical, to those identified in the April 2016 IEP (compare Dist. Ex. 16 at p. 6 with Dist. Ex. 18 at p. 6).

The March 2017 IEP social development present level of performance described that the student came into school every morning "very happy" and greeted his teachers and peers daily (Dist. Ex. 16 at p. 6). The IEP further described that the student would check the daily schedule and would "quickly notice if something was missing" (*id.*). Additionally, if the student's morning activity was not on his desk, he would sit by himself and look around the room, he did not engage in discussions during morning meeting, and often would restate whatever question he was asked (*id.* at pp. 6-7). The student had made progress in following through with the "greeting" however this was intermittent (*id.* at p. 7). When the class was engaged in a game, the student often did not understand the directions and would not play properly, multiple repetitions of directions and verbal and gestural prompts were often required for him to complete the game (*id.*). Additionally, the student could not work with a peer without adult intervention due to the language demands of the tasks (*id.*). Finally, the IEP indicated that the student often played by himself or with a coach during recess and peer interactions needed adult facilitation (*id.*).

The student's strengths in social development were identified to be that he enjoyed telling his teachers and peers what he did over the weekend (Dist. Ex. 16 at p. 7). The March 2017 CSE identified the student's social development needs which included playing reciprocally for 10-15 minutes with a peer especially when playing with play-doh, initiating and maintaining a conversation with a peer, and to working cooperatively in a group of no more than three by following through with his portion of the demand in order to contribute to the group (*id.*).

Regarding physical development, the March 2017 CSE indicated that although the student participated in programmatic OT, "as it is part of the classroom configuration," his fine and gross motor skills were within normal limits and there were no physical or motor needs that should be addressed through special education at that time (Dist. Ex. 16 at p. 7).

The management needs the CSE identified in the March 2017 IEP included that the student required visual materials and strategies during instructional time, and due to his severe language deficits, he required linguistic scaffolding, breaking down of directions and tasks as well as some classroom materials pre-taught and re-taught in order for him to succeed (Dist. Ex. 16 at p. 7). The CSE determined that the student's significant delay in social, language, attention, reading comprehension, written expression, and math language-based concepts and word problems inhibited his progress in the general education curriculum (*id.*).

For the 2017-18 school year the March 2017 CSE recommended 12-month programming consisting of an 8:1+2 special class placement, 4.5 times daily for 60-minute sessions, with, according to the meeting information summary, mainstream into specials with the student's grade level peers into physical education, art, music and library; two 40-minute sessions per six day cycle of adapted physical education in an 8:1+2 student to teacher ratio; one daily, 60-minute session of programmatic speech-language therapy provided in the special classroom; two 30-minute sessions of group speech-language therapy per six day cycle in the provider's office; three 30-minute sessions per six day cycle of programmatic OT provided in the special classroom; one 60-minute session per month of parent counseling and training (Dist. Ex. 16 at pp. 2, 11-12). The meeting summary indicated that the parent was "in agreement" with the CSE recommendations (*id.* at p. 2).

Additionally, the March 2017 CSE recommended the following supplemental aids and services, program modifications and accommodations: visual materials and strategies, linguistic scaffolding, pre-teaching, reteaching of materials, and an extended school day three times weekly for 1.5 hours per day (Dist. Ex. 16 at pp. 11-12). As support for the school personnel on behalf of the student, the March 2017 CSE recommended a behavioral intervention consultation for the team twice monthly for 30-minute sessions (id. at p. 12). The CSE determined that the student would participate in the alternate assessment, as his "severe disabilities require[d] the use of alternate performance indicators to appropriately assess abilities and needs" (id. at p. 13). Regarding the extent that the student would not participate in regular class, extracurricular and other nonacademic activities, the IEP identified that "[i]n the areas of non-participation, special class and speech, the student require[d] special instruction in an environment with a smaller student-to-teacher ratio and minimal distractions in order to progress in achieving the learning standards" (id.). Finally, the March 2017 IEP indicated that the student would attend the extended school day at another district school and would require transportation to the other site (id. at p. 14).

Turning to the issue of appropriate programming for the 2016-17 and the 2017-18 school years, the district argues that the IHO's determination that it failed to offer a FAPE for the 2016-17 and 2017-18 school years is not supported by the evidence in the record and that it was appropriate for the CSEs to recommend an 8:1+2 special class program. The evidence in the hearing record discussed in detail above, supports the district's contention that recommending an 8:1+2 program was appropriate.

Review of the April 2016 IEP showed that while the student did well with decoding and fluency, handwriting, spelling and math calculations, he struggled greatly with reading comprehension, writing, receptive and expressive language, word problems, inductive reasoning, application of skills, retention of skills, pragmatics and social interactions (see Tr. pp. 415-16; Dist. Ex. 18 at pp. 1-7). The hearing record shows that the student required a significant level of 1:1 support, modifications and accommodations in order to be successful, and that his progress even with that level of support was limited (see Tr. pp. 104-05, 415-16, 651-58, 665-68, 869-71; Parent Exs. A; B; E; II; Dist. Ex. 18).

The December 2014 educational reevaluation scores indicated that the student was performing within the average range for many of the skills assessed (see Parent Ex. E). However, the supervisor testified there was a lot of variation in the scores which showed he did much better with fluency or academic skills, but he scored much lower in his ability to apply those skills than he did in his ability to do an isolated skill (Tr. p. 415). She stated that the average scores could only carry him so far through rote tasks and things that can be memorized; however, the scores did not account for what the core curriculum required in areas such as inductive reasoning, explaining how one got an answer or to explain one's thinking (Tr. pp. 415-16). She opined that the student could only do the rote skills and could not show the use of those skills in other avenues (Tr. p. 416).

The December 2014 speech-language reevaluation indicated that the student had a severe deficit in his receptive and expressive language, pragmatic and vocabulary skills (see Parent Ex. A). The April 2016 IEP indicated that the student experienced significant difficulty in following

oral directions and daily routines, comprehending oral language, participating in basic greetings and conversations, and that he did not engage in cooperative play, had made limited academic progress, and his language skills and understanding of concepts had not improved significantly and inhibited his learning (see Dist. Ex. 18 at pp. 1-7). The student required a significant amount of 1:1 assistance to engage with peers, participate in classroom meetings and games, work with a peer, and to engage and complete academic tasks successfully (*id.*). The district school psychologist, who was the student's case manager and provided programmatic counseling during the 2015-16 school year, testified that the student's interactions with peers was not meaningful because he was unable to keep up with the conversations and he did not know how to interject (Tr. p. 652). Furthermore, she described that the student was unable to work collaboratively with other students, or express his opinion, listen to their opinions and incorporate that into his own answer (*id.*).

In math, the school psychologist explained that the student did well with computation, but as the demands of the math curriculum changed and included more word problems his language deficits led to his struggle in showing his skills (Tr. pp. 652-53). In reading, other students in the 12:1+1 class were progressing at much higher levels than the student independently, and were working on concurrent comprehension, story re-telling, prediction, and character problem-solving skills that the student struggled with (Tr. pp. 655-56). In writing, the school psychologist explained that the other students were able to provide lengthy responses about reading materials and produce an essay, something the student also struggled with (Tr. p. 656).

Additionally, the school psychologist testified that the student was exhibiting "some behavioral challenges" regarding his lack of fluency in following the routine structure of the school day and that as that structure lessened during the school year, he was not maintaining the skills that were observed when those structures were in place (Tr. pp. 653-54). She opined that the other students no longer needed that structure, but the student did, so he struggled with the overall functioning of the 12:1+1 curriculum placement (Tr. p. 654). The school psychologist explained that the student was unable to progress with the majority of the modifications that were provided within the class, and that simply breaking down the language, providing linguistic guidance or prompting to utilize a strategy was not sufficient for him, and that he needed 1:1 intervention in addition the language significantly modified, as well as visuals (Tr. pp. 657-58). She further explained that the student's best modality of response was either a choice or yes or no questions, although at times when the same question was asked and the choices were switched, he provided the wrong answer (Tr. p. 658). Furthermore, she described that the student's needs required significant breaking down of language and modification of the curriculum, which was evident developmentally in that the other students no longer required significant teacher support to be able to complete daily routines, but the student did require it and such intensity could not be provided in the 12:1+1 special class (Tr. p. 869).<sup>12</sup>

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<sup>12</sup> The IHO repeatedly faulted the district for not conducting sufficient evaluations such as an FBA and then providing a corresponding BIPs. I do not believe the IHO's decision is well reasoned in this regard, but for the reasons described above lack sufficient additional time before the deadline of this decision to describe why. It

The psychologist opined that the 8:1+2 special class was the best program for the student because his language was significantly impaired and that in order for him to continue progressing, he needed language to be modeled, used and scaffolded every day which was not part of the 12:1+1 classroom, but it was part of the 8:1+2 (Tr. pp. 664-65). She further explained that the 8:1+2 afforded the student to have language modified and modeled every day in all aspects, and to have the curriculum modified to his pace of learning and to his level of understanding (Tr. p. 668). The 8:1+2 would afford the behavioral modifications that the student required in order to be able to learn (id.). The school psychologist testified that the program modifications and supplementary aids and services the April 2016 CSE recommended had been provided during the 2015-16 school year, and she opined that the "difficulty became the pace of the curriculum and the complexity of the language" such that those modifications and aids "were above and beyond what could be done in the 12:1+1 classroom" (Tr. p. 870). Furthermore, she stated that the 12:1+1 classroom expectations were "too above the level of frustration of what [the student] needed and could handle" which was evidenced "when we saw some frustration from him and his unwillingness to engage in some of the academic task[s] that were simply too difficult for him, and the demand was too high, because the language was just above what he could tolerate" (Tr. pp. 870-71).

According to the school psychologist the April 2016 CSE had significant concerns about the student's ability to progress within the 12:1+1 curriculum given its pace and language demands (Tr. p. 651). She further explained that the CSE knew that the student performed best in a 1:1 environment within the 12:1+1 class, and he also required "significant curriculum modifications in terms of pace, and he required behavioral adjustments to the environment to make sure that he [wa]s learning" (id.).

The supervisor of elementary education and pupil personnel services for special education (supervisor), who served as the chairperson of the April 2016 CSE meeting testified that the April 2016 CSE discussed the modifications that might have enabled the student to stay in the 12:1+1 classroom; however, these were already being attempted in the classroom (Tr. pp. 76-77, 419-20). She opined that the 12:1+1 was not appropriate because the student would have "struggled significantly" with the curriculum and the expectations to work independently (Tr. pp. 104-05). The supervisor testified that an additional teaching assistant was added to the 12:1+1 classroom during the 2016-17 school year because the amount of individualized support the student required was impacting the amount of support the classroom staff could provide to the other students (Tr. pp. 420-21). She further reported that the student continued to have significant difficulty, continued to need a lot of prompting and frequent check-ins, and was unable to do independent work without an adult sitting with him (Tr. pp. 422-23).

Based on the information discussed more thoroughly above, the April 2016 CSE's recommendation to move the student from a 12:1+1 special class into a smaller, more supportive

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will have to suffice to say that the IEPs themselves were designed to address this polite and eager to please student's deficits that lead to his inability to follow the school structures and routines. In short, an FBA and BIP were not necessary in this case, while the IHO believed they were critical missing evaluations and interventions, the IHO did not adequately address why no one at Fusion found such assessments or tools necessary in order to facilitate the student's ability to follow school structures and routines in that setting.

8:1+2 special class was appropriate to meet the student's identified needs. However, the evidence in the hearing record supports the IHO's finding that the CSE did not revise the student's IEP individually, as it provided him with OT when there were no identified physical or motor needs and such time would be better spent elsewhere especially considering the student's pronounced expressive and receptive language deficits (see IHO Decision at p. 20).

Turning to the March 2017 IEP, the hearing record is scant in evidence about the student experience in the 8:1+2 special class during the 2016-17 school year. However, the hearing record contains a November 2016 psychological addendum that was consistent with results of the prior evaluation from January 2015 and indicated that the student continued to demonstrate significant deficits in his receptive, expressive, and communication skills and social interactions (compare Parent Ex. B with Dist. Ex. 8). Further, comparison of the March 2017 IEP present levels of performance with those in the April 2016 IEP indicated that the student made limited progress during the 2016-17 school year in his academics, language, pragmatic and social skills (compare Dist. Ex. 16 at pp. 1-7 with Dist. Ex. 18 at pp. 1-7). Therefore, the March 2017 CSE's determination to continue the recommendation for an 8:1+2 special class program continued to be appropriate to meet the student's identified needs.

#### **a. Alternate Assessment**

Turning next to the district's argument that the IHO erred in finding that the student should not have been designated to participate in alternate assessment for both the 2016-17 and the 2017-18 school years, the hearing record showed that the student would not have been successful participating in State and district wide assessments (Tr. pp. 76-77, 104-04, 415-16, 420-23, 546, 593-94, 597-98, 651-58, 665-68, 869-71; Parent Exs. A; B; E; F; G; H; II; JJ; Dist. Exs. 8; 16; 18). With respect to the 2016-17 school year, the meeting information summary attached to the April 2016 IEP indicated that the CSE engaged in a discussion about alternate assessment, and after reviewing results of the adaptive and speech and language evaluations, recommended alternative assessment due to significant language deficits (Dist. Ex. 18 at p. 2). Additionally, the April 2016 CSE determined that the student would participate in the alternate assessment, because his "severe disabilities require[d] the use of alternate performance indicators to appropriately assess abilities and needs" (id. at p. 12). According to the supervisor, the April 2016 CSE discussed the higher level and inferential language that made up the fourth-grade curriculum and State tests, as well as whether they felt the student would be able to do the tests (Tr. pp. 85-87). The CSE then considered the New York State criteria for designating a student for alternate assessment and determined that despite good visual spatial and problem solving with fluid reasoning skills, because of his limited language, the student's overall cognition was "extremely limited" and he met the criteria for cognitive impairment (Tr. p. 87). Regarding the next criteria, communication and language, the supervisor testified that was the student's "greater area of deficit" therefore he "met that section" of the criteria (Tr. pp. 87-88). Further, in the area of adaptive behavior the student's language deficits severely limited his ability to function in his environment, he was recommended for a specialized instructional class, and he needed to acquire learning behaviors other than rote skills; as such, he met all of the criteria for alternate assessment (see Tr. p. 88-89).



The district school psychologist testified that the three requirements for alternate criteria include cognitive disability, communication and language, and significant adaptive deficits (Tr. p. 907). Further, when the CSE reviewed the criteria for alternate assessment, they felt the student met all of the criteria (Tr. p. 669). She explained that all of the April 2016 CSE team members considered all of the components for alternate assessment, provided their own perspective based on their areas of expertise and determined that his overarching cognitive deficit was in the area of language, as seen in cognitive and speech-language testing results (Tr. pp. 669-70, 932). Additionally, the student continued to need behavioral strategies in order to access the curriculum, and he continued to demonstrate adaptive deficits in the area of communication, receptive and expressive language, socializing, leisure skills and functional communications (Tr. pp. 669-70). The school psychologist further explained that he had "adequate and average basic skills, but academic skills [we]re not part of the criteria for consideration for New York State assessment" in that students need no have significant academic deficits (Tr. p. 907). The school psychologist explained that speech and language development is a cognitive skill, and opined that "[f]or [the student] they happen to be one and the same" and that his language was the most significant disability for him (Tr. pp. 910-913).

The district school psychologist testified that alternate assessment was more aligned to the individual student levels, which differed from the State tests that do not allow modifications commensurate with the student's skills, and noted that all students take the same test (Tr. pp. 640-41). She further opined that the student could not take the State test because his language was not developed enough, therefore, he could not participate in a meaningful way that would allow the district to "glean his ability to read, comprehend and answer questions based on the way and the demands of the test" (Tr. p. 642). She clarified that because of the student's significant language and adaptive behavior deficits, the type of instruction and the level of modification and accommodations he required in order to participate in language tasks, the State ELA and math assessments were not appropriate (Tr. pp. 642-43). The school psychologist explained that the determination that he would not understand test questions was based on his performance in the classroom and his observed deficits and as measured on standardized assessments (Tr. pp. 977-78). She continued, that standardized assessments have predictive value, and if a student significantly struggled under standardized assessments, "it would logically follow they would struggle academically" (Tr. p. 978). The hearing record showed that the student required a significant amount of prompting and support in order to complete school work, and often was unable to do tasks independently (Tr. pp. 76-77, 104-04, 415-16, 420-23, 535-36, 546, 590-94, 597-98, 604, 619-20, 651-58, 665-68, 811, 847, 869-71, 946-48, 1063-64, 1182; Parent Exs. A; B; E; F; G; H; II; JJ; Dist. Exs. 8; 16). The school psychologist testified that the modifications being provided to the student in the classroom were not permitted on the State tests (Tr. p. 948).

With regard to the 2017-18 school year, the hearing record does not show that the student's identified needs changed significantly enough to alter the recommended program. Furthermore, while the March 2017 IEP indicated that the student made limited progress, he continued to exhibit similar needs in terms of the level of prompting and modifications he required in order to access the curriculum (Dist. Exs. 8; 16 at pp. 1-7). Additionally, the March 2017 CSE determined that the student would participate in the alternate assessment, as his "severe disabilities require[d] the

use of alternate performance indicators to appropriately assess abilities and needs" (Dist. Ex. 16 at p. 13). Therefore, continuing to designate the student for alternate assessment was appropriate for the 2017-18 school year. Here as well, I note that while the IHO initially identified the correct standard stated in State regulations in determining whether a student has a "severe disability" defined as having "limited cognitive abilities" combined with other factors of "behavioral and/or physical limitations" and the need for "highly specialized education, social, psychological and medical services, in order to maximize their full potential for useful and meaningful participation in society and for self-fulfillment" (see 8 NYCRR 100.1[t][2][iv]), in her analysis of alternate assessment and whether it was inappropriate for the student by each annual CSE meeting for each school year, the IHO shifts that standard slightly to necessitating that a student must show a "severe cognitive disability" (emphasis added), which does not properly allow for the need of the CSE to balance consideration of the extent of the student's variable cognitive profile with the other factors in that test.<sup>13</sup>

### **b. LRE**

Turning next to the district's assertion that the IHO erred in finding that the 8:1+2 special class program was not the student's LRE, the evidence in the hearing record shows that although as discussed above a special class placement was appropriate, the district failed to show that the program mainstreamed the student to the maximum extent appropriate (see IHO Decision at p. 76).

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300. 107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see

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<sup>13</sup> As further described below even the parent's expert after further testing describes the student's cognitive profile as "highly variable," indicating that the student has certain cognitive limitations and that the dispute in this case is over professional opinions as to how best to describe aggregated IQ scores. The IHO does not adequately explain why the CSE must adopt the viewpoints of the private expert.

34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

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

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

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with nondisabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).<sup>14</sup>

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the

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<sup>14</sup> The Second Circuit left open the question of whether costs should be considered as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

The evidence in the hearing record supports the CSE's determinations that the student's needs were such that he required a special class placement for content area instruction and it was appropriate to remove him from the general education setting to that extent; however, the hearing record contains little, if any, evidence to establish that the district engaged in any meaningful LRE considerations on the second prong of the Newington test that were individualized to this student when making its recommendation to remove the student from his non-disabled peers for all of the instructional time envisioned under this student's plan for the 2016-17 and 2017-18 school years. Testimonial evidence elicited at the impartial hearing, while providing some insight into the CSEs' decision-making process when selecting the student's placement in the LRE, was also insufficient to establish that the district appropriately considered or applied the two-prong Newington test, that is, after deciding to remove the student from the general education classroom, whether the student was otherwise included in school programs with nondisabled students to the maximum extent appropriate.

For instance, with regard to the 2016-17 school year, the April 2016 CSE recommended the student attend a 12:1+1 special class for one hour per day (Tr. pp. 73, 79-81, 83, 283; Dist. Ex. 18 at pp. 2, 11). The supervisor testified that the CSE decided that the student would attend the 12:1+1 class during special classes (music, art, gym, computers and library) for 30 minutes and one other class such as math, if scheduling allowed, for 30 minutes (Tr. p. 73). The school psychologist explained that the only time the student would be with peers outside of the 8:1+1 and 12:1+1 special classes would be during lunch and recess when "all the kids [were] together"; however, the hearing record does not contain any additional information regarding the makeup of peers during lunch and recess (Tr. p. 961). Additionally, the school psychologist testified that the April 2016 CSE discussed having the student attend the 12:1+1 special class but "left the decision making as to what would be most appropriate for next year's teachers" (*id.*). The supervisor testified that allowing the student to attend the 12:1+1 for one hour per day offered "the opportunity to be exposed to the less restrictive setting but offered him the support he needed to hopefully learn new concepts and skills" (Tr. p. 93). Additionally, the school psychologist testified that mainstreaming could mean access to typical peers "but it doesn't mean it has to be" (Tr. p. 963).

To the extent the district relies on the CSEs' consideration of placing the student in the 12:1+1 special class for specials as evidence that the student's recommended placement was in the LRE, such reliance is misplaced. Initially, as correctly noted by the IHO (IHO Decision at p. 72-73 [opining that the analysis of the student's LRE did not rest on a comparison of the difference in ratios between the 12:1+1 and 8:1+1 special classes but instead concerned access to peers without disabilities], any difference between the ratios of the 12:1+1 special class contemplated as a possible placement for the student's specials and the 8:1+1 special class recommended by the CSEs for the student's content area instruction does not bear on LRE (34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; R.B. v. New York Dep't of Educ., 603 Fed App'x 36, 40 [2d Cir. Mar. 19, 2015])[stating that "[t]he requirement that students be educated in the least restrictive environment applies to the type of classroom setting, not the level of additional support

a student receives within a placement"; see T.C. v. New York City Dep't of Educ., 2016 WL 1261137 at \*13 [S.D.N.Y. Mar. 30, 2016] [finding that the IHO's application of LRE requirement to a ratio dispute was improper, stating that "[a] less restrictive environment refers to the ratio of special education to general education students in the same classroom, not the ratio of special education students to teachers"]. Applying the district's contentions regarding the ratios would have the impermissible effect of eviscerating the second prong of the Newington analysis, which addresses access to nondisabled peers to the maxim appropriate extent, albeit after some removal to special settings has been justified. Accordingly, to the extent the evidence in the hearing record reflects consideration of a 12:1+1 special class for the student's specials by the CSEs, but does not include evidence that the district engaged in a similar consideration of the extent to which the student could be appropriately included in school programs with nondisabled peers, the district has failed to carry its burden of demonstrating that the recommended placement for the student is in the LRE.

Here, the evidence in the hearing record does not show that the April 2016 CSE engaged in any additional discussion regarding opportunities to include the student in school programs with nondisabled students to the maximum extent appropriate as required. With regard to the 2017-18 school year, the meeting information summary attached to the March 2017 IEP indicated that the CSE discussed that the student be provided with mainstreaming opportunities with his grade level peers during specials; however, review of the hearing record does not provide any additional evidence as to the specific content of this discussion or any IEP related recommendations that may have been contemplated by the CSE or recommended as a result (Dist. Ex. 16 at p. 2).<sup>15</sup> Accordingly, the evidence in the hearing record supports a finding that the CSEs for the 2016-17 and 2017-18 school years erroneously conflated the student-teacher ratios for the 12:1+1 and 8:1+1 special classes with the LRE requirement that disabled students must be included in school programs with nondisabled students to the maximum extent appropriate and the district did not otherwise proffer evidence that the CSEs considered mainstreaming opportunities for the student. As a result, albeit for somewhat different reasons, the IHO correctly determined that the district's

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<sup>15</sup> Although it is not precisely clear how much of the specifics of a district's provision of inclusion opportunities or a mainstreaming program to a particular student program must be included on an IEP (see e.g. Application of a Student with a Disability, Appeal No. 21-148; Application of a Student with a Disability, 20-047), where an IEP indicates that the student will not participate in a special class for the entire school day, some evidence of whether the district considered mainstreaming opportunities for the student during the part of the day where he or she was not in a special class may be required to demonstrate that the district has complied with the Newington factors discussed above. A CSE for example does not have to prescribe the "general education" setting down to the details of a daily schedule on a student's IEP if the student were to be scheduled at times by a school to attend a general education setting without special education supports, yet such times would be of great relevance to a Newington-style LRE analysis. Moreover, the hearing record showed that the student struggled significantly with socialization and pragmatic language, therefore any additional support (i.e., a 1:1 aide) the student might have needed to access such opportunities should have been included in the April 2016 and March 2017 IEPs to the extent actual mainstreaming opportunities were contemplated as opposed to the potential placement of the student in the 12:1+1 special class during certain times he was not scheduled to be in the 8:1+1 as testified to by the supervisor and the school psychologist during the impartial hearing (Tr. pp. 93, 961-63).

placement recommendation for the student was not in the LRE and, as a result, it did not offer the student a FAPE for the 2016-17 and 2017-18 school years.

## **2. Middle School**

### **a. 2018-19 School Year**

On March 28, 2018 the CSE subcommittee convened for the student's annual review and to develop the IEP for the 2018-19 school year (Dist. Ex. 14). According to the meeting information summary attached to the IEP, the CSE reviewed the "re-evaluation" reports and the IEP listed the following evaluation reports from January 2018: psychological reevaluation, speech-language reevaluation, educational reevaluation, classroom observation, and social history update, and as well as a February 2018 annual review report (Dist. Ex. 14 at pp. 1, 3; see Parent Ex. MM; Dist. Exs. 5-7).<sup>16</sup>

According to the January 2018 psychological reevaluation report, the school psychologist and a school psychology doctoral intern administered the WISC-V to the student, conducted a records review, interviewed the student, and observed the student in the classroom (Dist. Ex. 6 at pp. 1, 2). During the evaluation, the student was observed to be "cooperative and compliant," exhibited variable eye contact, was responsive to questions, and his attention level was within normal limits (id. at p. 2). The evaluators reported that the WISC-V measured five different cognitive abilities that were "critical for academic achievement" (id. at p. 3). The evaluators also reported that the student "showed average skills in several areas," including fluid reasoning/nonverbal problem solving, that his visual-spatial thinking was "intact," and that his processing speed was "within age expectations"; all skills that served as "personal strengths" that supported his academic development (id. at pp. 3, 4, 5-6).<sup>17</sup> Despite these strengths, the evaluators reported that the student "showed substantial difficulty on tasks assessing his crystallized knowledge, or his understanding of vocabulary and general information," which was "substantially below age expectations and an area of "significant normative deficit" (Dist. Ex. 6 at pp. 3-4). The student's full scale IQ of 76 (low) and his performance "suggest[ed] that his overall intellectual ability [was] well below age expectations" (id. at p. 3).

In January 2018 the district speech-language pathologist administered the CELF-5 and both the ROWPVT-4 and EOWPVT-4 to the student as part of his reevaluation (Dist. Ex. 7). The student's CELF-5 receptive language index standard score was 55, which indicated "severe receptive language deficits" in that the student had significant weaknesses in his ability to interpret, recall and execute oral commands of increasing length and complexity, understand relationships between words based on different features, interpret sentences that made comparisons, and understand spoken paragraphs (id. at pp. 2, 5). Administration of the ROWPVT-4 assessed the student's ability to understand the meaning of single words, and the evaluators described the

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<sup>16</sup> It does not appear that the January 2018 social history update or the February 2018 annual review reports were included in the hearing record.

<sup>17</sup> The student's performance on the following WISC-V subtests was in the average range: block design, digit span forward and backward, coding, matrix reasoning, and figure weights, with a fluid reasoning index score also in the average range (Dist. Ex. 6 at pp. 5-6).

student's standard score of 61 as indicating his receptive vocabulary skills fell "significantly below the average range" (*id.* at p. 3). The student's CELF-5 expressive language index standard score of 57 indicated "severe expressive language deficits" with significant weaknesses in his ability to formulate grammatically correct sentences and acceptable, meaningful sentences by manipulating given words and word groups, and recalling sentences (*id.* at p. 2). Administration of the EOWPVT, used to assess the student's "ability to name objects, action, and concepts when presented with color illustrations," yielded a standard score of 63, indicating that the student's expressive vocabulary skills fell "significantly below the average range" (*id.* at p. 3). The pragmatics profile of the CELF-5 was also administered to the student, and he attained a standard score of 65, which the evaluator reported indicated "significantly below average pragmatic skills" (*id.* at pp. 5-6). The speech-language pathologist concluded that the student's core language standard score of 51, which she described as "an indicator of general language ability," his language content index (semantic knowledge) standard score of 55, and his language memory index standard score of 55 (ability to apply memory to language tasks) were "a valid sample of [the student's] current level of functioning at this time" (*id.* at p. 3).

The student's special education teacher administered the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) to the student in January 2018 to assess his academic achievement (Dist. Ex. 5). In reading, the student's reading composite standard score of 63 was in the low range, and he achieved subtest standard scores of 76 (letter word recognition, below average) and 54 (reading comprehension, very low) (*id.* at p. 4). The special education teacher reported that although the student was able to decode all given sentences and passages, he began to struggle when answering comprehension questions as passages grew in length, despite going back to the passage and attempting to find the correct response (*id.* at p. 2). The student's written language composite standard score of 67 was in the low range, comprised of a written expression subtest standard score of 51 (very low) and a spelling subtest standard score of 87 (average) (*id.* at p. 4). According to the special education teacher, while the student's spelling skills were average, his performance on tasks that required him to fill in a blank, correct a sentence for capitalization or punctuation, write complete sentences to finish a section, and write an essay that retold a story was in the very low range (*id.* at p. 2). In the area of math, the student's math composite standard score of 77 was in the below average range, with concepts and applications and computation subtest standard scores of 67 (low) and 90 (average), respectively (*id.* at p. 4). The special education teacher reported that the math concepts and applications subtest required the student to "respond orally to items" that required the application of math principles to real life situations, but that on computation tasks the student showed understanding of addition, subtraction, multiplication, and division "as is expected in fifth grade" (*id.* at pp. 2-3). Overall, the special education teacher reported that the student's math reading, and writing skills fell within the below average to low range (*id.* at p. 3).

The district school psychologist and school psychology doctoral intern conducted a classroom observation of the student in his fifth-grade classroom (Parent Ex. MM). During a speech lesson, the student was observed to be attentive and reply to a class-wide prompt, engaged and easily redirected during a lesson on learning adjectives, and provided correct verbal responses to concrete questions (*id.* at pp. 1-2). He required scaffolding to answer more complex questions and elaborate on his responses, and had difficulty identifying similarities among a group (*id.* at p. 2). The student was then observed correctly selecting a picture that matched a target adjective and

respond to corrective feedback, listen to a story independently and read out loud with accurate pronunciation (*id.*). However, the evaluators reported that the student had "much difficulty" answering questions about the story and locating relevant details in text (*id.* at p. 3). According to the observation report, the student was able to answer some questions with support, but that the special education teacher reported that the student's "overall comprehension of the text was low" (*id.*). The evaluators concluded that the student "displayed difficulty verbally communicating his ideas and comprehending verbal information" (*id.*).

Review of the March 2018 IEP shows that it reflected results from the January 2018 administrations of the KTEA-3, CELF-5, EOWPVT-4, ROWPVT-4, and WISC-V (Dist. Ex. 14 at pp. 3-4). The meeting information summary attached to the March 2018 IEP indicated that the CSE concluded that the student's cognitive evaluation results "show[ed] overall cognitive deficits with the most severe deficits in the language domain," and that academic testing and speech-language assessment results showed "significant deficits" in all domains and areas assessed (*id.* at p. 1). Next, the meeting information indicated that the CSE reviewed the student's "functional levels and abilities" noting that in the classroom the student could become distracted and need redirection although he responded well to praise and reinforcements (*id.*). According to the meeting information summary, the student's reading decoding was a relative strength, but comprehension was much weaker and he needed support to answer questions (*id.*). In writing, the CSE noted that the student benefitted from individual teacher support (*id.*). Math was an area of relative strength, although word problems were the most difficult due to the student's guessing and inability to execute multi-steps (*id.* at pp. 1-2). The meeting summary reflected that the student greeted others spontaneously, shared rote activities he completed on the weekends, consistently responded when questions were presented in different tones, and was improving his ability to ask reciprocal questions (*id.* at p. 2). The CSE concluded that the student's delay in social, language, attention, reading comprehension, and math language-based concepts and word problems inhibited his progress in the general education curriculum and that he continued to meet the criteria for participation in the alternate assessment (*id.*). The CSE chairperson of the March 2018 CSE meeting testified that results of the reevaluation showed that the student's "significant language deficits greatly impact[ed] his ability to learn" and that although he had "isolated skills," his ability to use them "majorly impact[ed]" his learning performance (Tr. pp. 142-43; Dist. Ex. 14 at p. 1).

Speech-language present levels of performance indicated that the student had made "[s]teady progress" and improved his ability to follow simple two-step orally presented directions, answered yes/no questions in a variety of formats, and was beginning to use strategies to aid in recall/processing of verbally presented information (Dist. Ex. 14 at p. 5). The student demonstrated difficulty when linguistic concepts were incorporated into two-step directives, inconsistently answered "wh" questions after listening to a short, content-based, three sentence story, and required repetition and visuals to retain information (*id.*). He exhibited improved ability to maintain eye contact and continued to require prompts to initiate conversation (*id.*). Study skills present levels of performance indicated that the student attempted to follow directions and routines; however, inattention and language difficulties interfered with his success and he became easily distracted by classroom interruptions (*id.*). The IEP also reflected that the student at times required visual prompts and reminders to follow morning routines independently, language scaffolding and modeling were "essential" to help the student follow through with tasks, and he



variably took several minutes to begin an assignment (id.). The student reportedly followed the classroom wide behavior system and earned breaks throughout the day (id.).

Academically, the March 2018 IEP reflected that the student was currently reading at "a level K" and had not yet been able to move reading levels so far that year (Dist. Ex. 14 at p. 5). While decoding was a relative strength for the student, he "struggle[d] tremendously with comprehension, which according to the IEP was "very difficult" due to his expressive and receptive language deficits (id.). With modifications and prompts the student answered literal comprehension questions, but recalling a story in order, predictions about a story, and answering inferential questions were "very difficult" for him, even with scaffolding and verbal/visual prompts (id.). In writing, the IEP indicated that the student's handwriting was neat, he used proper capitalization/punctuation when writing sentences although had difficulty transitioning to paragraphs (id.). According to the IEP the student required verbal prompting to continue with an idea in writing, generating ideas for writing was problematic for the student, he required a choice of topics, and graphic organizers were difficult for him to use as he needed scaffolding to take information and generate ideas on paper (id. at pp. 5-6). The student could become easily distracted when writing and required prompts/reminders to complete the task, 1:1 attention and choices to organize/expand his ideas and add details to his writing (id. at p. 6). The IEP indicated that math was an area of relative strength for the student, particularly rote skills that included addition, subtraction, and multiplication facts, and he demonstrated understanding of place value and fractions (id.). Word problems were problematic for the student due to the language embedded in the questions, as was showing conceptual understanding (id.). Teacher assistance continued to be required when the student was asked to identify the correct operation to solve word problems and he had difficulty reading word problems independently as the language demands of the task were difficult for him (id.).

The March 2018 CSE identified the academic, developmental and functional needs of the student, which included that in the area of study skills, the student needed to work independently for 10 minutes on familiar worksheets or activities while displaying appropriate behavior with one or less prompts to stay on task; complete arrival and departure routines independently while showing appropriate behavior; and independently follow familiar two-step directions related to classroom routines in a group setting (Dist. Ex. 14 at p. 6). For reading, the CSE identified that the student needed to sequence and retell a story at his independent level when given visual prompts and answer three literal "wh" questions related to story elements after reading or listening to a story on his independent reading level (id.). In writing, the student needed to complete a four-part graphic organizer about a topic and transfer that information to write a four-sentence paragraph from that organizer independently, and after discussing topics as a class, think of a topic and write a main idea sentence with one supporting detail (id.). For math, the CSE indicated that the student needed to solve two-step word problems that required addition/subtraction (id.). Regarding speech-language skills, the IEP indicated that the student needed to work on demonstrating conversational skills by initiating conversation, taking turns and maintaining eye contact for three verbal exchanges, following two-step directions presented orally incorporating basic linguistic language, comprehending a sequence of two events presented orally from a paragraph of at least three sentences, and formulating complete sentences about each picture using correct word order and temporal words (id.).

Socially, the March 2018 IEP indicated that the student was "very happy" coming to school, he greeted teachers and peers daily, checked the daily schedule, enjoyed playing games with peers, and exhibited good turn taking skills (Dist. Ex. 14 at p. 6). The student did not always ask for help after an activity had started, at times directions needed to be repeated multiple times, and the student often repeated phrases throughout the day despite a lack of response to those comments (id.). Physically, the IEP indicated that the student's fine and gross motor skills were within normal limits, he enjoyed going to physical education class, and that there were no physical or motor needs that should have been addressed through special education at that time (id. at p. 7). The March 2018 CSE identified the student's management needs, which included that he "required visual materials, strategies and directions during instructional time. Due to his severe language deficits, [the student] needs linguistic scaffolding, breaking down of directions and tasks" as well as academic materials pre-taught and re-taught for him to succeed (id.).

For the 2018-19 school year the March 2018 CSE recommended 12-month programming consisting of an 8:1+2 special class placement, five times daily for 40-minute sessions; one 40-minute session per day of adapted physical education in a 15:1 student to teacher ratio; one daily, 30-minute session of programmatic speech-language therapy provided in the special classroom and one 30-minute session of programmatic speech-language therapy in the classroom on alternate days; two 30-minute sessions per week of programmatic OT provided in the special classroom; one 60-minute session per month of parent counseling and training (Dist. Ex. 14 at pp. 11-13). The CSE determined that the student would participate in the alternate assessment, as his "severe disabilities require[d] the use of alternate performance indicators to appropriately assess abilities and needs" (id. at p. 13). Regarding the extent that the student would not participate in regular class, extracurricular and other nonacademic activities, the IEP identified that in "special class and APE" the student "require[d] special instruction in an environment with a smaller student-to-teacher ratio and minimal distractions in order to progress in achieving the learning standards" (id. at p. 14).

In October 2018 the CSE convened at the parent's request due to his concerns that the student was not being challenged enough in the current 8:1+2 special class setting (Dist. Ex. 12 at p. 1). According to CSE meeting information, the student's private tutor reported that the student "did not always show his full capabilities" and that he had been staying more focused and providing responses on topic in reading, working on level M text in Fountas and Pinnell, transitioning away from pictures, answering a variety of "wh" questions about what he read, and was working on inferencing and predicting (id.).<sup>18</sup> At that time the student was working at a fourth grade level in math at home, multi-step word problems were addressed via "Go Math," and the student required scaffolding for problem solving (id.). The student's special education teacher next described the student's performance, in that he: followed routines in the classroom, was prompt dependent, constantly sought reassurance, completed independent work for five minutes that did not require

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<sup>18</sup> The references to private providers in this proceeding are at times confusing or ambiguous. The contemporaneous evidence shows that at the time, the CSE had received input from a private tutor that attended the October 2018 CSE meeting, but later at the parents' behest, other evidence was initially proffered from another individual privately working with the student which apparently were read aloud at a later CSE meeting (see e.g. Dist. Ex. 58 at pp. 1-2). However, the IHO subsequently later struck the one of the individual's testimony and corresponding exhibits from the hearing record upon a motion by the parents' attorney (Tr. pp. 3780-81; Parent Exs. JJJJ-MMMM; Dist. Ex. 12 at p. 1).

higher-level thinking, and inconsistently followed two-step directions in the classroom (*id.* at pp. 1-2). According to the special education teacher, in reading the student had difficulty sequencing a story and answering "wh" questions in a multiple choice format, filling in a graphic organizer and putting that information into a paragraph during writing activities, and in math became confused with two-step applied problems despite strong computation skills (*id.* at p. 2). During speech-language therapy, the student was working on following one-step novel directions, initiating conversations and maintaining appropriate eye contact, making an appropriate comment to the response made by a peer, and sequencing four pictures and telling a story about them (*id.*). The student had difficulty with word order and although he could recall one detail about a two-sentence passage read to him, at that time he did not yet put that information in his own words (*id.*).

The meeting information reflected that the CSE discussed the student's strengths and challenges, as well as the supports needed for him to learn (Dist. Ex. 12 at p. 2). At that time, the parent shared that he wanted the student to attend "a music college after high school," and the CSE discussed considering alternate pathways for the student to be successful in the music field after high school (*id.*). The parent opined that the student needed to be "pushed more academically" and was not in agreement with the then-current placement (*id.*). The CSE agreed to provide the student with higher level work in the classroom and reconvene to consider whether a change in placement for one subject would be appropriate (*id.*). Until that time the CSE recommended that the student's IEP "stay[] the same" (*id.*; *see* Dist. Ex. 14 at pp. 3-14).<sup>19</sup>

Over two dates in October and November 2018, the parents obtained a private psychological evaluation of the student, "in order to determine his present cognitive and academic functioning for the purpose of determining the extent of his educational needs and appropriate placement" (Dist. Ex. 3). Behaviorally, the evaluator noted that the student was "compliant and cooperative and eager to perform the tasks presented to him" noting that he appeared to be mildly anxious but was attentive and able to focus on the tasks (*id.* at p. 1). The student "spoke in brief phrases" and was "able to understand and follow instructions without any problems"; the evaluator indicated that there were "no unusual behaviors" observed and that overall, "test results seem[ed] to be an accurate representation of [the student's] current level of functioning at [that] time" (*id.*).<sup>20</sup>

Administration of the WISC-V to the student yielded the following standard scores: verbal comprehension 68 (extremely low), visual spatial 92 (average), fluid reasoning 85 (low average) working memory 74 (borderline), processing speed 111 (high average), with a full scale IQ of 84 (low average) (Dist. Ex. 3 at p. 2). The evaluator concluded that these cognitive assessment results suggested that the student's overall intellectual functioning was in the low average range, with a significant difference between his verbal reasoning abilities and his nonverbal reasoning abilities, and weaknesses in reasoning and problem solving skills (*id.* at p. 6). The evaluator measured the

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<sup>19</sup> Although the meeting information summary indicated that the student's IEP would stay the same, the October 2018 IEP did not include programmatic OT services (*compare* Dist. Ex. 12 at pp. 2, 11-12, *with* Dist. Ex. 14 at p. 12).

<sup>20</sup> The evaluator noted that although Korean was the "family's primary home language," the parents spoke to the student "mostly in English" and that he was "English dominant" (Dist. Ex. 3 at pp. 1, 2).

student's academic achievement abilities using the WIAT-III, and he achieved the following subtest standard scores: reading comprehension 62, math problem solving 79, word reading 80, pseudoword decoding 94, numerical operations 88, spelling 79; with a basic reading composite standard score of 87 (average) and a mathematics composite standard score of 82 (below average) (id. at p. 4). According to the evaluator, the student was performing below his grade level in reading comprehension and mathematic reasoning skills (id. at pp. 5, 6). The student's mother completed the Vineland-III, a measure of the student's adaptive behavior functioning, which reflected that the student's communication, daily living skills, and socialization domain standard scores were in the moderately low range, as was the adaptive behavior composite standard score (id. at p. 5). The evaluator reported that the Vineland-III results indicated that the student was functioning below age levels in all areas of adaptive function when compared to others in his age group; specifically, the student's listening, paying attention, understanding communication, using words and sentences to gather and provide information, understanding how letters make words, and reading and writing ability were below that of his peers (id. at p. 6).

The evaluator recommended "[s]chool accommodation to assist [the student's] school work in the classroom (reading, math problem solving) in a least restrictive setting . . . to the maximum extent in the same setting in which he would be educated if he did not have a disability" and "the opportunity participate in a rich and verbal classroom experience as much as possible, with appropriate modifications and supports" (Dist. Ex. 3 at p. 7). The evaluator concluded that the student did not "exhibit severe cognitive disability that would indicate the need for [a]lternate [a]ssessment," and despite "significant verbal and communication deficits and educational delays, he has the ability and potential to work toward grade level standards" (id.). After reiterating the program criteria, the evaluator stated that the student did not meet the New York State Alternative Assessment criteria, in that he did not "exhibit severe cognitive disability," his adaptive behavior scores were in the moderately low and not clinically significant range, and he did not require any of the educational support services listed in the criteria (id.). The evaluator concluded that the student would benefit from opportunities to interact/socialize with typical peers or students with less significant impairment and being in a least restrictive environment "where he [could] flourish" (id.).

The CSE reconvened in December 2018 at the request of the parent with the parents' and district's attorneys present (Dist. Ex. 10). According to the meeting information summary, the student's father expressed his concerns and disagreement with the student's 8:1+2 "special intensive needs class" placement, indicating that it was not challenging him, and showing the district CSE members examples of work he had completed with the private tutor (id. at p. 1). A discussion ensued regarding the student's alternate assessment designation, and the parent's attorney stated that the student's "current cognitive scores [were] not consistent with a student who is alternately assessed" (id.). The parent requested that the student receive instruction in a 12:1+1 special class with "more challenging goals and curriculum" (id.). Next, the student's special education teacher discussed the student: indicating that he engaged in moderate to high levels of self-talk and giggling that required redirection, that he perseverated on receiving verbal praise and was unable to "move on" until he received it, that he required instructions broken down, and did not follow through with novel directions or directions given in a group (id. at p. 2). The special education teacher also reported that socially, the student struggled with commenting appropriately to a peer's response, had difficulty initiating a conversation, and did not look at peers as models of

what he should be doing (id.). At the time of the CSE meeting, the student independently completed familiar worksheets and academic tasks up to seven minutes and followed most classroom routines (id.).

Academically, the December 2018 IEP meeting information reflected special education teacher reports that the student read independently at a kindergarten to first grade level and responded to simple "wh" questions with 50-60 percent success, sequenced a story with 1:1 support with approximately 35 percent success, and had difficulty sequencing stories with visuals (Dist. Ex. 10 at p. 2). The special education teacher reported that reading comprehension was the most challenging academic task for the student (id.). In writing, the special education teacher indicated that the student's handwriting was neat, his spelling was accurate, and he used proper punctuation and capitalization (id.). The meeting information reflected that the student had difficulty thinking of a topic to write about, filling in graphic organizers with details, and transferring the information from the graphic organizer and writing a paragraph, which required maximum support (id.). According to the special education teacher, the student was the most confident in math, as his basic math computation skills were good, and he had made gains since September (id.). At that time, the student was working on completing multi-step word problems using addition and subtraction and was able to complete some word problems using multiplication and division (id.). The student's family and consumer science teacher reported that the student had been unable to recall the second step of a two-step recipe and required significant staff support to follow a coffee shop customer routine (id.).

In speech-language therapy, the speech therapist reported to the December 2018 CSE that the student had difficulty with novel directions, did not look around to see what peers were doing to gain insight as to how to complete a direction, and labeled simple nouns and verbs but usually only when asked (Dist. Ex. 10 at p. 2). The student was able to independently sequence four pictures that told a story, but had difficulty formulating complete sentences about each picture using correct word order (id.). According to the meeting information summary, the student was able to initiate conversations on relevant topics two times during a therapy session with 50 percent accuracy, he maintained eye contact, used the same script with multiple talking partners, and had difficulty responding appropriately to comments made by adults and peers (id.).

The meeting next turned to information provided by the student's private tutor, who reported she had worked with the student for four years (Dist. Ex. 10 at p. 2).<sup>21</sup> The tutor opined that the student's autism diagnosis contributed to the difficulties noted by school staff (id.). She reported that she addressed the student's self-talk with "firmness," that with her the student responded to a variety of "wh" questions with prompting and was working on answering higher level "why" and "how" questions with prompting (id.). As with the special education teacher, the tutor acknowledged that the student's handwriting and spelling skills were good, and he had difficulty writing complete sentences (id.). The CSE discussed how the tutor assisted the student academically and the level of prompting/scaffolding (id.).

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<sup>21</sup> As noted previously, the IHO struck the testimony and exhibits related to the private tutor (Tr. pp. 3780-81; Parent Exs. JJJJ-MMMM; Dist. Ex. 10 at p. 1).

The December 2018 CSE led by the school psychologist, then reviewed the results of the fall 2018 private psychological evaluation report (Dist. Ex. 10 at pp. 2-3). The school psychologist noted concerns with the evaluation such as the practice effect of WISC-V administrations to the student 10 months apart, particularly in the areas of significantly improved coding and digit span subtest scores (id. at p. 3). Additionally, adaptive behavior rating scales completed most recently by the student's mother showed the student's moderately low range skills in all domains, while the same rating scale completed by the student's father six months prior indicated "much lower scores" (id.; see Dist. Ex. 4).<sup>22</sup> Further, the school psychologist noted inconsistencies in the private evaluation report with regard to the student's developmental history and his behavior during the assessment—that there were no unusual behaviors—which the school psychologist opined was "highly unlikely" given the student's "autistic behaviors" school staff noticed on a daily basis (id.). Finally, the school psychologist noted that the private school psychologist's conclusions did not appear based on prior evaluation results or information about the student's school functioning, as that information was not mentioned in the private evaluation report nor did the private evaluator contact any of the student's school staff when preparing her report (id.).

After discussing the results of the private academic achievement testing, the meeting information summary indicated that the December 2018 CSE discussed the student's reading comprehension level, noting that according to the special education teacher his instructional level with teacher support was first grade, while the private tutor reported that the student was reading at an end of second/beginning of third grade level with her at home (Dist. Ex. 10 at p. 3). The tutor opined that the student did not require such a restrictive placement and that he should not be alternately assessed (id.). The CSE then reviewed the goals the tutor had suggested and after "extensive discussion" recommended some changes and deletions/additions to the annual goals to incorporate the tutor and parents' suggestions (id.).

Next, according to the meeting information summary the December 2018 CSE discussed the student's designation as participating in the alternate assessment (see Dist. Ex. 10 at p. 3). The attorney for the parent indicated that the parent had not understood the implications of that decision when he agreed to the alternate assessment program in elementary school (id.). The district special education department head explained the continuum of programs at the middle school; indicating that the student's significant cognitive, language and academic deficits would prevent him from being successful in a 12:1+1 special class, and also that the student's adaptive functioning skills were "significantly lower" than the peers in that special class, which would prevent his meaningful participation in group instruction, ability to follow teacher instruction and directives, and work independently on assignments even with 1:1 teaching assistant support (id.). Additionally, as the student did not model observed behavior of others, he would not benefit from being around role models from the 12:1+1 special class (id.). The meeting information indicated that the discussion turned to whether the district had provided reasonable accommodations to the student so he could be educated in the LRE; the special education department head indicated that despite the work

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<sup>22</sup> In May 2018 the student's father completed the Vineland-3 to provide an updated adaptive skills assessment as part of his application to the Office for People with Developmental Disabilities (OPWDD) (Dist. Ex. 4). According to the report, the student's overall adaptive functioning was "significantly below age expectations" and that skill deficits in the area of communication, daily living, and social skills impeded his ability to function independently at home and in the community (id. at pp. 2, 3, 4).

presented by the student's father and private tutor, the student's skills and functioning were significantly lower than what was necessary to be successful in a 12:1+1 special class, based on the observation of the special education teacher of 12:1+1 special and co-taught classes (id. at pp. 3-4).

At that time, the CSE chairperson expressed significant concerns about the student's well-being if he were to attend the 12:1+1 special class, as he opined it would be detrimental to the student's educational and social/emotional functioning, in that he would be overly frustrated and upset that he could not understand/master the material (Dist. Ex. 10 at p. 4). The parent "emphatically" disagreed (id.). The CSE chairperson suggested changing the student's math class to the other 8:1+2 special class which was more challenging, but the student's father declined the change in placement (id.).

The December 2018 meeting information summary reflected that the parent and parent's attorney questioned the appropriateness of the student's continued designation as a student who was alternately assessed (Dist. Ex. 10 at p. 4). The CSE chairperson reviewed assessment results and current functioning in the classroom, which indicated that despite some relative strengths in the student's nonverbal reasoning and math computation skills, his significant verbal cognitive and language deficits, as well as his significant academic deficits, "prevent[ed] him from meaningfully accessing the next generation curriculum or NYS ELA and Math testing covered in the special 12:1-1 or co-taught classes" and also that his current functioning levels in school were consistent with those levels of the students in the 8:1+2 special class who were alternately assessed (id.). The parent and the parent's attorney requested that the CSE change the student's placement and alternate assessment designation; however, the CSE recommended continuation of the student's current program and alternate assessment status, except for a change in placement to a different 8:1+2 special class for math instruction (id.).

Review of the December 2018 IEP present levels of performance shows that they were updated from the October 2018 IEP with the information district staff discussed during the CSE meeting (compare Dist. Ex. 10 at pp. 8-10, with Dist. Ex. 12 at pp. 5-7). In the area of speech-language skills, the December IEP indicated that the student had made "slow but steady progress" and that he was working on his ability to follow one-step novel directions, noting that this skill was inconsistent (Dist. Ex. 10 at p. 8). In group settings, the student rarely looked to see what peers were doing in order to gain insight as to what he should be doing (id.). The student had made some progress independently sequencing four-step pictures and telling about the sequence; however, he had difficulty formulating complete sentences about the sequence (id.). According to the IEP, the student used some temporal words appropriately and had made improvements in initiating conversations with peers when provided with a script, yet he often used the same script with multiple partners and required modeling to use appropriate comments or responses during the conversation (id.). The student was working on comprehending an event from a paragraph read aloud, as he attempted to repeat the story verbatim rather than retelling it in his own words (id.).

In the area of study skills, the December 2018 IEP indicated that the student followed most routines in the classroom, although if a new routine was presented or if something was different, the student became confused and would wait for individual directions rather than looking to peers as models for what to do, at times requiring prompting from the teacher (Dist. Ex. 10 at p. 8). The student reportedly followed two-step related directions; however, when directions were given in a

group situation the student would not follow through, rather, would look to the instructor and wait to be told what to do (id.). He independently completed familiar worksheets and academic task bins and could work up to seven minutes independently with minimal redirection (id.). Additionally, the student followed the classroom-wide behavior system and earned breaks during the day (id.).

Regarding reading, the December 2018 IEP indicated that decoding was a relative strength for the student, and that he read fluently and could decode many words above his independent reading comprehension level, but "struggle[d] excessively with comprehension" (Dist. Ex. 10 at p. 8). Specifically, the IEP stated that comprehension was very difficult for the student due to his expressive and receptive language deficits, and he required visual prompts, models and repetition in order to answer literal and inferential "wh" questions correctly (id.). With those modifications in place, the student could answer some literal comprehension questions about the setting and characters in the story, although he would read the question and immediately state he needed to look in the story without looking at the answers (id.). According to the IEP, "[r]eading comprehension [was] the most challenging academic area for [the student] because . . . he [would] fixate on getting everything correct without focusing on what the instructor [was] teaching (id.). Additionally, retelling a story with a beginning, middle and end, sequencing, predicting, and answering inferential questions was very difficult for the student, even with scaffolding and verbal and visual prompts (id.). The student sequenced stories with 1:1 adult support (id.).

In the area of writing, the December 2018 IEP continued to reflect that the student's handwriting was neat, his spelling was accurate, and he used proper punctuation and capitalization when writing sentences (compare Dist. Ex. 10 at p. 9, with Dist. Ex. 12 at p. 5). When given a teacher chosen topic, the student was able to fill in a four-part graphic organizer with minimal details, but he required frequent prompting to continue writing (Dist. Ex. 10 at p. 9). He had a difficult time transferring information from the graphic organizer to a paragraph using novel sentences, and he required verbal support/modeling to write each sentence (id.). Additionally, the student was challenged by creating a topic to write about given his limited repertoire of subjects, and had difficulty writing a full topic sentence (id.).

Regarding math, the December 2018 IEP reflected that it was an area of relative strength, particularly math facts and when presented with a new multi-step concept with calculations he was successful over time (Dist. Ex. 10 at p. 9). However, word problems were problematic for the student due to the language embedded in the questions, showing conceptual understanding was very difficult for him, and he had difficulty reading word problems independently due to the language demands of the task (id.). Teacher support continued to be required when the student was asked to identify the correct concept to solve word problems (id.). According to the IEP, the student demonstrated the ability to understand place value, add/subtract and multiply with regrouping, and fraction concepts, and had mastered multiplication facts (id.).

The December 2018 CSE determined the student's academic, developmental and functional needs including that in the area of study skills, he needed to work independently on familiar worksheets/activities while displaying appropriate behavior, and independently follow familiar two-step directions having to do with classroom routines in a group setting (Dist. Ex. 10 at p. 9). In reading, the CSE identified that the student needed to sequence and retell a story at his independent level when given visual prompts, answer literal "wh" questions related to story



elements after reading or listening to a story on his independent reading level, identify the main idea of a story, and read a short paragraph and draw an inference (id.). In writing, the student needed to complete a graphic organizer about a topic and write a paragraph with a topic sentence and details; in math, the student needed to solve multi-step word problems requiring addition, subtraction, multiplication and division, and work on computing fractions (id.). Additionally, in the area of speech-language, the CSE identified that the student needed to work on following two-step oral directions, use written scripts to participate in on-topic conversational exchanges, answer varied "wh" questions related to a paragraph read aloud, and retell a four-part sequence using his own words when provided with pictures (id.).

The social development present levels of performance in the December 2018 IEP indicated that the student had a positive mood at school and greeted his peers and teachers but appeared to be anxious about his work from the day or night before (Dist. Ex. 10 at p. 9). He repeated certain phrases multiple times until his teacher prompted him to move on to a task (id.). During morning meeting the student struggled with commenting appropriately on what another person said, using rote responses that were not contextually appropriate (id.). Often the student repeated himself instead of initiating a conversation, and he needed visual or verbal prompts to ask a socially appropriate question to a peer or adult (id.). The student was unable to appropriately interact with peers in social situations without an adult (id.). According to the IEP, the student engaged in moderate to high levels of self-talk, defined as speaking to himself in a contextually inappropriate manner to the current topic (id. at pp. 9-10). Further, at times the student engaged in continuous laughing and giggling that required adult intervention to redirect him back to task (id. at p. 10). The IEP indicated that the student required verbal praise after each task or he was unable to move on to the next task, which interfered with his ability to timely complete tasks (id.). During group work, the student perseverated on receiving reinforcement such that it caused "the whole group to slow down their learning" and the perseveration could last several minutes (id.). The student's receipt of verbal praise had been faded to a thumbs up or head nod, which at times caused the student to seek out more reinforcement from adults and peers (id.). The IEP noted that planned ignoring was currently in place (id.). According to the IEP, the student needed to learn to tolerate not receiving reinforcement from an adult while in a group setting (id.).

Physically, the December 2018 IEP stated that the student's fine and gross motor skills were within normal limits, he enjoyed going to adapted physical education class and playing outside during recess (Dist. Ex. 10 at p. 10). The CSE did not identify physical or motor needs of the student that needed to be addressed through special education at that time (id.).

Regarding management needs, the December 2018 CSE identified that the student required consistent and constant positive reinforcement, visual materials and strategies, and directions repeated during instructional time (Dist. Ex. 10 at p. 10). Due to his severe language deficits, the student required linguistic scaffolding, breaking down of directions and tasks, and academic materials pre-taught and re-taught for him to succeed (id.). The CSE determined that the student's significant delay in social, language, attention, reading comprehension, written expression, and math language-based concepts and word problems inhibited his progress in the general education curriculum (id.).

For the remainder of the 2018-19 school year, the December 2018 CSE recommended an 8:1+2 special class placement, five times daily for 40-minute sessions; one 40-minute session per

day of adapted physical education in a 15:1 student to teacher ratio; one daily, 30-minute session of programmatic speech-language therapy provided in the special classroom and one 30-minute session of programmatic speech-language therapy in the classroom on alternate days; one 60-minute session per month of parent counseling and training (Dist. Ex. 10 at pp. 15-16). The CSE determined that the student would participate in the alternate assessment, as his "severe disabilities require[d] the use of alternate performance indicators to appropriately assess abilities and needs" (*id.* at p. 17). Regarding the extent that the student would not participate in regular class, extracurricular and other nonacademic activities, the CSE identified that in "special class and APE" the student "require[d] special instruction in an environment with a smaller student-to-teacher ratio and minimal distractions in order to progress in achieving the learning standards" (*id.*).

Turning to the issue of appropriate programming for the 2018-19 school year, the IHO concluded that the district's position was that the student "was unable to access learning due to his severe communication language needs" yet she found that the district decreased the student's speech-language services over time despite his need for "intensive remediation" (IHO Decision at pp. 59-60). The evidence in the hearing record described above shows that the student exhibited significant expressive and receptive language deficits, and deficits in vocabulary and general information knowledge that affected his educational performance such that he was designated to be alternately assessed, despite having some cognitive skills in the average or low average range (Tr. p. 2495; Dist. Ex. 7; *see* Dist. Ex. 3 at pp. 2, 3; 5; 6 at pp. 3-4). As previously discussed, during the 2016-17 and 2017-18 school years (fourth and fifth grade) the CSEs recommended that the student receive one 60-minute session per day of "programmatic" speech-language therapy in the classroom and two 30-minute sessions per six-day cycle of small group speech language therapy in the provider's office because his "language deficits were so very severe" (Tr. p. 83; Dist. Exs. 16 at p. 11; 18 at p. 11). The district school psychologist testified that the student "required the speech-language deficits to be addressed every single day" and that the curriculum the student was working with required higher levels of language (Tr. pp. 1053-54). However, for the start of the 2018-19 school year (sixth grade) the March 2018 CSE recommended a reduction in programmatic speech-language therapy by 30 minutes per day (*compare* Dist. Ex. 14 at p. 12, *with* Dist. Ex. 16 at p. 11). Additionally, the CSE chairperson of the March 2018 CSE meeting testified that despite the student's "low" scores on the CELF-5, the CSE did not recommend individual speech-language therapy services (Tr. pp. 308-09; *see* Dist. Ex. 14 at pp. 11-12). The middle school speech therapist testified that the district did not "typically" have individual speech services at the middle school level, as working on the student's skills in isolation "might not be the best method" due to the difficulty students with autism have with generalization and concluded that programmatic services were sufficient to meet the student's needs (Tr. pp. 2488-89).

The student's middle school special education teacher testified that during the 2018-19 school year programmatic speech therapy entailed the speech therapist pushing into the classroom to support the language component that went along with the content subject the students were learning in the classroom (Tr. pp. 1196, 1209, 1455-56). The middle school speech therapist testified that she provided the student's programmatic speech-language therapy at the start of the 2018-19 school year (Tr. pp. 2267, 2285-86). She stated that there were times she pulled students for individual sessions to work on individual skills, and that she also worked with students in small and large groups (Tr. pp. 2285-86). Although she testified that the student needed very specific support to reach his IEP goal including "one-on-one teaching" and small dyads, she did not keep

a record of whether she worked with the student individually, in a dyad, or in a group on certain days (Tr. pp. 2428-29, 2446, 2489).

At the October 2018 CSE meeting, the speech therapist testified that she did not consider recommending "pull-out" speech-language therapy for the student because she felt the programmatic services were appropriate (Tr. pp. 2424, 2427-28). At that time, during speech therapy the student was working on following one-step novel directions, whereas in June 2018 the IEP annual goals progress report indicated the student had achieved the annual goal to follow two-step novel verbal directions (compare Parent Ex. OO at pp. 1, 6-7, with Dist. Ex. 12 at p. 2). The November 2018 IEP annual goals progress report did not reflect the progress the student may have made toward his annual speech-language goal to improve his ability to answer "wh" questions after listening to three sentences (Parent Ex. YY at p. 9). That report did indicate, however, that the student continued to exhibit difficulty following one-step novel directions with an embedded concept, formulating complete sentences about pictures he had sequenced using correct word order, and comprehending the sequence of one event presented orally from a two-sentence paragraph (id. at pp. 9-11).<sup>23</sup> The speech therapist testified that at the December 2018 CSE meeting the CSE did not consider additional speech-language services for the student as it opined that the programmatic services were appropriate (Tr. p. 2448).

Given the evidence discussed above, review of the hearing record does not afford a basis to overturn the IHO's determination that the recommended speech-language services did not offer the student a FAPE for the 2018-19 school year (see IHO Decision at pp. 59-60).

#### **b. 2019-20 School Year**

The parents withdrew the student from the district and he began attending Fusion at the end of January 2019 (see Parent Exs. Z; AA). On June 10, 2019, the CSE convened for the student's annual review and to develop an IEP for the 2019-20 school year (Dist. Ex. 52). Participants at the meeting included district staff, the student's ELA/English teacher from Fusion, the Fusion assistant director, and the parties' attorneys (id. at p. 1; see Tr. p. 6127). The meeting information summary reflected the ELA teacher's report that the student's social/emotional needs did not impact his learning, he advocated for himself when he needed help, and the 1:1 setting had been beneficial to him (id. at p. 2). According to the teacher, the student struggled with abstract ideas and did better with concrete information, he was provided with visual cues, simplified directions, extended time, and needed step-by-step instructions during the writing process (id.). Fusion staff reported that they could "spend as much time as [was] necessary on any single concept until [the student got] it" and that at times, it took "days in his 1:1 setting to accomplish it" (id.).

Academically, the June 2019 meeting information summary reflected the Fusion ELA teacher's report that the student read with fluency but had difficulty with reading comprehension, although when allowed to look back at the text, was generally able to correctly answer concrete questions (Dist. Ex. 52 at pp. 1-2). In math, the teacher reported that the student was "doing very

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<sup>23</sup> The 2018-19 IEP annual goals progress report reflected that by November 2018, the student had achieved the annual goal to initiate conversations on relevant topics in therapy sessions when provided with scripts with 50 percent accuracy (Parent Ex. YY at p. 11).

well academically," in that he obtained a grade of "A" performed basic multiplication, division, and subtraction without difficulty, and he had been learning intermediate math such as linear equations involving fractions (id. at p. 2). The CSE discussed the student's ability to answer word problems, and the assistant director reported that "any word problems [were] broken down into calculations since [the student did] not understand the language in the math word problems" (id.). In science, Fusion staff reported that the student's reading comprehension and analysis skills were below grade level, information was broken down into the most simplistic manner possible, and modifications were made to improve understanding (id.). In social studies, reports included that the student was not on grade level, and that he struggled with analysis and comprehension, needed support with vocabulary, and could not understand texts from a middle school level textbook (id.).

The June 2019 CSE meeting information summary reflects that the CSE next discussed that the student was on Fusion's "essential track" that would not prepare him for the Regents examinations and was reportedly "not as rigorous" in that assessments were project based and not presented in typical New York State standardized assessment format (Dist. Ex. 52 at p. 2). However, the assistant director did indicate that the student was introduced to the regular New York State curriculum in some subjects and he was judged to be on grade level in mathematics (id.). The CSE discussed the extent of prompting the student received at Fusion, that worksheets were made to simplify the material, and the student's "significant weaknesses in vocabulary"; which the parent opined was a result of insufficient exposure while the student attended the district, to which the district responded that the student's language abilities were below the second percentile (id.).

According to the June 2019 CSE meeting information summary, the CSE discussed the disparate viewpoints of Fusion and district staff regarding the student's reading comprehension skills (Dist. Ex. 52 at p. 2). Fusion staff had not used standardized assessments to determine the student's grade level in reading; however, estimated his reading skills to be at the fifth to sixth grade level (id.). The ELA teacher reported that the student could not answer abstract or critical thinking reading comprehension questions, that all questions were simplified so he could respond concretely, or he was given two response choices for more complex questions (id.). District staff reported that when the student was assessed during sixth grade, his independent reading level was between kindergarten and second grade (id.). The parent expressed concern that the district's view of the student's reading level had decreased from a second grade level in fifth grade, to a kindergarten/first grade level in sixth grade (id. at p. 3). The district special education teacher explained the difference in assessment tools used between the elementary and middle schools, in that her assessment of the student in sixth grade was "less affected by reading decoding skills" as compared to the fifth grade assessment (id.).

The June 2019 CSE meeting information summary reflected that the district special education teacher reviewed the student's present levels of performance from the time he was attending the middle school, including that the student engaged in high levels of self-talk, required significant amounts of praise and prompting, had difficulty following novel directions, did not look to peers as models, had difficulty using a graphic organizer and completing sentences during writing activities, read independently at a kindergarten to first grade level, and showed strength in math computation skills as opposed to applied problem solving (compare Dist. Ex. 10 at pp. 8-10, with Dist. Ex. 52 at pp. 2-3). When asked to update the IEP present levels of performance with the information Fusion provided, the CSE chairperson reportedly noted the similarities between

how district staff and Fusion staff worked with the student and the level of support, prompting, and modifications provided, and indicated that Fusion had been "avoiding the reading comprehension required in math problems" (Dist. Ex. 52 at p. 3). The meeting summary indicated that the parent disagreed with all the comments regarding the student's present levels (id.).

Regarding speech-language therapy, the June 2019 CSE meeting information summary reflected the district speech therapist's report that the student had demonstrated some improvement with following directions, interacting with peers using a script, and recalling basic story elements on a page prior to leaving the middle school (Dist. Ex. 52 at p. 3). The parent informed the CSE that the student had "been meeting with a private speech therapist" and agreed to send provide a copy of the student's progress (id.).

The June 2019 meeting information summary indicated that the CSE discussed the goal areas Fusion recommended, including that the student needed to improve his ability to write independently, solve word problems, think abstractly (Dist. Ex. 52 at pp. 2, 3). The parent objected to the annual goals written by district staff as they contained objectives, and as such were in line with alternate assessment curriculum (id. at p. 3). The CSE chairperson stated that the annual goals were aligned with the student's needs as presented by Fusion and district staff (id.). According to the parent, the student was "on a college track at Fusion"; however, that was not what district staff interpreted from the Fusion teachers' oral reports and the CSE chairperson also noted that the Fusion reports were based on 1:1 instruction (id.). Following a discussion, the CSE agreed to modify the student's reading annual goal by raising the independent reading grade level (id.).

According to the June 2019 CSE meeting information summary, the CSE discussed a May 2019 New York State Education Department policy brief regarding the criteria for alternate assessment and the implications of alternate assessment designation (Dist. Ex. 52 at p. 3). The district CSE members determined that the student satisfied alternate assessment criteria and continued to require that designation, a decision with which the parent "vehemently" disagreed (id. at pp. 3, 19).

Review of the June 2019 IEP shows that it was based upon a June 2019 report card and transcript, and evaluative information previously known to the CSE (compare Dist. Ex. 10 at pp. 5-7, with Dist. Ex. 52 at pp. 5-7; see Parent Exs. AAA-EEE).<sup>24</sup> For the 2019-20 school year, the CSE recommended five 40-minute periods per day of an 8:1+2 special class placement, one 40-minute session of adapted physical education on alternate days, one 30-minute session per day of programmatic speech-language therapy and one 30-minute session of programmatic speech-language therapy on alternative days, all sessions held in the special education classroom, two 60-minute sessions per week of extended school day services at the middle school, and one 60-minute session per month of parent counseling and training (id. at pp. 17-18). The CSE also recommended that the student receive 12-month services (id. at p. 18).

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<sup>24</sup> The June 2019 meeting information summary reflected that the parent read an acceptance letter from the Julliard Pre-College Program and explained that the student's acceptance was based on his music skills (Dist. Ex. 52 at p. 3). The IHO determined that the June 2019 CSE also had available to it the information contained in Parent Ex. FFF; however, that information regarding the student's performance at Julliard was dated after the June 2019 CSE meeting (compare IHO Decision at p. 45, with Parent Ex. FFF).

Turning to the IHO's finding that the speech-language services offered by the district for the 2019-20 school year were not appropriate and denied the student a FAPE, the evidence in the hearing record shows that the CSE's recommendations for this school year suffered from the same defect as the prior school year. Testimony from the middle school speech therapist indicated that during fall 2018 prior to leaving the district, the student exhibited weak social skills, was unable to answer inferential questions and some literal questions, struggled to formulate sentences in his own words, lacked skills needed to make requests and benefit from peer models, and his ability to make basic categorizations and identify items by semantic class was impaired (see Tr. pp. 2322-24, 2329-32, 2357-58, 2363-64). Review of the speech-language present levels of performance in the June 2019 IEP shows that they were similar if not identical to those contained in the December 2018 IEP, and that the district continued to recommend the same amount of programmatic speech-language therapy as it had during the 2018-19 school year (compare Dist. Ex. 10 at pp. 8, 15-16, with Dist. Ex. 52 at pp. 7-8, 17-18; Tr. pp. 2322-24; IHO Decision at pp. 59-60). As with the 2018-19 school year, given the degree of the student's language communication and social pragmatic deficits the district believed the student exhibited, and continued to believe the student demonstrated as of the June 2019 CSE meeting, the evidence affords no basis to disturb the IHO's finding that the programmatic speech-language therapy the district recommended did not offer the student a FAPE (compare Dist. Ex. 7 and Dist. Ex. 10 at pp. 8, 15-16, with Dist. Ex. 52 at pp. 2-3, 7-8, 17-18; IHO Decision at p. 60).

#### **c. 2020-21 School Year**

The student remained at Fusion during the 2019-20 school year (see Parent Exs. JJJ at p. 1; HHHH; Dist. Exs. 57; 61). In July and August 2019, the parents obtained a private psychoeducational review of the student from a licensed psychologist to assist in educational planning and due to their dissatisfaction with the district's special education recommendations including the alternate assessment designation, the inappropriate level of curriculum in district classes, and the failure to recommend participation in general education (Parent Exs. JJJ at p. 1; MMM). In a report dated September 2019, the licensed psychologist indicated that he had conducted a "systematic parent interview, two (2) in-office meetings with [the student], an observation at his school program, consultation with his teacher, and a review of records," which included past evaluation reports, IEPs, and student work samples (Parent Ex. JJJ at pp. 1, 2). During the evaluation, the student presented as polite but anxious, in that he focused on the facial expressions of his parents and constantly sought approval of adults, including confirmation that he had responded correctly (id. at p. 3). According to the licensed psychologist, the student's anxiety was "significant," and he closely monitored the reaction of others rather than relying fully on his independent problem-solving skills (id.). Because the student's attention was so often directed to the reactions of others, the licensed psychologist opined that his attention to task details may have been diverted at times, and his responses to questions in various situations "were most frequently offered with seemingly great uncertainty" (id.).

During an observation of the student at Fusion, the licensed psychologist reported that the student read aloud, decoded accurately, used appropriate expression, and appeared to be most confident answering literal and concrete questions posed orally by the teacher (Parent Ex. JJJ at p. 4). The student was then observed progressing through the tasks of inferential comprehension presented by his teacher, and the licensed psychologist noted that the student's records described "the critical linguistic and cognitive skills underlying the development of inferential

comprehension as among [the student's] most significant vulnerabilities" (id.). The licensed psychologist opined that the student's instruction, "academic content recorded in his notebook and reflected in the work samples reviewed were individualized and responsive to his needs" (id.). The student was reportedly engaged in class, presented his work proudly, and the licensed psychologist concluded that "[c]learly [the student was] benefitting in several important ways from his current instructional experience" although stated the "absence of typically developing classmates preclude[d] the important opportunity to benefit from rich classroom talk" (id.).

In his private psychoeducational review report, the licensed psychologist discussed the conclusions drawn by previous evaluators, who determined that the student's overall intellectual functioning was "quite low" despite some evaluation results showing that three of five cognitive abilities critical for academic achievement were reported to be in the average range and "a fourth was very nearly so" (Parent Ex. JJJ at p. 4). The licensed psychologist concluded at that time it was not appropriate or accurate to characterize the student's overall intellectual ability as well below age expectations, but rather more useful and accurate to describe his cognitive skills as highly variable and report his actual performance on different tasks (id. at p. 5). To further evaluate the difficulties underlying the student's poorest, most recent WISC-V performances, the licensed psychologist administered the multiple choice verbal comprehension index (MCVCI) of the WISC-V Integrated, described as a measure of verbal comprehension that did not require any expressive responses, which was comprised of the similarities and vocabulary subtests of the WISC-V verbal comprehension index (id.).<sup>25</sup> Following administration of the MCVCI, which yielded a similarities multiple choice subtest score with a percentile rank of 95 and a vocabulary multiple choice subtest score with a percentile rank of 5, the licensed psychologist concluded that the results "differ[ed] strikingly" from prior WISC-V results, as when task demands to orally express responses were diminished or reduced, the student's "verbal abstract reasoning and word knowledge [were] revealed to be far better than previously thought" (id. at pp. 5-6).

As such, the licensed psychologist "strongly recommended" that the student be integrated into general education classes to access the New York State curriculum, concluding that when expressive language demands of tasks were reduced, the student had an appropriate opportunity to demonstrate acquired skills and knowledge (Parent Ex. JJJ at pp. 7, 8). Among other recommendations, the licensed psychologist indicated that "individualized support to preview language and content of planned instruction w[ould] be important, as w[ould] daily review of presented content" (id. at p. 7). Additionally, the licensed psychologist stated that assessment of the student's mastery of new knowledge and learning should reduce test demands of expressive language (id. at p. 8).

The hearing record reflects that CSEs convened on June 15, 22, and 30, 2020 (collectively, the June 2020 CSE) to conduct the student's annual review and develop an IEP for the 2020-21 school year (Dist. Ex. 58). According to the resultant IEP, in addition to information reviewed during CSE meetings for prior school years, the June 2020 CSE had available for consideration the September 2019 private psychoeducational review report, January 2020 Juilliard pre-college

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<sup>25</sup> According to the September 2019 private psychoeducational review report, "[t]he WISC-V Integrated test provides adapted and varied versions of the WISC-V subtests for purposes of better understanding the difficulties underlying a student's test performance" (Parent Ex. JJJ at p. 2).

program transcripts, a June 12, 2020 speech-language progress summary, a June 15, 2020 Fusion progress report, and proposed educational goals from Fusion dated June 24, 2020 (id. at p. 7; see Parent Exs. GGG; JJJ; HHHH; IIII).<sup>26</sup> The CSE meeting information summary also reflects that the CSE discussed a classroom observation of the student conducted at Fusion in October 2019 (Dist. Exs. 57; 58 at pp. 3, 4-5).

During the October 2019 observation, the student received 1:1 math instruction comprised of completing problems involving substituting a given quantity for a variable and following the order of operations to evaluate the expression, which the observers described as "purely arithmetic" without the "presence of any word problems or applied problem solving" (Dist. Ex. 57 at p. 1). The student was observed engaging in self-stimulatory behavior and requiring prompting to complete problems and did not engage in reciprocal conversation with the Fusion instructor other than to provide numerical answers (id. at pp. 1, 2). The observers opined that although the student could likely complete an evaluation of expression problems with integers, he struggled with fractional components, lacked an understanding of the concept, or "the ability to solve at all" (id. at p. 3). When completing word problems, the Fusion instructor indicated that he has the student underline and box key words to improve understanding of the sentence (see id.). While on a tour of Fusion, the observers learned that the student was on a "truncated schedule from 8:30-1:00" and received instruction in math, science, social studies, English and physical education at Fusion, in addition to one period per day of homework café (id.). The student's January 2020 Juilliard pre-college transcript reflected grades of "A" in courses entitled string ensemble, youth chorus, and viola-appel, and "A+" in music theory and ear training (Parent Ex. GGG).

The June 15, 2020 Fusion academic summary report reflected that in English/ELA, the student read with fluency but continued to struggle with reading comprehension (Parent Ex. HHHH at p. 2). During the year, the student worked with material on a fifth to seventh grade level and comprehended material after spending "a longer time reviewing it" and in a 1:1 environment (id. at pp. 2-3). According to the report, the student was able to answer text-based questions independently but needed assistance with open-ended and inferential questions, although he answered inferential questions presented in a multiple-choice format (id. at p. 3). The instructor reported that the student "never display[ed] any negative behaviors," was always focused and did what he needed to do, always went to class on time and prepared with his homework and took out his homework at the start of class without prompts to do so (id.). The student also reportedly always completed tests/quizzes independently and was usually able to finish in the time allotted (id.). English/ELA goals for the student were to increase his ability to make inferences and draw conclusions based on implied information from texts at a seventh to eighth grade level, use graphic organizers to verbally retell important events of a text, and write at least five grammatically/syntactically appropriate sentences to answer questions or express his thoughts independently (Parent Exs. HHHH at p. 3; IIII).

In math, according to the June 2020 Fusion report the student was "on grade level," was able to complete the "entirety" of the math course 2 material and was able to follow the "Next Gen Math Standards without any trouble" (Parent Ex. HHHH at p. 1). According to the math report, the student was able to "piece information together" but did "have issues" with geometry as it

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<sup>26</sup> The hearing record does not appear to contain the June 12, 2020 speech-language progress summary.



required "analytical reasoning skills" (id.). The report indicated that the student expressed misunderstanding when he didn't understand concepts, asked for additional time, and was easily redirected to task (id.). The student's math instructor reported that the student underlined/highlighted key concepts and wrote synonyms of a word to gain better understanding of the question, and the instructor would like the student to be able to read problems and understand what they were asking, explain his answers, and work on his reasoning skills (id.). Suggested math goals included that the student would solve multi-step word problems and show work for each step and use variables to represent quantities in 10 real world or mathematical problems and construct simple equations/inequalities to solve the problems (Parent Ex. IIII).

According to the June 2020 Fusion report, the student was on an "essential track in life science" class, which used a modified general curriculum aligned to the New York State common core and that he was "doing well in the class with a modified curriculum" (Parent Ex. HHHH at p. 2). The report indicated that while the student had "great recall with key terms," he lacked full comprehension of the topics (id.). Although the student recalled information word-for-word from his notes, he struggled answering "next level open ended questions" (id.). The teacher also reported that the student had a hard time explaining his thinking and his answers (id.). The student required "a lot of repetition and reteaching" and the report indicated that every session began with a more intense review of previous material before moving on to new material (id.). Other accommodations provided included breaks, very basic notes to copy along with a guided note sheet, and in-depth review sessions prior to a test (id.). In history class, the teacher reported that the student exhibited "tremendous growth" over the course of the year, and that much of the work completed "was dedicated towards reading comprehension and vocabulary" (id.). According to the report, a goal for the student was to "progress into more elaborate sentence structures (id.). In science and history, the report indicated that the student was on time to class, cheerful, ready to learn, had homework prepared, and "never needed his attention focused as he was always ready to work" (id.).

The meeting information summary attached to the student's 2020-21 IEP reflected that at the June 15, 2020 CSE meeting the ELA/English special education teacher from Fusion read the student's June 2020 Fusion progress report (Dist. Ex. 58 at pp. 1, 2). In ELA, the Fusion teacher reported that the student read with fluency, but comprehension was "challenging" although he could answer some inferential questions in multiple choice format with annotation and scaffolding (id. at p. 2). According to the ELA Fusion teacher, the student was reading at a fifth to seventh grade level, which "surprised" the district CSE members, as his comprehension was judged to be several years lower last year (id.). The ELA Fusion teacher had not administered formal or information reading assessments to determine the student's grade level, rather she judged his success with assigned books (id.). The meeting information summary indicated that the teacher acknowledged that the student did not appear to understand the "themes" of the book and had difficulty with summarizing and telling the main points at the end of class with repetition and review (id.). Regarding vocabulary, reportedly the student spent one to two weeks learning vocabulary words from an assigned text, was able to understand the learned words in other contexts, and recently began to incorporate them into a sentence (id.). In writing, the student needed prompts and sentence starters for each sentence and was reportedly able to respond to short answer questions about texts (id.).

The meeting information summary from the June 15, 2020 CSE meeting also reflected that the CSE discussed how Fusion determined the student was on grade level in math, and concerns that it was difficult to know how much prompting the student was provided (Dist. Ex. 58 at pp. 1, 2). During the discussion of social studies, district CSE members questioned whether there was evidence of the student's analysis/synthesis of information at which point the parent acknowledged that there was a "gap between what [the student was] doing in social studies and what would be expected in 7th grade" and that the work was "clearly differentiated" (id. at p. 2). The CSE reviewed the science portion of the Fusion progress report, noting that the student received several accommodations and had difficulty showing conceptual comprehension (compare Dist. Ex. 58 at p. 2, with Parent Ex. HHHH at p. 2). According to the CSE chairperson, it was "difficult to ascertain [the student's] true skills with only vague written reports from his teachers, with the exception of the ELA Fusion teacher (Dist. Ex. 58 at p. 2).

According to the June 15, 2020 meeting information summary, the document identified as a speech-language progress report was read to the CSE (Dist. Ex. 58 at pp. 1, 2). The parent shared that approximately two-thirds of the provider's time was "speech/language related" while the rest was "related to work outside of speech" (id. at p. 2). When asked whether the provider who authored the private speech therapy report was qualified to deliver private speech therapy, the parent responded that he "believe[d] so, and she does work for the NYC schools" (id.).<sup>27</sup> The district speech therapist reportedly expressed concerns that it was unclear the prompting level need for the student to answer "wh" questions, whether or not there were linguistic concepts embedded in direction-following tasks, and if the student could maintain conversation on a topic whether it was provided or spontaneous (id.). The ELA Fusion teacher noted that "all instruction at Fusion Academy is 1:1" and that the student participated in 'homework café' and next year he would participate in a social skills group (id.). The parent also described the student's participation in the "intensive" Juilliard pre-college program, which provided accommodations (Dist. Ex. 58 at p. 3).

The June 15, 2020 CSE meeting information summary indicated that the district special education teachers described a classroom observation conducted "in the fall" during 1:1 math instruction (Dist. Ex. 58 at p. 3; see Dist. Exs. 57; 61). According to the teachers' report, the student completed order of operations problems involving arithmetic and no word problems (id.). The teachers reported that the student required "[c]onsiderable support," did not appear to understand concepts on a "deeper level," was observed engaging in self-stimulatory behaviors, and did not seek to interact with the observers (id.). To allow the CSE additional time to review information about the student, participants agreed to "table the meeting and reconvene" (id.).

On June 22, 2020 the CSE reconvened to continue the student's annual review, without Fusion staff in attendance (Dist. Ex. 58 at p. 3). The CSE meeting information summary indicated that the CSE chairperson expressed significant concerns about the absence of Fusion staff, which limited the ability to discuss the student's strengths, needs and goals (id.). The meeting was tabled with the understanding to reconvene with Fusion teachers present (id.).

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<sup>27</sup> It appears that this provider's qualifications and licensure to deliver speech-language therapy to the student could not be later established by evidence admitted at the impartial hearing.

The CSE reconvened on June 30, 2020 to complete the student's annual review (Dist. Ex. 58 at p. 3). According to the meeting information summary, the district school psychologist reviewed the results of the September 2019 private psychoeducational review report, concluding that the student "scored significantly higher on the measure of categorical word reasoning in multiple choice than he had when he had to provide open-ended responses" as with the previous assessment, and that "[h]is score on the multiple choice measure of vocabulary was slightly higher than previously assessed" (*id.*). The district school psychologist next reviewed the licensed psychologist's opinion that the student's cognitive abilities were stronger than previously thought, he should be educated in an integrated classroom, and that recommendations for alternate assessment were premature (*id.* at pp. 3-4). The district school psychologist raised several concerns with the private review report and ultimately stated he disagreed with the conclusion and recommendations from the licensed psychologist (*id.* at p. 4).

The June 30, 2020 meeting information summary reflects that "Fusion teachers then joined the meeting" at which point the CSE appeared to engage in lengthy discussions regarding Fusion teachers' credentials, the student's math performance, the type of support he required to solve different types of math problems, the student's reading level, his inferential comprehension skills, prompt dependence, and difficulty with "emotional understanding of characters" (*see* Dist. Ex. 58 at pp. 4, 5). The CSE also continued the discussion of the fall 2019 observation of the student during 1:1 math instruction, and the observers reported to the CSE that the student typically spent his one period of homework café with one of his teachers rather than interacting with classmates (*id.* at pp. 3, 4, 5).

According to the June 30, 2020 CSE meeting information summary, the CSE reviewed the proposed goals from Fusion, including grade level math goals, sixth to seventh grade reading and writing goals, and seventh grade level reading comprehension goals (Dist. Ex. 58 at p. 5). District staff noted that the student was "not in a classroom" but received instruction in a 1:1 environment and that should be taken into consideration when developing goals (*id.*). The meeting information summary indicated that the educational goals were adjusted based on feedback from Fusion teachers, observations, and prior assessments; there were disagreements regarding the student's then-current skill levels—particularly reading comprehension—and the inclusion of certain goals (*id.*). Review of the meeting information summary shows that the parents and the district also disagreed about the student's participation in adapted physical education, that he met the criteria for alternate assessment, that he should receive extended school year services, and the composition of the CSE (*id.* at pp. 5, 6). The CSE discussed transition activities and post-secondary goals, and the parent's desire for the student to receive a high school diploma so he could attend music college, which the district CSE members did not believe was "a realistic goal at this time" (*id.*).

The June 30, 2020 CSE meeting information summary indicated that the CSE discussed program modifications and testing accommodations, and whether the student could receive instruction in a 12:1+1 special class with additional supports such as a teacher assistant and a modified curriculum (Dist. Ex. 58 at p. 6). According to the summary, the CSE "did not think [the student] would be appropriate for a 12:1[+]1 class even with modifications due to his inability to access the curriculum or the complexity of the language in the classroom, as well as group instruction and peer modeling" (*id.*). For the 2020-21 school year (eighth grade), the June 2020 CSE continued the recommendation from the 2019-20 school year; five 40-minute periods per day

of an 8:1+2 special class placement,<sup>28</sup> one 40-minute session of adapted physical education on alternate days, one 30-minute session per day of programmatic speech-language therapy and one 30-minute session of programmatic speech-language therapy on alternative days, all sessions held in the special education classroom, two 60-minute sessions per week of extended school day services at the middle school, and one 60-minute session per month of parent counseling and training (compare Dist. Ex. 58 at pp. 20-21, with Dist. Ex. 52 at pp. 17-18). The CSE also recommended that the student receive 12-month services (id. at p. 21).

Regarding speech-language present levels of performance, the June 2020 IEP reflects information from the document which was identified as a June 12, 2020 speech-language progress report (Dist. Ex. 58 at p. 10). According to the provider, the student continued to present with receptive and expressive language delays, had difficulty with reading comprehension, struggled making inferences and drawing conclusions, and had difficulty retelling a story in a sequential order with important details (id.). The IEP reflected that the provider reported that the student answered yes/no questions, discussed his likes/dislikes appropriately, answered "wh" questions given prompts, and spoke and wrote in simple complete sentences (id.). The provider indicated that the student followed one and two step directions, although as they became longer in length "difficulties [were] noted" (id.). According to the IEP, the student engaged in a conversation for four exchanges while remaining on topic and maintaining eye contact, and he was working on initiating conversations and asking clarifying questions (id.). The provider stated that continuing services would be beneficial for the student, to work on receptive and expressive vocabulary skills, word structure, the ability to follow complex directions, understand spoken paragraphs, initiate and end conversations, use nonverbal pragmatic language cues respond to and ask questions, and tell/retell a story (id.).

The CSE chairperson of the June 2020 CSE testified that regarding the private psychoeducational review report that was reviewed during the meeting, the licensed psychologist "looked at one ability that seemed to be a strength for [the student]," which was important to take into consideration, but that it was a "giant leap" to assume he could benefit from the language in the classroom (Tr. pp. 5806-07; Dist. Ex. 58 at p. 1). He continued that despite the student's "significant strength in the multiple choice section" of the licensed psychologist's assessment, "that unfortunately did not correlate with his ability to understand what was going on in the classroom . . . to deal with interacting with other people in the class, with his receptive and expressive language . . . ." (Tr. pp. 5856-57). During the June 2020 CSE meeting the chairperson discussed that among other disabilities, the student had severe verbal language deficits (see Tr. pp. 6032-33).

One of the district special education teachers who participated in the June 2020 CSE meetings testified that to her, by June 2020, the fact that the student had been in a 1:1 program at Fusion for the past year and a half, was "really screaming the need for intensive support" in part due to the student's "severe cognitive deficits, his language deficits" (Tr. pp. 5518-19; Dist. Ex. 58 at pp. 1, 3). She further testified that when she observed the student at Fusion, he demonstrated "very little" use of language, there was no conversational interaction between the student and the teacher, nor was there "real expression or reaction from [the student] in any way" (Tr. p. 5547).

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<sup>28</sup> The June 30, 2020 CSE meeting information summary indicated that the CSE recommended that the student "be placed in the higher functioning of the two 8:1+2 special class[es]" (Dist. Ex. 58 at p. 6).

The special education teacher stated that the student was "not conversational," that "he only really replie[d] to direct questioning" and exhibited self-talk (Tr. p. 5548). She opined that the student was "functioning much lower than the lowest of [her] 12:1+1 students" with regard to language abilities (see Tr. pp. 5548-49). Additionally, she testified that she didn't see the student as being able to express himself to analyze or explain a lot of what he was doing (Tr. p. 5551). Although one of the other district special education teachers who participated in the June 2020 CSE meeting opined that the recommended special education programming for the 2020-21 school year was appropriate for the student "due to his deficits in communication and language where he would be receiving speech daily," as with the prior school years, the district continued to view the student's language needs and deficits as paramount, yet continued with the same amount of "programmatic" speech-language therapy as in years past, which the IHO determined was insufficient and denied the student a FAPE (Tr. pp. 5667-68; Dist. Exs. 10 at pp. 15-16; 52 at pp. 17-18; 58 at pp. 1, 2, 20-21; IHO Decision at pp. 59-60). Again, I will not depart from the IHO's conclusion on this point.

### **C. Unilateral Placement**

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational

benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

With regard to the parties dispute over whether Fusion was appropriate to address the student's needs, analysis of the following claims asserted by the district is necessary.

### **1. The Student's Needs**

Although not in dispute in this appeal, a discussion of the student's special education needs is beneficial to evaluate the evidence regarding the appropriateness of the parent's unilateral placement of the student at Fusion. I recognize some repetition of several points I have stated above, but once again in the interest of a timely decision and the lack additional time to further refine this decision, it cannot be helped.

The parties do not appear to dispute that among the student's most severe areas of deficit is his language skills which has been consistently identified over time. As previously noted, in developing the student's IEP for the 2018-19 school year, in March 2018 the CSE reviewed various evaluation reports from January 2018 including a speech-language reevaluation which indicated that the student had "severe receptive language deficits" in that the student had significant weaknesses in his ability to interpret, recall and execute oral commands of increasing length and complexity, understand relationships between words based on different features, interpret sentences that made comparisons, and understand spoken paragraphs (Dist. Ex. 7 at pp. 2, 5). At that time, the student also exhibited "severe expressive language deficits" with significant weaknesses in his ability to formulate grammatically correct sentences and acceptable, meaningful sentences by manipulating given words and word groups, and recalling sentences (id. at p. 2). In addition, the student's expressive vocabulary skills fell "significantly below the average range" (id. at p. 3). In reading, the student was able to decode but struggled when answering comprehension questions and while the student's spelling skills were average, his writing ability was in the very low range (Dist. Ex. 5 at p. 2). In math, an area of relative strength, on computation tasks the student showed understanding of addition, subtraction, multiplication, and division "as is expected in fifth grade," although word problems were the most difficult for him (Dist. Exs. 5 at pp. 2-3; 14 at pp. 1-2). Review of the March 2018 IEP shows that the CSE concluded that the student's cognitive evaluation results "show[ed] overall cognitive deficits with the most severe deficits in the language domain," and that academic testing and speech-language assessment results showed "significant deficits" in all domains and areas assessed (Dist. Ex. 14 at pp. 1, 3-4).

Specifically with regard to speech-language, as previously noted, the record shows that in March 2018, speech-language present levels of performance indicated that the student had made

"[s]teady progress" and improved his ability to follow simple two-step orally presented directions, answered yes/no questions in a variety of formats, and was beginning to use strategies to aid in recall/processing of verbally presented information (Dist. Ex. 14 at p. 5). The student demonstrated difficulty when linguistic concepts were incorporated into two-step directives, inconsistently answered "wh" questions after listening to a short, content-based, three sentence story, and required repetition and visuals to retain information (id.). He exhibited improved ability to maintain eye contact and continued to require prompts to initiate conversation (id.). In October 2018, during speech-language therapy, the student was working on following one-step novel directions, initiating conversations and maintaining appropriate eye contact, making an appropriate comment to the response made by a peer, and sequencing four pictures and telling a story about them (District Ex. 12 at p. 2). The student had difficulty with word order and although he could recall one detail about a two-sentence passage read to him, at that time he did not yet put that information in his own words (id.). In the area of speech-language skills, the December 2018 IEP indicated that the student had made "slow but steady progress" and that he was working on his ability to follow one-step novel directions, noting that this skill was inconsistent (Dist. Ex. 10 at p. 8). In group settings, the student rarely looked to see what peers were doing in order to gain insight as to what he should be doing (id.). The student had made some progress independently sequencing four-step pictures and telling about the sequence; however, he had difficulty formulating complete sentences about the sequence (id.). According to the IEP, the student used some temporal words appropriately and had made improvements in initiating conversations with peers when provided with a script, yet he often used the same script with multiple partners and required modeling to use appropriate comments or responses during the conversation (id.). The student was working on comprehending an event from a paragraph read aloud, as he attempted to repeat the story verbatim rather than retelling it in his own words (id.).

However, while the parents generally do not appear to dispute that the student had needs in the areas of language and reading comprehension, they have disagreed with the district's view on the issue of the student's cognitive functioning. As previously noted, the parents obtained a private psychological evaluation of the student, over two dates in October and November 2018, "in order to determine his present cognitive and academic functioning for the purpose of determining the extent of his educational needs and appropriate placement" (Dist. Ex. 3 at p. 7). The evaluator concluded that the student's overall intellectual functioning was in the low average range, with a significant difference between his verbal reasoning abilities and his nonverbal reasoning abilities, weaknesses in reasoning and problem solving skills, and that student was performing below his grade level in reading comprehension and mathematic reasoning skills; however, opined that the student did not "exhibit severe cognitive disability that would indicate the need for [a]lternate [a]ssessment," and despite "significant verbal and communication deficits and educational delays, he has the ability and potential to work toward grade level standards" (id. at pp. 5, 6, 7). The evaluator recommended "[s]chool accommodation to assist [the student's] school work in the classroom (reading, math problem solving) in a least restrictive setting . . . and the opportunity [to] participate in a rich and verbal classroom experience as much as possible, with appropriate modifications and supports" (id. at p. 7).

Upon the student's attendance at Fusion, the record demonstrates areas of agreement but also disparate views of the student's skills and deficits between Fusion and district staff during the 2019-20 school year. As previously noted, at the June 2019 CSE meeting, the Fusion ELA

teacher's report indicated that the student's social/emotional needs did not impact his learning, he advocated for himself when he needed help, and the 1:1 setting had been beneficial to him (Dist. Ex. 52 at p. 2). According to the Fusion ELA teacher, the student struggled with abstract ideas and did better with concrete information, he was provided with visual cues, simplified directions, extended time, and needed step-by-step instructions during the writing process (id.). Fusion staff reported that they could "spend as much time as [was] necessary on any single concept until [the student got] it" and that at times, it took "days in his 1:1 setting to accomplish it" (id.). The Fusion ELA teacher's report also noted that the student read with fluency but had difficulty with reading comprehension, although when allowed to look back at the text, was generally able to correctly answer concrete questions (id. at pp. 1-2). In math, the teacher reported that the student was "doing very well academically," and performed basic multiplication, division, and subtraction without difficulty, and had been learning intermediate math such as linear equations involving fractions (id. at p. 2). However, the CSE discussed the student's ability to answer word problems, and the Fusion assistant director reported that "any word problems [were] broken down into calculations since [the student did] not understand the language in the math word problems" (id.). The CSE also discussed the extent of prompting the student received at Fusion, that worksheets were made to simplify the material, and the student's "significant weaknesses in vocabulary" (id.).

At the June 2019 meeting, as previously noted, the CSE also discussed the differing views of Fusion and district staff regarding the student's reading comprehension skills (Dist. Ex. 52 at p. 2). Fusion staff had not used standardized assessments to determine the student's grade level in reading; however, estimated his reading skills to be at the fifth to sixth grade level (id.). The ELA teacher reported that the student could not answer abstract or critical thinking reading comprehension questions, that all questions were simplified so he could respond concretely, or he was given two response choices for more complex questions (id.). District staff reported that when the student was assessed during sixth grade, his independent reading level was between kindergarten and second grade (id.). The district special education teacher reviewed the student's present levels of performance from the time he was attending the middle school, including that the student engaged in high levels of self-talk, required significant amounts of praise and prompting, had difficulty following novel directions, did not look to peers as models, had difficulty using a graphic organizer and completing sentences during writing activities, read independently at a kindergarten to first grade level, and showed strength in math computation skills as opposed to applied problem solving (compare Dist. Ex. 10 at pp. 8-10, with Dist. Ex. 52 at pp. 2-3). The CSE chairperson reportedly noted the similarities between how district staff and Fusion staff worked with the student and the level of support, prompting, and modifications provided, and indicated that Fusion had been "avoiding the reading comprehension required in math problems"; however, the parent disagreed with all the comments regarding the student's present levels (Dist. Ex. 52 at p. 3). Regarding speech-language therapy, the student had demonstrated some improvement with following directions, interacting with peers using a script, and recalling basic story elements on a page prior to leaving the middle school (id.).

While the student remained at Fusion for the 2020-21 school year, the parents obtained another private psychoeducational review of the student from a licensed psychologist in July and August 2019, to assist in educational planning and due to their dissatisfaction with the district's special education recommendations (Parent Exs. JJJ at p. 1; MMM). The licensed psychologist observed the student at Fusion and reported that he read aloud, decoded accurately, used



appropriate expression, and appeared to be most confident answering literal and concrete questions posed orally by the teacher (Parent Ex. JJJ at p. 4). He then observed the student progressing through the tasks of inferential comprehension presented by his teacher, and the licensed psychologist noted that the student's records described "the critical linguistic and cognitive skills underlying the development of inferential comprehension as among [the student's] most significant vulnerabilities" (*id.*). The licensed psychologist opined that the student's instruction, "academic content recorded in his notebook and reflected in the work samples reviewed were individualized and responsive to his needs" (*id.*). The student was reportedly engaged in class, presented his work proudly, and the licensed psychologist concluded that "[c]learly [the student was] benefitting in several important ways from his current instructional experience" although stated the "absence of typically developing classmates preclude[d] the important opportunity to benefit from rich classroom talk" (*id.*).

In his report, the licensed psychologist discussed the conclusions drawn by previous evaluators, who determined that the student's overall intellectual functioning was "quite low" despite some evaluation results showing that three of five cognitive abilities critical for academic achievement were reported to be in the average range and "a fourth was very nearly so" (Parent Ex. JJJ at p. 4). The licensed psychologist concluded at that time it was not appropriate or accurate to characterize the student's overall intellectual ability as well below age expectations, but rather more useful and accurate to describe his cognitive skills as highly variable and report his actual performance on different tasks (*id.* at p. 5). Following administration of the multiple choice verbal comprehension index (MCVCI) of the WISC-V Integrated, described as a measure of verbal comprehension that did not require any expressive responses, and comprised of the similarities and vocabulary subtests of the WISC-V verbal comprehension index,<sup>29</sup> the licensed psychologist concluded that the results "differ[ed] strikingly" from prior WISC-V results, as when task demands to orally express responses were diminished or reduced, the student's "verbal abstract reasoning and word knowledge [were] revealed to be far better than previously thought" (*id.* at pp. 5-6). As such, the licensed psychologist "strongly recommended" that the student be integrated into general education classes, concluding that when expressive language demands of tasks were reduced, the student had an appropriate opportunity to demonstrate acquired skills and knowledge (*id.* at pp. 7, 8). Among other recommendations, the licensed psychologist indicated that "individualized support to preview language and content of planned instruction w[ould] be important, as w[ould] daily review of presented content" and stated that assessment of the student's mastery of new knowledge and learning should reduce test demands of expressive language (*id.*).

In response to the results of the September 2019 private psychoeducational review report, at the June 2020 CSE meeting, the district school psychologist concluded that the student "scored significantly higher on the measure of categorical word reasoning in multiple choice than he had when he had to provide open-ended responses" as with the previous assessment, and that "[h]is score on the multiple choice measure of vocabulary was slightly higher than previously assessed" (Dist. Ex. 58 at p. 3). The district school psychologist raised several concerns with the private review report and ultimately stated he disagreed with the conclusion and recommendations from

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<sup>29</sup> According to the September 2019 private psychoeducational review report, "[t]he WISC-V Integrated test provides adapted and varied versions of the WISC-V subtests for purposes of better understanding the difficulties underlying a student's test performance" (Parent Ex. JJJ at p. 2).

the licensed psychologist (*id.* at p. 4). Further, the CSE chairperson of the June 2020 CSE testified that the licensed psychologist "looked at one ability that seemed to be a strength for [the student]," which was important to take into consideration, but that it was a "giant leap" to assume he could benefit from the language in the classroom (Tr. pp. 5806-07; Dist. Ex. 58 at p. 1). He continued that despite the student's "significant strength in the multiple choice section" of the licensed psychologist's assessment, "that unfortunately did not correlate with his ability to understand what was going on in the classroom . . . to deal with interacting with other people in the class, with his receptive and expressive language . . . " (Tr. pp. 5856-57). During the June 2020 CSE meeting the chairperson discussed that among other disabilities, the student had severe verbal language deficits (*see* Tr. pp. 6032-33).

Further, at the June 2020 meeting, the CSE considered a June 2020 Fusion academic summary report which the ELA/English teacher from Fusion read at the meeting, which reflected that the student read with fluency but comprehension was "challenging" although he could answer some inferential questions in multiple choice format with annotation and scaffolding (Parent Ex. HHHH at p. 2; Dist. Ex. 58 at pp. 1, 2). During the year, the student worked with material on a fifth to seventh grade level, which "surprised" the district CSE members, as his comprehension was judged to be several years lower last year, and he comprehended material after spending "a longer time reviewing it" and in a 1:1 environment (Parent Ex. HHHH at pp. 2-3; Dist. Ex. 58 at p. 2). The ELA Fusion teacher had not administered formal or information reading assessments to determine the student's grade level, rather she judged his success with assigned books (Dist. Ex. 58 at p. 2). The meeting information summary indicated that the teacher acknowledged that the student did not appear to understand the "themes" of the book and had difficulty with summarizing and telling the main points at the end of class with repetition and review (*id.*). According to the report, the student was able to answer text-based questions independently but needed assistance with open-ended and inferential questions, although he answered inferential questions presented in a multiple-choice format (Parent Ex. HHHH at p. 3). Regarding vocabulary, reportedly the student spent one to two weeks learning vocabulary words from an assigned text, was able to understand the learned words in other contexts, and recently began to incorporate them into a sentence (Dist. Ex. 58 at p. 2). In writing, the student needed prompts and sentence starters for each sentence and was reportedly able to respond to short answer questions about texts (*id.*). The student also reportedly always completed tests/quizzes independently and was usually able to finish in the time allotted (Parent Ex. HHHH at p. 3).

In math, according to the June 2020 Fusion report the student was "on grade level," was able to complete the "entirety" of the math course 2 material and was able to follow the "Next Gen Math Standards without any trouble" (Parent Ex. HHHH at p. 1). According to the math report, the student was able to "piece information together" but did "have issues" with geometry as it required "analytical reasoning skills" (*id.*). The report indicated that the student expressed when he didn't understand concepts, asked for additional time, and was easily redirected to task (*id.*). The student's math instructor reported that the student underlined/highlighted key concepts and wrote synonyms of a word to gain better understanding of the question, and the instructor would like the student to be able to read problems and understand what they were asking, explain his answers, and work on his reasoning skills (*id.*). At the June 2020 meeting, the CSE discussed how Fusion determined the student was on grade level in math, and concerns that it was difficult to know how much prompting the student was provided and to ascertain the student's true skills given

vague written reports (Dist. Ex. 58 at pp. 1, 2). An October 2019 observation was also considered in which the student received 1:1 math instruction comprised of completing problems involving substituting a given quantity for a variable and following the order of operations to evaluate the expression, which the observers described as "purely arithmetic" without the "presence of any word problems or applied problem solving" (Dist. Ex. 57 at p. 1).

## **2. Specially Designed Instruction, Progress and Speech-Language Instruction**

Initially, while the IHO spent significant time on the FAPE aspects of the case, I note that the IHO's analysis of Fusion is far more brief, consisting of approximately three pages of fact analysis. I have endeavored to cover as much of the relevant information as possible within my own timeframe.

### **a. Specially Designed Instruction and Progress**

On appeal, the district asserts that the parents failed to meet their burden to show that the student's program at Fusion was appropriate as Fusion did not provide the student with speech and language services. The district alleges this is especially true as "the IHO determined that the [d]istrict's provision of speech and language services on more than a daily basis was insufficient" to meet the student's needs. Additionally, the district argues that the IHO relied too heavily on the "purported" progress the student made at Fusion, which the district submits is "illusory and contrived," and further that the testimony by Fusion personnel established that the student was not actually achieving "grade A work" as reported on the student's progress reports.

In this case, the evidence regarding the specially designed instruction offered at Fusion is considerably entwined with the evidence and the parties dispute over the student's progress and the degree and manner he progressed toward grade-level academics. While a student's progress is not dispositive of the appropriateness of a unilateral placement, a finding of some progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at \*11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

### **i. English Language Arts**

The parents provided pre-filed testimony by affidavit in which the student's ELA teacher at Fusion testified that in working with the student for the 2018-19 and 2019-20 school years, she "presented work at the highest level that [t]he student could achieve" (Tr. pp. 2936, 2947, 2983; Parent Ex. BBBB ¶¶20-21). She stated that she began working with the student in English in January 2019 and in ELA in June 2019, for the 2018-19 (sixth grade) school year (Parent Ex. BBBB ¶28). Initially, she assessed his reading level "by seeing first what he could read fluently and then [asking] him comprehension questions" and found that the student could "read and decode up to fifth grade and entering sixth grade level books and even up to grade level"; however, he was "comprehending below grade level, closer to the fourth grade level" (Tr. p. 3030; Parent Ex. BBBB ¶¶38-39). In response to the district's counsel's question of what she did to assess the student's initial abilities, during cross examination, she testified that she worked with the student "on

worksheets and vocabulary, and I would kind of assess him that way" in order to "see what kind of questions he was able to answer pertaining to the topic so if it was reading comprehension, could he answer inferential questions by himself, could he answer open-ended questions by himself" (Tr. p. 2983). However, she further responded that she did not administer any standardized tests to him herself, and although Fusion administers "MAP testing and the Mind Prints testing," she did not think those were standardized tests (Tr. pp. 2984, 3105). Additionally, the ELA teacher opined that the student's reading comprehension was at a "fourth or fifth grade level" when he first started at Fusion which was why she started with Roald Dahl books because there is a "range with [the] books" and she "can be asking higher level questions for [her] higher readers" but the student was "more on fourth grade level when she first got him" based on her review of The Witches with the student (Tr. pp. 3032-34).

The student's ELA teacher testified that at Fusion, teachers communicated daily with the student's parents in emails that included enough details to allow reinforcement of the same material at home in order for the student to learn, a sampling of which dated February 14, 2019 to April 2, 2020 was included in the record (Parent Exs. BBBB ¶26; DDDD). Specifically, during the 2018-19 school year, regarding her entry dated February 14, 2019, the ELA teacher testified on cross examination, that the "Brainpop video" on making predictions and quizzes was "grade level" as these are "usually geared toward middle school students" (Tr. p. 2995; Parent Ex. DDDD at p. 1). She further testified that the student needed "much assistance" on a worksheet in which they read a scenario and had to predict or infer what would happen next (Tr. p. 2996). The teacher testified that the student "was able give me the correct answer when I summarized the scenario and focused on specific parts of the paragraph" to "fact questions and inferential questions" (Tr. pp. 2996-97; Parent Ex. DDDD at p. 1). The teacher further testified regarding the February 14, 2019 entry that the student watched another Brainpop video on commas, that the lesson focused on using commas when listing things, she did a couple of examples on the board, and they worked on a worksheet together in which the student was able to place the commas in the correct place (Tr. p. 2995; Parent Ex. DDDD at p. 1). When asked what grade level "commas" were, the ELA teacher testified that "it started in fourth and fifth, but I know the sixth grade curriculum does focus on that again [] so this was done at a sixth grade level" (Tr. p. 2997). Regarding her entry dated June 25, 2019, about an exercise in which the student "had to choose a picture and together we would create a story," the ELA teacher was asked on cross examination about her statement that "[the student] does have a difficult time creating events that did not occur, so I would start the sentence for him like last week and then he would finish the sentence," giving an example in which she said "[T]he haunted hotel was located in a forest," and the student responded "on Long Island"; the ELA teacher testified that she "gave him the sentence starter, [and] he filled in the blank" "for this specific activity" (Tr. pp. 3000-04; Parent Ex. DDDD at p. 2). The ELA teacher also testified regarding her June 25, 2019 entry in which she and the student read a passage about pizza around the world, answered five multiple choice questions together and the student answered five multiple choice questions independently, three of which were correct (Parent Ex. DDDD at p. 2). The ELA teacher testified that in the five questions they answered together, the student had been taught to eliminate two (of four) answers that he definitely thought were not the answer, after they read the questions together (Tr. pp. 3004-07).

The student's ELA teacher at Fusion further testified that during the 2018-19 school year, she focused on grammatical rules, possessive nouns, independent and dependent clauses,

identifying conjunctions and combining sentences with conjunctions (Parent Exs. BBBB ¶¶47; EEEE). According to the teacher, the worksheet on possessive nouns included an example box as a model for using two different kinds of apostrophes—single and plural—and though she did not recall exactly, she believed that the worksheet was at a fourth grade level, and that while the level of help that she gave the student varied, if she worked with the student on it, they would have done the first two questions together (Tr. pp. 3053-58; Parent Ex. EEEE at p. 1). The teacher further testified that on another worksheet on singular possessive nouns, she filled in the words for each answer and the student added the apostrophe "s" as that was the skill they were working on (Tr. pp. 3058-60; Parent Ex. EEEE at p. 2). Additionally, the teacher testified on cross examination with respect to a worksheet on conjunctions that the student received credit for completing the homework assignment, and that although several incorrect answers were marked as such on the worksheet, she would go over these with the student upon review in class (Tr. pp. 3060-68; Parent Ex. EEEE at p. 4). With respect to a worksheet on subordinating conjunctions, the teacher admitted on cross examination that there were errors in the form worksheet she was using but testified that she reviewed the correct answers with the student in class (Tr. pp. 3068-75; Parent Ex. EEEE at p. 5). The teacher further testified that the student completed a second worksheet on subordinating conjunctions that was given as part of a review packet to prepare for quizzes and tests and that the student worked on it with his tutor, but it was not reviewed or corrected in class (Tr. pp. 3075-82; Parent Ex. EEEE at p. 6).

In her testimony by affidavit, the ELA teacher at Fusion testified that she began to work on reading goals with the student to increase his comprehension and found that he needed repetition, to work on inferencing, and to revisit topics (Parent Ex. BBBB ¶¶40, 43). She testified that she used the supplemental aids and services and strategies from the student's IEP which included providing visual materials and strategies, linguistic scaffolding, re-teaching and preteaching of materials as needed, and some verbal prompting, and found that by May 2020, the student "was working much more independently" (*id.* ¶¶43-45). Furthermore, she found that the student needed modification of the general New York State curriculum (*id.* ¶46).

The student's Fusion ELA teacher further testified that in English and ELA, she worked on "reading (decoding), spelling, writing, and comprehension" with the student and that "he was making progress" (Parent Ex. BBBB ¶48). On cross examination, the teacher testified that she monitored the student's progress based on her progress summaries, "tests, quizzes and worksheets" (Tr. pp. 3051-52). She stated that the student "read non-fiction expository texts and answered multiple-choice questions requiring that he identify author's purpose, supporting details and reasons, demonstrate sequencing, comparing and contrasting and that he use[d] graphic organizers and time lines" (Parent Exs. BBBB ¶49; EEEE). The student's ELA teacher further testified that during the 2018-19 school year, the student read James and the Giant Peach by Roald Dahl and that "[o]ver the course of the year, [the student] made steady progress," "consistently earn[ing] grades of A or better" in English and in language arts throughout the school year "culminating in final semester grades of English (A and A, respectively) and [l]anguage [a]rts (A and B+, respectively)" (Parent Ex. BBBB ¶¶50-51). On cross examination, the ELA teacher testified that the student's grades were based on "[h]is tests and quizzes" and that his worksheets that had been previously reviewed in testimony at the hearing "had led him to those tests so of course they are not going to be accurate at first" (Tr. pp. 3083-84). She further stated in direct testimony by affidavit, that "[the student] read[] with fluency but ha[d] more difficulty with reading

comprehension"; however, he was "able to answer the questions accurately" when given the opportunity to look back in the text (Parent Ex. BBBB ¶52). On cross examination, when asked if she had a sample of work in which the student "read something at whatever [she] thought his grade level was," and he had to answer questions without being able to go back and look at the text, the ELA teacher testified that for "his tests for the Witches, Holes and Charlie and the Chocolate Factory," the student "did not have access to the novel, and [she] did not help him with any test or quiz" for assessments given at the end of each topic for both the 2018-19 and 2019-20 school years" (Tr. pp. 3095-96).

The student's ELA teacher testified that one of the student's "most significant areas of weakness [wa]s his difficulty with understanding abstract ideas," opined that this was an area of weakness related to his autism and indicated that he "seem[ed] to do better with concise ideas," "d[id] well with repetition when learning something new" and that she "accommodate[d] [the student's] learning needs" with the use of visual cues and rewording questions as needed, extra time on assignments, and "walk[ing] him through the writing process" which provided him with "the tools and confidence" to complete tasks successfully, concluding that "[o]ver the course of the 2018-2019 school year, [the student] progressed to the end of a fifth grade level" and "emerged as a reliable contributor" to "class discussions regarding main idea and details, as well as providing textual evidence for predictions" (Parent Ex. BBBB ¶¶53-58). On cross examination, the teacher testified that the student was able to answer inferential questions in a multiple choice format using the strategy of highlighting clues in a paragraph, for example, if he was reading a paragraph about a boy who was embarrassed, he was able to go back into the text and independently highlight things like "his hands were shaking" (Tr. pp. 3099-3100). When asked how she was able to conclude that the student was at a fifth grade level at the end of the 2018-19 school year, she testified that the "Roald Dahl books were on a fifth grade level" and she would "give him a final exam from questions from the text, and he obviously could not use his notes from the novel or ask me any questions, and he was able to recall most all events on the main idea [and] [h]e was able to grasp information about the main characters" (Tr. pp. 3103-34). She also testified that she determined his reading level without formal reading assessment, that Fusion has a "MAP" assessment but, in her experience, it was not always accurate and so she liked to do her own assessment in class (Tr. pp. 3105-06). The ELA teacher also testified that she estimated the student to be at a "third to fourth" grade level in writing, needed sentence starters and prompts when writing longer assignments; however, he was "able to write complete sentences" and "his spelling [wa]s always accurate and so [wa]s his grammar" (Tr. pp. 3109-10). When asked if the student "can't start a sentence without a "sentence starter," the teacher testified that that was the case "[o]nly for a creative writing assignment" and if it was a question about the text, the student was able to answer the question, for example, if asked "what is the sign of a Witch," he could write "One sign of a [w]itch is that they wear a hat" (Tr. p. 3110).

In direct testimony by affidavit, the ELA teacher stated that during the June 2019, she presented the ELA portion of the Fusion academic summary for 2018-19, the student's sixth grade year, stating that he was "working on close to grade level work in reading and grade level in math" and "was working at a fifth grade reading level in [r]eading and ELA and [wa]s now able to work with some sixth grade material, with prompting and assistance" (Parent Exs. BBBB ¶¶62, 64; FFFF). She also testified that the academic summary presented indicated that the student "reads with fluency, but does have a difficult time with his reading comprehension"; however, was "able

to answer the questions accurately" when given a chance to look back at the reading (Parent Exs. BBBB ¶59; FFFF). The summary also stated that the student had "difficulty thinking abstractly and making inferences" and "d[id] well with repetition when learning something new"; however, the "one to one setting allow[ed] us to spend more than one day working on a topic, to ensure that [the student] c[ould] reach mastery" (Parent Exs. BBBB ¶59; FFFF). As indicated in the summary, the teacher testified that "[t]o accommodate to his needs, [she] use[d] visual cues as needed (once during a multiple choice test), and [she] also reword[ed] the questions as needed" further "giv[ing] him extra time to complete assignments and walk[ing] him through the writing process" (Parent Exs. BBBB ¶59; FFFF). The teacher further testified that the student's "social emotional needs do not impede on his learning" nor did he "show signs of anxiety or frustration when faced with a challenge" but "advocate[d] for himself when he need[ed] help" (Parent Exs. BBBB ¶59; FFFF). Finally she testified that she would recommend goals of "working on independent[] writing skills and practicing abstract ideas (not using open-ended questions)" (Parent Exs. BBBB ¶59; FFFF). On cross examination, the teacher testified that she did not present statistical data relating to the student's progress to the CSE at the June 2019 meeting (Tr. pp. 3145-46).

Regarding the 2019-20 (seventh grade) school year, the student's ELA teacher testified that she was the student's ELA and language arts teacher from September 2019 through June 2020 and worked with the student on worksheets related to those topics (Parent Exs. BBBB ¶67; GGGG). She also stated that she worked with the student on more challenging books, initially starting with "on grade level books, such as A Series of Unfortunate Events but found that it was too advanced" and as the student "loves Roald Dahl, he read Charlie and the Chocolate [Factory] by Roald Dahl, which is close to a fifth (5th) grade level book" and "was able to decode this on his own and answer comprehension questions" (Parent Exs. BBBB ¶¶68-69). On cross examination, the teacher testified with respect to grade level, that she had taught A Series of Unfortunate Events "one other time" to an eighth grade class and that the "language is different the way that they speak" and "it's more like a comedy" so along with his tutor, she realized that the student "wasn't understanding some of those jokes or language that went along with it" (Tr. pp. 3155-56). She further testified on cross examination, that Charlie and the Chocolate [Factory] was "close to a fifth [] grade level book" meaning that it could be used for teaching students in a range of grades "meaning most fourth and fifth" graders; a "fourth grader with a higher reading level" or a "seventh or eighth grader who struggles with reading" and the books can be paired with "higher-level" worksheets for questions "closer to a sixth grade level, or you could start with more basic assignments that would be on a lower grade level" (Tr. pp. 3157-59). The ELA teacher further testified on cross examination that the student could independently answer factual questions but also inferential questions such as "how did Charlie treat his grandfather or how did Augustus Gloop treat his mother" and was able to tell her that the character Augustus was mean to his mother, and that the tutor also worked with the student on the book (Tr. pp. 3159-60). The ELA teacher further testified that she worked with the student "on The [B]FG by Roald Dahl, which is on a 5-6 grade level" and that the student was able to also read and decode this on his own and answer basic comprehension questions (Parent Exs. BBBB ¶70). The student's ELA teacher also stated that the student "read the book Holes, this year, which is close to a seventh grade level," "read[ing] the entire book himself, [] not just listen[ing] to it, and [wa]s able to actually do work and write on it," for example, the student completed a worksheet with the heading "Middle School Book Report" for Holes, and in response to the question "How many holes did he dig?" was able to answer: "[h]e dug 99 holes"; the student's "work show[ing] the progress he has made" (Parent Exs. BBBB ¶¶71-73; GGGG, pp.

1-4). On cross examination, when asked whether the student "g[ot] the humor in the book, or the irony in the book because that doesn't come through in the report," the teacher testified that "irony foreshadowing" would be more of a higher level skill, usually eighth or ninth grade but that the student "did laugh at some points" when she read portions out loud (Tr. pp. 3169-70).

With regard to the student's progress noted in the ELA sections of the daily academic summaries for the 2019-20 school year, the ELA teacher testified on cross examination about her September 4, 2019 entry that the student "did an excellent job on his homework assignment," as to whether the student "wrote the homework"; she answered that he worked with a tutor and she was "not there when he worked with a tutor" (Tr. p. 3008; Parent Ex. DDDD at p. 3). With respect to that same entry, the ELA teacher testified on redirect about reading the book Matilda with the student and that he was able to "tell [her] that Matilda now lives with Miss Honey and that they are happy together" which was an example of inferencing (Tr. pp. 3007, 3286-87; Parent Ex. DDDD at p. 3). With respect to her entry of April 2, 2020, about working with the student on inferences in an exercise matching pictures of toys with children's descriptions of toys, the ELA teacher testified on cross examination that inferencing as a skill was "around fourth grade" level, and on redirect that although inferencing was a difficult skill for the student, he was "able to infer on his own and also highlighted the clues of each description" (Tr. pp. 3014, 3286-87; Parent Ex. DDDD at p. 5).

The ELA teacher testified that "[w]hen [the student] complete[d] comprehension questions, initially, I guided him and gave him clues in the text to find the answer" but "[a]s of May 2020, he has been able to find the answers on his own" (Parent Ex. BBBB ¶74). On cross examination, she testified that for tests and quizzes, he was able to recall without using his book, "he d[id] not use his book on tests and quizzes" (Tr. pp. 3172-73). She also stated that the student "needed repetition and needed to work on inferencing" and "to revisit topics" and "was able to find inferential answers only when questions were given in multiple-choice format" (Parent Ex. BBBB ¶75). On cross examination, the ELA teacher testified that she used multiple choice questions for inferential questions with the student "[o]nly when we [were] not working with a novel" as the student "usually c[ould] answer it in a sentence" if the inference questions were about the characters from the book (Tr. p. 3176). The ELA teacher also testified that the student "made progress in writing" and she was particularly pleased with the student's work on an April 7, 2020 "'write anything' prompt about a day in which he could do anything, in which he wrote about playing [the] [v]iola and then visiting an amusement park" for which the teacher "prompted [him] with some sentence starters and he was then able to finish on his own" (Parent Exs. BBBB ¶76; GGGG-5). On cross examination, the teacher testified that the exercise dated April 7, 2020 was done virtually, and she gave the student a sentence starter for the first sentence, and then the student "would tell [her] his sentences, and then whatever he said, [they] wr[ote] it together" sometimes at the same time but she would also write it on a whiteboard and then hold it up (Tr. pp. 3179-83).

The ELA teacher testified that, as with the 2018-19 school year, she would "preview lessons and re-teach topics" as needed, use the strategies on the student's June 2019 IEP, "which include[d] providing visual materials and strategies, linguistic scaffolding and, as noted, re-teaching and preteaching of materials" (Parent Ex. BBBB ¶¶77-78). She also found that the student could make progress and work toward the general education curriculum but needed modifications and accommodations and that "as of the end of the seventh grade year, [the student] [wa]s currently working on a late fifth- early sixth grade level" in English and language arts, having



"achieved final semester grades of B+ and A- respectively in [l]anguage [a]rts, and B+ and A, respectively in English for the 2019-2020 school year" which meant he had to "complete all work and make progress" (Parent Exs. BBBB ¶¶79-81; HHHH). On cross examination, the teacher testified regarding accommodations and modifications, that sometimes the student would need extra time on classwork or homework assignments and rewriting of directions to make them simpler (Tr. p. 3191). When asked what the student's independent reading level was, the ELA teacher answered that it was fifth grade, and his instructional level for reading was "sixth grade" (Tr. pp. 3192-94). The teacher testified that the student's independent writing grade level as of June 2020 was "a range of fourth to fifth grade" and his instructional writing level was the same, "fourth to fifth grade" (Tr. p. 3194). On cross examination, the teacher testified that the student's grades were based on homework, participation, tests and quizzes, and sometimes writing assignments or projects such as book reports, and a family tree project (Tr. p. 3196). The teacher further testified that the student's vocabulary words were developed from the book he was working on, they worked on 20 words at a time, made cards with definitions and pictures and played a matching game, the student rewrote the words, worked with his tutor on the words, and was tested on the words (Tr. pp. 3197-3205).

In direct testimony regarding the ELA portion of the Fusion academic summary for 2019-20, the student's seventh grade year, the ELA teacher testified that he was a "pleasure to have in class" and a hard worker who read with fluency but "still struggle[ed] with reading comprehension," explaining on cross examination that "if it [was] a new topic that [wa]s introduced, he w[ould] sometimes have trouble comprehending" and they "spen[t] a longer time reviewing it" which for longer chapters may be "two to three sessions" (Tr. pp. 3200-01; Parent Exs. BBBB ¶83; HHHH). She further testified that the student was "able to answer text-based questions independently, but still need[ed] assistance with open ended questions and inferential questions"; however, could "answer inferential questions when presented to him in [a] multiple choice format" (Tr. pp. 3205-08; Parent Exs. BBBB ¶83; HHHH). When asked if the student was allowed to go back in the text to find the answers to fact-based questions, the ELA teacher stated "[n]ot for tests or quizzes" but "[o]nly if we [were] doing work in class" (Tr. p. 3207).

The ELA teacher concluded in direct testimony, that the student had made "substantial progress academically at Fusion" (Parent Ex. BBBB ¶84). She also noted that he "adjusted very well to the remote environment and ha[d] received remote 1:1 instruction from March 2020 to the end of the school year in June 2020" (id. at ¶85). The ELA teacher testified that based on the student's work in 2019-20, she recommended that the student have "seventh and/or eighth grade level" goals for the 2020-2021 school year, (id. at ¶86). The ELA teacher testified on cross examination that the annual goals for the IEP "should be on or close to grade level"; however, with respect to one of the student's goals, that to write "grammatically and syntactically" accurate sentences was "[s]econd-third grade" level skill (Tr. pp. 3262).

With regard to the student's social progress while enrolled in Fusion, the ELA teacher testified on direct by affidavit that she observed the student informally at the homework café and that the student "interacted with typical peers" there "almost every day" and would eat lunch with the other students, further explaining when asked that it was "not a daily thing" she did, but that she had "been in the [h]omework [c]afe as a sub for a teacher, or if [she] had a break, [she] would just hang out" there (Tr. pp. 3262-63; Parent Ex. BBBB ¶87). In direct testimony, she further stated that when the student first started at Fusion, "he had difficulty at times communicating with

typical peers, as he would repeat phrases"; however, that in 2019-20, she "noticed he [wa]s more comfortable with typical peers and continue[d] to model their language and behavior" and was "scheduled to participate in a social skills group for the 2020-2021 school year" (Parent Ex. BBBB ¶¶88-90). On cross examination, the ELA teacher testified that the student "would often initiate conversation," but would repeat phrases, for example, telling other "students what he had for lunch every single day" so she would help him with ideas for additional topics to talk about (Tr. pp. 3264-65). She also testified that she observed the student "model peer behavior" such as "how to act in [h]omework [c]afé: [d]oing your homework, sitting down on the couch, playing games socially in [h]omework [c]afé," with "intervention and encouragement" which she explained, when asked, that she might prompt the student if he was repeating or asking kids the same question, with "[o]kay, [] lets talk about something new" (Tr. pp. 3266-67). On redirect, the ELA teacher testified that the student developed over time from avoiding the homework café to staying for lunch, talking about the other boys, being excited to be part of the social settings and no longer avoiding those settings (Tr. pp. 3282-83).

## **ii. Mathematics**

The student's mathematics teacher at Fusion provided pre-filed testimony by affidavit, which was entered into evidence without objection (Tr. pp. 3331-32). Such testimony reflected that he also began working with the student in January 2019 (Parent Ex. SSSS ¶9). From January 2019 to June 2019, during summer 2019, and during the 2019-20 school year, the mathematics teacher worked with the student for one hour per day on two days per week (*id.* ¶11). According to the math teacher's testimony during cross examination, prior to working with the student, he reviewed the student's IEP (Tr. p. 3341). The math teacher also reviewed the student's "Intake & Formal Education Plan" (FEP) that had been developed by Fusion (Parent Exs. SSSS ¶10; PPPP). With regards to mathematics, the FEP indicated that with support, which included multiple tutors, the student was able to perform grade level math (Parent Ex. PPPP). According to testimony, during the first few lessons, the math teacher targeted the student's mathematics level, which was determined to be much higher than the third grade level mathematics which the district deemed him able to perform (Parent Ex. SSSS ¶14). The mathematics teacher stated that he had been implementing accommodations from the IEP by reading questions out loud to the student and having detailed notes prepared for him (Tr. pp. 3340-41).

The student's math teacher testified by way of affidavit that the student made meaningful progress both socially and with regard to mathematics while enrolled at Fusion (Parent Ex. SSSS ¶28). The math teacher indicated that he would note the student's progress in academic summaries that were written daily (Tr. p. 3343; Parent Ex. SSSS ¶ 13, 17, 24). In response to why every entry indicated "[h]e did a great job on the homework assignment," the mathematics teacher stated he made these comments when every homework question was correct (Tr. pp. 3343-44). When questioned about a September 4, 2019 entry in which the mathematics teacher both stated "[h]e did a great job on the homework assignment," and "[w]e did fix a few problems in the Coordinate Geometry and Plane Geometry sections" it was explained by the teacher that the student completed the assignment and got the correct answer, but the work necessary to back up his answer was not presented by the student (Tr. pp. 3343-47; Parent Ex. DDDD at p. 3). However, when further asked why the entry noted that "[t]he mistakes were not conceptual, just a few calculation mishaps," the teacher explained in part that the student's work may have been close enough to prompt him to choose the correct answer (Tr. p. 3347).

Specifically, with regard to the student's social progress while enrolled in Fusion, the mathematics teacher indicated by affidavit that he was able to observe the same because "the homework café is right outside of my office, and I s[aw] [the student] frequently engaging and interacting with his peers" (Parent Ex. SSSS ¶ 28). However, during the math teacher's testimony on cross examination it was established that the teacher had spent no time supervising the homework café, except on a few occasions when another teacher was absent (Tr. pp. 3377-78). The math teacher stated that he was only in the homework café for 10 to 15 minutes when the student was present (Tr. pp. 3379). The math teacher indicated on cross examination that he never observed the student working with other students (Tr. p. 3380). Additionally, the math teacher stated that no other teachers had experienced the student being in classes with other children as everything at Fusion is in a 1:1 setting (Tr. p. 3382).

During the 2018-19 school year, the student achieved a grade of A in Math 1A and A+ in Math 1B, which are the sixth grade level math courses at Fusion (Parent Exs. SSSS ¶16; RRRR at p. 1). The student's mathematics teacher stated that at the end of the school year, the student was able to complete intermediate and complex math problems and his computational skills were deemed to be above average (Parent Exs. FFFF at p. 2; SSSS ¶17). The math teacher testified that the student could do basic multiplication, division, addition, and subtraction with ease, while appropriately showing his work (Parent Exs. FFFF at p. 3; SSSS ¶17). It was further stated that the teacher did not need to lower the grade level of the student's work, as the student could handle material at his grade level and sometimes had the ability to handle seventh grade math (Parent Exs. FFFF at p. 3; SSSS ¶17). Although he stated that the student could solve practically all math problems when given in numbers or arithmetic form, the student's mathematics teacher recognized that the student was having difficulty with reading comprehension (Tr. pp. 3349-3350; Parent Exs. FFFF at p. 3; SSSS ¶17). Specifically, if the math problems had a key word or the student was told to use a particular math operation, he either had problems identifying the operation to use or was unable to complete the same (Tr. p. 3349). Therefore, additional word problems were provided to facilitate the student's thinking (Tr. p. 3349; Parent Exs. FFFF at pp. 2-3; SSSS ¶17).

In direct testimony by affidavit, the student's math teacher again indicated that during the 2019-20 school year, the student made progress with math, completed the entirety of the Math Course 2 material, was able to follow the Next Generation Math Learning Standards at his grade level, and was on the college preparatory track (Parent Ex. SSSS ¶¶18, 24, 25, 26). The student's math teacher testified that the student was solving equations and completing statistics, geometry and word problems at the seventh grade level (Tr. pp. 3371-72, Parent Ex. SSSS ¶26). Even further, the student was able to complete many NYS Common Core seventh grade questions in which the student was required to explain his answer (Parent Ex. SSSS ¶24). The student was stated to be "good at reusing a procedure and deriving an answer" especially if it was algebraic in nature (*id.*). However, the student was stated to have difficulty with geometry concepts because "they require analytical reasoning skills (i.e., parallel lines with a transversal line)" (*id.* ¶18). The math teacher testified that the student had trouble with such problems as they are more visual, lack details, and are not explicit in providing directions to the student (Tr. p. 3364). However, the student was able to get through the material (Parent Ex. SSSS ¶24). The math teacher stated that the student could "express misunderstanding" when he did not understand concepts, "ask[ed] for more time to copy concepts," and did not hesitate to ask for assistance with a problem (Tr. pp. 3392-93; Parent Ex. SSSS ¶24).

With regard to the student's ability to complete math word problems during the 2019-20 school year, the math teacher stated that the student progressed and learned to circle key words (Parent Ex. SSSS ¶¶ 18, 26). The math teacher noted that the student "highlight[ed]/underline[d] key concepts and may [have written] synonyms of a word to get a better understanding of the question," but that he still desired for the student to be able to read problems and explain what was being asked (Tr. pp. 3368-69; Parent Ex. SSSS ¶24). In addition, the math teacher stated that in order to reinforce ELA skills, more word problems were provided that required comprehension to perform the mathematics (Parent Ex. SSSS ¶24). On cross examination, the teacher was questioned with regard to how the student should be able to solve word problems in order to be deemed on grade level (Tr. pp. 3373-76). The math teacher responded that the student was able to answer "a simple algebraic equation-type problem" presented verbally, but if the student was asked "a word problem, not lengthy but just applied in that kind of sense," it took time for him to understand what the question is asking, because he did not "have it in front of him to read" (Tr. p. 3373). The math teacher's testimony on cross examination indicated that for the student to be considered on grade level for mathematics he would not necessarily need to be able to solve a word problem whether presented in writing or verbally "because they're two different things we are testing. One is the reading part of it, and one is the listening part of it" (Tr. p. 3375). Regarding the student being able to do grade level work in general, a distinction was drawn between ELA and mathematics (id.). On cross examination, the math teacher ultimately agreed that for the student to be doing grade level work and deemed competent, he should be able to answer a question whether presented verbally or in writing (Tr. p. 3376). However, on re-direct examination, the math teacher stated that math exams are written, which required the student to read the problem (Tr. p. 3386). Additionally, the math teacher testified that he never saw a math question that required a student to listen to the problem, so if the student could read a problem and write it down, he could still be considered on grade level (id.).

Although the student was provided with extended time to complete math assessments during the 2019-20 school year, the math teacher noted that the student did not always need such time, would independently state that he would check his work, and was able to achieve "[m]astery level" on such assessments (Parent Ex. SSSS ¶¶ 18, 20, 24). The math teacher stated that on December 11, 2019, the student was administered a Middle School Math Course 2a Unit 3 Assessment, that was developed by way of a website that generates exams but allows for the teacher to pick individual questions for testing (Tr. p. 3351; Parent Ex. SSSS ¶19). On such exam the student was determined to have obtained a score of 98 percent without assistance or the ability to look at materials (Parent Exs. RRRR at p. 2; SSSS ¶19). It was stated that the student began working on math remotely in March 2020 due to the COVID-19 pandemic and completed a Final Assessment for Math 2B on May 13, 2020 in which he was observed on Zoom (Parent Exs. SSSS ¶¶21-22; WWW). According to the teacher's testimony during cross examination, at least one question was answered by way of the student using a calculator, despite the student having an apparent dislike of using the same (Tr. pp. 3362). Overall, the student received grades of A+ in Math 2A and 2B, Fusion's seventh grade math courses (Parent Exs. SSSS ¶23; RRRR at p. 1).

The math teacher indicated in an affidavit, dated July 28, 2020, that he informed the district during a CSE meeting on June 30, 2020, that the student was "completing a 7th grade-level math curriculum" and that although the student "will need to spend more time[] on a given topic, he will still be able to complete the entire 7th grade curriculum" (Parent Ex. SSSS ¶26). During cross

examination, which occurred on August 4, 2020, the math teacher was questioned about when the student was expected to complete the entire seventh grade curriculum and he indicated that the student had already completed the seventh grade curriculum as of the date of the CSE meeting (Tr. p. 3371). During re-direct testimony, the math teacher stated that the student completed the seventh grade curriculum on the date of the final assessment (Tr. pp. 3383-85).

The math teacher further alluded to the student's progress by way of the student's grade level advancement, by testifying that he recommended for the student to have eighth grade level goals for the 2020-2021 school year (Parent Ex. SSSS ¶27). The math teacher testified on cross examination that although the student could solve some word problems, he could not complete those that had multiple steps (Tr. pp. 3379-80). Therefore, an appropriate goal for eighth grade should include being able to solve multi-step word problems and show work for each step (Tr. pp. 3379-80; Parent Ex. IIII).

### **iii. Fusion Assistant Director**

The assistant director at Fusion provided pre-filed testimony by way of two affidavits which were entered into evidence without objection (Tr. p. 6124; Parent Exs. NNNN; XXXXX). In direct testimony, the assistant director stated that he initially met the student on his first day of school at Fusion (Parent Ex. NNNN ¶ 17). Further, the assistant director indicated that the student worked hard and made progress at Fusion that his teachers were pleased (Parent Ex. XXXXX ¶¶ 3, 11). It was stated that the daily summaries from teachers documented such progress (id. ¶ 12).

In direct testimony by affidavit, the assistant director testified as to the three course levels that are available to middle school students at Fusion, which are essential, high school college preparatory, and honors (Parent Ex. NNNN ¶ 28). The assistant director testified that "basic college prep" means "grade level" and that essential level courses provide the same content, but in different ways (Tr. p. 6161). Additionally, the assistant director stated that a student is placed on the essential track when he or she is struggling to work independently or lacks the ability to take a high-stakes test (Tr. p. 6162). In essential level courses, content is mastered at the highest potential of the students and students can receive accommodations and modifications to assessments as needed to show their understanding of the grade level material (Parent Ex. NNNN ¶ 29). In fact, midterm and final assessments are not required at the essentials level (id. ¶ 30). The essentials level was stated to have flexibility regarding the depth of content and rigor (id.). The assistant director stated that the essential track was a modified and differentiated version of the New York State standards, that allows the student to experience the general New York State curriculum on grade level and study the same material as the college track (Parent Exs. NNNN ¶¶ 29, 34; XXXXX ¶¶ 7, 9).

The assistant director indicated that the student was on the essential track for English and ELA (Parent Exs. NNNN ¶ 33; XXXXX 6). Despite this, on re-direct examination, it was stated that the student's note taking, spelling, use of grammar, and use of capitalization, had improved (Tr. p. 6159). The assistant director testified that the student was on the college preparatory track for math, pre-algebra, modern US History, and earth science (Parent Exs. NNNN ¶ 33; XXXXX ¶ 6). On re-direct examination. The assistant director stated that with regard to "high-stakes" testing, the student was "getting there" and was progressing (Tr. p. 6162). However, the assistant director testified that he saw the student work independently on math problems "a couple of times,"

but only witnessed "a very few" (Tr. p. 6163). The assistant director was also unsure of whether the student had taken math assessments independently (Tr. p. 6164).

At the time of the assistant director's April 8, 2021 affidavit, he stated the student was exposed to content at an eighth grade level, according to New York State standards, in the areas of mathematics, language arts, English, history and science (Parent Ex. XXXXX ¶ 10). However, around the same time, the student was deemed to not be on the eighth grade level with regard to making inferences (Tr. p. 6142). Additionally, the assistant director stated that the student was on track to receive a Fusion private high school diploma (Parent Exs. NNNN ¶ 35; XXXXX ¶ 8).

In describing how the student made meaningful progress while at Fusion, the assistant director testified that the 1:1 small class size and the specially designed instruction benefited the student tremendously (Parent Ex. NNNN ¶ 37). Additionally, the student was stated as being academically engaged with his learning because instructors employed specially designed instruction to assist with progress, which included re-teaching concepts as necessary, scaffolding questions, paraphrasing, practicing, rehearsing difficult skills, and providing alternative means of assessing mastery of the materials (Parent Ex. XXXXX ¶ 13).

To demonstrate the student's overall progress, the assistant director noted the grades the student received (Parent Exs. NNNN ¶ 32; XXXXX ¶ 4). Specifically, "[f]or the 2019-2020 school year, [the student] achieved final semester grades of B+ and A- respectively in Language Arts, and B+ and A, respectively in English" (Parent Ex. NNNN ¶ 32). Additionally, "[the student] achieved final semester grades of A and A+, respectively in Ancient Civilizations, and final semester grades of A and A, respectively, in Foundations of Personal Fitness" (*id.*). Furthermore, "[the student] received final semester grades of A and A+, respectively in Math, and A+ and A+, respectively, in Physical Science" (*id.*). The assistant director stated that the student sustained strong grades over the course of fall and winter 2020 and that as of February 2021, the student "achieved grades of A+ in Language Arts 8A, A- in Modern US History, A+ in Pre-Algebra, A in English, A+ in Earth Science and A in Personal Fitness" (Parent Ex. XXXXX ¶ 4). When questioned why one of the student's lowest grades was an A- in history, the assistant director stated that "typical kids do really well when they are the only person in the class" (Tr. pp. 6128-29). He continued that "typical students in Fusion do really well . . . A's and Bs are typical grades that I would see" (Tr. p. 6129). However, upon questioning, the assistant director could not describe what the student did to be deemed outstanding in language arts or to earn an A+ in science (Tr. p. 6130).

As noted by the IHO, the student's grades at Fusion on balance appear to correspond more to his effort than to an objective standard against which performance is measured (*see* IHO Decision at p. 83). The assistant director testified that at Fusion, "grades consist of participation, including engagement with instructor and material, preparation/readiness and organization, as well as mastery of content as demonstrated through a variety of informal and formal assessments" (Parent Ex. XXXXX ¶ 5). Additionally, on cross examination, the assistant director testified that because grades consist of participation and engagement with an instructor, a student who is learning virtually is deemed not participating when the camera is pointed at the ceiling, the student is not looking at the teacher, or is not answering questions, which was relevant due to the student having attended Fusion virtually during the 2020-2021 school year (Tr. p. 6146). Regarding the student's participation, on re-direct examination, the assistant director stated that "[h]e is giving it 100 percent," "the teachers say he is participating," and "giving it his all" (Tr. p. 6174).

In direct testimony by affidavit, the assistant director stated that he observed the student both in class and in homework café on multiple occasions while enrolled at Fusion (Parent Exs. NNNN ¶ 19; XXXXX ¶ 14). The assistant director described the homework café as being an opportunity for students to interact with each other on a daily basis, and to work on homework and projects, both collaboratively and individually (Parent Exs. NNNN ¶¶ 16, 19; XXXXX ¶ 14). However, on cross examination, such observation in homework café had admittedly not occurred in over a year (Tr. p. 6154). The assistant director testified that since the student had been at Fusion, the student had not been in any academic classroom with another student, whether in-person or by way of a virtual means (Tr. pp. 6147-48). However, while the student was learning virtually, the student's teacher would take a laptop into the homework café so that the student could greet other students, but he had no communications with other students in relation to any academic endeavors (Tr. p. 6147). The assistant director also testified on cross examination, that he had observed the student on three or four occasions, but that this only occurred during the course of observations that were being conducted in the evaluation of the student's teacher (i.e. conducting an employee evaluation) (Tr. p. 6127).

With regard to social and emotional growth, on cross examination, the assistant director indicated that although progress occurred prior to March 2020, it was also demonstrated subsequently during a few interactions that occurred online (Tr. p. 6155). Additionally, the assistant director testified "from what I'm seeing here from prior to the year, he grew throughout the year, and even now, even virtually, just the interactions I've had with him over Zoom, you could see he is growing, he is getting bigger, he is more mature. He is initiating" (Tr. p. 6174). The assistant director stated that when the student began at the school, "he did not address me. Now he is asking for me, so there is definitely growth in that aspect, socially for sure" (*id.*).

Although it appears that Fusion provided some specially designed instruction to meet the student's academic needs, and there was some evidence regarding how Fusion addressed his reading comprehension, vocabulary development and inferencing skills, but that evidence alone is not sufficient to establish that Fusion was an appropriate unilateral placement. With regard to progress, he likely made progress in certain areas, but the evidence of progress was largely subjective because Fusion's assistant director essentially conceded that the school's standards were subjective, so the factor does not weigh heavily in my calculus. I did not find sufficient evidence to show that Fusion provided instruction specifically to target his significant receptive and expressive language needs, as well as his pragmatic and social skill needs (despite informal homework café interactions). My conclusion on this point is related to the next section which addresses the fact that Fusion didn't provide formal speech-language therapy or services to otherwise address his specific language-based (non-academic related) deficits.

### **b. Speech-Language Services**

The district asserts that Fusion is an inappropriate unilateral placement for the student because it does not provide the student with the related service of speech-language therapy to address his significant and undisputed speech-language needs. The district argues that the failure of Fusion to provide speech-language therapy to the student is central to the question of its appropriateness in light of the IHO's determination that the district's provision of speech-language services to the student "on more than a daily basis" was insufficient to meet his needs and deprived him of a FAPE. The parents admit that the student was not receiving speech-language services at

Fusion; however, they inconsistently assert that the speech-language services provided by the district were "inappropriate and reduced" and that the parents "have provided [the student speech-language] services in 2020-21." Relatedly, the parents seek clarification that the IHO was awarding reimbursement for "private tutoring and related services," pursuant to the IHO's order awarding the parents tuition "plus the private-related services for the period(s) from January 2019 through June 2019, 2019-2020, and 2020-2021 school years, be awarded, provided such related services are [speech-language services] and comport with NYSED professional licensing" (IHO Decision at p. 86).

The student's father testified that the student did not receive speech services from Fusion as Fusion did not have "speech providers" (Tr. pp. 4781, 4836, 4843). He also testified that the student did not receive speech services between December 2018 and June 2019 (Tr. p. 4842). The student's father testified at the April 29, 2021 hearing date that "starting from around September of last year, we hired a speech pathologist," and that she was working with the student twice per week for one hour sessions "carry[ing] over a lot of what he does at Fusion, such as the book he is reading right now" and its vocabulary, "to incorporate that into how she is working with [the student]" and she got the Fusion information from the daily update which she received as well (Tr. pp. 6518-20; see, e.g., Parent Ex. DDDD).

The father's testimony appears to refer to one of the tutors who was working with the student on ELA and math skills, as well as science, reading and writing; however, the evidence in the hearing record does not indicate that this tutor was working with the student on speech-language needs specifically (Tr. at pp. 3850-3851, 3917; see Parent Exs. XXXX ¶¶ 4-13; YYYY). Notably, the tutor referred to by the father as a "speech pathologist" (who worked with the student at different times during the period from 2013 and 2021) testified at the impartial hearing that "I am just his tutor" (Tr. pp. 3579, 3566-3567, 3570, 3581, 3584, 3593, 3620; see generally Parent Ex. XXXX ¶¶ 3, 19-34). Accordingly, the father's testimony did not establish that the parents obtained private services to address the student's speech-language needs but instead reflected that they retained tutors who worked with student outside of his program at Fusion, although, at least one tutor received information regarding the student's assignments and performance at school from Fusion (see generally Parent Exs. AA at p. 1, AAA at p. 1, BBB at p. 1, CCC at p. 1, DDD at p.1, DDDD at pp. 1-5, III at p.1, XXXX ¶¶ 38, 40).

One of the factors to consider in determining if a private school is appropriate is whether the unilateral placement "at a minimum, provide[s] some element of special education services in which the public school placement was deficient" (Berger, 348 F.3d at 523; see Frank G., 459 F.3d at 365 [describing how the unilateral placement provided services the district acknowledged that the student required, yet failed to provide]). While parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at \*9 [S.D.N.Y. Mar. 18, 2010]), a lack of evidence as to how a student's significant area of need is addressed by the unilateral placement can result in a finding that the unilateral placement is not appropriate (see R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at \*5 [S.D.N.Y. Mar. 30, 2011] [finding a unilateral placement was not appropriate where it was undisputed that speech-language therapy was "critical" to remediate the student's language needs, the private placement chosen by the



parents did not provide speech-language therapy and, although the parents claimed the student received private speech-language therapy, they "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"), *aff'd sub nom*, 471 Fed. App'x 77 [2d Cir. Jun. 18, 2012]; *see also* *L.K. v. Northeast Sch. Dist.*, 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [finding that the parent failed to prove that the unilateral placement addressed the student's considerable social-emotional needs absent testimony from the student's counselor, evidence concerning the counselor's "qualifications, the focus of her therapy, or the type of services provided" or how the services related to the student's unique needs]]. The evidence in the hearing record supports a finding that Fusion did not provide the student with speech-language therapy or services to otherwise address his significant language needs beyond the ELA instruction he received, and there is no evidence in the record that the parents obtained private speech-language therapy services during the student's attendance at Fusion from January 2019 through June 2019, and during the 2019-2020 and 2020-2021 school years. Given that the district's failure to offer appropriate speech-language services to the student to address his greatest areas of need in large part formed the basis for the IHO's finding, which I have affirmed herein, that the district denied the student a FAPE for his middle-school years, the parents would be hard-pressed to establish the appropriateness of Fusion as a unilateral placement in the absence of any evidence that Fusion provided speech-language services or instruction to the student to meet his language needs or that the parents provided evidence showing how appropriate, privately obtained appropriate speech-language services for the student. Accordingly, the IHO erred by finding that Fusion was an appropriate unilateral placement given that the parents failed to prove that the placement they chose provided the student with services to address his speech-language needs that he required to obtain educational benefit.<sup>30 31</sup>

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<sup>30</sup> Questions arose during the impartial hearing with respect to one of the student's private tutor's qualifications to provide speech-language therapy privately which, as previously noted herein, resulted in the parents' motion to withdraw the individual's testimony and related exhibits (Tr. p. 3780).

<sup>31</sup> The district also asserts that the Fusion teachers are not reasonably qualified to provide instruction to the student, as most of the teachers providing instruction are not certified in either their content area or in special education. Further, the district contends that the 1:1 instruction that Fusion provides is not the least restrictive environment for the student, and that although the LRE requirement analysis is not dispositive but rather one factor in determining the appropriateness of the program, given the IHO's conclusion that an 8:1+2 district program was overly restrictive, LRE should be a major consideration in determining whether Fusion was appropriate for the student. While I have determined, as discussed in detail above, that the district correctly argued Fusion was not an appropriate unilateral placement due to its lack of speech-language therapy services which were also not otherwise obtained by the parents for the student, the district's arguments concerning the lack of teacher qualifications are unavailing. It is well settled that teachers at a unilateral placement need not be State-certified (*Carter*, 510 U.S. 7, 14 [noting that unilateral placements need not meet state standards such as state certification for teachers]). Moreover, as acknowledged by the district, although the restrictiveness of a parental placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (*M.S.*, 231 F.3d at 105; *Walczak*, 142 F.3d at 122; *see* *Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 26-27 [1st Cir. 2002]), parents are not as strictly held to the standard of placement in the LRE as are school districts (*C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 830, 836-37 [2d Cir. 2014]; [noting "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

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE in the LRE, but that the totality of the circumstances does not lead me to conclude that Fusion is an appropriate unilateral placement for the student, the necessary inquiry is at an end.

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

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated August 12, 2021 is modified by reversing those portions that found that Fusion was an appropriate unilateral placement for the student and directed the district to provide reimbursement relief to the parent and further related services to the student.

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

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

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same mainstreaming requirements as a school board")) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G., 459 F.3d at 364). While the restrictiveness of Fusion may not, by itself have been sufficient to deny tuition reimbursement, the parents' case is weak in this area as well, because even their own expert acknowledged that the "absence of typically developing classmates preclude[d] the important opportunity to benefit from rich classroom talk" (Parent Ex. JJJ at p. 4).